IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

A.J. STOVALL, APPELLANT

VS.

W.L. HAYES AND HOLLY SPRINGS TIRE, APPELLEE

NO. 2006-CA-02144

APPEAL FROM THE CIRCUIT COURT OF MARSHALL COUNTY, MISSISSIPPI
M2005-487 JC

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interested in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Dr. A.J. Stovall, Appellant;

2. W.L. Hayes, owner of Holly Springs Tire, Appellee;

3. Holly Springs Tire, Appellee;

4. Latrice Westbrooks, Esq., The Law Office of Latrice Westbrooks, PLLC, attorney of record for Appellant, A.J. Stovall; and

5. Kent Smith, Esq., Smith Whaley, PLLC, attorney of record for Appellees W.L. Hayes and Holly Springs Tire.

This the 18th day of June, 2007.

Latrice Westbrooks, Esq.

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I. WHETHER THE LOWER COURT'S ERRONEOUSLY FOUND THAT MUTUALITY OF CONSENT EXISTED BETWEEN STOVALL AND ANY REPRESENTATIVE OF HOLLY SPRINGS TIRE?

STATEMENT OF THE CASE

I. Nature of the Case

The Appellant seeks to reverse the ruling of the Marshall County Circuit Court. The lower court ruled that the agreement between the Plaintiff and Defendant was modified by subsequent course of dealings and the course of conduct between the Plaintiff and Defendant. The trial court also amended the complaint/pleadings to include a mechanic's lien, ruling in favor of the Defendant.

II. Course of Proceedings and Disposition Below

A. Procedural History

On September 30, 2005, the Plaintiff filed a complaint with the Marshall County Justice Court against the Defendants. In Justice Court, the judge ruled that the Defendant return the car to the Plaintiff and that the Plaintiff pay a sum of four hundred dollars ($400.00). On November 22, 2005, the Plaintiff appealed, de novo, the decision of the justice court to the Marshall County Circuit Court. An initial judgment was rendered for the Plaintiff but set aside on April 11, 2006, as the Defendants has not received notice of hearing. After a hearing on November 9, 2006, the lower court entered a judgment on December 4, 2006, in favor of the Defendant/Counter-Plaintiff in an amount of eight hundred sixty-eight

dollars and twenty-two cents ($868.22).

B. Substantive Facts

A.J. Stovall, a professor at Rust College, owned a 1998 Plymouth Dodge Neon. The car was a pre-owned vehicle and sometime in April 2005, the meter for the heater/cooler started going over to hot. (T.rec. 10). On May 2, 2005, Mr. Stovall took the vehicle to be diagnosed and the problem was determined to be the fan was not "kicking in" all the time. Next, he took the car to a Dodge Plymouth dealership in Southaven, Mississippi and that service department could not determine what the problem was because the car did not show any problems while it was in their possession. (T.rec. 12, 13). Afterwards, Mr. Stovall drove the car (when he was able) until he left the country at the end of May 2005.

When Mr. Stovall returned to the county, the vehicle's heater needle still indicated the car was running hot. In August 2005, it was suggested that he go to Holly Springs Tire. He went there and spoke to the mechanic, Greg Wilson. Stovall never conversed with the William Hayes about the car unless he was looking for Mr. Wilson (T.rec. 13, 14). He never discussed a price or any other dollar amount with Mr. Hayes prior to servicing the vehicle. According to Mr. Stovall, he told Mr. Wilson what was happening with the car but that nobody seems to know what the problem is. Mr. Wilson assured Mr. Stovall that he could fix the car. (T.rec. 14). Upon Wilson's statement, Mr. Stovall told him, "if you can fix it, then fix it". (T.rec. 14). [1]

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[1] Due to the brevity of the trial exhibits, all have been included in the record excerpts, page/tab 2.

Stovall left the car with Wilson on that following Monday, August 15, 2005. He received a call later that day telling him that the car was ready for pick up. (T.rec. 15). He received a bill and was told to go inside. This is when he sees Mr. Hayes who gave him a receipt for one hundred sixty-two dollars ($162.00). Stovall noticed that there were things done to the car that were not really needed but he did not complain as long as the car was fixed.[2] (T.rec. 15). Once he got in the car, he attempted to test drive the car to Memphis. Before he got to the Red Banks exit, the needle started to indicate that the car was running hot again.(T.rec. 17). After receiving some advice, he had the car towed back to Holly Springs Tire. The next day, he saw Mr. Wilson and told him what happened. Mr. Wilson told him to leave the car with him and he would figure out what went wrong with the car. Wilson called Stovall back. Stovall went to see him and he told Stovall he needed a water pump. On August 27, 2007, Stovall purchased the water pump and came back to the mechanic shop a couple of days later. Wilson told Stovall that the water pump did not do what he needed it to do. (T.rec. 18). He then stated the car needed a timing belt. At this point, Stovall reminded Wilson that he told him initially that he did not want to spend a lot of money and Wilson told him during their first visit that he could fix the car. Stovall asked Wilson for a flat rate and that he would not pay beyond that. Wilson quoted him a price of two hundred dollars ($200.00). (T.rec. 19). Upon accepting that quote, Stovall also stated that he would buy the parts and he wanted to test drive the car for two (2) days prior to delivering payment to Holly Springs Tire. Wilson accepted the terms by saying "Deal",

[2] The extra things done were wiper blades, thermostat and coolant in the air conditioner.

forming the verbal agreement.[3]

On September 2, 2005 Stovall purchased the timing belt and delivered it to Wilson. Wilson then tells Stovall, it's your head gasket. Stovall then purchases the head gasket and delivers it to Wilson. At no time did Wilson or any other representative of Holly Springs Tire tell Stovall the agreement needed to be changed.[4] Two weeks passed by and Stovall gets a call saying your vehicle is ready. Stovall goes to see Wilson, who points him inside the shop and tells him he has to go inside. (T.rec. 21-22). Stovall goes inside the building and a gentleman gives him a bill of eight hundred sixty-eight dollars and twenty-two cents ($868.22). Stovall took the bill outside to Wilson and protested stating this is not what we agreed to and you have to do something. He also told Wilson, "you know what I agreed to". Wilson then goes inside and speaks to Hayes, who then reduces the invoice by two hundred dollars ($200.00). (T.rec. 22). Stovall then protests to Hayes saying this is not what Wilson agreed to and Hayes tells him, "No. It's six hundred ($600.00)". Stovall left the premises and immediately pursued this action in the Marshall County Justice Court filing an action in Replevin.

SUMMARY OF THE ARGUMENT

The Marshall County Circuit Court did abuse its discretion in its Judgment, finding that the agreement had been modified and that the Defendants are entitled to an award of

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[3]There was no written estimate or agreement between the parties.

[4] Stovall would asked every morning during the two week period and ask about the car and Wilson would tell him, he can't get to it yet.

eight hundred and sixty-eight dollars and twenty-two cents. Verbal agreements are valid agreements but as to any contract, there must be a meeting of the minds and any modification must have all the essential elements, including mutuality of consent as the first agreement.

There was no meeting of the minds to modify the agreement between Stovall and Wilson or any other representative of Holly Springs Tire. Stovall consistently asked if the price for labor was $200.00 and the response Wilson gave him was always yes. Lastly, Stovall had no notice of a mechanic's lien as none had been filed against him. The testimony during trial mentioned nothing about a lien, only about violating the agreement between Wilson and Stovall. Hence, the court abused its discretion and erroneously found that all elements of an agreement or contract existed in any alleged modification.

ARGUMENT

I. Standard of Review

The admissibility of evidence is governed by the abuse of discretion standard of review. ***McLendon v. State***, 945 So.2d 372 (Miss. 2006) *citing* ***Culp v. State***, 933 So.2d 264 (Miss. 2005). The discretion of the trial judge must be exercised within the boundaries of the Mississippi Rules of Evidence. ***McLendon*** *citing* ***Beech v. Leaf River Forest Prods., Inc.***, 691 So.2d 446 (Miss. 1997). A trial judge sitting without a jury is allowed the same deference as a chancellor. ***Pritchard v. Van Houten***, 2007 So.2d (2005-CA-00710-COA) *citing* ***City of Jackson v. Perry***, 764 v. 373 (Miss. 2000). A trial judge's findings of fact following a bench trial will not be disturbed on appeal as long as they are supported by substantial, credible and reasonable evidence. . .Issues of law, however, are reviewed under a de novo standard. ***Mickalowski v. American Flooring, Inc.***, 2007 MSCA 2005-CA-

01864-052907 citing ***City of Jackson v. Brister***, 838 So.2d 274 (Miss. 2003). Thus, the Court will not disturb the trial court's findings unless they were manifestly wrong, clearly erroneous or an erroneous legal standard was applied. ***Pritchard*** 2007 So. 2d at (¶20).

II. Whether the Lower Court's Erroneously Found That Mutuality of Consent Existed Between Stovall and any Representative of Holly Springs Tire?

During his second visit to Holly Springs Tire, Stovall made a verbal contract with Wilson. Wilson told Stovall he could fix the problem with the car. Wilson told Stovall he could fix the car for $200.00. After accepting Stovall's terms to test drive the car, Wilson stated, "Deal". Wilson, as the mechanic, acted as an agent for Holly Springs Tire. Stovall testified that he had no actual dealings with Hayes until it was time to present the payments. For a contract to exist, essential elements must exist: (1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual consent and (6) no legal prohibition precluding contract formation. ***Murray Envelope Corp. v. Atlas Envelope Corp.***, 851 So.2d 426 (Miss. 2003); ***Hunt v. Coker***, 741 So.2d 1011 (Miss.Ct.App. 1999); ***Mauldin Co. v. Lee Tractor Co. of Miss., Inc.***, 2006 So.2d (2004-CA-02150-COA).

The Court did not disagree that an agreement had been reach by the parties. During the first visit to the shop, Wilson told Stovall he could fix the vehicle. When Stovall picked the car up, Wilson presented Stovall with the bill and Stovall presented the bill to Hayes. Wilson, acting as an agent, presented himself to have the legal authority to make a contract or an agreement with Stovall, the customer. Wilson had apparent authority to act as agent for Holly Springs Tire. Stovall relied to his detriment on the representations made by

Wilson. The Apellees will contend that Wilson did not have the actual authority to commit repairing the vehicle for $200.00. However, actual authority is not litmus test upon which this honorable Court need answer the question:

> The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound if the conduct of the principal is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might rightfully believe the agent to have the power he appears to have. The agent's authority as to with whom he deals is what it reasonably appears to be. So far as third persons are concerned, the apparent powers of an agent are his real powers.
>
> The finder of fact must determine whether there is sufficient evidence to meet the three-pronged test for recovery under the theory of apparent authority, which requires a showing of (1) acts or conduct of the principal indicating the agent's authority, (2) reasonable reliance upon those acts by a third person, and (3) a detrimental change in position by the third person as a result of that reliance. ***Patriot Leasing v. Jerry Enis Motors***, 928 So.2d 856 (Miss. 2006).

Wilson admitted that he dealt with Stovall initially and claimed he did not remember quoting Stovall an amount. (T.rec. 47, 48). He also stated that he did not see Stovall go inside and speak with Hayes about a quote. (T.rec. 52). Hayes testified that he was not apart of any discussions between Wilson and Stovall. (T.rec. 63). The lower court found that any agreement that was formed included various and saundry changes in the agreement, thus acknowledging Wilson's apparent authority.

Inherently finding that an agreement or contract existed, the Court erroneously determined that the agreement had been modified through a series of actions. The actions would consist of Wilson telling Stovall that the problem is the head gasket instead of a timing belt. There was a mutual agreement that the part needed to be changed but the amount of $200.00 never changed.

There was never a mutual consent between the parties in the case at bar. Any contract may, before a breach occurs, be changed or modified in one or more of its details, by a new agreement also bilateral, by the **mutual consent of the parties**, without any new independent or distinct consideration. ***Albert Mackie & Co. LTD. v. S. Dale & Sons***, 122 Miss. 430, 84 So.2d 453 (Miss. 1920). Even if Stovall purchased new parts, that still does not indicate that he mutually consented to change the price quoted to him initially. Hayes was never privy to any discussion that took place between Wilson and Stovall. (T.rec. 63). Further evidence of Stovall's lack of mutual consent to change the price of $200.00 was (1) he continuously asked if the charge will still be $200.00 (T.rec. 21) and (2) Wilson's and Hayes' efforts to reduce the exaggerated price of $868.22 by $200.00 (T.rec. 22). Any modification of the initial agreement between the parties lacked mutuality of consent, therefore making any alleged subsequent agreement void. Modifications to an agreement still require mutuality of consent (even where there is no new consideration). ***Gregory v. Lacy***, 156 Miss. 147, 125 So. 722 (Miss. 1930).

CONCLUSION

Appellees respectfully pray that this Court reverses the Judgment of the Marshall County Circuit Court. The lower Court did not deny the existence of an agreement to repair the 1998 Plymouth Neon for $200.00. There was not a modification of the agreement between the parties to repair the vehicle for more than amount quoted. The lower court's decision was not supported by substantial, credible and reasonable evidence and Mr. Stovall should have his car restored to him and an amount of $200.00 paid to the Defendants. The

Appellant also request any relief under the principals of law and equity to which he may be entitled.

Respectfully Submitted this the 19th day of June, 2007.

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CERTIFICATE OF SERVICE

I, LATRICE WESTBROOKS, do hereby certify that I have this day forwarded, via facsimile and U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing the Brief of the Appellant and Record Excerpts to all parties concerned as listed below:

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Honorable Andrew K. Howorth
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THIS the 18th day of June, 2007.

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