

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM SCOTT, PAULETTA SCOTT  
AND BRENDA GREENWOOD

Appellant

VS.

CAUSE NO.: 2007-TS-00470

TABITHA GAMMONS

Appellee

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REPLY BRIEF OF APPELLANTS

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(ORAL ARGUMENT REQUESTED)

Appeal from the Circuit Court of Marshall County, Mississippi  
(Cause No.: M2003-406)

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES	
i) Cases .....	ii
ARGUMENT .....	1-13
CONCLUSION .....	13
CERTIFICATE OF SERVICE .....	14

## TABLE OF AUTHORITIES

<i>Country Club of Jackson, Mississippi, Inc., v. Saucier</i> , 498 So. 2d. 337, 339-340 (Miss. 1986) .....	5, 7, 8, 9
<i>Duncan v. Cessna Aircraft Company</i> , 665 S.W. 2d. 414 (Tex. 1984) .....	9
<i>Smith v. Falke</i> , 474 So. 2d., 1044 (Miss. 1985) .....	5, 7, 8

Tabitha Gammons has completely missed the sole issue in this case.

The issue at hand is whether or not Tabitha Gammons was released from any potential tort liability when the Scott family executed a Release for the stated specific benefit of Chris Conway, his father, and Direct Insurance when it is admitted by Tabitha that Tabitha is never named or mentioned within any Release involving this wreck.

Throughout Tabitha Gammons' Brief, Tabitha takes the position that, instead, the issue is one of insurance coverage and insurance company liability.

Insurance coverage and obligations under an insurance policy are matters for Declaratory Judgments. Those issues are not matters for consideration in a tort case where a Plaintiff claims that a Defendant wronged the Plaintiff, and in response to that allegation, the Defendant initially states that the Defendant was involved in the tort; then later changes her position and states that she was not involved in the tort, but instead should be granted a Release which covered someone else entirely who was involved in the tort.

The Scotts reiterate that a jury should determine whether or not Tabitha Gammons was driving the pick-up truck which struck the Scott family car and whether or not she is legally liable for damages proximately caused. Period.

If a jury determines that Tabitha Gammons was driving the pick-up truck as she initially stated in her Answer, then, Tabitha Gammons can assert, and fail, that she was released in Chris Conway's Release.

If, on the other hand, a jury determines that Tabitha Gammons was not driving the pick-up truck, which was alleged in Tabitha's Amended Answer, then there will be no issue of "release" as Tabitha will have no tort liability.

That is the crux of this case. A disputed issue of material facts exists regarding who was driving the pick-up truck and whether adequate consideration was paid for a release of Tabitha's alleged liability. If for purposes of this summary judgment Tabitha Gammons is willing to stipulate that she was driving the vehicle and that she should be covered by the Release given Chris Conway, so be it. If this is the case, this Honorable Court will find, as did the first trial judge, that the "adequate consideration" necessary for a "release" is a disputed issue of material fact. (R. 235-237)

However, Tabitha is not willing to stipulate that she was driving the pick-up truck in question but wants to skip ahead to the issue of a Release which does not name or identify her in any way.

Tabitha Gammons, nor anyone or anything on her behalf, paid any consideration to the Scott family for a Release. This was specifically held by the "second" trial judge. Yet, the "second" trial judge found this lack of consideration irrelevant. (Transcript of Proceedings, Volume 4, pages 48-49)

Now, Tabitha states that Direct Insurance Company was her "primary insurer," and they paid monies to the Scott family.

For purposes of this argument, Plaintiff would state that if Direct Insurance was paying on behalf of Tabitha Gammons (as her "primary insurer"), it seems quite evident that Direct Insurance would have included Tabitha Gammons' name in the General Release. They did not do so.

Direct Insurance listed Chris Conway and his father as owners of the pick-up truck as well as Direct Insurance Company's lawyers as those being released but never mentioned in the Releases, Tabitha Gammons.

It cannot be missed that common sense dictates that if Direct Insurance Company wanted a release of Tabitha Gammons, they would have paid for and included Tabitha Gammons in the release.

Ms. Gammons wants, in her argument, to get outside the record. Tabitha wants to continue to refer to letters from counsel, Kent Smith, Martin Zummach and Scot Spragins to try to show the intent of the parties.

At page 12 of Ms. Gammons' Brief a rhetorical question is asked that involves the letters of the lawyers making it "crystal clear" that the understanding was that Chris Conway was driving the vehicle. The rhetorical question posed by Ms. Gammons was "If this is not so, why would plaintiffs' counsel not dispute the payment of settlement funds to Tabitha Gammons?"

First, the intent of the parties and their lawyers is completely irrelevant to a summary judgment motion. However, there is actually an answer to this rhetorical question, and that is that the Scotts did dispute payment to Tabitha Gammons. The Scotts did assert that Tabitha Gammons was driving the pick-up truck, and the Scotts did assert that the insurance company should not pay Tabitha Gammons anything under her own uninsured motorist coverage and disputed that Direct Insurance Company should pay her anything because she was the driver of the pick-up truck and therefore could not collect from any source if she was driving the pick-up truck from a liability standpoint other than possibly William Scott. (R. 254)

The insurance companies obviously ignored this warning.

While the Scotts do not feel it necessary to answer rhetorical questions, when one is asked, and there is a clear answer which establishes the Scotts' exact point, the Scotts want to provide it to the Court. Here, Tabitha Gammons collected from a liability carrier that she would have never been able to collect from if she was driving the pick-up truck. That is why that liability carrier does not want to turn around and have to pay again.

Issues of intent are clearly not issues to be dealt with on Motions for Summary Judgment. However, since Tabitha insists on continuing to refer to the "intent" of the lawyers involved in this case, Appellants would point to this Court to what the issue for determination was as it related to "witnesses" referred to in correspondence between lawyers and insurance companies. (Referred to by Tabitha Gammons' Brief at pages 15-16).

A witness supported William Scott's rendition of the facts. The witness' name was Charles Bradstreet. William Scott had always indicated that a girl was driving the pick-up truck, but there was no known independent witness to support that allegation. The remaining Scott family members never saw who was driving the vehicle because of the severity of the impact and their injuries.

The independent witness that could substantiate Mr. Scott's recollection was Charles Bradstreet. The existence of this witness and William Scott's theory that a girl was driving was made known to Direct Insurance and State Farm Insurance.

When the witness disappeared and could not be located by either the insurance companies or counsel, the Scotts indicated in a letter that the witness would apparently not be available to support William Scott's theory that a girl was driving the vehicle.

What Tabitha Gammons has now failed to inform this Court is that Mr. Bradstreet was eventually found. That witness testified in a deposition conducted by Tabitha Gammons' lawyers and supported William Scott's theories that Tabitha Gammons was driving the vehicle.

Again, if Tabitha Gammons is willing to stipulate that she was driving the vehicle as the witness and William Scott indicate, then the issue is solely whether or not the Release to Chris Conway as the owner of the vehicle covered Tabitha. *Smith v. Falke*, 474 So. 2d., 1044 (Miss. 1985) and *Country Club of Jackson, Mississippi, Inc., v. Saucier*, 498 So. 2d. 337, 339-340 (Miss. 1986) say with a resounding "no" to that sole question.

All of the issues argued by Tabitha are completely irrelevant to the pending cause. The sole issue for determination is which, or whether both, Trial Judges were correct in their Summary Judgment rulings.

Both Judges hearing the Motion for Summary Judgment ruled that the issue of adequate consideration, as it relates to an alleged release of Tabitha, was *on the table* for the Court's consideration. Judge Lackey found that adequate consideration for a release of Tabitha Gammons was a disputed issue of material fact to be ultimately determined by a jury and denied Defendant's summary judgment motion. Judge Howorth later found with no additional proof in the record, that no consideration was paid by Tabitha Gammons but ruled that Tabitha Gammons was still entitled to a summary judgment because the Judge could not "imagine" that the insurance company had not included Tabitha in the Release in question.

The only time that any member of the Scott family was to have supposedly placed driver responsibility with Chris Conway was in a set of Court documents in settlement releases



completely unrelated to the pending cause but relied upon by Defendant now in their Brief to support an inconsistent position taken by some of the Plaintiffs.

When Mrs. Scott and Brenda Greenwood made a claim against William Scott for any purported liability William might have in the cause of this accident, William Scott's insurance company's lawyers prepared Releases and Court documents.

As stated by Tabitha, those documents stated that the driver of the pick-up truck was allegedly Chris Conway.

What should not be missed by the Court is that it would not have mattered in those Release documents or those Court documents if it had said that Santa Claus was driving the other vehicle (pick-up truck). What is material is that those Releases and those Court documents were prepared solely as it relates to the liability of William Scott (not Chris Conway or anyone else in the pick-up truck).

It did not matter as it relates to the Release of William Scott's liability who was driving the pick-up truck.

In any event, the irrelevant documents indicated that, at least according to William Scott's insurance carrier, they thought Chris Conway was driving the pick-up and stated as such by saying that allegedly Chris Conway was driving.

William Scott did not sign any of those documents in question or appear before the Chancery Court of Marshall County so at a minimum he has not made any inconsistent statements to be "bound" by.

Regardless, those documents are completely irrelevant to the Releases prepared covering the alleged driver or owner of the pick-up truck. The pick-up truck Release was to have been

viewed by the Trial Court under *Smith* and *Saucier* to determine if Tabitha was released from liability. In those Releases, only Chris Conway and his father are identified as owners of the vehicle insured by Direct Insurance. No mention of Tabitha Gammons is made. In fact, Tabitha Gammons is not mentioned in any Release of either the Conway liability or the Scott liability.

The reason is simple. Tabitha Gammons contributed nothing towards any of the Releases.

It does not matter that under the insurance law of the State of Mississippi that the pick-up truck's insurance coverage is "primary" or "secondary."

It matters only that Tabitha Gammons did not pay any consideration to receive a Release, and no one on her behalf obtained a Release for Tabitha Gammons by including Tabitha Gammons in the Releases.

Tabitha's attempt to confuse the issues by indicating that Mrs. Scott, William Scott's wife, executed documents prepared by William Scott's liability carrier to release William Scott's alleged liability mentioned the other alleged driver to be Chris Conway is nothing more than a red herring.

The fact remains that Tabitha Gammons nor anyone on her behalf paid one cent in consideration to the Scott family; and never obtained a Release of Tabitha Gammons by including her name in a Release.

Of four potential Defendants, three were released, and one was sued.

The three that were released were Chris Conway and his father in their status as owners of the pick-up truck and William Scott in his status as the owner of the Cadillac as well as his status as the driver of the Cadillac.

Tabitha has still not addressed to this Court or the Trial Court below why she initially admitted driving the pick-up truck and then changed her answer to allege that she was not driving the pick-up truck. Nothing could be clearer from the stand point of a summary judgment — there is a disputed issue of material fact present making summary judgment inappropriate.

If Tabitha was driving the pick-up truck owned by Chris Conway, then Chris Conway should have obtained a Release on behalf of Tabitha when he got his own liability Released for being the owner of the vehicle if that was what was intended.

Thus, the parties should go to trial, and a jury should be entitled to learn if Tabitha was driving the vehicle or not.

At pages 13-14 of Appellee's Brief, Ms. Gammons refers to language from two completely different Releases.

In one, John Spencer, Chris Conway and Direct Insurance are released. In the second one, State Farm Mutual Automobile Insurance Company is released.

No mention of Tabitha Gammons is made in any of the Releases. Yet, Tabitha Gammons wants to indicate that these partial quotes establish that she should be released ignoring the Supreme Court's opinions in *Smith* and *Saucier*.

Ms. Gammons goes further at page 14 by asking that the Court look at the "four corners of the Releases." The Scotts could not agree more. The Trial Court should have looked only at the four corners of the Releases. Within the four corners of the Releases, Tabitha Gammons' name is never mentioned. However, Tabitha, while urging that we look only at the four corners, then wants to, within the same sentence, go outside of the four corners of the Release to

determine the intent of the parties by looking at May 28, 2002, and June 5, 2002, correspondence.

Tabitha suggests that we look at correspondence if the Court finds the language of the Releases to be ambiguous.

This is a complete misapplication of the law. If the Releases are ambiguous, which they are not, summary judgment should not have been granted. If the Releases are ambiguous, which they are not, and they are absent the name Tabitha Gammons, summary judgment should not have been granted.

At page 15 of Appellee's Reply Brief, the Appellee states in the first full paragraph:

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.*

The Scotts now ask simply — where did any of the Releases release Tabitha Gammons? They do not.

Ms. Gammons then has the good graces at the bottom of page 15 of her Reply Brief to finally state in black and white:

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 (sic) and June 5, 2000 (sic).

The Mississippi Supreme in *Saucier* at pages 339-340 adopted the holding of *Duncan v. Cesna Aircraft Company*, 665 S.W. 2d. 414 (Tex. 1984) where the Texas Supreme Court held that a specific identification for the release of a tortfeasor is met when the reference in the release is so particular that a stranger can readily identify the released party; and a tortfeasor can claim

the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious events is not in doubt. For this reason alone, summary judgment was inappropriate.

Tabitha Gammons states that:

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.

What is absurd is for Tabitha Gammons to believe that the Appellants, the Scott family, with nearly \$300,000.00 in medical bills would release Tabitha Gammons and Chris Conway for \$40,000.00. The Appellants did release Chris Conway for \$40,000.00 and released William Scott for another sum of money in order to proceed against who they believed drove the pick-up truck. Tabitha Gammons.

It would also be equally absurd for Direct Insurance to attempt to obtain a Release for Tabitha Gammons by including her in a Release when no money was being paid on her behalf. That is exactly what happened. Tabitha Gammons was not included in the Release and her own insurance carrier (State Farm) has to now stand good for Tabitha Gammons' liability.

At page 16 is a footnote 7 in an attempt to buttress the absurdity of it all, Tabitha states:

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

What relevance does this footnote have to a summary judgment motion? Does Tabitha Gammons individually really care who is paying her defense costs? Does that really enter the picture as it relates to a General Release? Or, does it not accurately state what the lawyers on

behalf of Tabitha Gammons are concerned with, defense costs and liability coverage, not tort liability and Releases?

At page 22 of Tabitha's Reply Brief, Tabitha insists that Appellants Scott and Greenwood (of course, excluding William Scott) took the position before the Chancery Court of Marshall County that Chris Conway was the driver of the Spencer pick-up truck.

That is not exactly correct. First, the documents indicate Chris Conway was the alleged driver. Second, the documents were a Release and Court documents involving only William Scott's liability as the driver of the Cadillac having nothing to do with the liability of the driver or owner of the Spencer pick-up truck.

Again, it does not matter who was driving the other vehicle or any other vehicles that may or may not have been involved in the accident. Those Releases and those Court documents only dealt with William Scott's potential pre-suit liability; not Chris' or Tabitha's liability.

Tabitha then states in the very next sentence at page 22 that:

This sworn statement is relevant and material to the issues at hand.  
**Plaintiffs benefitted from this position by receiving settlement  
benefits from [the] (sic) insurance carrier for the Spencer  
vehicle, . . .**

This is untrue. The Releases and Court documents referred to by Tabitha in this paragraph had nothing to do with the pick-up truck/Spencer vehicle. It had only to do with William Scott. The Scotts assume that this inaccurate and misleading statement was a typographical error. The last paragraph of page 22 of Appellee's Reply Brief attempts to convince this Court that the Chancery Court of Marshall County was dealing with the pick-up truck's owner's Release where

Chris Conway is alleged to have been driving the vehicle involving the Spencer Release. Again, it is untrue when it is stated:

**Plaintiffs benefitted from this position by receiving settlement benefits from [the] (sic) insurance carrier for the Spencer vehicle, . . .**

The Marshall County Chancery Court documents referred to dealt solely with William Scott's liability and had nothing to do with the pick-up truck, Spencer, Conway or Tabitha Gammons.

In any event, that is exactly what the jury trial is necessary for — to allow Tabitha Gammons to use the alleged prior inconsistent statements of Pauletta Scott against her at trial wherein she supposedly indicates that Chris Conway was the alleged driver of the vehicle.

It is expected at trial that Pauletta Scott will say, as she has said in her sworn deposition, that she did not know who was driving the pick-up truck and since William Scott's lawyers, the same lawyers now representing Tabitha Gammons, indicated that Chris Conway was driving in William Scott's Releases, it made no difference to her.

Tabitha Gammons sums it up quite well in the first paragraph at page 25 of her brief:

While defendant (Tabitha Gammons) cannot point to any changes made to her position, her insurer certainly changed its position based upon representations of the plaintiffs.

As stated earlier, this is not an issue of insurance carriers and insurance carrier's liability or a carrier's reliance on anything under a policy of insurance. Those issues are dealt with in Declaratory Judgments. These are issues of tort liability and disputed issues of material fact as it relates to who was driving the pick-up truck and whether Tabitha, if driving, was released.

A jury should determine who was driving the pick-up truck. If the jury determines that it was Tabitha Gammons driving the pick-up truck, then, if Tabitha Gammons or Tabitha Gammons' insurance carrier wants to pursue the issues of accord and satisfaction to avoid satisfying a possible verdict, then so be it.

In the first full paragraph of page 25, Tabitha Gammons states that "she was assured" that claims against her were settled. Tabitha states:

**The simple fact that she was served with a lawsuit regarding claims *she was assured were settled* prejudices her.**

Tabitha cannot point to one spot in the record where she was "assured" of anything by anyone. If she was assured by anyone, to include a lawyer for a insurance company, outside the record that any potential claims against her were released, all one would have to do is go look and see if that assurance was made. If someone assured Tabitha Gammons that any potential claims against her were settled, they should be brought to answer exactly where they obtained for her those assurances because her name is never mentioned in any Release executed by anyone involving this automobile accident. Thus, it does not appear that that allegation can be supported either inside or outside the record of this cause.

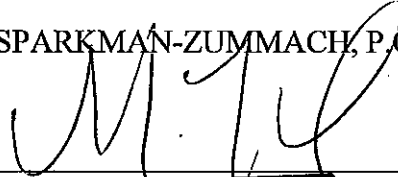
### **CONCLUSION**

Based on the foregoing as well as Appellants' Brief already filed herein, the Scotts pray that this Honorable Court reverse the ruling of the Trial Court granting summary judgment to Tabitha Gammons.



Respectfully submitted,

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### CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

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on this the 12<sup>th</sup> day of November, 2007.

  
MARTIN ZUMMACH