IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIAM SCOTT, PAULETTA SCOTT
AND BRENDA GREENWOOD

Appellant

VS.

TABITHA GAMMONS

Appellee

CAUSE NO.: 2007-TS-00470

BRIEF OF APPELLANTS

(ORAL ARGUMENT REQUESTED)

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

SPARKMAN-ZUMMACH, P.C.
7125 Getwell Road, Ste. 201
P.O. Box 266
Southaven, Mississippi 38671
(662) 349-6900

JOHN WATSON
8619 Highway 51 North
P.O. Box 1366
Southaven, Mississippi 38671
(662) 393-9260

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

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 and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

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

Martin Zummach, #9682

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I.

Whether the Trial Judge (unless indicated otherwise, when "Trial Judge" is written, it refers to either the Honorable Henry Lackey or the Honorable Andrew Howorth without distinction) erred in dismissing the cause of action brought by the Scott family against Tabitha Gammons on the alternative bases of ***accord and satisfaction, judicial estoppel or equitable estoppel.***

II.

Whether the Trial Judge erred in ruling that the Defendant below, Tabitha Gammons, was the beneficiary of a General Release which did not name her and, where Tabitha Gammons nor anyone on her behalf, paid any consideration in order to obtain a Release for Tabitha Gammons.

III.

Whether the Trial Judge erred in granting a Motion for Summary Judgment where the sole apparent reason for the dismissal of the action surrounded a General Release executed by the Scott family for the benefit of another alleged tortfeasor who paid consideration to obtain the Release and said Release did not identify or name the Defendant, Tabitha Gammons, as a party released.

IV.

Whether the Trial Judge erred in granting Defendant's Motion for Summary Judgment when (1) the first Judge ruled that the issue of "adequate consideration" was a disputed issue of material fact and yet (2) later, a second Judge, in the same case, ruled that Tabitha Gammons had

not paid any consideration to obtain a release and yet the second Judge still granted Tabitha Gammons' Motion for Summary Judgment on that very issue.

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS

This case involves a two-car automobile accident which occurred in Marshall County, Mississippi on a very narrow road. The very standard, basic, head-on automobile accident involved the purported negligence of both drivers of both vehicles by each crossing the road's center line, (one vehicle was a Cadillac and the other vehicle was a pick-up truck) allegedly causing the accident and the resulting injuries to the occupants of the respective vehicles.

The occupants of the Cadillac were the Scott family. The Scott family made a claim against their own husband and father, William Scott, who was driving the Cadillac; the insurance carrier for the pick-up truck; as well as the under insured motorist coverage protecting the Cadillac in which they were occupants. The Scott family medical bills exceeded $230,000.00.

The Scott family's claims were all settled without filing suit against Chris Conway, who was the owner of the pick-up truck; or William Scott, the owner and driver of the Cadillac; or the underinsured motorist carrier for the Cadillac.

A lawsuit was subsequently filed by the Scott family naming only Tabitha Gammons as the Defendant driver of the pick-up truck. (R. 1-5)

The responsive pleadings filed by Tabitha Gammons did not allege the comparative fault of an "actual" or different driver of the pick-up truck which hit the Scott Cadillac. (R. 7-10)

In fact, the Answer filed by Tabitha Gammons **ADMITTED** she was driving the pick-up. (R. Page 5, Paragraph 5) Later, she and her lawyers changed their Answer and said Chris Conway was driving the pick-up. (R. Page 70, Paragraph 5 and Paragraph 5, page 82)

After amending her Answer to say Chris Conway was driving, Tabitha Gammons and her lawyers chose then to pursue a tactic of moving to dismiss the Scotts' lawsuit on the bases of ***accord and satisfaction, judicial estoppel and equitable estoppel*** surrounding the fact that the occupants of the Cadillac had given a General Release to someone named Chris Conway, his father and Direct Insurance Company which would, according to Tabitha Gammons, cover any acts of Tabitha Gammons. (R. 7-10; 14-19; 80-84; 239-251)

After hearing Defendant's initial Motion for Summary Judgment, which had as its bases for dismissal the doctrines of accord and satisfaction, judicial estoppel, and equitable estoppel, the first Trial Judge (Hon. Henry Lackey) drafted and mailed a letter opinion indicating Tabitha Gammons would be GRANTED summary judgment and inviting suggestions from Plaintiffs' counsel if there was any disagreement with the Court's proposed findings or conclusions. (R. 265)

Plaintiffs' counsel responded to the letter with the invited criticism referring the Honorable Trial Court to *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), as has been briefed earlier by Plaintiffs in response to Defendant's initial Motion for Summary Judgment. (R. 266-268)

Apparently in response to this letter, the Trial Judge, Judge Lackey, issued a diametrically opposite Order DENYING Summary Judgment, but ruling that absent fraud or lack of

consideration, Ms. Gammons would have been released from liability by the Releases executed by the Scott family in favor of Chris Conway. (R. 235-237)

Said Order was not appealable as a final Order inasmuch as it left open the issue of "fraud" and "adequate consideration" and did not dismiss the case.

Fraud had never been pleaded by the Plaintiffs nor the Defendant in this case.

Defendant then filed a Second Motion for Summary Judgment or in the Alternative Motion to Bifurcate (R. 239-243) alleging that the Defendant, Tabitha Gammons, should be dismissed from the action or the case should be bifurcated on the issue of fraud. (R. 239-243)

Plaintiffs responded indicating that fraud was never an issue in the case in obtaining a Release because Tabitha Gammons was never given a Release from the Scott family to begin with. (R. 252-268)

When the Second Motion for Summary Judgment or in the Alternative Motion to Bifurcate was set for oral argument, Judge Howorth appeared for the first time.

Judge Howorth heard the argument of Plaintiffs and Defendant and had presumably reviewed the pleadings and earlier rulings of Judge Lackey.

Judge Howorth ruled from the bench, following the arguments of counsel, dismissing the Plaintiffs' action. (R. 357) Judge Howorth found the following:

> JUDGE HOWORTH: I mean I don't think it's disputed that there was no consideration paid on behalf of Tabitha Gammons so the claim of lack of consideration is seemingly irrefutable at this point. . . The Court believes it's appropriate to grant summary judgment as to the remaining claims and make this a final and appealable judgment. So in the event Judge Lackey or me and double your pleasure. There is twice the chance we have committed error here when you run both of us into a case, should be given an opportunity to have a higher court review this decision. So I will ask you to prepare an order granting summary judgment.

BY MR. ZUMMACH: So that the record is clear, Your Honor, it sounds like to me that because the fraud, misrepresentation, the other issues addressed by Judge Lackey's second order were never pled there was no way to really go forward.

BY THE COURT: And there is no evidence before the court of such claims. Not only not pled but don't seem to exist.

BY MR. ZUMMACH: But by its very nature and I think, Your Honor, mentioned that by its very nature on the issue of Judge Lackey's order related to lack of consideration do I hear the court saying that they are granting summary judgment as to that sole remaining issue that consideration was paid. I need to know exactly what the issue would be on appeal and -

BY THE COURT: I don't know that am prepared to make that finding. There was no money given. I think that consideration as we all know doesn't have to be money. And let's remember that that coverage can be complex and just because one company didn't pay any money doesn't mean that it might not have been obligated, subrogated or indemnified relative to another company and I would never couldn't imagine an insurance company[1] paying to settle unless it was certain what future liability it might have and for this reason they would insist on releases to everyone that you knew about or had reason to know about. And I think that is how the release should operate. I know that the law is all over the place on that point and that is where I'm going to come down on it today and if the supreme court wishes to speak differently I would invite them to do so.

BY MR. ZUMMACH: Right and I'm just trying to get [to the] issue, did Tabitha Gammons pay consideration[?]

BY THE COURT: The only finding I'm prepared to make on that is that there was no money paid by Tabitha Gammons. No evidence that there was any money paid by or on behalf of Tabitha Gammons. Whether or not that constitutes lack of consideration

BY MR. ZUMMACH: And if the court rules that, doesn't that place us . . . because that is what Judge Lackey's order says, now the judge has ruled there was no money paid by Tabitha Gammons.

---

[1] The insurance company which paid the Scott family was Chris Conway's. Tabitha Gammons' insurance company paid nothing. Judge Howorth did not have to "imagine" State Farm being exposed after paying anything. State Farm didn't.

BY THE COURT: Judge Lackey says that the issue of lack of consideration *might*[2] lead to a question of fact for the jury. I'm of the opinion that regardless of whether or not consideration was paid that summary judgment is proper and that preserves all issues to both of you. (Emphasis Added).

BY THE COURT: And I guess that puts us off for February or whatever. See if I can make good use of that time. I hear the chancery judge is trying to hold court up here and I want to do all I can to botch up the courtroom in Marshall County to keep them from having court.

Then, for some reason, Judge Lackey signed the Order granting Summary Judgment based on Judge Howorth's bench ruling. (R. 357)

This appeal ensued on the final Order being entered.

STATEMENT OF FACTS

A two-car accident occurred in Marshall County, Mississippi on a very narrow road. A Cadillac was involved and a pick-up truck was involved. The occupants of the Cadillac were the Scott family. (R. 1-5)

The occupants of the Cadillac, to include the driver of the Cadillac, made a claim against Mr. Chris Conway, the owner of the pick-up, and his insurance carrier, Direct Insurance Company. Suit was not filed. In making that insurance claim, one occupant of the Cadillac, Mr. Scott, said that he witnessed the driver of the pick-up truck get out of the pick-up truck immediately after the accident. Mr. Scott indicated that a **girl** was driving the pick-up truck at the time of the accident and not a boy. Chris Conway is a boy. Tabitha Gammons is a girl. Both Gammons and Conway admitted being occupants of the pick-up truck. Chris Conway, the boy,

---

[2] Judge Lackey's Order did not recite "might." Judge Lackey said it was a question of fact for the jury.

asserted in initial negotiations that he was driving the vehicle owned by his father, and the vehicle was insured in his father's name.

Direct Insurance Company, on behalf of the boy's father and the boy, who were the named insureds, paid the occupants of the Cadillac, the Scott family, a sum of money and prepared General Releases for each of the occupants of the Cadillac to execute in favor of only Chris Conway, his father, and Direct Insurance. No one else. (R. 89-114)

Tabitha Gammons, the girl, who it was alleged by the Scott family to have been driving the pick-up truck, did not pay any monies towards that settlement, nor did her insurance carrier (which was different from Chris Conway's) or anyone on her behalf pay any consideration or provide a Release to the Scott family to execute. Chris Conway's lawyers and Chris Conway's insurance carrier did not include Tabitha Gammons in their Release or refer to her in any way. (R. 97-114)

Suit was then filed. Neither Chris Conway nor his father were named as Defendants. (R. 1-5)

It was alleged in the Scott lawsuit that Tabitha Gammons was operating the pick-up truck which was the one owned by Chris Conway and his father. While the Complaint could have included a negligent entrustment claim against Chris Conway and/or his father for permitting Tabitha Gammons to drive, no claim was made because Chris Conway and his father, through their insurance company, had paid for and received a General Release (pre-suit) from the Scott family, and so therefore no allegation of negligent entrustment would be, or could be, alleged against them.

Instead, the allegations contained in the Complaint were solely against Tabitha Gammons for her negligent operation in driving the pick-up truck. (R. 1-5)

The lawyers[3] for Tabitha Gammons and Tabitha Gammons' insurance company, instead of filing an Answer and pleading the comparative fault of the "actual" or some other driver of the pick-up truck and go to trial, initially admitted Tabitha Gammons was driving the pick-up truck. (R. Page 5, Paragraph 5) Then, Tabitha Gammons changed her story and denied driving the truck. (R. Page 70, Paragraph 5 and Page 80, Paragraph 5)

Once she changed her story by way of an Amended Answer, Tabitha Gammons and her lawyers chose to instead pursue a tactic of moving to dismiss the lawsuit on the legal bases of (1) accord and satisfaction; (2) judicial estoppel; and/or (3) equitable estoppel. (R. 80-84)

The theory being on the part of the Defendant, Tabitha Gammons, the fact that the occupants of the Cadillac had given a General Release to Chris Conway, Chris' father and Direct Insurance Company, which would, according to Tabitha Gammons, cover and preclude any cause of action against Tabitha Gammons.

Instead of the Trial Court, as required by the case law of Mississippi in reference to Summary Judgments, assuming that the facts as alleged by Plaintiffs were true for purposes of summary judgment; that is that Tabitha Gammons was operating the vehicle and would therefore have independent legal liability than that of the owners of the vehicle; the Court examined whether or not solely the Release given to Chris Conway and his father released Tabitha Gammons from legal liability.

---

[3] Amazingly, some of the same lawyers who originally represented Chris Conway appear on behalf of Tabitha Gammons once she was sued. One of the law firms represented the legal interests of William Scott and now takes a position adverse to him in the very same claim.

After initially admitting to driving the pick-up, the Appellee, Tabitha Gammons, claimed she was not driving the pick-up truck. In another breath, she claimed that the Release given to Chris Conway released her for her liability for driving the pick-up truck.

Apparently overlooked by the Trial Court is the fact that if Tabitha Gammons was not driving the pick-up truck, she would not be in need of a Release. If she was not driving the pick-up truck, or Plaintiffs did not prove at trial that she was driving the pick-up truck, she would have no legal liability, and her insurance carrier would not have to be concerned with indemnification.

Instead, the lawyers and respectfully, the Trial Court, placed the proverbial horse before the cart. The insurance carrier for Tabitha Gammons (which was a different insurance company than Chris Conway's) was obviously concerned that they would have financial liability for the acts of Tabitha Gammons, so they attempted, and succeeded, in having Tabitha Gammons dismissed early in the litigation by claiming that she was included in the General Releases given to Chris Conway by the Scott family.

The Trial Court and the Appellee overlooked the issue that Chris Conway and his father were exposed to potential independent legal liability under independent theories in tort even if Tabitha Gammons, instead of Chris Conway, was driving the vehicle. Chris Conway's insurance carrier recognized this fact and accordingly negotiated his and his father's release by paying consideration to the Scott family before suit was filed.

It must be noticed that the Scott family's settlement with Chris Conway, his father and Direct Insurance Company came long before any suit was filed by the Scott family against Tabitha Gammons.

Hopefully, the following hypothetical is helpful to the review of this Honorable Court:

If a hypothetical lawsuit had been brought against Chris Conway, his father and Tabitha Gammons by the Scotts under alternative theories of liability, wherein the Scotts believed that Tabitha Gammons was driving the pick-up truck, but after hearing that Chris Conway was claiming to have been driving the pick-up, could allege in their hypothetical lawsuit alternative theories — that either Chris Conway or Tabitha Gammons was driving the pick-up truck in question, and it would be for the jury to determine who was the driver.

The jury at trial, in the hypothetical case, could determine that Tabitha Gammons was driving the vehicle, and at the same time conclude that Chris Conway was her host and was negligent in permitting her to drive the vehicle with which she was unfamiliar or unqualified, thus, exposing Chris Conway to independent legal liability for the negligent entrustment, coupled with Tabitha Gammons' liability for her independent acts of negligence in the operation of the vehicle. The jury could find that Chris Conway's earlier admissions about himself driving the pick-up truck were to stay out of trouble with his dad for having let his girlfriend drive the pick-up. Or the jury could believe that Chris Conway was driving, and Tabitha was not, and the Scotts would lose their lawsuit as to Tabitha.

If during the pendency of the hypothetical litigation, Chris Conway approached the Plaintiffs to settle any disputed liability only he might have, the Plaintiffs would be free to settle with Chris Conway, his father, and his insurance company and proceed against only Tabitha Gammons.

Tabitha Gammons, of course, if she did not settle in the hypothetical case with Plaintiffs, could at trial, and in her pleadings allege that Chris Conway was driving the pick-up truck and therefore possibly comparatively free herself from any legal exposure at trial.

In reality, nothing different in the actual case at hand has occurred.

Chris Conway, his father, and his father's insurance company settled with Plaintiffs for any alleged/disputed liability they may have had under any theory of liability before suit was filed. Chris and his father received a General Release. Tabitha Gammons chose not to take part in that Release, and she was not included in the Release. Therefore, the hypothetical lawsuit was been pared down in the actual lawwsuit from three possible defendants to only one defendant, Tabitha Gammons.

COURSE OF THE RELEVANT PROCEEDINGS

On August 30, 2005, a Motion for Summary Judgment and Memorandum in Support thereof was filed by the Defendant, Tabitha Gammons. (R. 89-95)

A response was made by Plaintiffs in the form of a Response to Motion for Summary Judgment. (R. 322-345)

Defendant then filed her Rebuttal on or about November 8, 2005. (R. 212-219)

Following the hearing on Defendant's Motion, the Trial Court indicated that it would issue its Ruling after taking the matter under advisement. (Transcript of Proceedings, Volume 4, page 25)

On January 30, 2006, for some reason unknown to counsel for the Scott family, the Honorable Judge Henry Lackey wrote a letter to Plaintiffs' counsel and copied Defendant's counsel, Brian Hyneman and Kent Smith. (R. 265)

Judge Lackey's letter indicated that the attorneys for Tabitha Gammons had been requested by the Judge to prepare an Order GRANTING Defendant's Motion for Summary Judgment.

Plaintiffs' counsel was at a loss to say the least. The Court had instructed counsel in open Court and on the record that the Court would prepare the Order once the Trial Judge made a decision.

The undersigned knew of no contact between the Trial Judge and the defense counsel requesting defense counsel to prepare an Order.

In any event, the exemplar or proposed Order GRANTING Gammons' Motion for Summary Judgment was provided to counsel for the Scott family on or about January 30, 2006, along with Judge Lackey's letter.

Said letter invited the Plaintiffs' counsel's "criticism or comment." (R. 265)

As requested, Plaintiffs' counsel wrote the Honorable Trial Judge and copied adverse counsel. (R. 266)

As this Honorable Court will recognize, the proposed Order GRANTING Defendant's Motion for Summary Judgment was essentially a recitation of defense counsels' earlier filed Motion and Memorandum for Summary Judgment.

Counsel for the Scott family, in his responsive letter, again called to the Trial Court's attention *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) and called to the Trial Court's attention the Mississippi Supreme Court's rulings as it relates to the release of a joint or co-tortfeasor. In the face of Plaintiffs' February 6, 2006, letter and without any further

correspondence with Plaintiffs' counsel, the Honorable Trial Judge, Henry Lackey, entered an Order DENYING Tabitha Gammons' Motion for Summary Judgment. (R. 235-237)

After the letter correspondence with Judge Lackey, counsel for Plaintiffs saw no further correspondence or briefs from defense counsel, and counsel for Plaintiff is still at a loss as to what changed other than his February 6, 2006, letter to Judge Lackey pointing out *Saucier* and *Smith.*

The Order DENYING the Motion for Summary Judgment finds at page 3 of the Order, third paragraph:

> **the Releases executed by Plaintiffs would preclude this cause of action against Gammons, unless there was some misrepresentation, or concealment of facts, absence of good faith, lack of understanding of legal rights of the nature and effect of the release, *or lack of adequate consideration*.** (R. 235-237)

The Honorable Trial Court went on to rule in his Order:

> [T]he issue of whether the releases were void because of some misrepresentation, or concealment of facts, absence of good faith, lack of understanding of legal rights of the nature and effect of the release or lack of adequate consideration is a question of fact or determination by a jury.

Someone reading this Order would assume that at least the issue of "adequate consideration" going directly to the issue of accord and satisfaction would be tried as a question of fact. As this Court will see later, this ruling was the "law of the case" yet a second Judge ruled differently in the same case without a trial having been conducted.

Counsel for Plaintiffs to this date cannot understand how the issues of "some misrepresentation" or "concealment of facts," "absence of good faith" "lack of understanding of legal rights of the nature and effect of the releases" ever became issues for determination by the Trial Court. None of these issues were briefed by Plaintiffs, and none of the issues were initially

briefed by Defendant. In fact, those issues were not present in this case and still are not present in this case. The Complaint, upon which the Trial Judge had to rule, never alleged fraud or any concealment of facts. (R. 1-5)

One Judge (Judge Lackey) ruled that the issue of "adequate consideration" was[4] a disputed issue of material fact and required a trial. Yet another Judge (Judge Howorth) found that there was no consideration to obtain the Release paid by Tabitha Gammons or anyone on her behalf, and yet still dismissed the Scott family's action against Tabitha Gammons. (Transcript of Proceedings, Volume 4, pages 48-49)

The original Complaint itself was a plain, run of the mill automobile accident Complaint. After changing her initial admission that she was driving the vehicle, in response to that Complaint, Tabitha Gammons then argued three issues — (1) accord and satisfaction; (2) judicial estoppel; and (3) equitable estoppel.

So, when counsel for Plaintiffs and Defendant read Judge Lackey's initial ruling, it appeared that the only issue that was present both in the Complaint, Motion for Summary Judgment, or Response to Motion for Summary Judgment was the alleged "lack of adequate consideration" which would go directly to the issue of accord and satisfaction argued by the Defendant.

That being the case, Plaintiffs were apparently under the mistaken assumption that the issue of accord and satisfaction was still in dispute and at issue for trial. It was the law of the case. Judge Lackey ruled that that disputed issue precluded dismissal.

---

[4] "Was" not "might be."

Next, procedurally, Tabitha Gammons filed a "Motion for Summary Judgment or in the Alternative Motion to Bifurcate." (R. 239-251)

Contained within that Motion for alternative relief, Defendant argued that there was no issue of disputed material fact as to "misrepresentation, concealment, absence of good faith or lack of understanding in regard to the releases." (R. 239-251)

Counsel for Defendant and counsel for Plaintiffs apparently understood Judge Lackey's Order similarly. There was no issue ever alleged in the pleadings regarding "misrepresentation, concealment, absence of good faith or lack of understanding" as it relates to the release. Defendant states as much at paragraph III, page 2 of Defendant's Motion for Summary Judgment or in the Alternative Motion to Bifurcate. (R. 240)

Even though the Defendant stipulated that the Plaintiffs never alleged any misconduct as it relates to misrepresentation or lack of understanding, the Defendant went on to brief the current state of the law as it relates to that issue. (R. 239-251)

The only issue that remained at that juncture in the litigation was the issue of "accord and satisfaction." Counsel for Plaintiffs stated as much in his September 6, 2006, Response to the Defendant's Motion for Summary Judgment or in the Alternative Motion to Bifurcate. (R. 252-255)

Said Motion for Summary Judgment or in the Alternative Motion to Bifurcate was set for oral argument on January 9, 2007.

To counsel for Defendant and counsel for Plaintiffs' surprise, the Honorable Judge Howorth appeared to hear the argument.

Frankly, and with all candor, the issues of misrepresentation and concealment of facts were never on the table for consideration by the Trial Court but only the issue of whether or not there was "accord and satisfaction."

Judge Howorth stated that he was operating under a limited set of guidelines in reviewing Judge Lackey's first Order and since all parties agreed that there was no misrepresentation, he granted the Defendant's Motion for Summary Judgment or in the Alternative Motion to Bifurcate. (R. 357)

The issue of accord and satisfaction had already been briefed fully and had presumably been considered by Judge Lackey when Judge Lackey had earlier ruled that "adequate consideration" was a disputed issue of material fact.

Procedurally, this case took another disconcerting twist. Even though Judge Howorth heard oral argument and presumably read the briefs of Plaintiffs and Defendant on the limited issues contained in Judge Lackey's first Order, it is Judge Lackey who signs the second Order Granting the Summary Judgment Order now on appeal.

Judge Howorth stated from the bench in his ruling:

> The only finding I am prepared to make on that is that there was no money paid by Tabitha Gammons. No evidence that there was any money paid by on or behalf of Tabitha Gammons. Whether or not that constitutes lack of consideration
>
> Judge Lackey says that the issue of lack of consideration *might*[5] lead to a question of fact for the jury. I'm of the opinion regardless of whether or not consideration was paid that **summary judgment is proper**, and it reserves all issues to both of you.

[5] Judge Lackey ruled "was" not "might be."

Judge Howorth found that no consideration was paid by Tabitha Gammons but then ruled that regardless if consideration was paid, summary judgment was appropriate. Then, Judge Lackey signed that Order. (Transcript of Proceedings, Volume 4, pages 48-49)

In other words, Judge Howorth presumably read the briefs regarding the Second Motion for Summary Judgment; heard argument on the Second Summary Judgment, and yet Judge Lackey is the Judge who orders the eventual final summary judgment on appeal herein.

This case should be remanded to the Trial Judge, be it Judge Howorth or Judge Lackey, to conduct a jury trial as in any other automobile accident and let a jury determine who was driving the vehicle which impacted with the Scott vehicle. If the jury determines Tabitha Gammons was driving, then, and only then, would the issue of ***accord and satisfaction*** be ripe.

As a matter of law and fact, Tabitha Gammons has not received a General Release releasing her from tort liability and, as a matter of law and fact cannot claim accord and satisfaction until the requisites of accord and satisfaction are met by Tabitha Gammons showing that she paid something of value to obtain a release.

ARGUMENT

In this case, it is alleged by Tabitha Gammons that a release prepared by an attorney that specifically identified only Chris Conway and his father and their insurance company, and was conspicuously missing the name of Tabitha Gammons, still acts as a release for Tabitha Gammons when admittedly, Tabitha Gammons, nor anyone on her behalf, has paid one red cent to any of the Plaintiffs to obtain a release of liability.

Two cases decided by the Mississippi Supreme Court are instructive. The first case Smith v. Falke involves a typical chain reaction accident where the plaintiff is in the first car and the two

defendants are in two trailing cars. The plaintiff of course is struck from the rear and files suit against defendant number one and defendant number two which represent the following or trailing automobiles.

The Mississippi Supreme Court ruled that the release by the plaintiff of defendant number two by name and "all other parties who may be liable" did not release defendant number one.

The above scenario was decided in 1985 by the Supreme Court of Mississippi in the case of *Smith v. Falke*, 474 So. 2d., 1044 (Miss. 1985). -Distinguishable b/c 2 cars, 2 drivers - here 1 car

As stated above, the plaintiff driver brought an action against the two drivers of two vehicles following her car when her car was struck from behind. The plaintiff released from liability the second automobile (defendant 2) upon payment by the second automobile's insurance carrier's limits of insurance.

Based upon that release, the first driver (defendant 1) filed a Motion to Dismiss the action pending against him.

The *Smith* Trial Court *placed* great weight on the phrase "all others whatsoever" and then released defendant one. The *Smith* Plaintiff appealed.

In *Smith*, the first driver (as Tabitha Gammons is attempting) was attempting to obtain protection from a release that did <u>not</u> mention the first driver's name. The Mississippi Supreme Court not only reversed the Trial Court <u>but rendered</u> its decision that the first driver was not released from liability.

The Supreme Court ruled in *Smith* that Mississippi jurisprudence follows the majority rule that for a release of one joint or co-tortfeasor to release other joint or co-tortfeasors, the

satisfaction received by the injured party must be intended to be, and must be accepted as, full and total compensation for damages sustained.

The Mississippi Supreme Court in *Smith* recognized Professor Prosser's rationale wherein a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so.

The first vehicle driver in *Smith* contended that he was a third party beneficiary to the release between the plaintiff and the second vehicle's driver. The Mississippi Supreme Court did not accept this third party beneficiary classification because the driver of the first vehicle was a "stranger to the contract" between the plaintiff and the second defendant.

In reversing and rendering its decision, the Mississippi Supreme Court held that "in a release contract, the party releases only those parties whom he intends to release." *Smith v. Falke*, 474 So. 2d., 1044 (Miss. 1985) at 1047.

Later, the Supreme Court of Mississippi considered a second scenario where the Saucier following occurred: a guest passenger who was injured while riding in a car driven by a drunk involved in a one car crash, which killed the drunk driver, settled with the drunk driver's insurance company and gave that drunk driver's estate a full release.

The passenger then later sued the bar which provided the alcohol to the deceased drunk driver.

In the case of the *Country Club of Jackson, Mississippi, Inc., v. Saucier,* 498 So. 2d. 337, 339-340 (Miss. 1986), the Mississippi Supreme Court analyzed very closely *Smith v. Falke*, 474 So. 2d., 1044 (Miss. 1985), as well as the body of law in this country surrounding releases.

In *Saucier*, the Country Club, like Tabitha Gammons here, who had served alcohol to the deceased driver, wanted to enjoy the protections of the release granted the deceased drunk driver.

The release in *Saucier* identified as the released parties, the driver, the driver's estate and "all persons who might be liable."

The ***all persons' language*** contained in the *Saucier* release was nearly identical to the ***all other persons' language*** in the Chris Conway/Direct Insurance Company release in the case at hand.

The Mississippi Supreme Court ruled and again reiterated its earlier holding in *Smith v. Falke*, by stating "this Court there held that the language of the release discharging a co-defendant and 'all others whatsoever' could not be construed to release another co-defendant absent a manifest intent to do so." *Country Club of Jackson, Mississippi, Inc., v. Saucier,* 498 So. 2d. 337, 339-340 (Miss. 1986) at page 338.

In *Saucier,* the injured plaintiff (passenger in deceased's vehicle) argued to the Mississippi Supreme Court the contention that the only parties specifically named in a release are absolved of liability. The Supreme Court of Mississippi agreed, and analyzed *Spector v. K-Mart Corp.,* 99 A.D. 2d. 605, 471 N.Y.S. 2d. 711. K-Mart claimed to have been included within the purview of "all other persons, firms or corporations" named in a release given by the plaintiff to Smith Kline Corporation. The New York Supreme Court there found that the language was more of an attempt to insulate the entire corporate structure of Smith Kline than to release some outside entity such as K-Mart.

The Mississippi Supreme Court also looked to *Amond v. State Department of Highways,* 333 So. 2d. 380 (La. App. 1976) where the Louisiana State Highway Department was not a

named party to a release signed between the plaintiff and an insurance company for settlement of a claim. The Louisiana Court held that the highway department was not within the meaning of the release's phrase "all other persons, firms and corporations who might be liable."

The Mississippi Supreme Court analyzed and looked to *Young v. State*, 455 P. 2d. 889 (Ak. 1969) where the Alaska Supreme Court held that tortfeasors are not released unless specifically named in a release.

The Mississippi Supreme Court looked to and examined *Alsup v. Firestone Tire and Rubber*, 101 Ill. 2d. 196 (1984) where the Illinois Supreme Court held that tortfeasors must specifically be named or otherwise identified in order to be discharged by a release; and tortfeasors will not be discharged unless they have been named or specifically designated.

Finally, the Court observed *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.

Applying the above standards and the Mississippi Supreme Court's rationale to the case at hand, there can be no doubt; Tabitha Gammons has not been released from liability.

Adopting the rationale of the aforementioned cases, at pages 339 and 340 of the Supreme Court's opinion in *Saucier*, the Court ruled "an injured party executing a release incident to a settlement with one tortfeasor releases others by whom or on whose behalf no consideration has

been paid only where the intent to release the others is manifest." See also, *Holland v. Mayfield,* 826 So. 2d. 664, 669 (Miss. 1999).

For the release of one tortfeasor to release other tortfeasors, the satisfaction received by the injured party must be intended to be, and must be accepted as, full and total compensation for damages sustained. *Holland v. Mayfield*, 826 So. 2d. 664, 669 (Miss. 1999); *Smith v. Falke,* 474 So. 2d. 1044, 1045 (Miss. 1985); *Weldon v. Lehman,* 226 Miss. 600, 84 So. 2d. 796, 797 (Miss. 1956).

The burden of proving accord and satisfaction is upon the one (Tabitha Gammons) who maintains the affirmative of that issue. *Wallace v. United Mississippi Bank,* 726 So. 2d. 578, 590 (Miss. 1998); *Wade v. Sanders Oil Company,* 185 So. 2d. 442, 443 (Miss. 1966). Tabitha Gammons proved nothing to satisfy or justify the granting her of a summary judgment on the basis of accord and satisfaction.

The elements of accord and satisfaction must be proven by clear and convincing evidence. *Wallace v. United Mississippi Bank,* 726 So. 2d. 578, 590 (Miss. 1998). The elements of accord and satisfaction consist of four basic requirements each to be proven by clear and convincing evidence.

1. Something of value must be offered in full satisfaction of demand (Ms. Gammons never offered anything. Judge Howorth ruled as much and Judge Lackey ruled the issue was disputed).

2. The offer must be accompanied by acts and a declaration which amount to a condition that if the thing offered is accepted, it is accepted in full satisfaction (Tabitha Gammons never offered anything).

3. The party offered the thing of value is bound to understand that if he takes it, he takes it subject to the conditions; and

4. The party must actually accept the item offered. (Tabitha Gammons never offered anything).

Royer Holmes v. Chandeleur Holmes, 857 So. 2d. 748, 753-754 (Miss. 2003).

As a matter of law, the Mississippi Supreme Court has indicated that a release of a party can only be relied upon if the release clearly and unequivocally identifies that person to be released.

Tabitha Gammons' name is never mentioned in any release considered by the Trial Court.

Defendant also argued the doctrine of judicial estoppel. Case law was never presented to the Trial Court holding that when one party happens to share lawyers with another party, they are bound by judicial estoppel when the party that is sought to be bound (William Scott) never made an appearance before the judicial authority in question.

As it relates to the other issues of estoppel, be it equitable or judicial, it is the position of Estoppel the Plaintiffs that there were sufficient facts in the record which would have precluded summary judgment. Judge Lackey initially ruled as much, but, the ruling of Judge Howorth found that there was not consideration paid by Tabitha Gammons as an undisputed fact, but then dismissed the action. The two orders are not reconcilable.

Defendant's Motion for Summary Judgment or in the Alternative Motion to Bifurcate outlined what Defendant contended the facts of the case were.

Of importance are Defendant's three bases for the requested grant of summary judgment.

First, Defendant claims that Tabitha Gammons should be dismissed from the lawsuit as a matter of law on the theory of ***accord and satisfaction.***

Her second basis for the Trial Court granting her Motion for Summary Judgment or in the Alternative Motion to Bifurcate was the doctrine of equitable estoppel.

Thirdly, the Defendant claimed to be entitled to summary judgment on the doctrine of judicial estoppel.

Plaintiffs will take them one at a time.

Defendant correctly stated the Horne Book definition of "accord and satisfaction." A45

The Defendant cites *Medlin v. Hazelhurst Emergency Physicians,* 889 So.2d 496, 498 (Miss. 2004).

In order for an action brought by Plaintiffs to be precluded in the doctrine of accord and satisfaction against the Defendant, (1) something of value must be offered.

The analysis should have stopped right there. Tabitha Gammons, the Defendant, who was claiming to have accorded and satisfied the Scott family claim against her has never paid anything of value to the Scott family.

For purposes of analysis only, the second requirement for accord and satisfaction is that the 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, and third, a party who offered the thing of value is bound to understand that if he takes it, he takes it subject to a condition, and fourth, the party must actually accept the item offered.

Again, neither Tabitha Gammons, nor anyone on her behalf, paid or offered one thing to the Scott family.

In the face of this undisputed fact, (nothing was ever offered) the Trial Court granted Tabitha Gammons' release from this lawsuit which is nothing more than an ordinary run of the mill automobile accident based upon alternative theories of a fault.

The next theory Defendant urged in its Motion for Summary Judgment was one of equitable estoppel.

Again, the Defendant cited Mississippi law on the requirements for the Court to find equitable estoppel and in order to equitably estop the Scott family from proceeding with their lawsuit against Tabitha Gammons.

The Defendant cited *O'Neal v. O'Neal,* 551 So. 2d., 228, 232 (Miss. 1989) where the Mississippi Supreme Court found that equitable estoppel is applicable when (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.

In this case, Tabitha Gammons has never, and can never, point to one change of position that she took in reliance upon some representation made by the Scott family. Additionally, she can state no detriment or prejudice caused her as a result of the Scott family settling with Chris Conway.

Throughout Defendant's Motion for Summary Judgment, broad categorical statements are made in support of their Motion. For example, Ms. Gammons argued in her Motion for Summary Judgment that Plaintiffs' change of position works to the detriment and prejudice of Tabitha Gammons.

Defendant, Tabitha Gammons, never states what detriment or prejudice has occurred because none have occurred because Tabitha Gammons has never paid anything or transferred anything of value as consideration for a Release of liability.

Defendant's third theory in support of releasing her from liability as a matter of law is that of judicial estoppel.

Defendant claims that because Pauletta Scott and Brenda Greenwood on behalf of Brenda Greenwood's daughter, Ashley, executed Chancery Court documents in a completely separate action wherein it was stated that Chris Conway allegedly drove the vehicle causing harm to Ashley Greenwood, Brenda and Pauletta should be barred as matter of law from proceeding against Tabitha Gammons.

Pauletta Scott and Brenda Greenwood on behalf of a minor, Ashley Greenwood, signed documents in another case all together, prepared by State Farm Insurance Company's lawyers, that stated that they were accepting money from William Scott's insurance company for a release of liability for William Scott because Chris Conway allegedly was in an accident with William Scott. These documents were in a different Court, different proceeding, and involving William Scott's liability not Tabitha Gammons. If the Releases, which were for the purpose of protecting William Scott, had recited that Santa Claus was allegedly driving the pick-up truck, it would not have made it so because the Release's purpose was to resolve William Scott's exposure — not Santa Claus', Chris Conway's or Tabitha Gammons'.

All documents surrounding the release of William Scott's liability have absolutely no bearing on the current lawsuit. Much less do those assertions in those releases and Court papers bar recovery on the theory of judicial estoppel.

The Defendant then goes on to state that if Brenda and Pauletta are barred utilizing the basis of judicial estoppel (which they weren't), William Scott, who never executed any judicial documents or made any appearance in any judicial setting, should also be barred because he is married to Pauletta, and he has the same lawyer as Pauletta.

On this basis, as well as others, the Trial Judge granted summary judgment dismissing the entire Scott family lawsuit against Tabitha Gammons.

All three theories might have been good theories for Chris Conway to assert if Chris Conway was sued by the Scott family after settling their case, but are absolutely inappropriate and inapplicable as to Tabitha Gammons.

UNDISPUTED FACTS

In this case, there were undisputed facts. Those undisputed facts have not changed and cannot now be disputed.

Based upon undisputed facts, the Trial Court granted summary judgment which was plain error.

Those undisputed facts are as follows:

1. On September 8, 2000, an automobile accident occurred between a pick-up truck and a Cadillac.

2. The Cadillac involved in the accident was being driven by William Scott and his passengers were Pauletta Scott; his daughter, Brenda Greenwood; as well as a young child who is not a party to this lawsuit, Ashley Greenwood.

3. The pick-up truck had as its occupants Chris Conway and Tabitha Gammons.

4. The pick-up truck was insured by Direct Insurance Company.

5. The name of the owner of the pick-up truck and named insured under the Direct Insurance policy was John Spencer.

6. The wreck occurred on St. Paul Road.

7. St. Paul road is a fairly narrow road but two cars can pass in opposite directions,

8. The pick-up truck and Cadillac came in contact with each other just below the crest of a hill wherein the driver of each vehicle has its field view of limited. The impact occurred wherein the front left of each vehicle impacted the front left of the other vehicle as a result of a head-on collision.

9. William Scott, Pauletta Scott and Brenda Greenwood suffered serious injuries.

10. A recorded statement of William Scott was taken on February 14, 2001, and said recorded statement transcript was entered into evidence for consideration by the Trial Court. (R. 346-353)

That recorded statement was taken by Rhonda Gatlin of State Farm Insurance on behalf of State Farm Insurance Company who was investigating the liability of the parties.

The following exchange occurred:

Q. Alright. Tell me after the impact occurred what happened you did did you s-...

A. Well, after we hit I couldn't see nothing but the glass it started just shattering you know. And I uh couldn't move my foot in there I couldn't get outta the car both doors were wedged where it wouldn't open up you know.

Q. Um-hum.

A. ***So then I see this young lady. Getting out of the truck to pass the driver's side you know.***

Q. Um-hum.

A. And that's about all I remember. I got out of the car and laid on the ground.

Q. ***Okay. So you remember after the impact after the impact you looked up saw the girl get out on the driver's side and then you blacked out for the most part?***

A. I got out on the ground, yeah that's when I blacked out.

Q. Okay. Alright. Now you said you never saw the boy get out of the truck?
A. I didn't see the guy get out of the truck yeah.

Q. ***Okay. How long after the time of the accident happened did you see the girl get out on the driver's side.***

A. ***Soon as (inaudible) I'd say maybe a couple of seconds more.***

Q. ***And then and then when did you see the girl get out of the vehicle was it when your vehicle got stopped. . .***

A. ***When my vehicle stopped this in when I viewed the lady getting outta the car. (State Farm's Recorded Statement of William Scott).***

11. In return for monetary consideration, all the Scott family signed Full and Final Releases prepared by John Spencer and Chris Conway's lawyers who were retained by Direct Insurance Company.

12. Each release stated that the Scott family was "releasing and forever discharging and acquitting **John Spencer and Direct**." (R. 97-114)

13. Nowhere in the Full and Final Releases prepared by Chris Conway's insurance company is Tabitha Gammons' name ever mentioned.

14. The Releases given to Brenda Greenwood and Pauletta Scott state that the money was being paid by Direct Insurance and was being paid "on behalf of John Spencer." (R. 97-108).

15. The Release given to William Scott to sign does not indicate on whose behalf the money was being paid but the Release itself does state that Mr. William Scott is releasing John Spencer and Direct. (R. 109-114)

These are the only Releases that can logically be examined to determine whether or not Tabitha Gammons has been released and forever discharged as a tortfeasor for her potential liability exposure.

CONCLUSION

The liability of Chris Conway and his father, John Spencer was alternative. If Chris Conway was driving, Chris Conway would have liability for his actions, and John Spencer, his father and owner of the pick-up truck, would have liability surrounding his ownership of the vehicle Chris was driving.

Alternatively, if Tabitha Gammons was driving, Chris Conway and John Spencer would still have potential liability for the negligent entrustment of that vehicle to Tabitha Gammons.

Since suit was never filed against Chris Conway or John Spencer, Tabitha Gammons' lawyers cannot now tell the Trial Court what the Plaintiffs' theories would have been had suit been filed against Chris Conway.

In actuality, Tabitha Gammons should go to trial, and Tabitha Gammons should state that she was not driving the vehicle as she has in her Amended Answers. If the jury believes her and does not believe Mr. William Scott, who states that Tabitha Gammons was driving the vehicle, the verdict will be in the favor of Tabitha Gammons and State Farm Insurance Company will not have to worry about paying any proceeds on behalf of Tabitha Gammons.

However, if the jury believes Mr. Scott's story that Tabitha Gammons was driving the pick-up and caused injuries and damages to the Scott family, a verdict would be presumably entered and then State Farm can argue what they want regarding whether or not they ever paid any compensation to the Scott family pre-litigation. Of course, they cannot, so they convinced a Trial Judge to head off a trial against Tabitha Gammons to avoid that financial problem.

Respectfully submitted,

SPARKMAN-ZUMMACH, P.C.

Martin Zummach, [redacted]
Attorney for the Appellants
P.O. Box 266
Southaven, MS 38671
662-349-6900

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:

Brian Hyneman, Esq.
P.O. Drawer 668
Oxford, Mississippi 38655

Kent Smith, Esq.
P.O. Drawer 849
Holly Springs, MS 38635

Honorable Henry Lackey
Marshall County Circuit Court Judge
P.O. Drawer T
Calhoun City, Mississippi 38916

on this the 7th day of August, 2007.

MARTIN ZUMMACH