IN THE SUPREME COURT OF MISSISSIPPI

DEERE & COMPANY	)	
	)	
APPELLANT/INTERVENING DEFENDANT	)	
	)	
V.	)	NO. 2007-IA-01362-SCT
	)	
FIRST NATIONAL BANK OF CLARKSDALE	)	
	)	
APPELLEE/PLAINTIFF	)	
	)	
AND	)	
	)	
EDWARD JOHNSON	)	
	)	
APPELLEE/DEFENDANT	)	

PERMISSIVE APPEAL OF INTERLOCUTORY ORDER DENYING MOTION TO RECONSIDER A MOTION FOR SUMMARY JUDGMENT

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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AND	)	
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EDWARD JOHNSON	)	
	)	
APPELLEE/DEFENDANT	)	

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 the Supreme Court may evaluate possible disqualification or recusal.

No change.

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SUMMARY OF THE REPLY ARGUMENT

The facts are undisputed: The judgment in Deere & Co. v. Johnson d/b/a F&E Farms, No. 2:95CV135-P-B (N.D. Miss.) was entered subsequent to the judgment in Johnson v. Parker Tractor & Implement Co., No. 14-CI-95-0074 (Cir. Ct. Coahoma Co., Miss.) making the federal court case judgment the last-in-time judgment on the same cause of action involving the same parties or privies. The judgment in the federal court case has been satisfied by operation of law. Johnson does not contest these facts in his brief.

The law is clear: Under the last-in-time rule, where there are inconsistent judgments rendered on the same cause of action involving the same parties, the judgment which is last-in-time is the controlling judgment. State ex. rel. Moore v. Molpus, 578 So. 2d 624, 642 (Miss. 1991). There can be no double recovery of damages. Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974). Satisfaction of one judgment satisfies all judgments on the same cause of action. McNutt v. Wilcox, 1 Freem. Ch. 116 (Miss. 1843).

The conclusion is unmistakable: Under the last-in-time rule law to the facts, the federal court judgment is the controlling judgment. In applying the judgment satisfaction law to the facts, satisfaction of the federal court case judgment works to satisfy the state court case judgment.

The trial court erred in denying Deere's motion for summary judgment grounded on the last-in-time rule and the judgment satisfaction rule, and this court should reverse and render.

REPLY ARGUMENT

Improper references to matters outside the record. Johnson has made improper references to matters outside the record in his brief. Beginning at the last paragraph on page 4 and continuing to page 5, Johnson references information from the appellate briefing in Deere & Co. v. Johnson, No. 02-60978 (5th Cir.) and even quotes portions of Deere's brief. This is improper as the information was not presented to the trial court and is not part of the record on appeal. Johnson had the opportunity to include whatever he wanted in his motion papers at the trial court level, but he opted not to include the document to which he now refers. Thus, Johnson is asking this court to consider this non-record information for the first time on appeal.

ISSUE NUMBER 1. Whether the trial court erred in denying Deere's motion to reconsider and motion for summary judgment by rejecting Deere's grounds for the motions that the rule that satisfaction of one judgment satisfies all judgments on the same cause of action precludes any collection activities on the state court judgment since the federal court judgment has been satisfied.

In his brief, Johnson does not contest the fact that the same cause of action was litigated to judgment in both Johnson v. Parker Tractor & Implement Co., No. 14-CI-95-0074 (Cir. Ct. of Coahoma Co., Miss.) (hereinafter sometimes "state court case") and Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B (N.D. Miss.) (hereinafter sometimes "federal court case"). Johnson does not contest the fact that the federal court case judgment has been satisfied. Johnson does not contest

Deere's position that satisfaction of one judgment satisfies all judgments on the same cause of action.

Nothing in Johnson's brief alters the fact that he obtained judgments on the identical cause of action for breach of warranties with respect to the same John Deere CTS combine in the state court case and the federal court case. Nothing in Johnson's brief changes the fact that the same elements of damages were litigated to judgment in both the state court case and the federal court case. In the state court case, the trial court allowed the issue of lost profits to go to the jury and the jury awarded Johnson lost profits damages. In the federal court case, Deere secured a judgment as a matter of law on the lost profits issue [R. 293] and a peremptory instruction on the lost profits issue [R. 295-296] resulting in Johnson getting no lost profits damages. While the outcomes on the lost profits issue were different, one favorable to Johnson and one unfavorable to Johnson, the issue was litigated to a judgment on the merits in both cases.

Nothing in Johnson's brief disputes there was identity of the parties in the state court case and the federal court case. In the state court case, Johnson sued Parker Tractor & Implement Company, the John Deere dealer which sold Johnson the CTS combine, for breach of warranties. In the federal court case, Johnson sued Deere & Company, the manufacturer of the CTS combine which was delivered from Deere & Company to its dealer Parker

Tractor. Deere and Parker Tractor were in manufacturer-dealer vertical privity. This is "vertical privity" in just a two-link chain of distribution which satisfies the identity of parties element; strict identity is not required. Little v. V&G Welding Supply, Inc., 704 So. 2d 1336, 1339 (Miss. 1997). Moreover, while Deere was not a named party in the state court case, Deere became Parker Tractor's indemnitor by accepting Parker Tractor's request for indemnity. With respect to Johnson's lawyer's disclosure of this fact to the jury, the majority opinion in Parker Tractor & Imp. Co. v. Johnson, 819 So. 2d 1234 (Miss. 2002), concluded that the statements were made to show that Parker Tractor was an agent under Deere's control and that both were liable. Parker Tractor v. Johnson, 819 So. 2d at 1240. This conclusion involved findings of privity between Deere and Parker Tractor, an identity of the quality and character of Parker Tractor and Deere, and privity so immediate that Deere, an un-named party, would be liable for the judgment. Deere's status as an indemnitor buttresses a finding of privity just as Liquid Air's status as an indemnitor buttressed the Little court's finding of identity of the parties. *See* Little at 1339, ¶19 (Liquid Air being indemnitor for named defendants, "buttresses our determination that Mid-South and V&G are Liquid Air's privies"; identity of parties factor satisfied).

No law cited in Johnson's brief is law which has overruled McNutt v. Wilcox, 1 Freem. Ch. 116 (Miss. 1843)(where there are

two judgments for same debt against two persons, satisfaction of one judgment discharges other judgment) or Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974)(there can be but one satisfaction of amount due plaintiff for his or her damages). It is well-settled that where a plaintiff obtains multiple judgments on the same cause of action, he or she can only obtain a single recovery, and where one judgment is paid, all judgments are satisfied, with this rule holding true even if the particular judgment that is satisfied awarded a lesser amount of damages than another judgment on same claim. 47 AM. JUR. 2D *Judgments* § 1009. Johnson does not contest in his brief that the federal court case has been satisfied.

No law cited by Johnson alters the public policy that a plaintiff may not recover twice for the same damages. *See* Davis v. USF&G, 837 F. Supp. 206, 211 (S.D. Miss. 1993)(as matter of public policy, injured party cannot collect twice for same damages); Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160 (5th Cir. 1984)(duplication of damages not allowed).[1]

Since the judgment for money damages in favor of Johnson on his breach of warranties counterclaim in the federal court case has been satisfied as a matter of law, the judgment on the identical cause of action in the state court case has also been satisfied as a matter of law. Any proceedings to collect on the

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[1] The Alcorn County v. U.S. Interstate Supplies, Inc. case was mis-cited with a Southern 2d citation in Deere's principal brief.

state court judgment will be in disregard of the fact that satisfaction of the federal court judgment operates to satisfy the state court judgment. There are no judgment proceeds payable to Johnson in the state court case which might be garnished by First National Bank of Clarksdale.

The trial court erred in denying Deere's motion for reconsideration and motion for summary judgment which were predicated in the grounds that the federal court case judgment has been satisfied, and satisfaction of the federal court case judgment satisfies the state court judgment as a matter of law. The trial court simply ignored this ground for summary judgment. There is no dispute as to the fact that the same breach of warranties cause of action was litigated to judgment by Johnson in both state court and federal court. There is no dispute as to the fact that the federal court judgment was satisfied as a matter of law. Deere is entitled to a judgment as a matter of law on the grounds that the satisfaction of one judgment satisfies all judgments on the same cause of action for summary judgment. Deere requests that this court reverse the trial court and render a judgment here for Deere.

ISSUE NUMBER 2. Whether the trial court erred in denying Deere's motion to reconsider and motion for summary judgment by rejecting Deere's grounds for the motions that the last-in-time judgment rule applies to the facts in this case thereby precluding any collection activities on the state court judgment because the federal court case judgment is the last-in-time judgment on the identical cause of action.

Johnson argues that there is a first-in-time rule and he

even cites a case styled Prager v. El Paso National Bank, 417 F.2d 1111 (5th Cir. 1969) at page 5 of his brief in support of his argument. Deere submits Johnson's first-in-time rule is a fiction and the Prager case, a short 466-word opinion, says nothing about a "first-in-time rule." Prager is just a garden variety *res adjudicata* case providing neither controlling nor persuasive authority on the last-in-time issue in this case.

Nothing in Johnson's brief changes the fact that the federal court judgment (Johnson awarded $30,634.86 which was offset and satisfied with the reasonable use assessment awarded by the jury, meaning Johnson took nothing) and the state court judgment (Johnson takes $90,000.00) are inconsistent judgments. Incredibly, Johnson argues in his brief that a "take nothing" judgment and a $90,000.00 judgment are not inconsistent. Johnson also seems to argue that the two judgments are not inconsistent even though the state court judgment included lost profits damages whereas in the federal court case the trial court rendered a judgment as a matter of law against Johnson on the lost profits issue and the jury refused to award Johnson any incidental damages or interest, and then assessed Johnson with a $70,000.00 reasonable use charge. [R. 78] It is important to note Johnson never raised this "the judgments are not inconsistent" argument at the trial court level [R. 260-264] and should not be permitted to do so on appeal.

Johnson argues in his brief that he, "urged the District

Court that the Mississippi judgment precluded any judgment that could have been rendered [in the federal court case]." [Johnson brief, p. 9] This is not accurate. Johnson never asked the federal court to find that his counterclaim had been resolved in the state court case such that the counterclaim was barred or rendered moot by the doctrine of *res adjudicata*. Johnson merely asked for a continuance of the federal court lawsuit in which Deere was suing Johnson for breach of an installment sale contract (a claim which was unaffected by the state court judgment), and in which Johnson had asserted a counterclaim on the same breach of warranties cause of action litigated in state court. Johnson never sought to dismiss his counterclaim on the ground of *res adjudicata*. It was Deere who raised the *res adjudicata* issue in the federal court case amended pretrial order [R. 201-222] at paragraph 7a [R. 202], and identified the questions of law regarding *res adjudicata* and double recovery of damages at paragraphs 10a, 10b, 10c, and 10d of the pretrial [R. 208-209]. The federal court case judgment necessarily carries with it a finding by the district court that the state court case judgment was not *res adjudicata*. The district court resolved that question of law against Deere by allowing Johnson to prosecute his counterclaim to a judgment.

If Johnson genuinely had been concerned about preserving the *res adjudicata* character of the state court case judgment, all he had to do was voluntarily dismiss his counterclaim in the federal

court case at some point before his counterclaim was submitted to the jury. Johnson's argument that the federal court forced him litigate to judgment his counterclaim is baseless. Johnson now attempting to characterize his counterclaim as an "affirmative defense" [Johnson brief, p. 8] is likewise baseless. Johnson claims his counterclaim was compulsory, but there was nothing compulsory about Johnson's counterclaim at the pleading phase of the case since he had already asserted the same cause of action in the Johnson v. Parker Tractor state court case and Rule 13(a) of the FEDERAL RULES OF CIVIL PROCEDURE excepts from the compulsory counterclaim requirement claims which are already pending in another court,[2] and there certainly was nothing compulsory about his litigating to judgment the counterclaim after having secured the state court case judgment. In prosecuting his counterclaim to judgment, Johnson waived the finality of the state court case judgment and is estopped from now claiming that the state court case judgment is *res adjudicata* simply because the federal court case judgment was not to his liking.

Nothing in Johnson's brief changes the fact that the federal court case judgment is the last-in-time judgment. Nothing in Johnson's brief changes the fact that he litigated to judgment the identical cause of action in both the state court case and the federal court case. In fact, Johnson does not dispute the

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[2] Johnson filed suit in the state court case on 3 October 1995 and filed his counterclaim in the federal court case on 5 October 1995.

fact that the identical cause of action was litigated in both case. Nothing in Johnson's brief changes the fact that Deere and Parker Tractor were in a two-link chain of distribution, thus standing in what this court recognized as chain of distribution "vertical privity" in Little v. V & G Welding Supply, Inc., 704 So. 2d 1336, 1339, ¶18 (Miss. 1997).

No law in Johnson's brief overrules State ex. rel. Moore v. Molpus regarding this court's adoption of the last-in-time rule of RESTATEMENT (SECOND) OF JUDGMENTS Section 15 holding that, "when inconsistent final judgments are rendered in two actions, the judgment more recent in time is given conclusive effect in a later action". State ex. rel. Moore v. Molpus, 578 So. 2d 624, 642 (Miss. 1991). (The later action involved in this case is, of course, the garnishment action against Johnson and Parker Tractor in First National Bank of Clarksdale v. Johnson.)

Johnson argues that the state court judgment is controlling under the principles of *res adjudicata* because the finality of the state court judgment was not affected by the appeal of that judgment. Johnson is correct that an appeal does not affect the underlying judgment. While the appeal of the state court judgment did not affect the finality of the judgment, Johnson's litigating to judgment his counterclaim on the same cause of action in federal court did. Why? Because Johnson moving forward in federal court rather than dismissing the counterclaim on the grounds of *res adjudicata* meant that Johnson waived any

position that the state court judgment was *res adjudicta* on his claim for breach of warranties concerning the same CTS combine. Johnson sought the same damages in the federal court case, used the same evidence, used the same jury instructions, and used the same legal theories in trying his case to judgment. On appeal of the federal court case judgment, Johnson did not raise any issues concerning being forced by the trial court to try his counterclaim, rather Johnson wanted an order reversing the district court's order denying Johnson a new trial on damages. Deere & Co. v. Johnson, 271 F.3d 613, ¶14 (5th Cir. 2001). Johnson was hardly taking of the position in the federal court case trial and appellate litigation that the state court case judgment was *res adjudicata*. No, Johnson made a strategic decision to litigate to judgment his counterclaim in the federal court case rather assert a position that the state court case judgment was *res adjudicata* on the breach of warranties claim at issue in both cases. Johnson should not be allowed now to claim that the state court case is *res adjudicata* simply to rescue himself from a strategic choice he made relative to the federal court case which turned out to be improvident given the federal jury handing him a take nothing verdict and the consequences of the last-in-time rule.

Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling. State ex. rel. Moore v. Molpus, 578 So.

2d at 642; RESTATEMENT (SECOND) OF JUDGMENTS § 15; RESTATEMENT OF JUDGMENTS § 42; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114. *See also* Treinies v. Sunshine Mining Co., 308 U.S. 66 (U.S. 1939)(as to claims asserted by same parties concerning same subject matter commenced in different forums and litigated to judgment in serial, last in time judgment controls). Since there was identity of the parties and identity of the cause of action in the state court case and the federal court case, and since the federal court case judgment was the last-in-time judgment, the federal court case judgment is the controlling judgment which, in effect, superceded the state court judgment. In addition, as discussed under issue number 1, the federal court case judgment in Johnson's favor has been satisfied as a matter of law.

The rationale for permitting the last-in-time judgment to control is that the winner of the first judgment had the opportunity to stand on that judgment in a subsequent action on the same claim. *See* Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L.R. 798, 798 (1969). *See also* Robi v. Five Platters Inc., 838 F.2d 318, ¶37 (9th Cir. 1988)(when two inconsistent judgments exist, it is tempting for court to reexamine merits of litigants' dispute and choose result it likes best; there are important reasons to avoid this temptation; litigant who put in jeopardy prior judgment must bear cost of its tactics; most recent court to decide matter may have considered

and rejected prior judgment as *res adjudicata* and its decision has preclusive effect; last-in-time rule is supported by rationale that it ends chain of litigation by stopping it where it stands after entry of most recent judgment). Deere's point is that Johnson waived the *res adjudicata* character of the state court case judgment when he prosecuted his counterclaim in federal court to judgment, and the federal court case judgment superceded the state court judgment and became the controlling judgment under the last-in-time rule. The doctrine of judicial estoppel prevents Johnson from now taking the position that the state court case judgment is the conclusive judgment and arguing that the state court judgment has *res adjudicata* effect.

The last-in-time rule is based on the most recent decision necessarily having resolved the *res adjudicata* issue with a finding that the prior judgment has no preclusive effect. The district court and the parties were all aware of the judgment in the state court case when the federal court case was tried. Johnson opted to litigate his counterclaim to judgment and the federal court allowed him to do that despite the *res adjudicata* and double recovery of damages questions of law listed in the amended pretrial order which necessarily means the federal court, like Johnson, did not consider the state court judgment *res adjudicata*. The federal court case judgment became the last-in-time judgment on the cause of action for breach of warranties concerning the involved John Deere CTS combine. Nothing in

Johnson's brief suggests why the last-in-time rule articulated in case law of the United States Supreme Court, case law of this court, scholarly works, and the RESTATEMENTS just does not apply to him.

The federal court case judgment is the controlling judgment under the last-in-time rule. There are no judgment proceeds payable to Johnson which First National Bank of Clarksdale might garnish. The trial court erred in denying Deere's motion for reconsideration and motion for summary judgment based on the last-in-time judgment rule. Deere respectfully requests that the court reverse the trial court and render a judgment for Deere.

ISSUE NUMBER 3. Whether the trial court erred in denying Deere's motion to reconsider and motion for summary judgment by concluding that under the law of the case doctrine the district court order and the unpublished opinion of the Fifth Circuit in the Anti-Inunction Act matter are the law of the case in First National Bank of Clarksdale v. Johnson, No. 14-CO-01-0411 (County Ct. of Coahoma Co., Miss.).

Nothing in Johnson's brief changes the legal standard concerning the "law of the case" rule. The law of the case rule applies only to one case, and does not, like *res adjudicata*, foreclose parties or privies in one case by what has been done in another case. Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co., 244 Miss. 465, 479 (1962). Mississippi law is clear that the law of the case doctrine is limited to the same parties in the *same case*.

The law of the case rationale advanced by the trial court is problematic in two respects. First, neither Deere nor Johnson

raised this issue below. Second, the trial court's law of the case rationale misses the mark because the trial court erroneously concluded that an order in another case somehow satisfied the law of the case rule. Deere respectfully submits that the trial court's formulation of the law of the case rationale was an attempt at fashioning a outcome-driven order using what one commentator has termed "legal abracadabra." *See* Jacob A. Stein, *La Donna Mobile*, WASHINGTON LAWYER, June 2008, p. 48 (at times judges may disguise desired result with "legal abracadabra").

Johnson's contention at page 5 of his brief that, "[t]he issues presently urged upon the Court have previously been decided and are res judicata or law of the case" is flawed for several reasons. First, *res adjudicata* is a claim preclusion rule and the claim at issue in the Anti-Injunction Act matter was a claim for injunctive relief under the re-litigation/protect and effectuate judgments exception to the Anti-Injunction Act. That claim is not at issue in this case as Deere is not seeking injunctive relief, but rather has intervened in a garnishment action seeking summary judgment based on the first-in-time rule and the satisfaction of judgment affirmative defenses. Second, the Fifth Circuit opinion has no issue preclusive effect on the last-in-time rule and satisfaction of judgment rule issues because those issues were not authoritatively decided and necessary for the decision by the Fifth Circuit. Third, even if

we were to give preclusive effect to the federal court orders on the issue of whether the lost profits issue was litigated to judgment in the federal court case, that would have no impact on the last-in-time rule and satisfaction of judgment rule analysis in this case since these rules do not require identity of the issues but rather just identity of the cause of action. However, under Mississippi law, the findings of the federal courts on the lost profits issue cannot be considered conclusive under collateral estoppel since those findings were plainly erroneous as the record shows that the lost profits issue was decided with a judgment as a matter of law adverse to Johnson. Where there is just a reasonable suspicion that a prior court's issue finding is wrong, a Mississippi court cannot apply collateral estoppel. Smith v. Malouf, 826 So. 2d 1256, ¶8 (Miss. 2002). In this case, there is more than "room for suspicion" concerning the federal court finding; the record shows the finding was incorrect. Fourth, the Fifth Circuit opinion itself recognizes that the state courts should resolve the questions presented.

The orders of the federal courts by no means operate as a bar for Deere to intervene as a party in interest as Parker Tractor's indemnitor in First National Bank of Clarksdale v. Johnson. Moreover, neither Johnson nor the bank appealed the trial court's order allowing Deere to intervene in this case claiming that the Anti-Injunction Act case orders barred such an intervention. And, neither Johnson nor the bank filed a motion

to strike Deere's answer in intervention or any of the affirmative defenses and matters of avoidance set-up in the pleading.

Johnson's argument that in "Deere II", "the Fifth Circuit specifically rejected the 'last in time rule' and instead applied the 'first in time' rule" (Johnson's brief, p. 7) is likewise incorrect. First, there is no such thing as a "first-in-time" rule for deciding which judgment in two successive actions involving the same cause of action and the same parties is the controlling judgment. Treinies v. Sunshine Mining Co., *supra*, State ex. rel. Moore v. Molpus, *supra*, Justice Ginsburg's law review article, and the RESTATEMENTS make that clear. Second, the Fifth Circuit never got to the issue. A three-judge Fifth Circuit panel issued an unpublished opinion on 14 May 2003 affirming the district court and finding that for the purposes of the re-litigation exception to the Anti-Injunction Act, Deere failed to make the requisite strong and unequivocal showing of re-litigation of the same issues in order to overcome the federal court's proper disinclination to inter-meddle in state court proceedings. Because any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy, the Fifth Circuit affirmed the trial court. Deere & Co. v. Johnson, No. 02-60978 (5th Cir. May 14, 2003). [R. 103] Following the Fifth Circuit's

guidance, Deere intervened in the state court proceeding to allow the state courts to proceed in finally determining the controversy. By affirming on the narrow Anti-Injunction Act threshold question, the Fifth Circuit avoided deciding the issues concerning the "last in time" rule, the satisfaction of one judgment satisfies all judgments on the same cause of action rule, and questions concerning whether Johnson is barred by the doctrines of waiver and estoppel from attempting to collect on the state court judgment.

The trial court in this case did not find that the orders in the Anti-Injunction Act litigation were *res adjudicata*. The trial court reasoned that, "for the last-in-time rule to apply, Mr. Johnson's claim for lost profits must have been litigated to judgment in Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms." [R. 300-301]. The trial court then stated that the findings of the district court and the Fifth Circuit showed that those courts, "concluded that the lost profits issue was not actually litigated and decided in Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B." [R. 301] The trial court then concluded that, "This court concludes that the orders and opinions in No. 2:02CV015-B-A (N.D. Miss.) and No. 02-60978 (5th Cir.) are the law of the case and binding on this court." [R. 301] The trial court's reasoning and conclusion is flawed for three reasons. First, complete identity of the issues is not required for the application of the last-in-time rule; the last-

in-time rule uses a same cause of action, not same issues, standard. Second, the trial court accepted findings of the federal courts on the lost profits issue which the trial court knew were wrong. The trial court had before it certified copies of the federal court case record showing a judgment as a matter of law for Deere on the lost profits issue [R. 293] and a peremptory instruction for Deere on the lost profits issue. [R. 295-296] The trial court even commented at the hearing on the motion for reconsideration that it was aware of the record evidence from the federal court case showing the lost profits issue was decided on the merits. [Tr. 3-4] Third, the law of the case doctrine only applies to the same parties and the same case. It is not a *res adjudicata* rule which applies from one case to another.

Res adjudicata is a claim preclusion concept; collateral estoppel is an issue preclusion concept. Collateral estoppel precludes parties from re-litigating specific issues which have been actually litigated and are essential to the judgment in a former action. Smith v. Malouf at ¶7. Also, collateral estoppel, unlike the broader doctrine of *res adjudicata*, applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated. Id. *citing* State ex rel. Moore v. Molpus, 578 So. 2d at 640. "At its core, the rule precludes parties from relitigating issues *authoritatively decided on their merits* in prior litigation." State ex rel. Moore

v. Molpus at ¶57 (emphasis supplied). This court has stated, "[t]he doctrine of collateral estoppel must never be seen as anything other than an unusual exception to the general rule that all fact questions should be litigated fully in each case," and that ***"[w]here there is room for suspicion regarding the reliability of those first fact findings, collateral estoppel should never be applied."*** Smith v. Malouf at ¶8 *citing* Mississippi Employment Sec. Commn. v. Philadelphia Mun. Sep. Sch. Dist., 437 So. 2d 388, 397 (Miss. 1983). (Emphasis supplied.)

So, assuming for the sake of argument that the trial judge in this case meant to conclude that by virtue of collateral estoppel the findings of the federal courts in the Anti-Injunction Act litigation that for the purpose of the re-litigation exception to the Anti-Injunction Act the issue of lost profits was not litigated in the federal court case, Deere submits that the trial judge erred in accepting the findings of the federal courts since those findings were patently erroneous as the record from the federal court case shows that the lost profits issue was decided against Johnson by the district court with a judgment as a matter of law and a peremptory instruction. [R. 293; 295-296] The trial judge had that record evidence, made reference to it at the hearing on the motion to reconsider and in the order denying the motion to reconsider from which this appeal is taken, yet the trial judge decided to ignore the record evidence showing that the lost profits issue was, in fact,

litigated to judgment in the federal court case. Deere submits that there are substantial questions regarding the reliability of the findings of the federal courts concerning the issue of whether the lost profits issue was litigated to judgment, and given the plain error of the federal courts, it would be improper for any court knowing the true facts about the lost profits issue being litigated to judgment in the federal court case to give collateral estoppel effect to the findings of the courts in the Anti-Injunction Act case. Smith v. Malouf at ¶8; Mississippi Employment Sec. Commn. v. Philadelphia Mun. Sep. Sch. Dist., 437 So. 2d at 397.

However, the trial judge found that the law of the case doctrine made the federal court findings in the Anti-Injunction Act litigation binding on him, not the doctrines of either *res adjudicata* or collateral estoppel. [R. 300-301] The trial court erred in concluding that the law of the case doctrine applied, and that the law of case doctrine is a *res adjudicata* rule such that it would apply in other cases. The trial court erred in its conclusion of law that the orders in certain federal court matters are the law of the case binding in on the state courts in First National Bank v. Johnson. The trial court erred is accepting the fact finding of the federal courts where that fact finding was plainly erroneous.

CONCLUSION

Since Johnson's second bite at the apple was not as

palatable as the first, he just wants to ignore the federal court case judgment, and he wants this court to ignore that judgment and the legal consequences of that judgment.

Nothing in Johnson's brief alters the outcome determinative facts, and no law cited in Johnson's brief is law overruling the controlling law cited in Deere's principal brief. Importantly, Johnson does not contest the fact that the same cause of action was litigated in both the state court case and the federal court case and that there was an identity of the parties in those case.

Deere's principal basis for the relief it requests is the fact that the federal court case judgment has been satisfied, and the satisfaction of that judgment satisfies the state court judgment because the two judgments were on the same cause of action. This is why Deere has led with the issue of whether the trial court erred in not granting the relief sought below based on this ground. The trial court did not even consider this ground in its orders. In his brief, Johnson does not contest Deere's position in issue number one regarding the satisfaction of one judgment satisfies all judgments on the same cause of action. Stripping away all the discussion concerning the last-in-time rule and the law of the case issue, we become focused on Deere's lead ground for relief -- the satisfaction of one judgment satisfies all judgments rule. No court has made any finding with respect to this issue.

Satisfaction of one judgment on a cause of action satisfies

all judgments on the same cause of action. McNutt v. Wilcox, *supra;* 47 AM. JUR. 2D *Judgments* § 1009. There can be but one satisfaction of the amount due to a plaintiff for his or her damages. Medley v. Webb, *supra*. The outcome determinative questions regarding the satisfaction of judgment ground for the relief sought by Deere are: (1) Was the same cause of action litigated in both the state court and federal court cases? (2) Was there an identity of the parties? (3) Was the federal court case judgment satisfied? Deere submits that the answer to all three questions is, "yes." Deere submits that the affirmative answers to the questions leads to a conclusion that the trial court erred in failing to apply the rule that satisfaction of one judgment satisfies all judgments on the same cause of action and enter summary judgment for Deere. Deere submits that it is entitled to a judgment as a matter of law and respectfully requests that this court reverse the trial court and render a judgment for Deere.

The trial court in this case concluded that for the last-in-time rule to apply, the issue of lost profits would have to have been decided, on the merits, in the federal court case. Deere submits that the last-in-time rule uses an identity of the cause of action standard not an identity of the issues standard. There is no requirement under the last-in-time rule that the identical issues in both forums be decided on the merits. In any event, the evidence in the record shows, by any standard of proof, that

the lost profits issue was, in fact, decided in the federal court case adverse to Johnson by means of a judgment as a matter of law and a peremptory instruction. [R. 293; 295-296]

This court adopted the RESTATEMENT last-in-time rule in State ex. rel. Moore v. Molpus, *supra*. Contrary to Johnson's argument, no court has rejected the last-in-time rule. Any court making that finding would be incorrect given the State ex. rel. Moore v. Molpus case. The outcome determinative questions regarding the last-in-time ground for the relief sought by Deere are: (1) Was the same cause of action litigated in both the state court and federal court cases? (2) Was there an identity of the parties? (3) Was the federal court case judgment last-in-time? Deere submits that the answer to all three questions is, "yes." Deere submits that the affirmative answers to the questions leads to a conclusion that the trial court erred in failing to apply the last-in-time rule and enter summary judgment for Deere. Deere submits that it is entitled to a judgment as a matter of law and respectfully requests that this court reverse the trial court and render a judgment for Deere.

The trial court erred in concluding that the district judge's order and the unpublished Fifth Circuit opinion in the Anti-Injunction Act matter were somehow the law of the case on the lost profits issue. Orders from other cases do not fall within the scope of the law of the case rule. Even if the trial court's law of the case rationale is re-characterized as a

collateral estoppel rationale, the trial court still erred in accepting findings of the federal courts which the trial court knew were erroneous. *See* Smith v. Malouf at ¶8 ("Where there is room for suspicion regarding the reliability of those first fact findings, ***collateral estoppel should never be applied.***"). (Emphasis supplied.)

Justice Oliver Wendell Holmes defined law as the, "prophecies of what courts will do." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). The law is, therefore, a predictive intellectual pursuit in which the litigants have a reasonable assurance that a matter will be decided in accord with the case law. In this case, despite clearly articulated law on the satisfaction of one judgment satisfying all judgments on the same case of action and case law on-point with respect to the last-in-time judgment rule, the trial court rendered a ruling inconsistent with the law.

Deere respectfully requests that this court reverse the trial court's order denying Deere's motion to reconsider and motion for summary judgment, and render a judgment here for Deere.

Respectfully submitted,

DEERE & COMPANY

JOHN B. GILLIS
MISSISSIPPI BAR NO. [redacted]

CERTIFICATE OF SERVICE

I, John B. Gillis, on the date shown below personally mailed the foregoing brief and three duplicates to the Clerk of the Supreme Court of Mississippi by first-class mail, postage prepaid. I also certify that a copy of the foregoing brief was served on the following persons on the same date pursuant to Rule 25 of the MISSISSIPPI RULES OF APPELLATE PROCEDURE: Dana Swan, Esquire, Chapman, Lewis & Swan, Post Office Box 428, Clarksdale, Mississippi 38614; Thomas T. Ross, Jr., Esquire, Hunt & Ross, Post Office Box 1196, Clarksdale, Mississippi 38614; Ken Adcock, Esquire, Post Office Box 3308, Ridgeland, Mississippi 39158 (via email only by agreement); Honorable Charles R. Brett, County Court Judge, Post Office Box 736, Tupelo, Mississippi 38802.

DATED: 6 June 2008.

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