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 BRIEF

ORAL ARGUMENT REQUESTED

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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.

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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.

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STATEMENT OF THE CASE

A. NATURE OF CASE.

This is a permissive appeal of an interlocutory order denying Deere & Company's motion to reconsider and for relief from an order denying Deere & Company's motion for summary judgment in First National Bank of Clarksdale v. Johnson, No. 14-CO-01-0411 (County Ct. of Coahoma Co., Miss.).

First National Bank of Clarksdale filed a petition for writ of garnishment in First National Bank of Clarksdale v. Johnson in an effort to garnish or intercept any proceeds payable to Edward Johnson, Jr. on the judgment he obtained in Johnson v. Parker Tractor & Implement Co., No. 14-CI-95-0074 (Cir. Ct. of Coahoma Co., Miss.) on 13 February 1998.

The Johnson v. Parker Tractor & Implement Co. case arose out of a commercial transaction on 25 August 1994 involving Edward Johnson, Jr., d/b/a F & E Farms (Johnson) buying from Parker Tractor & Implement Company, Inc. (Parker Tractor) a John Deere CTS combine, serial number H00CTSX650438. Johnson made a down payment of $30,634.36 and signed an installment payment contract promising to pay five annual payments of approximately $32,000.00 each. Johnson reneged on the first installment payment. As a consequence of Johnson's breach of the installment sale contract, Deere & Company (Deere) filed suit on 26 September 1995 in the United States District Court for the Northern District of Mississippi seeking to recover possession of the CTS combine and

the recovery of amounts due under the installment sale contract. The case was styled and numbered Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B.

On 3 October 1995, Johnson filed a complaint Coahoma County suing only Parker Tractor in Johnson v. Parker Tractor & Implement Co. seeking to recover damages for the alleged breach of warranties pertaining to the CTS combine. Parker Tractor and its insurance carrier requested Deere defend and indemnify Parker Tractor because the allegations in the complaint related to new equipment warranties. Deere accepted the tender of defense and agreed to indemnify Parker Tractor.

On 5 October 1995, Johnson served his answer and counterclaim in Deere & Co. v. Johnson. The counterclaim alleged the identical breach of warranties action concerning the identical CTS combine as was asserted in Johnson v. Parker Tractor.

Simultaneous litigation ensued in federal court and state court on the same cause of action alleged in Johnson's pleadings filed in those courts. Inconsistent judgments resulted in the federal court case and the state court case. The federal court case judgment was the last-in-time judgment and it was satisfied as a matter of law when Johnson's judgment for $30,634.86 was offset by a $70,000.00 reasonable use charge assessed by the jury for Johnson's use of the combine for three years without paying the annual payments.

Deere, as the indemnitor of Parker Tractor, was granted permission to intervene in the First National Bank v. Johnson case. Deere filed a motion for summary judgment in First National Bank v. Johnson seeking a judgment as a matter of law that judgment enforcement activities pertaining to the state court case were precluded on the grounds that: the federal court case judgment had been satisfied as a matter of law, and satisfaction of this judgment satisfied all judgments on the same cause of action for breach of warranty concerning the CTS combine; the last-in-time judgment rule makes the federal court case judgment the controlling judgment concerning the cause of action for breach of warranty concerning the CTS combine; and estoppel and waiver preclude enforcement of the state court judgment.

Deere's motion for summary judgment and subsequent motion to reconsider and for relief from the order denying the motion for summary judgment were denied by the trial court, leading to this appeal.

B. COURSE OF PROCEEDINGS AND DISPOSITION.

On 25 August 25 1994, Johnson purchased from Parker Tractor a new CTS combine, product identification number H00CTSX650438. Johnson made a down payment of $30,634.36 and signed an installment payment contract promising to pay five annual payments of approximately $32,000.00 each. Johnson reneged on the first installment payment.

On 26 September 1995, Deere, as the assignee of the installment sale contract between Johnson and Parker Tractor, filed suit in the United States District Court for the Northern District of Mississippi seeking to recover possession of the CTS combine and the recovery of amounts due under the note after Johnson defaulted. The case was styled and numbered Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B. (Hereinafter "federal court case".)

On 3 October 1995, Johnson filed a complaint Coahoma County suing only Parker Tractor seeking to recover damages for the alleged breach of warranties pertaining to the CTS combine. The case was styled and numbered Johnson v. Parker Tractor & Implement Co., No. 14-CI-95-0074 (Hereinafter sometimes "state court case".) Parker Tractor and its insurance carrier requested Deere defend and indemnify Parker Tractor because the allegations in the complaint related to new equipment warranties. Deere accepted the tender of defense and agreed to indemnify Parker Tractor.

On 5 October 1995, Johnson served his answer and counterclaim in the federal court case. The counterclaim alleged the identical breach of warranties action concerning the identical CTS combine as was asserted in the state court case. The counterclaim was not compulsory since the identical breach of warranties claim had already been asserted in the state court case.

Johnson litigated to judgment his claim against Parker Tractor in the state court case recovering $90,000.00. The judgment was entered on 13 February 1998. Parker Tractor appealed the judgment.

While the state court case was on appeal, Johnson prosecuted to judgment his breach of warranties claim in the federal court case. Johnson prevailed on his counterclaim receiving a money judgment in the amount of $30,634.86. The jury also assessed a reasonable use charge against Johnson in the amount of $70,000.00 for using the CTS combine for several years to harvest crops without paying for it. Johnson's judgment was satisfied by a $70,000.00 reasonable use charge assessed against Johnson by the jury for using the CTS combine for several years while not paying for it. Based on J.L. Teel Co. v. Houston United Sales, 491 So. 2d 851 (Miss. 1986), Deere filed a motion to amend the pleadings seeking a judgment awarding it a positive sum judgment for the difference between Johnson's $30,634.86 recovery and the $70,000.00 reasonable use charge. The motion was granted and a positive sum amended judgment was entered for Deere. Johnson appealed seeking an order reversing the amended judgment awarding Deere a positive sum judgment and a new trial on the counterclaim.

In the federal court case appeal, the Fifth Circuit reversed the positive sum judgment for Deere, otherwise affirmed the Johnson's judgment on the counterclaim, and directed entry of a

judgment reflecting that the reasonable use charge would completely offset Johnson's counterclaim judgment. Deere & Co. v. Johnson, 271 F.3d 613 (5th Cir. 2001). The second amended judgment was entered by the district court on 11 January 2002.

On appeal in the state court case, this court initially reversed and remanded for a new trial with an opinion dated 4 November 1999. Parker Tractor & Imp. Co. v. Johnson, 1999 Miss. LEXIS 346 (Miss. Nov. 4, 1999). A motion for rehearing was filed and granted. A new opinion was issued on 10 January 2002 affirming the trial court judgment. Parker Tractor & Imp. Co. v. Johnson, 819 So. 2d 1234 (Miss. 2002).

First National Bank of Clarksdale had a writ of garnishment issued on 17 January 2002 in First National Bank of Clarksdale v. Johnson, No. 14-CO-01-0411 (County Ct. of Coahoma Co., Miss.) as a judgment creditor of Johnson. First National Bank of Clarksdale is seeking to garnish or intercept any money payable to Johnson on the state court case judgment.

Deere initially tried to secure an injunction from the federal court to protect the federal court judgment under the re-litigation exception to the Anti-Injunction Act. The district court granted a 12(b)(6) motion to dismiss refusing to grant the requested relief under this narrow exception. Deere & Company v. Johnson, No. 2:02CV015-B-A (N.D. Miss.). The dismissal was affirmed on appeal. Deere & Company v. Johnson, No. 02-60978 (5th Cir. May 14, 2003)(unpublished opinion; not precedent under

5th CIR. R. 47). The Fifth Circuit noted that 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.

Following the guidance of the Fifth Circuit to resolve the issue in state court, Deere, as the indemnitor of Parker Tractor, filed a motion to intervene in the First National Bank v. Johnson case. The motion was granted. Deere filed a motion for summary judgment in First National Bank v. Johnson seeking a judgment as a matter of law that judgment enforcement activities pertaining to the state court case were precluded on the grounds that: the federal court case judgment had been satisfied as a matter of law, and satisfaction of this judgment satisfied all judgments on the same cause of action for breach of warranty concerning the CTS combine; the last-in-time judgment rule makes the federal court case judgment the controlling judgment concerning the cause of action for breach of warranty concerning the CTS combine; and estoppel and waiver preclude enforcement of the state court judgment. The trial court initially denied Deere's motion for summary judgment concluding that the issue of lost profits had not been decided on the merits in the federal court case; therefore, according to the trial court, there was not an identity of the cause of action in the federal court case and state court case, and therefore the last-in-time rule did not apply.

Deere filed a motion for reconsideration and relief from the order denying the motion for summary judgment providing a certified copy of the civil minutes for the federal court case trial showing judgment as a matter of law was granted on the lost profits issue and a peremptory jury instruction on the lost profits issue; thus, the lost profits issue was decided on the merits in the federal court case. The trial court held a hearing on Deere's motion for reconsideration. Despite the civil minutes from the federal court case showing disposition of the lost profits issue by a judgment as a matter of law, the trial court still found that the issue of lost profits was not decided on the merits so there was not an identity of the cause of action, but altered its rationale for denying Deere's motion for summary judgment after considering the reconsideration motion finding that the orders and opinions in the Anti-Injunction Act matter are the "law of the case" and binding on the state trial court. The trial court never considered the satisfaction of judgment grounds for the relief sought by Deere. The order denying the motion for summary judgment was filed on 23 July 2007.

Deere filed timely a petition for permissive appeal from the order filed on 23 July 2007 denying its motion to reconsider and motion for summary judgment. The petition was granted.

C. STATEMENT OF THE FACTS.

Deere & Company (Deere) is a Delaware corporation with its principal offices in Moline, Illinois. [R. 205] Parker Tractor

and Implement Company, Inc. (Parker Tractor) is a Deere dealer doing business in Tunica, Mississippi. [R. 170] Edward Johnson Jr., d/b/a F&E Farms (Johnson) is an adult resident citizen of Coahoma County, Mississippi. [R. 205] First National Bank of Clarksdale is a bank doing business in Clarksdale, Mississippi. [R. 4]

Johnson filed his complaint in Johnson v. Parker Tractor & Implement Co., No. 14-CI-95-0074 (Cir. Ct. Coahoma Co., Miss.) on 3 October 1995 suing Parker Tractor seeking to recover damages for the alleged breach of warranties pertaining to a new John Deere CTS combine manufactured by Deere and sold by Parker Tractor to Johnson on 25 August 1994. (Hereinafter sometimes "state court case".) [R. 170]

Parker Tractor and its insurance carrier, Sentry Insurance Company, requested a defense and indemnity be provided by Deere for Parker Tractor since the allegations related to design and manufacturing defects which Johnson contended breached certain UCC warranties. Deere agreed to indemnify Parker Tractor for any damages assessed against it relating to the CTS combine.[1]

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[1] During the trial of the state court case, Johnson's lawyer informed the jury of the contractual indemnity relationship between Deere and Parker Tractor by asking the following question:

> Q. And Deere and Company, John Deere, the people that send these combines down here they are covering Parker Tractor for any losses associated with this case, aren't they?
>
> Parker Tractor & Imp. Co., Inc. v. Johnson, No. 819 So. 2d 1234, ¶30 (Miss. 2002).

On 26 September 1995, Deere filed suit in the United States District Court for the Northern District of Mississippi as a secured creditor seeking to recover possession of the CTS combine and a 922 flex platform which secured a note given by Johnson, and the recovery of amounts due under the note after Johnson defaulted in April 1995. [Exhibit 1 (civil docket for Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms) to 29 June 2007 hearing transcript, docket entry 1.] The case was styled Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B (N.D. Miss., Delta Div.). (Hereinafter "federal court case".) (NOTE: Deere was the assignee of the installment sale contract between Johnson and Parker Tractor. The Fifth Circuit commented in Deere & Co. v. Johnson, 271 F.3d 613, 616, n.1 (5th Cir. 2001) that there was nothing in the record to show that Parker Tractor assigned the installment sale contract to Deere. Apparently, the Fifth Circuit failed to take notice of the double-sided nature of the form and the assignment on the back of the form. Had the Fifth Circuit asked for clarification regarding Deere's status as an assignee at oral argument, counsel would have assisted the members of the panel with understanding the evidence in the record.)

On 29 September 1995, Johnson, through counsel, appeared in the federal court case, and thereafter served on 5 October 1995 his answer and counterclaim alleging the same breach of warranties action which were asserted in the state court case.

[R. 158; Exhibit 1 (federal court case docket) to 29 June 2007 hearing transcript, docket entry 6.]

Johnson litigated to judgment his claim against Parker Tractor in the state court case recovering $90,000.00. Parker Tractor & Imp. Co., Inc. v. Johnson, 819 So. 2d 1234, ¶18 (Miss. 2002). The state court judgment was entered on 13 February 1998. [http://www.mssc.state.ms.us/Images/Opinions/Conv11388.pdf] The judgment was appealed to the Supreme Court of Mississippi. On 4 November 1999, the Supreme Court of Mississippi reversed the trial court judgment and remanded the case for a new trial. Johnson filed a petition for rehearing. Parker Tractor & Imp. Co., Inc. v. Johnson, No. 98-CA-00457-SCT, 1999 WL 1000712 (Miss. Sup. Ct. Nov. 4, 1999). The case remained on the supreme court's docket until 10 January 2002 when the court issued an order granting the petition for rehearing and issued a new decision affirming the trial court judgment. Parker Tractor & Imp. Co., Inc. v. Johnson, 819 So. 2d 1234 (Miss. 2002).

While the state court case was on appeal, Johnson opted to prosecute his breach of warranties claim regarding the CTS combine against Deere in the federal court case. [R. 201 (amended pretrial order in federal court case dated 2 February 1999); R. 229-255 (Johnson's jury instructions in federal court case).]

Johnson's counterclaim in the federal court case was identical to his claim in the state court case. [R. 158 (Johnson's answer and counterclaim in federal court case); R. 170

(Johnson's complaint in state court case); R. 185 (pretrial statement in state court case); R. 201 (amended pretrial order in federal court case).] The nucleus of operative facts relate to a certain CTS combine, serial number H00CTSX650438, manufactured by Deere and sold by Parker Tractor which Johnson claimed was sold in breach of warranties. [R. 158; R. 170; R. 185; R. 201.]

1. Johnson's pleadings in the state court case and the federal court case set-up identical breach of warranty claims. [R. 158 (Johnson's answer and counterclaim in federal court case); R. 170 (Johnson's complaint in state court case); R. 178 (Johnson's first amended complaint in the action against Parker Tractor; this pleading has a federal court caption as the state court case was removed to federal court under federal question jurisdiction because Johnson pled a Magnuson-Moss claim; Johnson's first amended complaint filed in federal court after removal eliminated the Magnuson-Moss claim thereby eliminating any contention that there was federal question jurisdiction, and the case was remanded to state court; the state court case moved forward on the Johnson's amended complaint.)] By comparing these pleadings, there can be no dispute that Johnson prosecuted the same cause of action in both the federal court case and the state court case.

2. The pretrial statement in the state court case and the amended pretrial order in the federal court case show that the identical claims were litigated by Johnson, and that the same

facts were in dispute, and that the same evidence was used by Johnson to support his claims. [R. 185 (pretrial statement in state court case); R. 201 (amended pretrial order in federal court case).]

3. The same claims and issues were actually decided in the state court case and the federal court case inasmuch as the same breach of warranty claims were submitted to the juries and actually decided by the juries in both cases. The verdict form in the federal court case is reproduced at page 617 of the reported opinion. Deere & Co. v. Johnson, 271 F.3d 613 (5th Cir. 2001). The claims submitted to the jury, as shown by the verdict form, are claims for breach of express and implied warranties. In the state court case, the jury charge included explicit instructions on express warranty of merchantability, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. [R. 223 (copies of the pertinent jury instructions in the state court case); R. 229-255 (copies of pertinent jury instructions in the federal court case, along with a memorandum prepared by Judge Pepper's law clerk concerning how jury instructions issues were resolved).] As shown by the transcript excerpts from the state court case [R. 256], counsel for Johnson made the following arguments concerning the claims at issue and the theories of recovery:

(a) "Now there are three basis [sic] to go forward on in this case. One is express warranty and it is

complex and it is complicated. It's hard for even lawyers to understand." [R. 258-259]

(b) "The second theory is, is called the implied warranty of merchantability. It's a mouthful. What it really means is if this combine was not fit for ordinary purposes . . . and it caused Johnson damages, they are liable." [R. 259]

(c) "The third one is implied warranty of fitness for a particular purpose -- another mouthful." [R. 259]

The trial of the federal court case started on 5 June 2000 with jury selection; presentation of evidence started on 7 June 2000. [R. 293 (federal court case civil minutes)] On 9 June 2000, the jury returned a verdict finding for Johnson on his breach of warranty/revocation of acceptance claim and awarded him $30,634.86 in damages. Deere & Co. v. Johnson, 271 F.3d at 617. The jury also assessed Johnson with $70,000.00 in reasonable use charges for his use of the CTS combine for the over three years he used the equipment from the date of purchase until the date of repossession.[2] Deere & Co. v. Johnson, 271 F.3d 613 (5th Cir.

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[2] The reasonable use assessment recognizes that one does not get something for nothing in this society. Johnson just paid the down payment of $30,634.86 in 1994, yet continued to use the CTS combine from 1994 to 1996 to harvest thousands of acres of crops. It is critical to note that the Fifth Circuit reversed the district judge on allowing an amendment to the pleadings to allow Deere a positive sum judgment under the theory of quantum meruit. The Fifth Circuit affirmed the reasonable use assessment against Johnson because the form of the verdict was not objected to by Johnson, and because Johnson made no contemporaneous objections to the evidence presented concerning the number of hours of use and the per hour rental value of a combine.

2001). The verdict was filed on 13 June 2000, and an initial judgment as entered. [Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entry 154.] The district judge allowed Deere to amend the pleadings post verdict to set-up a claim for quantum meruit such that Deere would recover a positive sum judgment. [Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entry 174.] The judgment was amended awarding Deere the positive sum of the difference between the $70,000.00 reasonable use award and the $30,634.86 in damages awarded to Johnson on his counterclaim. [Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entry 176.] Johnson appealed the federal court judgment; Deere cross-appealed. [Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entries 179 and 184.]; Deere & Co. v. Johnson, 271 F.3d at 616, n.1.

To the extent that the issue of Johnson's alleged lost profits is a "cause of action" (and Deere submits that it is not as lost profits is just an element of claimed damages), the issue of alleged lost profits was litigated to conclusion in the federal court case. Deere requested and secured a judgment as a matter of law on the issue of Johnson's alleged lost profits. [R. 293 (federal court case civil minutes), Other Remarks section, third entry, "plaintiff's oral motion for judgment as a matter of law: granted only as to Johnson's claim for lost profits";

Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entry 155.] Deere requested and secured a peremptory instruction, instruction number C-17, on the issue of Johnson's alleged lost profits. [R. 294 (memorandum regarding court's instruction C-17 being given); R. 295-296 (instruction C-17] The last paragraph of the instruction C-17 reads:

> You are instructed not to award any damages for alleged lost profits. *The court has* ***ruled*** *that these damages may not be awarded.*
>
> (Emphasis supplied.)

Appellate litigation ensued in the United States Court of Appeals for the Fifth Circuit. Oral argument was heard on 4 September 2001, and the Fifth Circuit handed down its opinion on 12 November 2001 affirming the judgment for Johnson on his breach of warranty claim, reversing the positive sum judgment for Deere, and rendering a judgment on the case with instructions to the district court to enter a "take nothing" judgment (that is, the reasonable use award would only serve to offset and satisfy the damages awarded to Johnson on his breach of warranty claim). Deere & Co. v. Johnson, 271 F.3d 613 (5th Cir. 2001). Neither party filed a petition for rehearing or a petition for writ of certiorari. The second amended judgment was entered by the district court on 11 January 2002. [Exhibit 1 (docket for federal court case) to 29 June 2007 hearing transcript, docket entry 195.]

First National Bank of Clarksdale, as a judgment creditor of

Johnson in a matter unrelated to the CTS combine commercial litigation, initiated the action from which Deere now appeals. [R. 4] First National Bank of Clarksdale is seeking to garnish or intercept any money payable to Johnson on the state court case judgment. Deere, as the indemnitor of Parker Tractor, is a party with an interest relating to the transactions and subject matter which are involved at the judgment enforcement proceedings, and Deere was granted permission to intervene in the action. [R. 107]

Deere filed a motion for summary judgment in First National Bank v. Johnson seeking a judgment as a matter of law that judgment enforcement activities pertaining to the state court case were precluded on the grounds that the federal court case judgment satisfaction worked to satisfy the state court case judgment, and the federal court case judgment was the last-in-time judgment and therefore the controlling judgment. [R. 126] The trial court denied Deere's motion for summary judgment. [R. 275] Deere filed a motion for reconsideration and relief from the order denying the motion for summary judgment. [R. 280-296] The trial court denied this motion. [R. 300] Despite the civil minutes from the federal court case showing disposition of the lost profits issue by a judgment as a matter of law, the trial court still found that the issue of lost profits was not decided on the merits so there was not an identity of the cause of action, but altered its rationale for denying Deere's motion for summary judgment after considering the reconsideration motion

finding that the orders and opinions in the Anti-Injunction Act matter are the "law of the case" and binding on the state trial court. [R. 300] The trial court never considered the satisfaction of judgment grounds for the relief sought by Deere. The order denying the motion for summary judgment was filed on 23 July 2007. [R. 300]

Deere filed timely a petition for permissive appeal from the order filed on 23 July 2007 denying its motion to reconsider and motion for summary judgment. The petition was granted.

SUMMARY OF THE ARGUMENT

Standard of review. The standard of review for all the issues is de novo. This court employs a de novo standard of review regarding decisions on motions for summary judgment. Pate v. Conseco Life Ins. Co., No. 2006-CA-01496-SCT , ¶3 (Miss. Sup. Ct. Jan. 3, 2008). The de novo standard of review is also applied to questions of law. Russell v. Performance Toyota, Inc., 826 So. 2d 719, 721, ¶5 (Miss. 2002).

In Windham v. Latco of Mississippi, Inc., No. 2005-CT-02086-SCT, ¶4 (Miss. Sup. Ct. Jan. 17, 2008), this court noted the familiar legal standard that a motion for summary judgment shall be granted by the trial court, "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case, there were no disputed facts regarding there being an identity of the parties between Deere and Parker Tractor because of chain-of-distribution or vertical privity. There were no disputed facts that the same cause of action for breach of warranties concerning the same CTS combine was litigated to judgment in the state court case and the federal court case. There were no disputed facts concerning the federal court judgment being the last-in-time judgment on the same cause of action concerning the same CTS combine. There were no disputed facts concerning the federal

court judgment being satisfied by operation of law with the $70,000.00 reasonable use charge assessed by the jury against Johnson offsetting the $30,634.86 verdict returned for Johnson on his counterclaim.

The trial court erred in denying the motion to reconsider and motion for summary judgment by failing to apply the rule of law that satisfaction of one judgment on the same cause of action satisfies all judgments in the same cause of action. Where there are two judgments for the same debt against two persons, satisfaction of one judgment discharges the other. McNutt v. Wilcox, 1 Freem. Ch. 116 (Miss. 1843). There can be but one satisfaction of the amount due the plaintiff for his damages. Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974). Johnson litigated the identical breach of warranties cause of action in state court and federal court. Johnson obtained a judgment in both state court and federal court awarding him money damages. 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.

The trial court erred in denying the motion to reconsider and motion for summary judgment by failing to apply the rule of law that where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second

action is controlling. This is the last-in-time rule. State ex. rel. Moore v. Molpus, 578 So. 2d 624, 642 (Miss. 1991), *citing* RESTATEMENT (SECOND) OF JUDGMENTS § 15 ("when inconsistent final judgments are rendered in two actions, the judgment more recent in time is given conclusive effect in a later action.").

The trial court erred in concluding that the "law of the case" doctrine applied and that 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. The doctrine of "law of the case" is a rule of practice distinct from the rule of *stare decisis* and it is not a limitation upon the power of the court. Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co., 244 Miss. 465, 479 (1962). The law of the case rule applies only to one case, and does not, like *res judicata*, foreclose parties or privies in one case by what has been done in another case. Continental Turpentine at 479. The district judge's order and the Fifth Circuit's unpublished opinion in the Anti-Injunction Act matter cannot be the law of the case in First National Bank of Clarksdale v. Johnson.

ARGUMENT

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.

The standard of review is de novo. Pate v. Conseco Life Ins. Co., No. 2006-CA-01496-SCT , ¶3 (Miss. Sup. Ct. Jan. 3, 2008)(court employs de novo standard of review regarding decisions on motions for summary judgment); Russell v. Performance Toyota, Inc., 826 So. 2d 719, 721 (Miss. 2002)(de novo standard of review applied to questions of law).

Johnson litigated the same breach of warranties cause of action in state court and federal court. There is identity of the cause of action when there is a commonality in the "underlying facts and circumstances upon which a claim is asserted and relief is sought from the two actions." City of Jackson v. Lakeland Lounge of Jackson, 688 So. 2d 742, 749 (Miss. 1996); Riley v. Moreland, 537 So. 2d 1348, 1354 (Miss. 1989); Walton v. Bourgeois, 512 So. 2d 698, 701 (Miss. 1987). Where the cause of action in a federal court suit is based on the same underlying facts and circumstances as a state court suit, there is an identity of the cause of action. Black v. City of Tupelo, No. 2002-CA-01919-SCT (Miss. Sup. Ct. Sep. 11, 2003)("The allegations contained in Black's federal suit are based on the same underlying facts and circumstances as the case at bar.";

held trial court properly found *res adjudicata* barred Black's state court claim).

Section 24 of the RESTATEMENT (SECOND) OF JUDGMENTS explains that where *res adjudicata* extinguishes a claim, the "claim extinguished includes all rights of the plaintiff *to remedies* against the defendant *with respect to* all or *any part of the transaction*, or series of connected transactions, *out of which the action arose.*" (Emphasis added). *Res adjudicata* provides that when a court of competent jurisdiction enters a final judgment on the merits of an action, the parties or their privies are precluded from relitigating claims that were decided *or could have been raised* in that action. Reid v. American Premier Ins. Co., No. 2000-CA-01791-SCT, ¶16 (Miss. Sup. Ct. Apr. 18, 2002)(emphasis added); Walton v. Bourgeois, 512 So. 2d 698, 700 (Miss. 1987).

The pleadings in the state and federal court cases [R. 158 (Johnson's answer and counterclaim in federal court case); R. 170 (Johnson's complaint in state court case); R. 178 (Johnson's first amended complaint in the action against Parker Tractor)], the pretrial statement in the state court case and the amended pretrial order in the federal court case [R. 185 (pretrial statement in state court case); R. 201 (amended pretrial order in federal court case)], the jury instructions in the federal court case and the state court case [R. 229-255 (Johnson's jury instructions in federal court case); R. 223 (copies of the

pertinent jury instructions in the state court case)], and the reported opinions in the state and federal court cases show that the identical cause of action was litigated in both cases -- a civil action for breach of warranties relating to the sale of the identical John Deere CTS combine. The same issues concerning damages were also litigated in both cases, including lost profits and consequential damages. The opinion in Deere & Co. v. Johnson, 271 F.3d 613 (5th Cir. 2001) explicitly identifies the civil action and damages litigated by Johnson in his counterclaim, to-wit:

> On September 26, 1995, Deere filed a complaint seeking to collect on the contract. Johnson counter-claimed. He alleged breach of contract, breach of express and implied warranties, breach of the implied warranty of fitness for a particular purpose, and intentional misrepresentations. Johnson sought *lost profits*, punitive and consequential damages.
>
> Deere & Co. v. Johnson, 271 F.3d 613, section II (5th Cir. 2001). (Emphasis added.)

The same cause of action for breach of the warranties of merchantability and fitness for a particular purpose concerning the same John Deere CTS combine was litigated in both the state court case and the federal court case. The jury instructions and even the argument of Johnson's lawyer in the state court case show this fact. While Johnson did not recover lost profits damages in the federal court case, he sought these damages. The damages issue was alleged and litigated, but Johnson came-up

short on the evidence in that he had no expert opinion testimony to offer on the damages and no documentary evidence to support his mere allegations, and Deere secured both a judgment as a matter of law and a peremptory instruction on the lost profits issue.

In Judge Pepper's 25 September 2002 memorandum opinion granting Johnson's motion to dismiss in Deere v. Johnson, No. 2:02CV015-P-A (N.D. Miss., Delta Div.)(exception to Anti-Injunction Act litigation), Judge Pepper did not opine that he erred in his handling the lost profits damages component of Johnson's alleged damages. Judge Pepper merely wrote, "based on an unpublished opinion of the Mississippi Supreme Court which purported to reverse the state trial court verdict, this Court did not allow any evidence of loss [sic] profits." On appeal, the Fifth Circuit somehow transmuted Judge Pepper's passing comment into a finding that, for the purposes of the re-litigation exception to the Anti-Injunction Act only, "the issue of lost profits was not litigated in the federal suit". Importantly, the Fifth Circuit had to concede that for the purposes of *res adjudicata*, the same causes of action and issues were litigated in both cases because *res adjudicata* applies not only to claims and issues litigated, but also to claims and issues which could have been litigated. *See* Deere v. Johnson, No. 02-60978, ¶5 (5th Cir. May 14, 2003)("While the doctrine of *res judicata* might encompass claims which could have been brought

in the federal court action, the relitigation exception only applied to claims that were actually litigated and decided in the federal court action.").

Even under the standard used for the re-litigation exception to the Anti-Injunction Act, it is not clear how the Fifth Circuit concluded that the identical claims for breaches of warranties were not litigated in both the state court and the federal court cases. It is difficult to understand how the Fifth Circuit concluded that the lost profits element of damages was not litigated and decided upon by the district court in the federal court case -- the record shows that Deere secured a judgment as a matter of law on the lost profits element of damages. A judgment as a matter of law (or directed verdict) is, by definition, a decision of the court.

Even assuming for the sake of argument that Judge Pepper's passing comment about the handling of the lost profits evidence (even though the lost profits damages were really disposed of by judgment as a matter of law and a peremptory instruction) was a *mea culpa* and an admission of trial judge error, and the Fifth Circuit's adoption of that *mea culpa* was considered properly in its analysis of the very limited questions presented concerning the re-litigation exception to the Anti-Injunction Act, neither of the federal courts' dicta has an impact on the question of whether the same cause of action was litigated in both state and federal court. First, an item of damages is not a "claim" or

"cause of action". Second, if Judge Pepper's comment was an admission of error and the Fifth Circuit's transmutation of that comment into a finding that the same causes of action were not litigated were proper, then Johnson's remedy, upon timely filing of the appropriate motion, was a new trial on damages in Deere & Co. v. Edward Johnson, Jr. d/b/a F&E Farms, No. 2:95CV135-P-B (N.D. Miss., Delta Div.). Johnson filed no such motion either after Judge Pepper's 25 September 2002 memorandum opinion or the Fifth Circuit's 14 May 2003 opinion. Third, for the purposes of *res adjudicata*, the same claims and issues were litigated in both the state and federal court cases. Even the Fifth Circuit had to concede that point. Under Mississippi law, *res adjudicata* applies not only to claims and issues litigated, but those claims and issues which could have been litigated. Global Oceanic Enterprises, Inc. v. Hynum, No. 2002-CA-000471, ¶11 (Miss. Sup. Ct. Aug. 14, 2003); Little v. V & G Welding Supply, Inc., 704 So. 2d 1336, 1337 (Miss. 1997). Thus, in determining under the *res adjudicata* doctrine whether the same cause of action was litigated in the state court case and the federal court case, it really does not matter that Johnson's pleadings were virtually identical in both cases, or that Johnson's portions of the state court pretrial statement and federal court amended pretrial order were virtually identical, or that Johnson used the same evidence to prove his claims in both cases, or that virtually identical jury instructions were given in both cases. Why? Because the

legal standard for determining whether the cause of action was identical is to look at the underlying facts and circumstances upon which a claim is asserted. City of Jackson v. Lakeland Lounge of Jackson, 688 So. 2d at 749. *See also* Black v. City of Tupelo, *supra* (where cause of action in federal court suit is based on same underlying facts and circumstances as state court suit, there is identity of cause of action). The identical underlying facts and circumstances gave rise to Johnson's claims in the state court case and federal court case. Thus, there is no dispute that Johnson obtained judgments on the identical cause of action in the state and federal court cases.

Johnson obtained a judgment in both state court and federal court awarding him money damages. In state court, the judgment was for $90,000. In federal court, the judgment was for $30,634.86. The opinion and judgment of the Fifth Circuit dated 12 November 2001 affirmed Johnson's $30,634.86 judgment. Pursuant to the Fifth Circuit judgment and mandate, Johnson's federal court judgment on the breach of warranties cause of action was satisfied as a matter of law in that the reasonable use assessment against Johnson in the amount of $70,000.00 offset any cash payment due to Johnson. While there was no literal transfer of cash from Deere to Johnson, Johnson's judgment was satisfied as a matter of law in accord with the jury verdict which tasked the jury to itemize Johnson's damages for his down payment, interest on the down payment, incidental expenses

incurred, less the fair rental value of the equipment for the period of use by Johnson, and the judgment entered thereon. As the Fifth Circuit noted, "[t]he verdict form clearly delineated the jury's task, which the jury faithfully executed", with the jury calculating Johnson's total damages as $30,634.86 less $70,000.00. (The jury awarded Johnson $0.00 for interest and $0.00 for incidental expense damages on the special interrogatory form of the verdict.)

Under Mississippi law, where there are two judgments for the same debt against two persons, satisfaction of one judgment discharges the other. McNutt v. Wilcox, 1 Freem. Ch. 116 (Miss. 1843). There can be but one satisfaction of the amount due the plaintiff for his damages. Medley v. Webb, 288 So. 2d 846, 848 (Miss. 1974). As a matter of public policy, an injured party may not collect twice for the same damages. Davis v. USF&G, 837 F. Supp. 206, 211 (S.D. Miss. 1993). Where a plaintiff obtains multiple judgments on the same cause of action, he or she can only obtain a single recovery for the wrong, and where one judgment is paid, all judgments are satisfied. 47 AM. JUR. 2D *Judgments* § 1009. This rule holds true even if the particular judgment that is satisfied awarded a smaller amount than another judgment on the same claim. Id. 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 state court judgment will be in disregard of the fact that satisfaction of the federal court judgment operates to satisfy the state court judgment.

The trial court erred in not finding for Deere on the satisfaction of one judgment satisfies all judgments grounds for summary judgment.

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.

The standard of review is de novo. Pate v. Conseco Life Ins. Co., *supra* (de novo standard of review for decisions on motions for summary judgment); Russell v. Performance Toyota, Inc., *supra* (de novo standard of review for questions of law).

The state court judgment is not enforceable under the "last-in-time" rule. The federal court judgment (Johnson awarded $30,634.86 which was offset and satisfied with the reasonable use assessment awarded by the jury) and the state court judgment (Johnson takes $90,000.00) are inconsistent judgments. For reasons known only to Johnson, he decided not to rely on the finality if the state court judgment and litigated to judgment his counterclaim on the identical cause of action in the federal court case. Johnson's contention that he was compelled to litigate the identical breach of warranty claims as a compulsory

counterclaim in federal court is without merit because Rule 13(a)(1) of the FEDERAL RULES OF CIVIL PROCEDURE excepts from the compulsory counterclaim requirement a claim that is already the subject of pending litigation. The corresponding state court rule is the same. Since Johnson filed suit on the identical cause of action in the state court case on 3 October 1995, there was nothing "compulsory" about his counterclaim filed in the federal court case on 5 October 1995 because the same cause of action was pending in state court. In any event, there was nothing "compulsory" about litigating to judgment his counterclaim in federal court inasmuch as he had already secured a judgment on the same cause of action in the state court case. Johnson waived the finality of the state court judgment by litigating to judgment the counterclaim in federal court.

Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling. RESTATEMENT (SECOND) OF JUDGMENTS § 15; RESTATEMENT OF JUDGMENTS § 42. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 114 (where there are inconsistent judgments rendered by different courts in matter involving the same parties and the same cause of action, the last-in-time judgment controls). This is the "last-in-time" rule. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66 (U.S. 1939)(in claims asserted by same parties concerning same subject matter commenced in different forums and litigated to judgment in serial, the last in time judgment

controls); Donald v. J.J. White Lumber Co., 68 F.2d 441 (5th Cir. 1934)(applying Mississippi law; plaintiff, for reasons of its own, opted not to rely on previous judgment, "and in our opinion waived it"; "[w]here there are two conflicting judgments, the last in point of time is the one which controls."). The rationale behind the last-in-time rule is that the implicit or explicit decision of the second court to the effect that the first court's judgment is not *res adjudicata* is itself *res adjudicata* and therefore binding on the third court. Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1530 (9th Cir. 1985). As explained by then professor and now United States Supreme Court Associate Justice Ginsberg, under traditional *res adjudicata* doctrine, where there are conflicting judgments and each would be entitled to preclusive effect if it stood alone, the last in time controls subsequent litigation. Ginsberg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L.R. 798 (1968), *citing* RESTATEMENT OF JUDGMENTS § 42.

This court adopted the last-in-time rule of RESTATEMENT (SECOND) OF JUDGMENTS § 15 in State ex. rel. Moore v. Molpus where the court held 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), *citing* RESTATEMENT (SECOND) OF JUDGMENTS § 15, Dimeck v. Revere Copper Co., 117 U.S.

559, 566 (1886), Donald v. J.J. White Lumber Co., 68 F.2d 441 (5th Cir. 1934), and Marsh v. Mandeville, 28 Miss. 122, 128 (1854)(failure to plead bankruptcy discharge waived defense and subsequent judgment on same debt controlled). Thus, there is no question that the RESTATEMENT last-in-time rule is a rule of law in Mississippi.

The last-in-time rule requires identity of the parties and identity of the cause of action. The record and the reported decisions in the state court case and the federal court case show the identities of the parties and the cause of action.

a. *Identity of the parties.* Deere was the manufacturer of the CTS combine and Parker Tractor was a John Deere dealer who sold the combine that was involved in the state court case and the federal court case. This is "vertical privity" in just a two-link chain of distribution and, according to the Supreme Court of Mississippi, this vertical privity satisfies the identity of parties element. Little v. V&G Welding Supply, Inc., 704 So. 2d 1336 (Miss. 1997). To establish identity of the parties, strict identity is not required. Little v. V&G Welding Supply, Inc., 704 So. 2d at 1339. In Little, there was a much less direct relationship between the parties in the chain of distribution than that in this case where Deere manufactured the combine and Parker Tractor (a Deere dealer with a John Deere sign out in front of its premises) sold the combine. Even so, the Little court held there was identity of the parties

between the state court case styled Little v. V&G Welding Supply, Inc. in which V&G Welding Supply, Inc. and Mid-South Oxygen Company were the defendants, and the federal court case styled Little v. Liquid Air Corp. involving the same plaintiffs suing Chevron and Liquid Air Corporation, sellers of the involved gas higher-up in the distribution chain. In the federal court case, Chevron and Liquid Air Corporation were granted summary judgments which were affirmed by the Fifth Circuit. Little v. Liquid Air Corp., 37 F.3d 1069, 1079 (5th Cir. 1994). The Mississippi supreme court held that even though V&G Welding Supply and Mid-South were not parties in the federal court case wherein Chevron and Liquid Air were the named defendants, there was identity of the parties and identity of the quality and character of the parties in both lawsuits because Chevron, Liquid Air, Mid-South, and V&G Welding were in the chain of distribution of the gas product at issue in both lawsuits. This was noted to be "vertical privity".

At all relevant times, there has been immediate, vertical privity between Deere and Parker Tractor. Furthermore, the quality and character of Deere and Parker Tractor were the same -- they both were U.C.C. sellers of John Deere equipment and were the two links in the chain of sale of the involved CTS combine sold to Johnson.

Importantly, while Deere was not a named party in the state court case, and while Parker Tractor did not file a third-

party complaint against Deere, Deere became Parker Tractor's indemnitor by accepting Parker Tractor's tender of defense and request for indemnity. (A third-party complaint was not necessary because Deere accepted Parker Tractor's tender of defense and request for indemnity.) As such, Deere was in a position to have its interests effected by the jury verdict. Deere's status as the indemnitor was not a secret, not even to the jury after Johnson's lawyer commented on Deere being the indemnitor for Parker Tractor. With respect to Johnson's lawyer's disclosure of this fact to the jury, Justice McRae, the author of the majority 10 January 2002 opinion, 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. Justice McRae's conclusion was a finding of: privity between Deere and Parker Tractor; an identity of the quality and character of Parker Tractor and Deere; and the fact that the privity was so immediate that Deere, an un-named party, would be effected by the jury verdict and judgment. This finding establishes privity between Deere and Parker Tractor. This privity in turn establishes the identity of the parties and the identical quality and character of the parties in the state court case and federal court case. Deere's status as an indemnitor should buttress 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 ¶19 (Liquid Air being

indemnitor for named defendants, "buttresses our determination that Mid-South and V&G are Liquid Air's privies" and identity of parties factor satisfied).

b. *Identity of the cause of action.* In the state court case, Johnson's cause of action was for breach of warranties concerning a CTS combine manufactured by Deere and sold by Parker Tractor. In the federal court case, Johnson's cause of action asserted in his counterclaim was for breach of warranties concerning the same CTS combine manufactured by Deere and sold by Parker Tractor. Identity of the cause of action exists when there is a commonality in the underlying facts and circumstances upon which a claim is asserted and relief sought from the two actions. Riley v. Moreland, 537 So. 2d 1348, 1354 (Miss. 1989). In Little, the court held that there was identity of the cause of action even though the theories of recovery in the federal court lawsuit against Chevron and Liquid Air was different than the theories of recovery in the state court lawsuit against V&G Welding and Mid-South because the underlying facts and circumstances were the same -- an accident which killed the plaintiffs' decedents involving a gas product sold by the Chevron -> Liquid Air -> Mid-South -> V&G Welding chain of distribution. The underlying facts and circumstances of Johnson's claim in the state court case and his counterclaim in the federal court case were identical; therefore, there was an identity of the cause of action in the two cases.

To the extent that the issue of Johnson's alleged lost profits is a "cause of action" (and Deere submits that it is not as lost profits is just an element of claimed damages), the issue of alleged lost profits was litigated to conclusion in the federal court case. Deere requested and got a judgment as a matter of law on the issue of Johnson's alleged lost profits, and Deere requested and got a peremptory instruction on the issue of Johnson's alleged lost profits. The civil minutes of the Deere & Co. v. Johnson read in pertinent part:

> Plaintiff's [Deere's] oral motion for judgment as matter of law: **granted** only as to Johnson's claim for **lost profits.**
>
> (Emphasis supplied.)
>
> [R. 293 (federal court case civil minutes), Other Remarks section, third entry]

As shown by trial minutes, Deere made a motion for judgment as a matter of law and secured a judgment as a matter of law on the lost profits issue.

In the federal court case, the district judge also augmented the judgment as a matter of law by giving a peremptory instruction to the jury that the jury could not award any damages for claimed lost profits. The certified copy of the district court's memorandum concerning jury instructions and a certified copy of jury instruction C-17 show this undisputed fact. [R. 294 (memorandum regarding court's instruction C-17 being given); R. 295-296 (instruction C-17)]. As the memorandum states, the

court's instructions C-16 and C-17 were given in lieu of Deere's instruction P-7. The last paragraph of the instruction C-17 reads:

> You are instructed not to award any damages for alleged lost profits. *The court has* ***ruled*** *that these damages may not be awarded.*
>
> (Emphasis supplied.)

A peremptory instruction is the functional equivalent of a Rule 50 directed verdict. *See* White v. Miller, 513 So. 2d 600 (Miss. 1987)(motion for directed verdict is technically correct procedure, but peremptory instruction has same effect). The last paragraph of instruction C-17 has the same legal effect as a judgment as a matter of law/directed verdict. Deere submits that the alleged lost profits issue was litigated to conclusion since a judgment as a matter of law constitutes an adjudication on the merits. 35B C.J.S., *Federal Civil Procedure* § 980.

The issue of Johnson's alleged lost profits was litigated to conclusion and adjudicated on the merits in the federal court case as shown by the fact that the district court in the federal court case a rendered a judgment as a matter of law for Deere on the issue and then gave a peremptory instruction on the issue. Importantly, Johnson did not take an appeal from the judgment as a matter of law or instruction number C-17. Johnson sort of appealed the lost profits issue since issue III in his appellant's brief was: "Whether the trial court erred in sustaining plaintiff's objections in excluding defendant's

evidence of damages with regard to defendant's counterclaim." Concerning this issue, Johnson briefed the testimony he gave that supported his claim to have lost $54,051.00 in profits. Even so, this just was not an appeal from the judgment as a matter of law or the peremptory instruction. With respect to Johnson's appellate issue III, an evidence ruling considered under the abuse of discretion standard of review, the issue was subsumed without comment in the Fifth Circuit opinion. If Johnson felt the Fifth Circuit overlooked the issue or failed to consider it, then Johnson's remedy was a motion for rehearing at the Fifth Circuit; however, he did not file a motion for rehearing.

Deere's relationship with Parker Tractor as manufacturer and selling dealer creates "vertical privity" regarding the sale of goods contract at issue in the state court case, and this "vertical privity" in the chain of distribution satisfies the identity of parties element of *res adjudicata*. Johnson's litigating to judgment the same cause of action in the federal court case resulted in a judgment which superceded the state court judgment. A review of the pleadings, pretrial statement and order, and jury instructions in the state court case and federal court cases shows, without a doubt, the identical cause of action was litigated to judgment by Johnson in both cases. Johnson obtained a second judgment on the same cause of action in federal court, he did this knowingly, and consequently he cannot now claim that the state court judgment is the final and

conclusive judgment on the cause of action litigated in both the state court and federal court cases. The last-in-time rule dictates that the federal court case judgment is the conclusive, final judgment. As previously noted, this judgment has been satisfied.

Closely related to the last-in-time rule are the doctrines of waiver and estoppel. Johnson is precluded by the doctrine of waiver from contending that the judgment in the state court case has any effect whatsoever because Johnson elected to proceed with his counterclaim in federal court after obtaining the judgment in the state court case on the same cause of action. Waiver is the is the intentional or voluntary relinquishment of a known right or privilege. Glass v. Glass, 726 So. 2d 1281 (Miss. App. 1998). Johnson intentionally relinquished his right to stand on the state court claim and judgment when he moved forward with his counterclaim in federal court. There was nothing compulsory about the counterclaim in federal court, either at the pleading stage or the trial stage. If Johnson wanted to preserve the state court judgment, he was obligated to dismiss the counterclaim in federal court. Without an explicit or implied waiver of any "finality" contention or position regarding the state court judgment, Johnson could not have pursued the counterclaim. Johnson is also precluded by the doctrine of judicial estoppel from contending that the judgment in the state court case has any effect whatsoever because Johnson elected to

proceed with his counterclaim in federal court after obtaining a judgment in the state court case on the same cause of action. Johnson's position in this action and the state court case (the judgment in the state court case is a final and conclusive judgment) is inconsistent with the position Johnson took in the federal court case where he litigated to judgment his counterclaim on the identical cause of action, and then appealed that judgment to the Fifth Circuit since his position in the federal court case, either expressly or impliedly, was that the state court judgment was not final. *See, e.g.,* Rankin v. American General Finance, Inc., 912 So. 2d 725, ¶¶10-11 (Miss. 2005)(we apply doctrine of judicial estoppel where there is multiple litigation between the same parties and one party knowingly asserts a position inconsistent with position in other litigation; doctrine is based on expedition of litigation between same parties by requiring orderliness and regularity in pleadings; judicial estoppel doctrine protects integrity of judicial process by preventing party from taking position inconsistent with one asserted by same party in another proceeding); Roberts v. Roberts, No. 2002-CA-00352-COA (Miss. App. Oct. 7, 2003)(doctrine of judicial estoppel is to prevent parties from playing "fast and loose with the courts").

Under the last-in-time rule, the federal court case judgment is the controlling judgment because it carries with it the finding that the state court judgment was not *res adjudicata*.

Deere submits that the judgment in the state court case is a nullity and may not be enforced because it was superceded by the federal court case judgment, and, as discussed in the satisfaction of judgment issue *supra*, because the federal court case judgment in Johnson's favor has been satisfied as a matter of law.

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.).

The standard of review is de novo. Pate v. Conseco Life Ins. Co., *supra* (de novo standard of review for decisions on motions for summary judgment); Russell v. Performance Toyota, Inc., *supra* (de novo standard of review for questions of law).

The trial court initially denied Deere's motion for summary judgment concluding that the issue of lost profits had not been decided on the merits in the federal court case; therefore, according to the trial court, there was not an identity of the cause of action in the federal court case and state court case, and therefore the last-in-time rule did not apply. [R. 275-279] Deere filed a motion for reconsideration and relief from the order denying the motion for summary judgment providing a certified copy of the civil minutes for the federal court case trial showing judgment as a matter of law was granted on the lost profits issue and a peremptory jury instruction on the lost

profits issue. [R. 280-296] The trial court held a hearing on Deere's motion for reconsideration. Despite the civil minutes from the federal court case showing disposition of the lost profits issue by a judgment as a matter of law, and despite the peremptory instruction on the lost profits issue, the trial court still found that the issue of lost profits was not decided on the merits so there was not an identity of the cause of action, but altered its rationale for denying Deere's motion for summary judgment after considering the reconsideration motion finding that the orders and opinions in the Anti-Injunction Act matter are the "law of the case" and binding on the state trial court. [R. 300-301]

The doctrine of "law of the case" is a rule of practice distinct from the rule of *stare decisis* and it is not a limitation upon the power of the court. Continental Turpentine & Rosin Co. v. Gulf Naval Stores Co., 244 Miss. 465, 479 (1962). The law of the case rule applies only to one case, and does not, like *res judicata*, foreclose parties or privies in one case by what has been done in another case. Continental Turpentine at 479. *See also* Mauck v. Columbus Hotel Co., 741 So. 2d 259, 266-67 (Miss. 1999)(law of the case doctrine provides that, "whatever is once established as the controlling legal rule of decision, between the same parties in the same case, continues to be the law of the case, as long as there is a similarity of facts."). Mississippi law is clear that the law of the case

doctrine applies to the same parties in the *same case*. The district judge's order and the Fifth Circuit's unpublished opinion in the Anti-Injunction Act matter cannot be the law of the case in First National Bank of Clarksdale v. Johnson. 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 the Anti-Injunction Act matter are the law of the case binding in on the state courts in First National Bank v. Johnson.

CONCLUSION

Johnson's basic argument is that the federal court judgment is a nullity because the state court judgment was entered first. Even though Johnson claims the federal court judgment is a nullity, he decided to take an appeal to the Fifth Circuit where one of Johnson's issues was whether the district judge erred in not giving a punitive damages instruction to the jury. Johnson wanted a new trial in the federal court case on damages, including punitive damages, in hopes of bettering his position *vis a vis* the state court judgment for $90,000.00 which at the time of the trial and appeal of the federal court case had been reversed and was being reconsidered on appeal in this court. It is disingenuous for Johnson to suggest now that the federal court case judgment is a nullity given his positions at trial and on appeal. Also, consider what Johnson's position would be if he

had recovered, say, $150,000.00 in the federal court case. Would that $150,000.00 judgment be a nullity? Of course not. Johnson now contends that the federal court judgment is a nullity because that judgment is disadvantageous to him. Regardless of the commonsense analysis of this case looking to the plainly obvious motive of Johnson, Deere is entitled to a judgment as a matter of law based on the facts and the law.

An injured party may not collect twice for the same damages. Alcorn County v. U.S. Interstate Supplies, Inc., 688 So. 2d 742 (Miss. 1996). Deere has satisfied the judgment in Deere & Co. v. Johnson as a matter of law in that Johnson's judgment for $30,634.86 was completely offset by the $70,000.00 reasonable use assessment made by the jury in favor of Deere. Satisfaction of one judgment on a cause of action satisfies all judgments on the same cause of action. McNutt v. Wilcox, 1 Freem. Ch. 116 (Miss. 1843). Since Johnson v. Parker Tractor and Deere & Co. v. Johnson involved the identical cause of action, and since the federal court case judgment has been satisfied, then the state court case judgment has been discharged and satisfied as a matter of law. Deere submits that neither the Johnson v. Parker Tractor judgment nor any derivative or related judgments or orders are enforceable because a judgment on the same cause of action has already been satisfied. Deere respectfully submits that the trial court erred in not granting Deere's motion for summary judgment and motion to reconsider on the grounds that

satisfaction of one judgment satisfies all judgments on the same cause of action.

The federal court case judgment ($30,634.86 judgment for Johnson minus $70,000.00 reasonable charge for use of equipment such that Johnson takes nothing) and the state court case judgment (Johnson takes $90,000.00) are inconsistent judgments. These inconsistent judgments resulted from Johnson litigating to judgment his counterclaim in federal court after having secured a judgment in state court. Even if Johnson's $30,634.86 recovery had not been offset and satisfied by the reasonable use charge, the federal court case judgment and the state court case judgment would be inconsistent judgments on the same cause of action, the federal court case judgment would be controlling, and Deere would be liable to Johnson for the $30,634.86 under the last-in-time rule. Or, if Johnson had not lost on the issue of lost profits and was awarded his claimed $54,051.00 in lost profits, and if the reasonable use charge was credited against a judgment of $84,685.86 (the Fifth Circuit held that the reasonable use charge was supported by the evidence, not objected to on the verdict form, and was properly applied to Johnson's judgment), Deere would have been liable to Johnson for $14,685.86. Even under this scenario, the federal court judgment and the state court judgment would be inconsistent judgments on the same cause of action, the federal court case judgment would be controlling, and Deere would be liable to Johnson for the $14,685.86 under the

last-in-time rule. The point is that under no circumstance would Johnson be entitled to collect $90,000.00 on the state court case judgment because of the last-in-time rule. The fact is the federal court case judgment -- Johnson's verdict of $30,634.86 satisfied by the $70,000.00 reasonable use charge assessed by the jury -- is the controlling, last-in-time judgment. This last-in-time judgment precludes any judgment collection activities by Johnson, First National Bank of Clarksdale, or anyone else on the state court judgment. Deere respectfully submits that the trial court erred in not granting Deere's motion for summary judgment and motion to reconsider on the grounds that the last-in-time rule applies and the federal court case judgment is the controlling judgment as it is last-in-time.

The trial court erred in concluding that the law of the case doctrine was applicable, and that the district judge's order and the unpublished Fifth Circuit opinion in the Anti-Injunction Act matter were *res adjudicata* on the lost profits issue. The case which provides *res adjudicata* impact as to the lost profits issue is Deere & Co. v. Johnson since the record shows that the lost profits issue was decided by the court in favor of Deere with both a judgment as a matter of law and a peremptory instruction.

Deere was entitled to summary judgment in the trial court on the grounds that the federal court case judgment is the last-in-time and controlling judgment, and that the federal court case judgment has been satisfied as a matter of law. Deere

respectfully requests that this court reverse the trial court and render a judgment for Deere.

Respectfully submitted,

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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:

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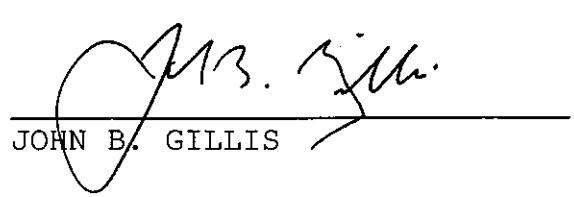

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