IN THE SUPREME COURT OF MISSISSIPPI

CAUSE No. :2007-IA-01362-SCT

DEERE & COMPANY
APPELLANT/INTERVENING DEFENDANT

V.

FIRST NATIONAL BANK OF CLARKSDALE
APPELLEE/PLAINTIFF

AND

EDWARD JOHNSON
APPELLEE/DEFENDANT

APPEALED FROM THE COUNTY COURT OF COAHOMA COUNTY
CASE NO. 14-CO-01-0411

BRIEF OF EDWARD JOHNSON

Dana J. Swan, Esquire
CHAPMAN, LEWIS & SWAN
Post Office Box 428
Clarksdale, MS 38614
601/627-4105

Attorneys for Appellee/Defendant

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEERE & COMPANY	**APPELLANT**
VS	**NO. 2007-1A-01362**
FIRST NATIONAL BANK OF CLARKSDALE and EDWARD JOHNSON	**APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal.

Honorable Charles R. Brett
County Court Judge
P.O. Box 736
Tupelo, MS 38802

John Gillis, Esq.
P. O. Box 185
Water Valley, MS 38965

Tom T. Ross, Jr., Esq.
P. O. Box 1196
Clarksdale, MS 38614

Ken Adcock, Esq.
P.O. Box 3308
Ridgeland, MS 39158

Dana J. Swan, MSB No. [redacted]

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEERE & COMPANY **APPELLANT**

VS **NO. 2007-1A-01362**

FIRST NATIONAL BANK OF CLARKSDALE and EDWARD JOHNSON **APPELLEES**

BRIEF OF APPELLEE EDWARD JOHNSON

COMES NOW THE Appellee Edward Johnson, ("Johnson") by and through counsel, and files this their Brief of Appellee and would show unto the Court that the trial court was correct in denying the summary judgment of Appellant Deere & Company ("Deere").

STATEMENT OF THE ISSUES

Johnson would submit that the issue to be decided in this interlocutory appeal is whether or not all the issues raised by Deere are subject to *res judicata* or of the law of the case doctrine.

I.

COURSE OF PROCEEDING BELOW

This present cause of action was initiated in the County Court of Coahoma County, Mississippi wherein the First National Bank of Clarksdale issued a writ of garnishment against Edward Johnson and Sentry Select Insurance Company (formally known as John Deere Insurance Company). John Deere Insurance Company was the guarantor of a supercedeas bond staying the execution of a $90,000.00 judgment against Parker Tractor. Deere & Company filed a motion to intervene, which was ultimately granted by the trial court. Deere alleged that the $90,000.00 judgment was not valid because of the "last in time" rule. The trial court ultimately rejected Deere's argument, and dismissed them from the garnishment action. This dismissal is the subject of the present Petition for Permission for Interlocutory Appeal.

II.

FACTS

The relevant facts to the issue before this Court is that Deere initially filed suit in Federal Court against Ed Johnson Jr. ("Johnson") to collect for non-payment on a defective combine which the dealer, Parker Tractor ("Parker"), could not fix. Because it was a compulsory counterclaim, Johnson filed a counterclaim for breach of warranty. The Federal suit by Deere was filed in September of 1995. In October of the same year, Johnson filed suit in State Court against Parker Tractor Implement Company, the dealer, seeking damages. The State Court trial occurred first in November of 1996. At the State Court trial, Johnson put on evidence of lost profits due to the failure of the combine to properly preform. The jury found for Johnson. Pursuant to the jury verdict, Johnson was awarded $150,000.00 for breach of warranty claims. After numerous pretrial motions, the State Trial Court then reduced the judgment to $90,000.00, and the final judgment was then entered on February 13, 1998. The supersedeas bond referred to *supra* was filed on that same date. Parker then appealed the final judgment to the Supreme Court of Mississippi.

On appeal, this Honorable Court initially reversed and remanded with an opinion dated November 4, 1999. *Parker Tractor & Inp. Co. v. Johnson*, 1999 Miss. LEXIS 346 (Miss. Nov. 4, 1999). (Hereinafter "*Johnson I*). In reversing the trial court, this Court held that it was improper for Johnson to put on proof of lost profits. The cause was remanded with instructions to retry without reference to lost profits as an element of damages. A motion for rehearing was filed. On January 10, 2002, pursuant to the motion for rehearing, a new opinion was issued granting the motion for rehearing and affirming the trial court's decision to allow lost profits as

an element of damages. *Parker Tractor & Inp. Co. v. Johnson* , 819 So. 2d 1234 (Miss. 2002). ("Hereinafter *Johnson II*).

Although contrary to Deere's assertions, Johnson requested that the Federal Court stay any trial pending the motion for rehearing in the Mississippi Supreme Court. (R. 63-64). Deere opposed the motion. (R. 65-71). Despite Johnson's request, after initially continuing the cause, the Federal Court case went to trial in June of 2000, some three years after the first State Court Trial. Based upon the unreported decision in *Johnson I*, the Federal District Judge, the Honorable Allen Pepper did not allow lost profits to be submitted to the jury as an element of damages. (R. 97). The jury found against Deere on its contract claim, and awarded Johnson damages on his counterclaim in the amount of the sum paid to Deere under the contract. Despite the fact that the issue of the reasonable use of the combine was never litigated in the District Court, Judge Pepper set-off the award to Johnson with an amount for the reasonable use of the combine. The Federal District Judge, amended the pleadings and entered an Amended Judgment allowing a quantum merit claim by Deere on or about August 17, 2000. The case was appealed by both parties and the Fifth Circuit Court of Appeals held the trial court erred in amending the pleadings. Deere & Co. v. Johnson, 271 F.3d 613 (5 th Cir. 2001) . (Hereinafter "*Deere I*"). (R. 74-94). The Appellate Court held that Johnson's verdict for the amount paid on the combine was completely off-set by the reasonable rental value of the combine, and the Court ordered that the result would be a "take nothing" judgment. The Fifth Circuit mandate was issued on December 4, 2001. Thereafter a final judgment consistent with the Fifth Circuit opinion in *Deere I* was entered by the District Court. After the Fifth Circuit issued its opinion, the Supreme Court of Mississippi in *Johnson II* affirmed Johnson's $90,000.00 judgment against

Parker on January 10, 2002. The State Court judgment was totally affirmed and is first in time.

Subsequently on December 28, 2002, Deere filed suit in United States District Court for the Northern District of Mississippi for the Delta Division. (Hereinafter "*Deere II*"). Deere sought an injunction pursuant to the Federal Anti Injunction Act to obtain an injunction to nullify the judgment of the state trial court and raised the same issues Deere now urges upon this Court. Deere also alleged in the complaint that there were two inconsistent judgments in *Deere I* and *Johnson II* and that the last in time rule favored the take nothing judgment of *Deere I.* Judge Pepper dismissed Deere's action and the Fifth Circuit affirmed. (R. 102-106). Despite the fact that the Fifth Circuit specifically rejected the "last in time rule" and instead applied the "first in time" rule in *Deere II* (R. 105), Deere continues to litigate this issue which has already been decided.

Judge Allen Pepper rejected both the application of the Anti Injunction Act and the last in time rule, recognizing that the state trial court's decision was first in time and thus enforceable. *See* September 25, 2002 Memorandum Opinion (R. 96-99). In his Opinion, Judge Pepper specifically states that based on the unreported decision of this Court in *Johnson I*, he did not allow lost profits to be submitted to the jury as an element of damaged in *Deere I.* (R. 97). Judge Pepper also rejected the "last in time" rule and held that since the State Court judgment was tried to final judgment before the Federal Court judgment, Deere was not entitled to any relief. (R. 98-99).

After denying Deere's motion for reconsideration, Deere timely appealed Judge Pepper's ruling to the Fifth Circuit on November 15, 2002. On Deere & Company's Statement of the Issues for Appeal, item 7 lists the issue of "Whether the district court erred by failing to apply the '**last in time rule**' regarding the inconsistent judgments at issue." Item 6 of the Statement of

Issues for Appeal also addressed "whether the district court erred by giving improper legal significance given to the date of entry of the state court case judgment." In Deere's brief to the Fifth Circuit, Deere again listed as Issue 7, "whether the district court erred by failing to apply the 'last in time' rule regarding the inconsistent judgments at issue in deciding the motion to dismiss." The brief also addressed "whether the district court erred by giving improper legal significance given to the date of entry of the state court case judgment in deciding the motion to dismiss." The "significance given to the date of entry" was argued on pages 32 to 33 and the "last in time" rule was argued on pages 33 to 35 of their brief, therefore the "last in time" issue was before the Fifth Circuit Court of Appeals. On May 14, 2003, the Fifth Circuit issued an unpublished opinion affirming Judge Pepper's order dismissing Deere's complaint in *Deere II.* The Fifth Circuit also noted that the issue of lost profits was not permitted in *Deere I.* The Fifth Circuit also rejected the "last in time" rule, which was before it. According to the Fifth Circuit, "in the pending case, the state court suit proceeded to final judgment first. . . . For purposes of res judicata, a judgment is treated as final even if it is on appeal."

III.

SUMMARY OF ARGUMENT

The first in time rule applies to different mandates issued by different courts for *res judica* purposes. *Prager v. El Paso Nat'l Bank*, 417 F.2d 1111, (5th Cir. 1969). The issues presently urged upon the Court have previously been decided and are res judicata or law of the case. *Bush Const Co. V. Walters,* 254 Miss. 266, 272, 179 So. 2d 188, 190 (Miss. 1965)(law of case doctrine applies to those issues actually litigated).

IV.

ARGUMENT

The final judgment from the state trial court has priority since it was first in time. The fact that the judgment in State Court was appealed (by complaining party's same lawyer) and not affirmed until after the trial in Federal Court does not suspend the binding and legal effect of the state judgment. This is a well-settled rule of law and has been addressed by the Courts several times. In *Mississippi Power & Light Co. v. Town of Coldwater*, 168 F. Supp. 463 (N.D. Miss. 1958) the issue was specifically discussed with regard the res judicata effect of a judgment on appeal. The Court stated:

> The question next to arise is whether or not the appeal to the Supreme Court which is still pending prevents the judgment of the trial court from being res judicata. This question has been answered by the Supreme Court of Mississippi. In the case of *Earl v. Board of Supervisors* , 182 Miss. 636, 181 So. 132, the Court says an appeal with supersedeas does not vacate the judgment appealed from; it merely suspends the enforcement of the judgment pending the determination of the appeal. If on that determination the judgment is affirmed, the effect thereof is to establish or confirm the validity of the judgment ***from and as the date of its rendition in the court of original jurisdiction***. Id at 475. (Emphasis added).

The judgment is final when rendered by the trial court. The appeal of a final judgment does not suspend the judgment. Affirming the judgment on appeal simply confirms the validity of the judgment "from and as of the date of its rendition" in the trial court *(Miss. Power & Light Co.*, supra.). Without dispute, the rendition of the judgment in favor of Johnson in State Court occurred on February 17, 1998, when the final State Court judgment was entered. Parker filed its

notice of appeal from said final judgment on March 17, 1998. The appeal was not interlocutory, and Plaintiff does not allege said appeal was interlocutory. Therefore, without dispute, it was an appeal of a final judgment.

In *Raju v. Rhodes*, 809 F.Supp 1229 (S.D. Miss. 1992) the District Court noted the obvious in a footnote:

> Although plaintiff has filed an appeal with the Mississippi Supreme Court seeking to overturn the judgment of the circuit court, under Mississippi law the pendency of an appeal has no effect on the preclusiveness of an administrative or judicial determination. (Citation omitted) Id. at 1236, footnote 8.

It simply does not matter when either of the Appellate Courts issued their opinions, because a pending appeal does not affect the preclusiveness of the judgment (unless of course the original judgment is reversed rather than affirmed as it was in this instance). The State Court judgment was entered first and affirmed on appeal. Deere raised these same issues in *Deere II* which were rejected and ruled upon by both the United States District Court and the Fifth Circuit Court of Appeals. Judge Pepper dismissed Deere's action and the Fifth Circuit affirmed. (R. 102-106). Despite the fact that the Fifth Circuit specifically rejected the "last in time rule" and instead applied the "first in time" rule in *Deere II.* (R. 105), Deere continues to litigate this issue which has already been decided. Not only are they res judicata. They are now the law of the case. *Bush Const Co. V. Walters,* 254 Miss. 266, 272, 179 So. 2d 188, 190 (Miss. 1965)(law of the case doctrine applies to those issues actually litigated).

Appellant argues that when there are successive inconsistent judgements, the last judgment prevails (Brief at page 34). Appellant also argues the federal court case "became the first, conclusive final judgment since the reported decision and mandate of the Fifth Circuit

predate the state supreme court decision. The judgments are not as inconsistent as Deere's arguments.

The last in time rule is not applicable to the undisputed facts in this case. None of the cases cited by appellant bear any similarity to the procedural situation in this matter. The cases cited by the Appellant deal with situations in which a party has failed to raise the affirmative defense of issue or claim preclusion, an affirmative defense the Courts have held can be waived. Here, the final state court judgment had been reversed by the Supreme Court of Mississippi, but a petition for rehearing had been granted and the case was still with the Mississippi Supreme Court when the federal trial began. Plaintiff sought a continuance pending that decision, and the District Court denied same (L.F. 117). Appellee had no choice but to present his compulsory counterclaim/affirmative defense to the jury.

The result on the trial of the issues was the same in both courts, the combine was a "lemon." *Deere*, supra at 616; *Parker*, supra at 1240. There is nothing inconsistent there. The amount of the damages was different, only because the District Court would not allow evidence of lost profits based on an unpublished opinion which was later withdrawn (as noted by District Judge Pepper in his Memorandum Opinion at page 2 (L.F. 117). The verdict on damages was different then, but not inconsistent. The damages awarded in the state case were for lost profits, see *Parker Tractor and Implement Co. v. Johnson*, 819 So.2d 1234, 1240 (Miss.2002). The damages awarded in the federal case were for the down payment of the combine, see *Deere & Co. v. Johnson*, 271 F.3d 613, 616 (5th Cir. 2001).

The case of *Donald v. J.J. White Lumber Co.*, 68 F.2d 441 (5th Cir. 1934) cited by Appellant demonstrates the flaw in Deere's "two conflicting judgments argument." In *Donald*, a dispute arose between Donald and the Internal Revenue Service over the value per thousand feet

of certain timber he owned. The lower the value per thousand feet, the higher amount of income from the timber land was taxable. The effective date of the Revenue Act was March 13, 1913 and when taxes were collected from 1917 to 1924, the parties agreed that the value of the timber was $5.25 per thousand feet. Donald later brought three separate suits for refunds against the Internal Revenue Service. In the first suit, the value per thousand feet was determined to be $5.34.

A second action was subsequently brought by Donald against the Revenue Service and a value of $7.00 per thousand feet was established. A third action was filed by Donald and a recovery was again made based upon $7.00 per thousand feet. The judgment of the first action was December 4, 1931. The judgment for the second action was April 9, 1932 and the judgment for the third was July 9, 1932. No appeal was taken from the first two actions, but an appeal was taken by the Revenue Service from the third action. The only basis for the appeal was that Donald was estopped from claiming a higher value than the $5.25 per thousand feet agreed upon in 1913. In rejecting the Revenue Services argument, this Court specifically noted that the Government could have raised the value of the timber established by the judgment in the first action to establish the value of the timber in the second suit, but "for reasons of its own, chose not to rely on it in that suit, and in our opinion thereby waived it, and cannot assert it in this case." *Id.* at 442.

It is clear that the facts of *Donald,* in which the Defendant Government waived the prior judgment's conclusiveness, are distinguishable from the facts in the case sub judice. Johnson urged the District Court that the Mississippi judgment precluded any judgment that could have been rendered and to continue the Federal trial until the Mississippi Supreme Court either

affirmed or reversed the Circuit Court's judgment.[1] The District Court denied the relief sought. Therefore, there was no waiver, and *Donald* is not applicable.

These facts simply do not fit the case sub judice. First, Johnson did not waive the preclusive effects of the State Court judgment by filing answer and compulsory counter claim in the Federal Case. He was the Defendant in the Federal Case and was required to assert his compulsory counterclaim, or risk waiving it. Second, the State Court judgment, although rendered first, was still pending on appeal during the Federal Trial. Johnson urged the Federal Court to continue the trial until the Mississippi Supreme Court ruled on the appeal. Finally, Johnson did not bring a third action. Instead, the third action was initiated by *Deere*, in an attempt to prevent its dealer, *Parker*, from paying a judgment properly rendered by a court of competent jurisdiction in Mississippi. It is Deere who should be estopped.

V.

CONCLUSION

The "last in time" rule, which is the subject of the present petition for interlocutory appeal, has been rejected by both the Federal Courts, and now by a State Court judge. The issue has already been decided by either the principals of *res judicata* or of the law of the case.

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[1]Of course, if the Mississippi Supreme Court reversed the judgment of the Circuit Court, then the Federal Judgment would have been the first final judgment.

RESPECTFULLY SUBMITTED this the 23rd day of May, 2008

Respectfully submitted,

CHAPMAN, LEWIS & SWAN
Attorneys for Plaintiff
P. O. Box 428
Clarksdale, MS 38614
(662) 627-4105

By: _____
Dana J. Swan MSB#[redacted]

CERTIFICATE OF SERVICE

I, Dana Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

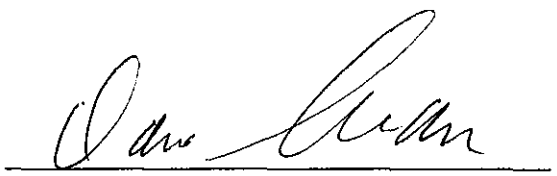
Honorable Charles R. Brett
County Court Judge
P.O. Box 736
Tupelo, MS 38802

John Gillis, Esq.
P. O. Box 185
Water Valley, MS 38965

Tom T. Ross, Jr., Esq.
P. O. Box 1196
Clarksdale, MS 38614

Ken Adcock, Esq.
P.O. Box 3308
Ridgeland, MS 39158

This the 23rd day of May, 2008.



Dana Swan