I. CERTIFICATE OF INTERESTED PERSONS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2007-TS-00470

WILLIAM SCOTT, PAULETTA SCOTT
AND BRENDA GREENWOOD — APPELLANTS

VS.

TABITHA GAMMONS — APPELLEE

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

1. Hon. Henry Lackey, Trial Judge
2. Hon. Andrew Howorth, Trial Judge
3. William Scott, Pauletta Scott and Brenda Greenwood, Plaintiffs/Appellants
4. Tabitha Gammons, Defendant/Appellee
5. Martin Zummach, Counsel for Plaintiffs/Appellants
6. John Watson, Counsel for Plaintiffs/Appellants
7. Brian Hyneman, Counsel for Defendant/Appellee
8. Kent Smith, Counsel for Defendant/Appellee

J. BRIAN HYNEMAN, BAR NO. [redacted]
Counsel of Record

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V. STATEMENT OF THE CASE

Plaintiff's cause of action arises out of a motor vehicle accident which occurred on September 8, 2000. The accident involved a vehicle owned and operated by William Scott and a vehicle owned by John Spencer which was occupied by Christopher Conway and Tabitha Gammons.[1] The Spencer vehicle was occupied by Pauletta Scott, Brenda Greenwood and Ashley Greenwood.

The Spencer vehicle was insured through Direct General Insurance Company (hereinafter "Direct"). The Scott vehicle was insured through State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"). Settlements were effectuated through the payment of liability funds from Direct and State Farm to the plaintiffs. In exchange for this payment, plaintiffs executed releases. In addition, plaintiffs and their counsel executed sworn court documents to have the claims of a minor approved by the Chancery Court. These settlements were based upon statements of plaintiff's counsel, Martin Zummach, made through correspondence to State Farm and counsel for Direct's insureds. (R.248-251).

Despite previous statements and the completed settlements, new counsel, John Watson, filed suit against the defendant on September 5, 2003 alleging that she was, in fact, the driver of the Spencer vehicle. (R.1-4). Defendant answered the complaint and ultimately moved for summary judgment under the theories of accord and satisfaction, judicial estoppel and equitable estoppel. (R.89-96). The Court originally denied defendant's motion, yet limited the issues to be resolved. (R.235-237). Based upon this order which limited the issues, defendant filed a second motion for

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[1]The actual driver of the vehicle owned by Spencer is the primary issue of dispute in the cause of action filed against defendant, yet this issue is of no consequence as to the issues under appeal.

summary judgment, or in the alternative, motion to bifurcate. (R.239-244). This motion was granted by the Court on or about February 26, 2007. (R.357). It is from this order which plaintiffs now file their appeal.

A. PROCEDURAL HISTORY

Plaintiffs filed their cause of action against defendant alleging that she was the driver of the Spencer vehicle involved in the September 8, 2003 motor vehicle accident, despite the finalized settlements based upon statements of plaintiff's counsel. (R.1-4). Defendant filed her original answer to the complaint on or about November 1, 2003 raising the affirmative defense that the alleged injuries were "caused and/or contributed to by persons other that defendant..." and the provisions of Miss. Code Ann. § 85-5-7. (R.7-10). Defendant, by agreement and without objection, amended her answer to the complaint on or about December 31, 2003 specifically denying that she was the driver of the vehicle. (R.13-17). Attorney Zummach entered an appearance on behalf of the plaintiffs on or about November 22, 2004. (R.38-39).

On or about August 11, 2005, Defendant amended her answer a second time by agreement and without objection. (R.79-84). The second amended answer included the affirmative defenses of accord and satisfaction, judicial estoppel and equitable estoppel. (R.80-83). Defendant filed her motion for summary judgment under these theories on or about August 30, 2005. (R.89-95).

Defendant's motion was heard on November 9, 2005 in front of the Honorable Judge Henry Lackey. After considering the motions and argument of counsel, Judge Lackey ultimately denied the motion pursuant to an order executed on February 21, 2006. (R.235-237). In his order Judge Lackey made a finding of material facts, yet determined that the issues of "misrepresentation, or concealment of facts, absence of good faith, lack of understanding of legal rights of the nature and

effect of the releases or lack of adequate consideration" were questions of fact left for jury determination. (R.235-237).

Based upon the order denying defendant's motion, defendant filed a motion for summary judgment, or in the alternative, motion to bifurcate stating that there were no genuine issues of material facts as to the issues left open by the original order. (R.239-243). This motion was heard by the Honorable Judge Andrew Howorth on January 9, 2007.

After considering the record, motions and arguments of counsel, Judge Howorth granted defendant's motion for summary judgment. An order granting defendant's motion was executed by Judge Lackey on February 26, 2007. (R.357). Plaintiff's appeal followed.

B. STATEMENT OF FACTS

William Scott was the driver of a vehicle involved in a motor vehicle accident with a vehicle owned by John Spencer and occupied by Christopher Conway and Tabitha Gammons. Pauletta Scott, Brenda Greenwood and Ashley Greenwood, a minor, were passengers in the Scott vehicle. The accident occurred as the vehicles met in the center of a narrow road in Marshall County, Mississippi.

After the accident, plaintiffs obtained counsel who began negotiating settlement for the plaintiffs pursuant to the liability coverages held by Direct, insurer of the Spencer vehicle, and State Farm, insurer of the Scott vehicle. Tabitha Gammons also obtained counsel who began negotiating settlement for a possible uninsured motorist claim with State Farm, who held her personal insurance.[2] On February 26, 2002, counsel for plaintiffs issued correspondence which discussed a

[2]Plaintiffs obtained representation from Martin Zummach. Gammons obtained representation from Sidney F. Beck, Jr.

proposed 50/50 liability split and coverages pertaining to both Christopher Conway and Tabitha Gammons. At that time, plaintiff's counsel indicated his client's belief that Tabitha Gammons was the driver of the vehicle. (R.354-355). Based upon this assertion an investigation ensued into whether Christopher Conway or Tabitha Gammons was driving the Spencer vehicle. This investigation failed to uncover any clear indication that Tabitha Gammons was, in fact, the driver of the vehicle owned by John Spencer. Then on May 28, 2002, plaintiffs' counsel issued correspondence to Kent Smith, counsel retained by Direct Insurance, dictating the terms of the settlement and requesting "some statement from Christopher Conway that there is no other available insurance to cover this accident protecting Mr. Christopher Conway inasmuch as I understand that Tabitha Gammons will be paid...for her claim..."[3] (R.248-249). A response to the May 28, 2002 correspondence was issued on June 3, 2002.

In that correspondence, Attorney Smith reiterated his belief that "all claims in the above-mentioned matter have been settled..." (R.250-251). Additionally, the correspondence indicates that there was no documentation which refuted the confirmed settlement, and noted that counsel was "perplexed" as to why the settlement had yet to be finalized. (R.250-251). Finally, counsel includes the declarations page regarding the coverage held by Christopher Conway "[i]n an effort to fully and finally complete the resolution of this matter". (R.250-251).

Following the June 3, 2002 correspondence, plaintiff's counsel issued correspondence to State Farm adjuster Mike Mulrooney on June 5, 2002 (dictated on June 4, 2002) regarding claims against William Scott for the accident. (R.221). In this correspondence, counsel clearly indicates

[3]It should be noted settlement drafts were previously issued to the plaintiffs by Direct Insurance Company, yet these drafts were never negotiated. It is presumed that these drafts were held awaiting the findings of the investigation into who was driving the Spencer vehicle.

the intentions of his client's to resolve their claims. Counsel states as follows:

> that the earlier made reference to an independent witness placing liability upon Ms. Tabitha Gammons will not materialize. It is not the Scott's intent to proceed as it relates to this witness. This witness will not again materialize.
>
> Additionally, this is to confirm that the Scotts have never identified their witness to State Farm in order to permit State Farm to conduct an investigation as it relates to liability of Tabitha Gammons.
>
> This is also to confirm that the Scotts desire to proceed with the settlement terms as set out in my May 28th correspondence which was further confirmation of the earlier reached settlement agreement...

(R.221). The settlement process was then begun between plaintiffs and the insurers for William Scott and Christopher Conway based upon a 50/50 liability scenario.

On or about December 17, 2002, William Scott, Pauletta Scott and Brenda Greenwood received the settlement benefits from Direct. Each party executed a Full and Final Release and Indemnifying Agreement which did "fully, completely and finally release and forever discharge and acquit John Spencer and Direct...and any other person...who may, in any manner, be liable..." from "any and all demands, judgments and causes of actions.." which arose out of the subject matter motor vehicle accident.[4] (R.97-114).

Then on or about March 31, 2003, William Scott, Pauletta Scott and Brenda Greenwood received settlement benefits from State Farm. Each party executed an Absolute Release and Settlement of Claims with Covenants which states that the parties allege to have been injured as a result of a motor vehicle accident with an "automobile being driven by Christopher D. Conway..."

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[4]The releases issued from Direct indicate that the motor vehicle accident occurred on September 3, 2000. It is undisputed that the accident occurred on September 8, 2000. Further it is undisputed that these releases pertain to claims arising out of the September 8, 2000 motor vehicle accident.

(R.115-129).[5] As with the releases presented by Direct, the State Farm releases worked to "release, acquit and forever discharge State Farm Mutual Automobile Insurance Company....and any and all other persons,...known or unknown...from any and all actions, causes of action, claims and demands..." (R.115-129).

The original claims arising out of the September 8, 2000 motor vehicle accident included the claim of a minor child, Ashley Greenwood. Ashley Greenwood was to also receive settlement funds from Direct on behalf of its insureds and State Farm on behalf of its insured. With her minority status, it was necessary to have the proposed settlement approved by the Chancery Court.

On or about February 19, 2003, Pauletta Scott executed a Petition for Authority to Compromise the Doubtful Claim of a Minor on behalf of Ashley Greenwood, a minor averring that the injuries were caused when the Scott vehicle was "allegedly struck head-on by a vehicle being driven by Christopher Conway." (R.131-135). Martin Zummach joined in the petition as counsel for Ashley Greenwood. On or about April 11, 2003, Pauletta Scott executed a second Petition for Authority to Settle a Doubtful and Unliquidated Claim of a Minor on behalf of Ashley Greenwood in the Chancery Court of Marshall County, Mississippi. This petition involved the settlement funds received from Direct. (R.136-147.) This petition was also approved by Martin Zummach as counsel for the plaintiffs.

Pauletta Scott executed both petitions as the temporary guardian of Ashley Greenwood. Brenda Greenwood, as the natural mother of Ashley Greenwood, joined in the petitions via a Joinder and Waiver of Service of Process executed on May 27, 2003. (R.148-149). Based upon the sworn

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[5]The release issued from State Farm to Brenda Greenwood misstates her name as Brenda Scott. It is undisputed that the release was intended for Brenda Greenwood. Further it is undisputed that Brenda Greenwood received settlement funds and executed the release.

statements included within the petitions, the Chancery Court of Marshall County issued decrees approving the settlements which were executed on March 14, 2003 and July 31, 2003 respectively. (R.150-162). In response to each petition, Chancellor Edwin Roberts decreed and adjudged that the injuries were the result of the Scott vehicle allegedly being struck head-on by a vehicle "being driven by Christopher Conway." (R.150-162).

Despite the declarations of plaintiff's counsel, the execution of releases and the filing of sworn pleadings to the contrary, plaintiffs, through Attorney John Watson[6], filed their cause of action against Tabitha Gammons on September 5, 2003 alleging that she was, in fact, the driver of the vehicle. (R.1-4).

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[6]John Watson is not a member of the Sparkman-Zummach firm who originally represented the plaintiffs. Martin Zummach did not enter an appearance in the present action until November 22, 2004. (R.38-39).

VI. SUMMARY OF THE ARGUMENT

This Court applies de novo standard of review to a granting of summary judgment by a trial court. *Moss v. Batesville Casket Company*, 935 So.2d 393, 398 (Miss.2006). "The moving party has the burden of demonstrating that [no] genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Howard v. City of Biloxi*, 943 So.2d 751, 754 (Miss.2006). If after this review any triable issues of material fact exist, this Court will reverse the trial court's decision to grant summary judgment. *Price v. Purdue Pharma Co.*, 920 So.2d 479, 483 (Miss.2006).

Defendant avers that regardless of the reasoning behind the granting of summary judgment, the resulting dismissal was proper under de novo review. It is easy to blur the position of Conway and Gammons in an effort to defeat summary judgment. It is certainly a main issue in the underlying case. However, it has no bearing on the issues before the Court. Regardless of who was driving, the all claims arising out of the September 8, 2000 accident were discharged through settlement prior to plaintiffs filing their cause of action against the defendant.

It is clear that plaintiffs and/or their counsel induced payments for settlement of all claims involving the September 8, 2000 accident by their representations; accepted payment of settlement benefits; executed releases; and executed sworn judicial documents under the representation that Christopher Conway was driving the vehicle. Once the money was received and the checks cashed, plaintiffs decided to wash themselves of their previous representations and acts in order to collect again under the allegations that Tabitha Gammons was the driver of the vehicle.

Summary judgment is proper under accord and satisfaction as Direct, the primary insurer of the vehicle occupied by Conway and Gammons, paid funds in exchange for a release of all claims.

Regardless of who was driving the vehicle, be it Conway, Gammons or Santa Claus, these payments would constitute consideration for the releases.

In the alternative, summary judgment was proper under the theory of judicial estoppel. Pauletta Scott and Brenda Greenwood executed sworn documentation which averred that Christopher Conway was the driver of the Spencer vehicle. Counsel for the two approved these sworn documents. As a result of these actions, plaintiffs' claims are precluded. Pauletta Scott and Brenda Greenwood's claims are precluded by virtue of their sworn statements. The claims of William Scott are precluded given the actions of his counsel who binds him with his representations.

In the alternative, summary judgment was proper under the theory of equitable estoppel. Based upon the fundamental notions of justice and fair dealing, equitable estoppel works to preclude the claims against Tabitha Gammons. Plaintiffs represented that their claims were ripe for settlement upon the basis that Christopher Conway was driving, and now seek to deny the representations which induced payment to them.

Reviewing the case de novo, it is clear that summary judgment was proper on any one, if not all, of the theories placed forth by defendant. Plaintiffs made statements and representations which induced settlement, and now seek to disavow their previous representations in hopes of a second payday.

VII. ARGUMENT AND AUTHORITY

ISSUE I: Whether the Full and Final Release and Indemnifying Agreement and/or Absolute Release and Settlement with Covenants discharge claims against Tabitha Gammons, thereby precluding the claims of the plaintiffs against her.

Throughout their brief, plaintiffs attempt to separate the insurers for John Spencer/Christopher Conway from the insurer for Tabitha Gammons as if they were two separate entities. Defendant finds it imperative to correct the numerous misstatements which reflect that John Spencer/Christopher Conway and Tabitha Gammons were insured by separate policies issued through separate insurers by referring to "Chris Conway's insurance carrier" or "her insurance carrier".

Certainly Tabitha Gammons is insured through a separate insurer, yet plaintiffs fail to realize or refuse to understand that Direct is also the insurer for Tabitha Gammons (assuming *arguendo* that she was the driver of the Spencer vehicle). Direct insured the vehicle owned by John Spencer, and would insure the driver of that vehicle whether that driver is Christopher Conway or Tabitha Gammons. "The longstanding rule in Mississippi is that the insurer for owner of the vehicle involved in the accident is the primary insurer." *United States Fidelity & Guaranty Co. v. John Deere Ins. Co.*, 830 So.2d 1145, 1148 (Miss.2002); *See also State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 797 So.2d 981, 983 (Miss.2001); *Travelers Indem. Co. v. Chapell*, 246 So.2d 498, 505 (Miss.1971). Under this rule, Direct General Insurance Company is the insurer for the driver of the Spencer vehicle, and owes that driver the duty of a defense and indemnification.

Plaintiffs repeatedly contend that Conway and his father had potential independent liability based upon a negligent entrustment claim. Plaintiffs assertion is disingenuous given the past representations made by plaintiffs' counsel. In correspondence of May 28, 2002, plaintiffs' counsel

dictates the terms of the settlement "under Chris Conway's policy", and requesting the "Declarations Page indicating that Christopher Conway's cumulative limits are $50,000.00 inasmuch as I understand that Tabitha Gammons will be paid...for her claim." (R.248). This correspondence makes it crystal clear that plaintiffs were proceeding with settlement with the understanding that Christopher Conway was driving the vehicle. If this is not so, why would plaintiffs' counsel not dispute the payment of settlement funds to Tabitha Gammons?

Plaintiffs hypothetical included in their brief is just that – a hypothetical. Fact is, plaintiffs never alleged nor hinted negligent entrustment until having their backs against the wall and facing summary judgment. This is clear given the representations made in the May 28, 2002 correspondence and further supported by the second correspondence issued by plaintiffs' counsel. This correspondence was issued to State Farm adjuster Mike Mulrooney on June 5, 2002. In this correspondence, plaintiffs' counsel indicates that it is the "Scotts desire to proceed with settlement terms as set out in my May 28th correspondence", and check with counsel in regards to "proceeding with the minor settlement and closing this case out." (R.221).

As insurer for the driver of the Spencer vehicle, Direct paid benefits to plaintiffs and presented releases to be executed by each plaintiff. (R.97-114). State Farm, as insurer of William Scott, paid benefits and presented releases to be executed by the plaintiffs. (R.115-129).

The Direct releases defined "Released Parties" as "John Spencer and Direct....and any other person,....who may, in any manner, be liable...." (R.97; 103; 109). These releases also worked to release "any and all claims of every kind and description that the Undersigned....have now or may ever have, both direct and derivative, against the Released Parties herein related to such incident." (R.98; 104; 110).

The State Farm releases defines "Releasees" as "State Farm Mutual Automobile Insurance Company....and any and all other persons,....known or unknown...." (R.115-116; 123-124). In executing the releases, plaintiffs agreed to "release, acquit and forever discharge" the releasees from "any and all causes of actions, claims and demands....and compensation whatsoever, on account of, in ay way growing out of, any and all known and unknown, foreseen or unforeseen, bodily and personal injuries, and damages...resulting or to result from an accident which occurred on or about September 8, 2000...." (R.115-116; 123-124). Further, these releases depicted the accident wherein the Scott vehicle "was allegedly struck by an automobile being driven by Christopher D. Conway...." (R.115; 123).

The releases executed by the plaintiffs constitute valid contracts wherein they agreed to "fully, completely and finally release and forever discharge and acquit John Spencer and Direct ...and any other person, firm or corporation who may, in any manner, be liable ...", and release "State Farm Mutual Automobile Insurance Company....and any and all other persons,....known or unknown...." (R.97; 103; 109; 115-116; 123-124).

When construing a contract, it will be read as a whole, so as to give effect and purpose to the entire contract. *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss. 1992). A reviewing court should seek the legal purpose and intent of the parties from an objective reading of the words used in the contract to the exclusion of extrinsic or parol evidence. Said court is not at liberty to infer intent contrary to that emanating from the text of the contract at issue. *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss. 1991). Only when a contract is unclear or ambiguous can a court go beyond the text. *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352 (Miss. 1990).

Under this direction, the court first looks to the "four corners" of the release. If, and only if,

ambiguity causes the terms of the contract to be unclear is extrinsic or parol evidence allowed in order to better determine the intent behind the contract. In the present matter, the plaintiffs' cause of action against Tabitha Gammons is precluded regardless of how the Court reads the releases. When looking at the "four corners" of the releases, they clearly discharge and acquit the named parties and all others who may be liable. Should the Court find the language ambiguous, the Court can look to the May 28, 2002 and June5, 2002 correspondence from plaintiffs' counsel to realize the intent of the plaintiffs was to fully and finally settle all claims related to the September 8, 2000 accident.

The language contained within the various releases is comparable to that discussed in *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748 (Miss. 2003). In *Royer*, a manufactured homes dealer, Royer Homes, entered into a contract with a manufacturer (Chandeleur) for sales and distribution of its product. Ultimately, Royer Homes filed a cause of action in Pike County for unpaid warranty service and accounts receivable. This suit remained dormant, and Chandeleur was purchased by Champion Enterprises, Inc. while the Pike County action was pending. In turn, Royer sued Champion in Hinds County alleging breach of contract, fraud and unfair trade violations, among others. The parties to the Hinds County action agreed to a settlement wherein Royer Homes executed a "Confidential Settlement, Release, and Indemnity Agreement"which released "any and all claims which arose or may arise from any prior business dealings." *Id.*

Subsequent to that settlement, Royer Homes resurrected the Pike County action against Chandeleur. Champion argued these claims were precluded under accord and satisfaction as they were released by the settlement documents executed in the Hinds County action. The Pike County Circuit Court agreed and Royer Homes appealed the decision. In affirming the lower court's

decision, the Mississippi Supreme Court found the release to be clear and, by its plain language, constituted accord and satisfaction. *Id.*

The present matter is akin to *Royer*. Plaintiffs settled a claim under the premise that Christopher Conway was the driver of the other vehicle. Monetary compensation was provided in exchange for a full and complete release of all claims against all person who may be liable. Plaintiffs accepted the funds then filed suit against Gammons alleging that she was, in fact, the driver of the other vehicle. Unfortunately for the plaintiffs, they had executed binding releases which worked to release all claims involving the September 8, 2000 accident – including any possible claims against Tabitha Gammons.

Plaintiffs cite two Mississippi cases, *Smith v. Falke*, 474 So.2d 1044 (Miss.1985) and *Country Club of Jackson, Mississippi, Inc. v. Saucier*, 498 So.2d 337 (Miss.1986) to support their argument that their cause of action against the defendant is not precluded because she was not specifically mentioned in the release. Both cases involved the review of releases wherein a third party was attempting to obtain benefit from the release of another tortfeasor. The Court, in both cases, rejected the argument of accord and satisfaction opining that the deciding factor in both cases was the question of intent. "[A]n injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no considerations have been given only where the intent to release the others is manifest." *Saucier*, 498 So.2d at 339-40 citing *Smith v. Falke*, 474 So.2d 1044, 1046 (Miss. 1985).

While Tabitha Gammons may not have been specifically identified within the subject releases, plaintiffs made their intent quite obvious through correspondence of May 28, 2000 and June 5, 2000. The May 28, 2000 correspondence wherein plaintiffs' counsel confirms that Tabitha

Gammons was to receive settlement funds from Direct while seeking information regarding additional or excess coverage insuring Christopher Conway. (R.248-249). Plaintiffs' intent is stated more directly in the June 5, 2000 correspondence. **"It is not the Scotts' <u>intent</u> to proceed as it relates to this witness....This is also to confirm that the Scotts <u>desire</u> to proceed with the settlement terms as set out in my May 28th correspondence...."** (R.221).

To accept the argument that plaintiffs did not intend to settle all claims arising out of the September 8, 2000 accident when the releases were executed would completely ignore the representations made by their counsel. Further, Direct has the duty, as insurer of Tabitha Gammons, to defend and indemnify Tabitha Gammons from any allegations related to the September 8, 2000.[7] It is absurd to think that Direct Insurance would pay over $40,000.00 to settle plaintiffs' claims and not settle any and all claims arising out of the accident against all those involved – including Gammons.

[7]Direct General Insurance Company continues to incur defense costs as they continue to defend Tabitha Gammons to date.

ISSUE II: Whether the payment of settlement benefits by the insurer of the vehicle, and consequently, the insurer of Tabitha Gammons, would constitute consideration or something of value to preclude the claims of the plaintiffs against Tabitha Gammons under the theory of accord and satisfaction.

The doctrine of accord and satisfaction has four basic requirements: (1) something of value must be offered; (2) offer must be accompanied by acts and declarations which amount to a condition that if the thing offered is accepted, it is accepted in satisfaction; (3) party offered the thing of value is bound to understand that if he takes it, he takes it subject to the conditions; and (4) party must actually accept the item offered. *Medlin v. Hazlehurst Emergency Physicians*, 889 So.2d 496, 498 (Miss 2004).

Plaintiffs repeatedly contend that "Tabitha Gammons never offered anything"or "has never paid anything of value to the Scott family", therefore the requirements of accord and satisfaction were not met. As explained *supra*, Direct was the insurer for the driver of the Spencer vehicle whether that be Christopher Conway or Tabitha Gammons. Assuming *arguendo* that Tabitha Gammons was, in fact, the driver of the Spencer vehicle as plaintiffs allege, the $40,000.00 paid to William Scott, Pauletta Scott and Brenda Greenwood would surely constitute "something of value". Gammons clearly meets the first requirement.

Once plaintiffs received the $40,000.00 in settlement benefits, they executed releases which dictated that the settlement was in satisfaction of all claims held against the "Released Parties". Specifically, plaintiffs agreed that they were

> "legally competent to execute this Release; that before voluntarily executing the same, [they were] fully informed of the contents of this Release and its meaning and has executed it, voluntarily, with the full knowledge that [they were] releasing and discharging forever any and all claims of every kind and description which [they]....have now or may ever have against the Released Parties arising out of the

September 3, 2000, incident mentioned herein.[8]

(R.100; 106; 112). This language clearly records plaintiffs intent to accept the settlement funds in satisfaction of the claims held against the released parties, thereby satisfying the second requirement under the analysis.

The third requirement is for the party offered the thing of value understands that it is accepted with conditions. The language noted *supra* would also satisfy the third requirement of accord and satisfaction. All plaintiffs voluntarily executed being "fully informed of the contents....and its meaning". Its meaning stated quite clearly that the acceptance of the settlement funds was conditioned upon the discharge and acquittal of any and all claims. Plaintiffs cannot and do not argue that they did not understand the ramifications of executing the release as "every person must be presumed to know the law, and in absence of some misrepresentation, or concealment of facts, the person must abide the consequences of his contracts and actions." *McCorkle v. Hughes*, 244 So.2d 386, 388 (Miss. 1971) (quoting *Fornea v. Goodyear Yellow Pine*, 178 So. 914, 918 (Miss. 1938).

The final requirement is the party must actually accept the offer of value. Plaintiffs do not attempt to argue against this requirement. Plaintiffs have accepted the settlement drafts, and their counsel has presumably dispersed the funds to them. As such, it is undisputed.

Plaintiffs claim that Tabitha Gammons has paid nothing of value to the Scott family despite receiving $40,000.00 from her insurer. It is clear that Gammons, through her insurer, has paid

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[8]The releases issued from Direct indicate that the motor vehicle accident occurred on September 3, 2000. It is undisputed that the accident occurred on September 8, 2000. Further it is undisputed that these releases pertain to claims arising out of the September 8, 2000 motor vehicle accident.

consideration or something of value to the plaintiffs in exchange for a satisfaction of any and all claims arising out of the September 8, 2000 motor vehicle accident. The plaintiffs were represented by counsel and represented that they understood the meaning of the releases. Plaintiffs do not attempt to dispute that the settlement funds were not accepted nor that the terms and conditions of the acceptance were not understood.

Defendant has met her burden of proving accord and satisfaction through clear and convincing evidence. As such, plaintiffs claims should be precluded under the theory of accord and satisfaction.

ISSUE III: Whether the plaintiffs' cause of action against Tabitha Gammons is precluded under the theory of judicial estoppel given that Pauletta Scott, Brenda Greenwood and their counsel executed and presented sworn pleadings before the Chancery Court of Marshall County, Mississippi which averred that Christopher Conway was the operator of the vehicle involved in the subject matter accident.

The doctrine of judicial estoppel also applies to preclude any cause of action on behalf of the plaintiffs. "Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation." *Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003); See also *Richardson v. Cornes*, 903 So.2d 51, 56 (Miss. 2005). "A party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." *Id.*

Pauletta Scott, as legal guardian and next friend of Ashley Greenwood, executed two separate petitions seeking authority from the Chancery Court of Marshall County to accept funds and conclude the claim of the minor. (R.131-147). These petitions involved settlement benefits paid by State Farm on behalf of its insured (R.131-135) and Direct Insurance on behalf of its insureds. (R.136-147). Brenda Greenwood, the natural mother of Ashley Greenwood, joined in the petitions through the execution of a Joinder and Waiver of Service of Process. (R.148). Attorney Martin Zummach joined in and approved the petitions, and subsequently presented them before the Chancery Court of Marshall County.

Both sworn petitions assert that Ashley Greenwood was injured in the motor vehicle accident of September 8, 2000 when the vehicle in which she was a passenger was "allegedly struck head-on by a vehicle **being driven by Christopher Conway** ..." (R.132; 137). The settlement on behalf of the State Farm insured was approved on or about March 14, 2003, and the Chancery Court of Marshall County entered a Decree Authorizing Settlement. (R.159-162). In its Decree approving

the settlement on behalf of the State Farm insured, the Chancery Court adjudged that the minor had a claim for damages arising out of an automobile accident wherein she was a passenger in a vehicle that was "allegedly struck head-on by a vehicle **being driven by Christopher Conway**..." (R.160). The settlement on behalf of Direct and its insureds was approved on or about July 31, 2003, and the Chancery Court of Marshall County entered the Decree Authorizing Settlement. (R.150-158). The Decrees issued by the Chancery Court were based directly upon the sworn statements of Pauletta Scott and Brenda Greenwood which were made with the approval of their attorney. In its Decree authorizing the settlement paid on behalf of the Direct insureds, the Chancery Court adjudged that Ashley Greenwood had a claim for injuries arising out of the motor vehicle accident, "wherein she was a passenger in a vehicle owned and operated by William J. Scott when they were allegedly struck head-on by a vehicle owned by John Spencer **and being driven by Christopher Conway**..." (R.151).

Plaintiffs argue that the Chancery Court documents were presented in a "completely separate action wherein it was stated that Chris Conway allegedly drove the vehicle...", therefore the claims of Pauletta Scott and Brenda Greenwood should not be barred. The problem with this argument is two-fold. First, the sworn documents did not state that Chris Conway allegedly drove the vehicle. The documents clearly state that the vehicle was "being driven by Christopher Conway", and this sworn statement can be used against the plaintiffs in a latter action. Secondly, the sworn statements were made in proceedings directly related to the September 8, 2000 motor vehicle accident and are relevant and material to this cause of action as they directly contradict the allegations set forth by the plaintiffs against Tabitha Gammons.

In *Simon v. Deporte*, 150 Miss. 673, 116 So. 534 (Miss. 1928), Sophie Desporte sued Joe

Simon for breach of contract for failure to execute and deliver a deed subsequent to Desporte's payment of the stated consideration under the deed. Prior to instituting the circuit court action, Desporte filed a sworn bill of complaint in chancery court which contained allegations inconsistent with the evidence she offered in the circuit court action. Simon sought to introduce the sworn pleading to rebut the evidence presented in the circuit court action. The circuit court denied Simon the opportunity to present the sworn pleading as Desporte testified she had signed the bill under oath without reading it. The Supreme Court found that the exclusion was improper opining that admissions in a sworn pleading are admissible in another action. *Id.* at 535; *See also Stuckey v. The Provident Bank*, 912 So.2d 859, 866 (Miss.2005) (adhering to the holding in *Simon* and agreeing that "in the proper context an admission made by a party-opponent in prior litigation can be used as evidence..."). "An admission in a pleading in one action may be received in evidence against the pleader...on the trial of another action to which he is a party, in favor of a party to the latter action, provided the admission is relevant and material to the issues involved in such action." 32 C.J.S. Evidence § 402 (2007).

Plaintiffs Scott and Greenwood, along with their counsel, took the position before the Chancery Court of Marshall County that Christopher Conway was the driver of the Spencer vehicle in sworn pleadings approved by their counsel. This sworn statement is relevant and material to the issues at hand. Plaintiffs benefitted from this position by receiving settlement benefits from insurance carrier for the Spencer vehicle, and then in regards to the same litigated event, found it more profitable to retreat from their sworn statements to allege that Tabitha Gammons was the driver of the Spencer vehicle. Such conduct should not be condoned, and should preclude the claims of Pauletta Scott and Brenda Greenwood against Tabitha Gammons.

As to William Scott, he, too, should be precluded from claiming damages from defendant based upon the actions of his attorney. Martin Zummach, as attorney for the Scott family, approved the sworn petitions averring that Christopher Conway was the driver of the vehicle at the time of the accident, and presented them to the Chancery Court. "An attorney is presumed to have the authority to speak for and bind his client." *Parmley v. 84 Lumber Company*, 911 So.2d 569, 573 (Miss.2005).

By signing the petitions and presenting them to the Court, counsel for William Scott bound his client to the contention that Christopher Conway was the driver of the vehicle. Rule 11 of the Mississippi Rules of Civil Procedure requires that an attorney for a represented party sign any pleading to certify that the "attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it." M.R.C.P. 11 (2006). In addition, the comment to Rule 11 provides that a "signed pleading may be introduced into evidence in another action by an adverse party as proof of the facts alleged therein." M.R.C.P. 11 (2007) *cmt.*

Pauletta Scott, Brenda Greenwood and the attorney for the Scott family filed and presented pleadings under oath before the Chancery Court of Marshall County stating that Christopher Conway was the driver of the Spencer vehicle at the time of the September 8, 2000 accident. Subsequent to these sworn statements, plaintiffs, and their counsel, take a completely opposite position alleging that Tabitha Gammons was the driver of the vehicle. Given the statements and the binding effect they have upon all plaintiffs, the present claims against Tabitha Gammons are precluded under the theory of judicial estoppel.

ISSUE IV: Whether the plaintiffs' cause of action against Tabitha Gammons is precluded under the theory of equitable estoppel given the actions of plaintiffs and their counsel.

Upon de novo review of the present matter, it is clear that plaintiffs' cause of action against Gammons should be precluded under the doctrine of equitable estoppel. Equitable estoppel has its roots in the "morals and ethics of our society." *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss.1984). "The doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing." *O'Neill v. O'Neill*, 551 So.2d 228, 232 (Miss. 1989). "Whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown." *PMZ Oil Co.*, 449 So.2d at 206.

A party asserting relief under the theory of equitable estoppel must show "(1) belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *Cothern v. Vickers, Inc.*, 759 So.2d 1241, 1249 (Miss.2000); *See also Covington County v. Page*, 456 So.2d 739, 741 (Miss.1984). Plaintiffs argue that the requirements of equitable estoppel were not met as defendant could not show any change of position in reliance upon the statements made by plaintiffs, nor any detriment which resulted from the purported reliance.

Defendant has provided ample proof that plaintiffs, through counsel, made representations that the plaintiffs intended to settle their claims taking the position that Christopher Conway was the driver of the vehicle. Direct, relying on the representations made by plaintiffs counsel, issued settlement drafts and presented releases which it thought would extinguish any claims arising from the September 8, 2000 accident. Defendant, in all candor, cannot state that these funds would not have been offered had the plaintiffs not retracted their original assertion that Tabitha Gammons was

driving the vehicle. However, it is an absolute that no settlement benefits would have been offered with the understanding that Direct would be forced to continue to incur attorney's fees and expenses in defending Tabitha Gammons. The payment of the liability benefits would constitute the change in position. While defendant cannot point to any changes made to her position, her insurer certainly changed its position based upon representations of the plaintiffs. Again, it is absurd to think that Direct Insurance would pay over $40,000.00 to settle plaintiffs' claims and not settle any and all claims arising out of the accident against all those involved – including Gammons.

As a result of this change, both Tabitha Gammons and Direct suffer from detriment and prejudice. The simple fact that the defendant has to deal with a lawsuit hanging over her is a detriment. The simple fact that she was served with a lawsuit regarding claims she was assured were settled prejudices her. Her primary insurer, Direct, and secondary/excess insurer, State Farm, continue to incur fees and expenses related to their attorneys defending a matter which plaintiffs represented was settled. Again, it is absurd to think that Direct Insurance would pay over $40,000.00 to settle plaintiffs' claims and not settle any and all claims arising out of the accident against all parties involved – including Gammons.

"[A]n equitable estoppel may be enforced in those cases in which it would be substantially unfair to allow a party to deny what he has previously induced another to believe and take action on." *PMZ Oil Co.*, 449 So.2d at 207. Plaintiff's through their representations induced settlement from Direct. These representations were reinforced by the filing of the Chancery Court pleadings which stated that Christopher Conway was the driver of the Spencer vehicle.

The actions of plaintiffs and their counsel go completely against the fundamental notions of justice and fair dealing, and their claims should be precluded under the theory of equitable estoppel.

VIII. CONCLUSION

Plaintiffs/Appellants request this Court to reverse the summary judgment granted Defendant/Appellee by the Circuit Court of Marshall County, Mississippi. In doing so, plaintiffs set forth disingenuous statements regarding the type of claims which were settled and upon what basis they were settled. The record and evidence in this matter clearly displays the plaintiffs', and their counsel's, intent to fully and finally resolve any and all claims related to the September 8, 2000 motor vehicle accident. Despite being paid $40,000.00 by the insurer of the Spencer vehicle under the representation that Christopher Conway was driving the vehicle; executing numerous releases which discharged all persons who may in any manner be liable; and presenting sworn pleadings to the Chancery Court of Marshall County averring that Christopher Conway was the driver of the Spencer vehicle, plaintiffs disavowed their numerous representations (sworn and unsworn) and filed suit against Tabitha Gammons alleging that she was, in fact, the driver of the Spencer vehicle. Plaintiffs' appeal seeks condonation of this conduct.

Upon de novo review of the record and evidence before it, this Court can come to only one conclusion – summary judgment was proper. While the lower court may have granted summary judgment in a somewhat unorthodox manner, the result was proper.

Plaintiffs' claims against defendant are precluded as the clear intent behind the payment of settlement benefits and execution of releases presented was to fully and finally settle all claims and release all insureds, and putative insureds, from liability arising out of the September 8, 2000 accident. Should the Court examine the "four corners" of the various releases and find them unambiguous, the claims are precluded. Should the Court find the releases ambiguous, the intent behind them is clearly displayed by representations made by plaintiffs counsel.

1- Plaintiffs' claims are precluded under the theory of accord and satisfaction. Regardless of who was driving the Spencer vehicle (Gammons or Conway), plaintiffs received consideration or value on the condition that all claims would be discharged. Plaintiffs understood the ramifications of executing the releases, and accepted the settlement funds upon executing the releases.

2- Plaintiffs' claims are precluded under the theory of judicial estoppel. Pauletta Scott, Brenda Greenwood and their counsel filed and presented sworn petitions before the Chancery Court of Marshall County averring that Christopher Conway was the driver of the Spencer vehicle. These statements were made in regards to a settlement directly related to the litigation of the current action. These sworn statements are evidence against their current position taken in regards to defendant which is in complete contradiction from that taken earlier in the litigation when seeking to have the minor's claims approved. By executing and presenting the petitions to the Chancery Court, plaintiffs' counsel bound all of his clients to this position, including William Scott.

3- Plaintiffs' claims are precluded under the theory of equitable estoppel. The fundamental notions of justice and fair dealing require that plaintiffs' actions have ramifications. Plaintiffs induced the payments of benefits through representations made by counsel to the respective insurers. It is absurd to believe that any insurer would pay a settlement which would not completely discharge any and all claims when the duty to defend remains. As a result of the plaintiffs' actions, defendant is required to defend against allegations which she once believed to be settled. Furthermore, she continues to incur the expense and hardship associated with defending the claims. Such can only be consider as prejudice against her or a detriment to her.

SEE RELEASE

Settled in full

Intent of settlement release all parties

For all reasons cited above and in the foregoing Appellee Brief, Defendant/Appellee Tabitha Gammons respectfully requests that this Honorable Court affirm the ruling of the lower court and

allow the grant of summary judgment to stand.

RESPECTFULLY SUBMITTED, this the 9th day of October, 2007.

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CERTIFICATE OF SERVICE

I, J. BRIAN HYNEMAN, of Hickman, Goza & Spragins, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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THIS, the 9th day of October, 2007.

J. BRIAN HYNEMAN