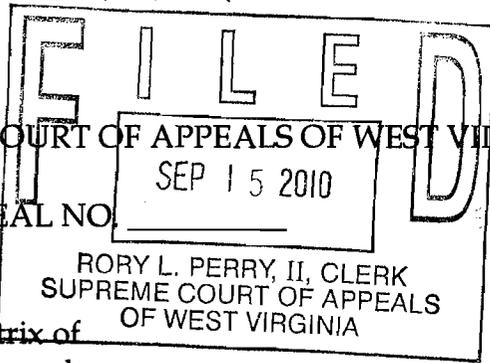


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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. _____

SHEILA F. HAYNES, as Administratrix of
the Estate of Elgene Phillips, Jr., Deceased,

Petitioners/Plaintiff Below,

vs.

Civil Action No. 07-C-493
(Honorable Jennifer Bailey)
Circuit Court of Kanawha County

DAIMLERCHRYSLER CORPORATION,
a foreign corporation; AUTOLIV ASP, INC., a
foreign corporation; and JOE HOLLAND
CHEVROLET, INC., a West Virginia corporation,

Respondents/Defendants Below.

PETITION FOR APPEAL

Respectfully submitted,

Charles M. Love, IV, Esquire
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I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is a Petition for Appeal pursuant to Rule 3 of the West Virginia Rules of Appellate Procedure of an Order issued by the Circuit Court of Kanawha County, West Virginia, the Honorable Jennifer F. Bailey, presiding and filed on May 4, 2010, denying Plaintiff's Motion To Sever Claims Against Chrysler and Plaintiff's Motion to Compel Autoliv To Pay Settlement.

II. STATEMENT OF FACTS

The wreck which gives rise to this action occurred on January 22, 2006 on Sissonville Drive near Sissonville, Kanawha County, West Virginia. At the time of the wreck, Elgene Phillips was driving a 1998 Dodge Ram 1500 and Gloria Phillips was his front seat passenger.

Gloria Phillips testified that immediately prior to the wreck, she and Elgene Phillips stopped at B&B Market where she purchased a gallon of milk, orange juice, a pork roast, some potatoes, and some other items. When Gloria got back in the truck, Elgene still had his seat belt on and he did not take it off at any time between the market and the wreck.

Elgene and Gloria Phillips left the market and were traveling northbound on Sissonville Drive when the truck hydroplaned. The truck crossed the centerline, ran off the left side of the road, went through a guardrail, and rolled over.

Elgene Phillips seatbelt unlatched, he was ejected and died as a result of blunt force trauma. Plaintiff's expert William H. Muzzy, III opined that these injuries occurred when Mr. Phillips was ejected during the rollover.

In contrast, Gloria Phillips' seat belt remained latched and retained her in the vehicle where she suffered only minor injuries including hitting her head, cutting her finger, and cutting her left elbow.

Mr. Muzzy also opined that, as with Gloria Phillips, Elgene Phillips would not have sustained fatal injuries had his seat belt remained latched and retained him in the vehicle during the wreck.

On February 19, 2009, Petitioner and the defendants, Autoliv and Chrysler, entered into an agreement wherein, "The Defendants agree to pay to the Plaintiff \$150,000.00." (February 19, 2009 Settlement Agreement)

On April 28, 2009, an order was entered by the Circuit of Kanawha County permitting the Estate of Elgene Phillips, Jr. to accept the settlement amount of One-Hundred, Fifty Thousand Dollars (\$150,000.00) in full and final settlement of all claims against Chrysler and Autoliv. No apportionment of which defendant was to pay what portion was made known to the court or the Petitioner. (Order Approving Settlement of a Wrongful Death Claim, April 28, 2009).

A full and final release of all claims against all defendants was executed on or about April 28, 2009 which released Chrysler and Autoliv for payment of One-Hundred, Fifty Thousand Dollars (\$150,000.00). No apportionment of which defendant was to pay what portion was made known to the Petitioner in this document. (Full and

Final Release of All Claims Against Chrysler, LLC and Autoliv ASP, Inc. and Joe Holland Chevrolet, Inc.)

Since August 30, 2009, the Petitioner has only received Sixty-Five Thousand Dollars (\$65,000.00) in settlement proceeds. The genesis for this failure to pay, the Petitioner believes, lies in the bankruptcy of Chrysler filed on April 30, 2009. Chrysler issued a check for Eighty-Five Thousand Dollars (\$85,000.00) and then would not honor the check when Petitioner attempted to cash it on April 30, 2009. The Court first approved the settlement on April 28, 2009. The Petitioner contacted Chrysler and Chrysler refused to honor the check. The Petitioner's position is that defendants collectively agreed to pay One-Hundred Fifty Thousand Dollars (\$150,000.00) for the settlement of the claims. This is evidenced by the settlement agreement, the release and the order approving settlement. There was not a separation of settlements between the parties. The Petitioner settled its claims for One-Hundred Fifty Thousand Dollars (\$150,000.00) to be paid by the defendants or either of them. Autoliv has refused to pay anymore than Sixty Five Thousand Dollars (\$65,000.00) despite being joint and severally liable for the total amount.

III. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in denying the Petitioner's Motions in their entirety where the Circuit Court made findings of fact not supported by any evidence, and where the Circuit Court misapplied the law of accord and satisfaction ignoring fraudulent conduct of the defendants and the elements necessary to final existence of accord and satisfaction.

IV. POINTS AND AUTHORITIES RELIED UPON

1. An accord of satisfaction requires full performance of the terms of the compromise. Once the parties have fully complied with the terms of the compromise agreement, the doctrine is invoked and acts as a bar to all actions upon the same agreement. Summers v. Summers, 186 W.Va. 635, 413 S.E.2d 692 (1991)

2. To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all. Charleston Urban Renewal Auth. v. Stanley, 176 W.Va. 591, 346 S.E.2d 740 (1985)

3. Whether the parties altered their original contract or entered a transaction of compromise depends on whether there was mutual consent. It is necessary to examine the evidence and determine whether the parties arrived at a new agreement or acted under the existing one. An accord or satisfaction operates as a bar only in regard to matters Painter v. Peavey, 192 W.Va. 189, 451 S.E. 2d 755 (1994) contemplated by the agreement and not to matters unknown to the parties at the time of its execution. Moore v. Hope Natural Gas Co., 76 W.Va. 649, 86 S.E.2d (1915)

V. DISCUSSION OF LAW

The defendants in this case committed a fraud against the Petitioner and the court. The underlying products liability claim in this case was settled for One-Hundred

Fifty-Thousand Dollars (\$150,000.00) by the Petitioner with the defendants. The defendants not once discussed with the Petitioner or court that there were two separate settlements as Autoliv now claims. None of the evidence submitted supports Autoliv's contention that Petitioner agreed to settle all of its claims against Autoliv for Sixty-Five Thousand Dollars (\$65,000.00) and had a separate agreement with Chrysler to settle the Petitioner's claims for Eighty-Five Thousand Dollars (\$85,000.00).

Autoliv was and remains jointly and severally liable to the Petitioner for One-Hundred, Fifty Thousand Dollars (\$150,000.00).

An accord of satisfaction requires full performance of the terms of the compromise. Once the parties have fully complied with the terms of the compromise agreement, the doctrine is invoked and acts as a bar to all actions upon the same agreement. Summers v. Summers, 186 W.Va. 635, 413 S.E.2d 692 (1991)

In this case the terms of payment of One-Hundred, Fifty Thousand Dollars (\$150,000.00) was not fulfilled. Therefore accord and satisfaction cannot operate as a bar to collection of the sum due under the settlement agreement.

To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all. Charleston Urban Renewal Auth. v. Stanley, 176 W.Va. 591, 346 S.E.2d. 740 (1985)

The order at issue from the underlying court failed to findings of consideration to support an accord and satisfaction. The court's order failed to note any evidence of acceptance of the partial payment by the Petitioner with knowledge by the Petitioner that it would accept Sixty-Five Thousand (\$65,000.00) rather than One-Hundred Fifty Thousand (\$150,000.00). The Petitioner thought that it was accepting One-Hundred, Fifty Thousand Dollars (\$150,000.00) not Sixty-Five Thousand Dollars (\$65,000.00) and a bad check for Eighty-Five Thousand Dollars (\$85,000.00).

Whether the parties altered their original contract or entered a transaction of compromise depends on whether there was mutual consent. It is necessary to examine the evidence and determine whether the parties arrived at a new agreement or acted under the existing one, Painter v. Peavey, 192 W.Va. 189, 451 S.E.2d 755 (1994)

There was no mutual consent to accept Sixty-Five Thousand Dollars (\$65,000.00) rather than One-Hundred, Fifty Thousand Dollars (\$150,000.00). The Petitioner was misled into believing it was receiving One-Hundred, Fifty Thousand Dollars (\$150,000.00) rather than Sixty-Five Thousand (\$65,000.00) and a bad check. The Petitioner did not discover it received only Sixty-Five Thousand Dollars (\$65,000.00) until the bank refused to honor the bad check.

An accord or satisfaction operates as a bar only in regard to matters contemplated by the agreement and not to matters unknown to the parties at the time of its execution. Moore v. Hope Natural Gas Co., 76 W.Va. 649, 86 S.E.2d (1915)

The Petitioner had no knowledge that it was receiving only Sixty-Five Thousand Dollars (\$65,000.00) rather than One-Hundred, Fifty Thousand Dollars (\$150,000.00) until the bad check was returned by the bank.

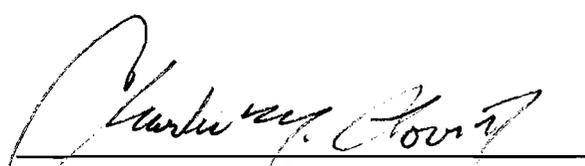
The underlying court was duped as was the Petitioner by the defendants' misrepresentations and now the decedent's family and child must suffer once again at the defendants' hands.

VI. RELIEF REQUESTED

For all of the foregoing reasons, Petitioner respectfully prays that this Honorable Court grant their Petition for Appeal and reverse the Circuit Court's order denying their motion to compel payment of settlement proceeds. Further, Petitioner respectfully requests that it be awarded costs and expenses incurred in prosecuting this appeal, including reasonable attorney's fees, as well as any other relief deemed appropriate by the Court.

SHEILA F. HAYNES, as Administratrix
of the Estate of Elgene Phillips, Jr.,
Deceased,

By Counsel



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EXHIBITS

ON

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