

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00035 COA

CHARLIE D. SPEARMAN

APPELLANT

v.

WESTERN SURETY COMPANY, GARY L. HAWKINS AND AUTOMOTIVE FINANCE
COMPANY, INC.ASDFADSFDAF

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. FRANK ALLISON RUSSELL

COURT FROM WHICH APPEALED: PRENTISS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

GREGORY D. KEENUM

ATTORNEYS FOR APPELLEES:

SONNY CLANTON

EUGENE BURTON GIFFORD, JR.

PAUL M. MOORE, JR.

NATURE OF THE CASE: PROPERTY BONDS - SURETY/TITLE BONDS FOR VEHICLES

TRIAL COURT DISPOSITION: LOWER COURT GRANTED SUMMARY JUDGMENT IN
FAVOR OF ALL DEFENDANTS.

MANDATE ISSUED: 6/24/97

BEFORE THOMAS, P.J., PAYNE, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Charlie Spearman brought suit against the three defendants, claiming that their fraud caused his loss of title to two vehicles. Spearman's suit solely makes claims on two bonds. Summary judgment was granted for the defendants. Spearman argues on appeal that there were disputed issues of material fact that barred summary judgment. We hold that any entitlement Spearman has to relief is not within the specific protections of the title surety bond. The trial court made no ruling on the notary public bond, and there are fact questions that require a remand on those issues.

FACTS

This is an appeal from a summary judgment in which neither side submitted affidavits setting out the operative facts. There was no trial of course, and thus no transcript of testimony. The actual record is accordingly sparse. However, the appellant Spearman's brief sets out detailed facts regarding the events. We recite the facts as alleged on appeal by the complaining party. An appellant's admissions can remove defects in the record about which he can complain. *General Contract Corp. v. Bailey*, 218 Miss. 484, 511, 67 So. 2d 485, 495 (1953). Certainly if Spearman's own alleged facts support the judgment, then he cannot complain of material disputes of fact.

James Hester Phillips was in the business of selling vehicles, using the business name of Steve's Auto Sales. Charlie Spearman said that he (Spearman) "held the titles," but does not explain that statement. The defendants allege, and there is no contrary evidence, that Phillips would purchase vehicles by bank draft and present the titles to Spearman. Spearman then paid the bank draft and retained the titles until the vehicles were sold. As is perhaps common practice in the used car business, Spearman made no effort to have title registered in his name. Thus an examination of the title certificates that he retained would reveal a predecessor owner, perhaps one in another state. Automotive Finance Company, Inc. financed the purchases made by two of Steve's Auto Sales' customers, Bonnie McGee and Marlin Ford. Subsequent to those purchases, Steve's Auto Sales went out of business. Automotive Finance was financing the purchase of these two automobiles and the title certificates to those vehicles were in Spearman's possession. McGee and Ford went into default and the vehicles were repossessed by Automotive Finance.

Automotive Finance did not have a title certificate on either vehicle, since Spearman had them. Unless a title certificate was procured, the vehicles could not be sold. Whether the finance company knew the location of the titles was disputed in the trial court. A statute permits a lienholder such as this finance company to obtain a new title certificate when the original is missing. Following that statutory procedure, Automotive Finance received from Western Surety a surety bond on each vehicle in question, that bond securing the rights of "a person under the original certificate." Miss. Code Ann. 63-21-23 & -27. The finance company filed the bond with the comptroller of the State Tax Commission and applied with the Commission for new title certificates on both vehicles. These applications were allegedly signed by McGee and Ford, certifying that their titles had been retained by the Steve's Auto Sales, which was now out of business. There was a dispute regarding whether these individuals ever signed the applications. Spearman contended that their signatures were forged by Hawkins, a notary public and manager of Automotive Finance. The evidence does not reflect the

subsequent ownership of the two vehicles.

On May 12, 1992 Spearman brought suit against the surety (Western Surety), the finance company (Automotive Finance), and the notary Hawkins who was also the manager of Automotive Finance. Spearman claimed that the defendants knew that he was holding the actual titles, and that he had been defrauded by the actions just described. According to the complaint, Spearman's interest is as an owner and lienholder. Yet nowhere in the complaint or in any filing in subsequent proceedings, does Spearman attach evidence of that. There is no certificate of title, no lien documents, nor anything else. Besides the allegation that he "held the original titles," there is complete silence as to the source of his lienholder/owner status.

On June 10, Hawkins on his own behalf and not for either of the two companies, filed his answer and also a request for admissions. On July 21, Western Surety filed an almost identical set of admission requests. Automotive Finance never filed a request for admissions. A transmittal letter from Spearman's attorney that is dated July 28, 1992 and which was filed two days later with the clerk, states that an answer "to the Request for Admissions" was sent to the attorney for Western Surety, with the attorneys for the other defendants being shown as receiving copies. The answers themselves were not then filed.

On January 6, 1994, a scheduling order was entered that required all pre-trial motions to be filed before March 31, 1994. Despite that order, on July 12, 1994 the three defendants filed a joint Motion for Summary Judgment. The motion alleged that because Spearman never answered the admissions propounded by Hawkins, despite denying identical requests submitted by Western Surety, the admissions were deemed admitted under Rule 36. M.R.C.P. 36. There were ten admissions requested in each document, and nine were identical. The only variation was in admission request number nine. Each request number nine asked for an admission that the named defendant did not act making him/it liable to the plaintiff, but Gary Hawkins's name was in his admission request, and Western Surety's name was in the other. The identical tenth request was that the plaintiff had no cause of action against any defendant.

Spearman's answer to the summary judgment motion did not raise the scheduling order issue. Spearman attached to his answer a document entitled "Plaintiff's Answers to Request for Admissions Propounded by Defendant, Western Surety Company." Those answers, dated July 28, 1992, denied the central admission requests. A concession that there was no cause of action and no liability would certainly eliminate genuine issues of material fact to be litigated in this case. The trial judge on October 7, 1994 denied the summary judgment motion. His one sentence order found the motion "not well taken," and implicitly rejected the effort to deem admitted the unanswered set of requests.

On October 24, 1994 the defendants sought reconsideration. The next court order was to permit a third party complaint to be filed by Western Surety against Hawkins and Automotive Finance, alleging if anything fraudulent occurred, those two defendants and not Western Surety were responsible. On November 21, 1994, the date the case was originally set for hearing, notice was given by the court that the case was reset for December 19. On December 13 the three defendants filed an amendment to their joint summary judgment motion. No order had yet been entered on their October motion for reconsideration. In the amendment it was alleged that in another suit that Spearman brought in 1989 against Automotive Finance, he had admitted in his Complaint that the

purchasers of about nine separate vehicles had been innocent purchasers for value. Spearman also allegedly admitted in a deposition that he was a "floor planner" for Steve Auto Sales. That particular piece of car dealer jargon meant that Spearman financed the inventory on the floor, and was not an owner. On December 16 Spearman filed a response, pointing out the scheduling order issue, and also raising other objections. On that same date, the trial court granted summary judgment to the defendants. He relied on Spearman's deposition from the related litigation, in which Spearman explained his lending practices. The court then found the case controlled by the judgment in a still earlier case, not involving Spearman. The Request for Admissions question was not resolved.

DISCUSSION

It is evident that the trial court ruled based on the single issue of whether Spearman had recourse against the title bond issued by Western Surety. This suit was not just Spearman's effort to collect on the title bond issued by Automotive Finance, as Spearman also sought collection under the notary public bond issued by Western Surety to Gary L. Hawkins. Spearman sought no relief against Hawkins or Automotive Finance apart from the payments Western Surety allegedly should make under the bonds. However, Spearman did argue that the relationship that Western Surety had with the other defendants made the surety company aware of the fraud that was being allegedly practiced against Spearman.

With this as background, we will discuss each of Spearman's allegations of error. The first four allegations are these:

- A. The trial court's grant of summary judgment was based on an erroneous decision of law;*
- B. The trial court erred by granting summary judgment to the defendants because there were genuine issues of material fact;*
- C. The trial court failed to take into account well settled agency law; and*
- D. The trial court erred by failing to review the facts which took precedence over the bona fide purchaser issue and, as a result, erroneously granted summary judgment*

The decision of law with which Spearman disagrees is that someone with no registered title or lien has no recourse against a title surety bond. Spearman calls himself in his appellate brief "a lienholder and a prior owner."

We first examine the authority relied upon by the trial court in making this conclusion. He cited to the Southern Reporter listing of a case that was decided without written opinion. *State, ex rel. Peoples Bank and Trust Co. v. Western Surety Co.*, 456 So. 2d 766 (Miss. 1984) (mem.). Apparently the trial court had examined the circuit judge's decision in that 1984 case, and concluded that the reasoning employed by the circuit judge was in effect approved by the Supreme Court in affirming the decision. Though the conclusion is reasonable and in a majority of cases that may well represent what in fact occurred at the Supreme Court level, that conclusion cannot be the basis for determining what is controlling precedent. Under Mississippi Rules of Appellate Procedure 35-A (d), an unpublished opinion cannot be "cited, quoted or referred to by any court . . . as authority." In fact, the decision in

1984 case apparently was without opinion at all, unpublished or otherwise. Thus that previous case is not helpful in resolving the present dispute.

Of course, what the trial court did in the 1984 case may quite easily represent an accurate view of the law. Thus we do not reverse merely because of reliance on improper authority. The relevant statute requires that a bond issued after application has been made to replace a missing title, is to be conditioned "to indemnify any prior owner and lienholder and any subsequent purchaser of the vehicle or person acquiring any security interest in it, and their respective successors in interest," against damages. The question becomes whether Spearman is in any of those categories of protected people.

The words in the statute, which are repeated by the language of the bond, are not arcane or slippery concepts. "Owner" is someone in whose name record title is held. A Certificate of Title placed in a desk drawer, which contains the name of somebody who might even be in a different state, does not transform the person sitting at the desk into the owner. The Motor Vehicle Title statute defines "owner" as "a person or persons holding the legal title of a vehicle. . . ." Miss. Code Ann. 63-21-5 (m). In context "holding the legal title" does not refer to someone's clutching a piece of paper with someone else's name on it. Whatever that kind of "holder" might be called, he is certainly not the "owner," which is the word being defined. Spearman was not the "owner."

The Motor Vehicle Title Law also defines "lienholder" as "any natural person, firm, co-partnership, association or corporation holding a lien as herein defined on a motor vehicle." Miss. Code Ann. 63-21-5(g). The term "lien" is then defined as a variety of things, such as a deed of trust, chattel mortgage, or trust receipt, and also "every other written agreement or instrument of whatever kind or character whereby an interest other than absolute title is sought to be held or given on a motor vehicle." There is no writing whatsoever that Spearman claims under in this case, that would give him an interest in the motor vehicle. The exclusive procedure for perfecting and giving notice of security interests to a motor vehicle is under that chapter of the Mississippi Code. Miss. Code Ann. 63-21-55. Spearman retained no enforceable security interest. A dealer and a floor planner can enter security agreements, but Spearman presents no such agreement in this case. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937, 939-40 (Miss. 1990).

Spearman cites us to a case in which a title surety company, instead of paying on the bond to somebody protected by it, offered to issue another bond to that person. *McBride v. Aetna Casualty & Surety Co.*, 583 So. 2d 974, 975 (Miss. 1991). Spearman cites language in *McBride* that states the bond is to protect "the public for damages occasioned" by certain kinds of title problems. The fact that the Supreme Court used the phrase "the public" in giving an overview of how the statute and bond were to operate, does not rewrite the plain meaning of the statute and bond. *McBride* dealt with a subsequent purchaser, specifically the kind of person protected by the bond.

Spearman is not overly detailed in informing the court what his relationship to the vehicles actually was. The defendants call him a "floor planner," and gave the trial court a deposition from another case in which Spearman admitted to that. Even though Spearman properly contests the use of that deposition in this case, a matter we address in the next section, we will not reverse a summary judgment because in some technical sense every fact necessary to sustain it does not appear in an affidavit or other evidence -- if every fact necessary is unavoidably inferred from what is in evidence.

That Spearman lent money to Steve's Auto Sales to purchase cars, and Spearman retained the certificate of title as his sole security, is the only reasonable explanation for the situation before us. Spearman by calling himself a lienholder or an owner without presenting evidence to prove it on summary judgment, suggests beyond any reasonable doubt that no such evidence exists. The trial judge had to infer from the only evidence before him that Spearman at most retained paper certificates of title without actually placing title in his own name. Spearman never denies that. The title surety bond did not protect someone in that status. The short cuts that may be standard in the used car business, of not registering titles and of not filing liens, may have their economic justifications. This title bond statute, however, requires compliance with certain fundamental recording obligations. Individuals in the automotive business who do not comply with the statutes, do so at their own risk.

Spearman made allegations in his complaint regarding the knowledge of Automotive Finance, Gary L. Hawkins, and Western Surety that he had lent money on these vehicles. Even were that true, such knowledge does not transform Spearman into an owner or lienholder. It is on that basis that a claim on Western Surety's bond might properly be made. The claims of knowledge and possible fraud might raise other obligations and possible claims for damages, but that is a matter not presently before us. The suit on this title bond, must show that Spearman was entitled under the statute to make such a claim. That he has failed to do.

E. Trial Court did not follow proper summary judgment procedures

Spearman argues that the trial court allowed a supplemental summary judgment filing to be made by the defendants just two days before the court ruled. The court's opinion stated that he relied upon the deposition that was submitted, and to which Spearman had not yet had a chance to respond. That was error. It is the kind of error that invokes the following familiar rule:

[T]his court will affirm the lower court where the right result is reached, even though we may disagree with the reasons for the result. We find that the lower court was correct in granting summary judgment on behalf of [the defendant], but for the reasons set forth in this opinion.

Stewart v. Walls, 534 So. 2d 1033, 1035 (Miss. 1988).

The trial court made one simple and unavoidable conclusion based on the facts -- Spearman loaned money on vehicles, kept titles with other people's names on them in his files, and took no steps to register title or perfect a security interest in the vehicles. Spearman's Complaint only alleges that he "held the original titles to said vehicles," and never asserts in that Complaint nor on appeal that he had complied with any statute that would have allowed him to create an enforceable interest in the vehicles as either an owner or lienholder.

A trial judge errs if he grants summary judgment based on facts first presented two days before the judgment, and to which the other party had no opportunity to respond. A court does not err in granting judgment when the material facts have long been uncontested in the record, even if a party files an immaterial pleading two days before judgment. The latter is what occurred here.

F. Hawkins breached his notary public duty by failing properly to witness signatures

The summary judgment opinion made no reference to the issue of the notary public bond. The defendants moved for summary judgment on all issues. The court in a brief opinion held that Spearman was not an owner nor a lienholder, and therefore had no recourse on the title surety bond.

We must now determine the effect of the trial court's making no ruling on the separate claim regarding the bond securing Hawkins obligations as a notary public. It is important to remember that whatever improprieties Spearman may allege, he must show that the notary public bond is intended to protect him against those matters. The bond requirement is established by statute:

Notaries public who are appointed and commissioned after July 1, 1988, shall give bond, with sufficient sureties, in the penalty of Five Thousand Dollars (\$5,000.00). . . .

Miss. Code. Ann. 25-33-1 (1991).

Among the duties of a notary public are to "receive the proof or acknowledgment of "such other writings as are commonly proved or acknowledged by notaries" Miss. Code Ann. 25-33-11 (1991). Failure in proper performance of those duties can lead to a claim on the bond by a party injured by that failure. The complaint references a bond issued by the same company, Western Surety, that secured Hawkins obligations as a notary public. We do not find in the record a copy of the bond, but it is not contested that the bond existed.

Had Gary Hawkins notarized the signatures that made it possible to get a substitute title, knowing that the signatures were not of the individuals named, then he would have breached his obligations as a notary public and his bonding company would stand liable to individuals injured by that act. The supreme court described a notary's bond this way:

The object of the official bond is to furnish indemnity against the misuse of official power and authority . . . and [the notary], together with his surety on his official bond, is liable for such damage as resulted from reliance on the truthfulness of the certificate of acknowledgment.

Hodges v. Mills, 139 Miss. 347, 355-56, 104 So. 165 (1925). In *Hodges*, the lender whose deed of trust was declared void because of a bad acknowledgment was entitled to sue on the notary's bond. *Hodges*, 139 Miss. at 353-54; *see also Hodges v. Mills*, 149 Miss. 1, 4, 115 So. 112 (1927) (second appeal). The question in this case, though, is whether Spearman could be a person injured by anyone's "reliance on the truthfulness of the certificate of acknowledgment." Spearman was a lender who was attempting to secure his loan by maintaining the physical title in his possession. Unless the seller -- Steve's Auto Sales or a successor -- could obtain good title to transfer to someone else, then Spearman's informal lien would be protected. The problem for Spearman is that the actual title certificates are not necessary to convey the vehicles:

- (1) A purchaser of goods acquires all title which his transferor had or had power to transfer. . . .
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.
- (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery

Miss. Code Ann. 75-2-403.

Thus if Steve's Auto Sales was a "merchant who deals in goods of that kind," i.e., in used cars, then good title would be conveyed to anyone who purchased in the ordinary course of business, "regardless of any condition" agreed upon by Spearman and Steve's Auto. This statute meant that Spearman retained no rights to block transfer of title. It is true that the statute that provides for replacement titles requires certification that the title was "lost, stolen, mutilated, or destroyed" or illegible. Miss. Code Ann. 63-21-27 (Miss. 1996). None of those words seems to apply to situations in which the merchant knows that the actual title is in a desk drawer. If the merchant is unable in these circumstances honestly to use Section 63-21-27, a point we need not decide, still the buyer under Section 75-2-403 has the right to good title that at least can be received through court action. The actual application in this case merely said that Steve's Auto Sales went out of business and did not deliver title. That would appear to be true and at worst incomplete.

Whatever claims Spearman might have against individuals or companies with knowledge of his financing the purchase of these vehicles, our question is much narrower: what is Spearman's right to sue on the notary public bond, or to put it more starkly, what did Hawkins allegedly do as a notary that hurt Spearman? Spearman's allegation is that Hawkins forged or knowingly participated in the forgery of an application for new titles. Since Spearman has no ownership or lien rights in the vehicles, at most he is an unsecured creditor. He makes no allegations regarding how as an unsecured creditor he could have been harmed, since he incorrectly alleges he is a lienholder and an owner. The defendants do not brief the issue either.

Generally, Spearman as an unsecured creditor had the right to seek a judgment and then enroll that judgment. Miss. Code Ann. 11-7-189 (Supp. 1996). That enrolled judgment creates a lien against property of the debtor, with a priority dating from the enrollment of the judgment. Miss. Code Ann. 11-7-191 (Supp. 1996); *Merideth v. United States*, 327 F.Supp. 429, 434-35 (N.D. Miss. 1970), *affirmed Merideth v. U.S.*, 449 F.2d 186 (5th Cir. 1971). The debtor's property would include any unsold automobiles still owned by Steve's Auto Sales. The allegations against Hawkins concern actions he took that allowed a finance company to get title to the vehicles after purchasers from Steve's Auto Sales had defaulted. If there was an impropriety there and had Steve's Auto Sales still been in operation, would Steve's Auto have been harmed by the notary's action? Spearman in some fashion must show that but for Hawkins' actions as a notary, the vehicles would have been available for him if he proved his claim against Steve's Auto. In other words, since Spearman is suing on the bond, he must have been harmed due to "reliance on the truthfulness of the certificate of acknowledgment." *Hodges*, 139 Miss. at 356. We do not answer these questions in the absence of briefing, nor suggest that these are the only issues on remand.

To show that there were no genuine issues of material fact the defendants relied on the requests to admissions propounded by Hawkins, which were never answered and could be deemed admitted. The "admissions" do not concern the points we are discussing here, but are sweeping admissions that Spearman had no cause of action. It appears that Spearman had pointed out to him his failure to answer, and yet never took advantage of the ample opportunity to correct this failure. The "deemed admitted" provision of Civil Rule 36 is not a technical trap for the unwary, but neither are its strictures to be ignored. *Towner v. Moore ex rel. Quitman County School Dist.*, 604 So. 2d 1093, 1099-1100 (Miss. 1992). The trial court made no ruling on the admissions, and we do not know what

explanation Spearman might have for the failure to answer. We leave it for the trial court on remand to determine in the first instance whether these answers should be deemed admitted.

THE JUDGMENT OF THE CIRCUIT COURT OF PRENTISS COUNTY IS AFFIRMED AS TO THE TITLE SURETY BOND; THE JUDGMENT IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS REGARDING THE NOTARY PUBLIC BOND. COSTS ARE TAXED ONE-HALF TO THE APPELLANT AND ONE-HALF TO THE APPELLEES.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, KING, AND PAYNE, JJ., CONCUR.

HINKEBEIN, J., NOT PARTICIPATING.