**IN THE COURT OF APPEALS**
**OF THE**
**STATE OF MISSISSIPPI**
**NO. 95-CA-01028 COA**

**DANIEL ROBERT BARROW, AMERICAN KEY AND LOCK, INC., & MICHAEL W. MCCORKLE** — **APPELLANTS**

**v.**

**JESSIE HOPKINS, SHERIFF OF MADISON COUNTY** — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

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| DATE OF JUDGMENT: | 07/29/95 |
| TRIAL JUDGE: | HON. WILLIAM JOSEPH LUTZ |
| COURT FROM WHICH APPEALED: | MADISON COUNTY CHANCERY COURT |
| ATTORNEYS FOR APPELLANTS: | JOHN STEPHEN BARRON |
| | E. MICHAEL MARKS |
| ATTORNEYS FOR APPELLEE: | REBECCA BARGE COWAN |
| | C. R. MONTGOMERY |
| | SAMUEL SUTHERLAND GOZA |
| NATURE OF THE CASE: | CIVIL -- PERMANENT INJUNCTION AGAINST THE SHERIFF |
| TRIAL COURT DISPOSITION: | SUMMARY JUDGMENT IN FAVOR OF SHERIFF/APPELLEE |
| DISPOSITION: | AFFIRMED -12/2/97 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 12/23/97 |

BEFORE BRIDGES, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

The appellants, Daniel Robert Barrow, American Key and Lock, Inc., and Michael W. McCorkle, locksmiths in Madison County, filed a complaint for permanent injunction against the appellee, Jessie Hopkins, the Sheriff of Madison County, in the Chancery Court of Madison County. The appellants, to whom we will refer collectively as "locksmiths," asked the chancery court permanently to enjoin Sheriff Hopkins from unlocking locked vehicles and to instruct "all persons requesting assistance with locked vehicles, in non-emergency situations, to call a professional locksmith." The chancellor sustained the sheriff's motion for summary judgment, and the locksmiths have appealed. There are no material issues of fact, but we affirm because we find that the locksmiths are unable to assert any

valid legal theory on which to base their complaint for permanent injunction.

## I. FACTS

For several years, Jesse Hopkins, Sheriff of Madison County, has followed a policy which authorized his deputies to unlock vehicles for residents of Madison County who had inadvertently locked themselves out of their vehicles. Robert Barrow, the principal shareholder in American Key and Lock, Inc., and Michael McCorkle are licensed locksmiths who primarily practice their profession in Madison County.

## II. LITIGATION

The locksmiths filed a complaint for permanent injunction against Sheriff Hopkins in which they complained that the Madison County Sheriff's Department's "practice of opening vehicles in non-emergency situations puts the Sheriff in direct competition with the Plaintiffs' private business enterprises and directly interferes with their ability to earn a living." Thus, "the sheriff's practice of allowing deputies to open locked vehicles in non-emergency situations has caused and continues to cause the Plaintiffs irreparable, concrete and tangible economic injury, over and above that degree of injury caused to the average citizen." The locksmiths charged in their complaint that this practice "constitute[d] an abuse of his discretionary authority, and a misappropriation of public property, man-power and funds [which] directly interfere[d] with the [locksmiths'] businesses." They concluded their complaint with a prayer for permanent injunctive relief as we earlier recited.

In his answer to the locksmiths' complaint, the sheriff admitted "that his Department, when called upon by the general public, assists citizens who have locked themselves our of their cars by opening their car doors for them." The day after the sheriff filed his answer, he moved for summary judgment. In support of his motion for summary judgment, the sheriff filed his affidavit in which he again admitted that "as an accommodation and service to the general public of Madison County, Mississippi, his Department provides assistance to motorist[s] who are locked our of their cars by unlocking their car doors for them." The sheriff further swore that he did not charge a fee to any citizen of Madison County for whom his deputies unlocked their vehicles. In his affidavit, the sheriff opined that "when any citizen is locked out of his or her car, that citizen's safety is at risk." The sheriff concluded by stating that he knew of no law or statute that prevented his department from providing these services free of charge to the general public in Madison County.

The locksmiths responded to the sheriff's affidavit with the "contention that the opening of a locked vehicle, where no emergency circumstances are present, constitutes a commercial service which falls into the same category as mechanic work, plumbing and child day care." It seemed obvious to the locksmiths that if "the sheriff was appropriating money, equipment, and manpower to perform these services [of mechanic work, plumbing and child day care] for county residents, that practice would be subject to injunction as an illegal misappropriation."

Both Barrow and McCorkle filed affidavits in which they swore that the sheriff's policy of unlocking cars in which Madison County motorists had locked their keys, "without regard to whether or not an emergency exists, has caused direct, concrete and tangible economic injury to" their respective businesses. Each affiant further stated that the police departments of the cities of Madison, Ridgeland, and Canton had "all adopted policies not to assist motorist[s] who have locked their keys

unless it is an emergency situation." According to the two affiants, neither the Jackson Police Department nor the Hinds County Sheriff's Department offered this service "except in emergencies."[(1)]

The locksmiths and the sheriff argued the sheriff's motion for summary judgment before the chancellor. Near the very beginning of his argument the locksmiths' attorney stated, "It is true [the sheriff's counsel] could not find any substantive law on this issue, *nor could we*." (emphasis added). After counsel for both the locksmiths and the sheriff had concluded their arguments, the chancellor granted the sheriff's motion for summary judgment. The locksmiths have appealed from the final judgment "of dismissal with prejudice as a matter of law" which the chancellor entered pursuant to his granting the sheriff's motion for summary judgment.

## III. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUE

We quote verbatim the locksmiths' issue from their brief:

**Whether the Chancery Court erred by refusing to enjoin the Madison County Sheriff's Department from unlocking vehicles for locked out motorist[s] in non-emergency situations.**

In his brief, the sheriff proposes this form of the issue: "Whether the Madison County Chancery Court erred in granting the Appellee's Motion for Summary Judgment." We find the sheriff's statement of the issue which this Court must resolve to be more appropriate in the present posture of the case, although this Court recognizes that the locksmiths' issue accurately relates the consequence of the chancellor's grant of the sheriff's motion for summary judgment.

### A. Standard of Review for Summary Judgment

A trial court's decision to grant summary judgment is reviewed *de novo* upon appeal. ***Spartan Foods Systems, Inc. v. American Nat'l Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991); *American Legion Ladnier Post 42, Inc. v. Ocean Springs*, 562 So. 2d 103, 105 (Miss. 1990); *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993).** If the appellate court finds beyond a reasonable doubt that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law, it will affirm the trial court's decision to grant summary judgment. ***Spartan Foods*, 582 So. 2d at 402; *Yowell v. James Harkins Builder, Inc.*, 645 So. 2d 1340, 1343 (Miss. 1994).**

The issues of fact are not in dispute in this case. The sheriff admits that his department unlocks cars in which Madison Countians have locked their keys as a matter of policy and practice, the activity which the locksmiths seek to enjoin permanently. The sheriff's practice of unlocking cars likely "cause[s] the [locksmiths] irreparable, concrete and tangible economic injury, over and above that degree of injury caused to the average citizen." However, this Court is troubled by both the locksmiths' and the sheriff's failure to cite specific legal authority to support their respective positions on this issue. Hence, the portion of our *de novo* review which concerns this Court is whether the sheriff "is entitled to judgment as a matter of law."

### B. Summary Judgment

The burden is on the movant to show that he is "entitled to judgment as a matter of law." ***American Legion*, 562 So. 2d at 106.** This is a burden of "production and persuasion;" it is not actually a

burden of proof in the true sense of the word. ***Yowell,* 645 So. 2d at 1343.**

> Merely establishing the absence of genuinely disputed facts will not carry the day for the summary judgment movant. The movant must also demonstrate that the applicable controlling law requires a decision in the movant's favor. Conversely, to defeat summary judgment, the nonmovant must articulate a viable legal theory entitling it to relief should it prevail on the facts at trial.

**11 James Wm. Moore et al., Moore's Federal Practice, § 56.11[8] (3d ed. 1997).** ***See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245-46 (1986)** (holding that to obtain summary judgment, movant must show both lack of genuine factual dispute and entitlement to judgment as matter of law) ; ***Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980)** (stating that for facts to create genuine dispute of form basis for judgment, party must have legitimate legal theory supporting claim) ; ***Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989)** (opining that if facts are resolved favorably for nonmovant, nonmovant must nonetheless show viable legal theory of recovery to defeat summary judgment).

The foregoing authorities require us to evaluate the locksmiths' argument to determine if they offer a viable or a legitimate legal theory to support their claim for injunctive relief against the sheriff. The locksmiths begin their argument by asserting that the sheriff's policy of opening locked cars at the request of their owners is not specifically authorized by any statute of the State of Mississippi. They cite various sections of the Mississippi Code which establish certain duties which a sheriff must discharge, i.e., attend courts, jail committed persons, and execute orders and decrees of the state's courts **(§ 19-25-31)**; execute and return process of this state's courts **(§ 19-25-37)**; to serve as county librarians **(§ 19-25-65)**; and to keep the peace **(§ 19-25-67)**. **Miss. Code Ann. §§ 97-25-31, -37, -65, -67 (Rev. 1995)**. The sheriff counters with ***Dean v. Brannon*, 139 Miss. 312, 326, 104 So. 173, 175 (1925),** in which the Mississippi Supreme Court opined that "our statutes are not the source of all the powers of a sheriff; many of his powers are of common-law origin." The locksmiths cite no authority which prohibits the sheriff from opening a locked car for a citizen of his jurisdiction.

They next cite **43A C. J. S.,** ***Injunctions* § 138 (1978)**, which "advises that an injunction is a proper remedy to prevent an unauthorized appropriation or use of public property if the person seeking the injunction can show special injury over and above that of the general public." Although the record contains not one specific instance of either locksmith's financial loss because the sheriff or his deputy opened a locked car which otherwise either of the locksmiths would have opened, this Court remains unpersuaded that a few minutes of an officer's time spent in assisting a citizen with unlocking his or her vehicle is "an unauthorized appropriation or use of public property." Especially are we unpersuaded in the light of the locksmiths' concession that a citizen's vehicle can be locked under circumstances which would constitute "an emergency situation" and that the assistance of the sheriff's department in an emergency situation does not constitute "an unauthorized appropriation or use of public property." In his opinion which he rendered from the bench after the conclusion of argument on the sheriff's motion for summary judgment, the chancellor reasoned about "emergency situations" as follows:

> Finally, and perhaps most importantly, who is going to decide which unlocking is an emergency and which is not? This Court cannot put itself in the position of weekly referee between the

> locksmiths and the Sheriff to decide if the latest unlocking is or is not an emergency."

This Court accepts the chancellor's analysis of the matter of emergency situations.

The locksmiths last argument is that "sound public policy dictates against unlocking vehicles for motorists in non-emergency situations." They quote not one authority to support their purely factual assertions on this question. They argue that "[m]odern vehicles are often equipped with sophisticated locking and anti-theft systems," which only they as trained locksmiths -- and not deputies armed only with a "slim jim" -- are qualified to unlock. They assert that the sheriff's practice exposes him to liability for damage to vehicles, which may result from the inept use of a slim jim. Finally, they state that there is "a trend among law enforcement agencies across the country of refusing to open vehicles in non-emergency situations." The record contains nothing to support this allegation other than the affidavits which Barrow and McCorkle filed in opposition to the sheriff's motion for summary judgment, and those affidavits mentioned three law enforcement agencies in Madison County and two in Hinds County. This Court responds to the locksmiths' argument on public policy by quoting from ***Ellis v. Ellis*, 651 So. 2d 1068, 1073 (Miss. 1995)**, in which the Mississippi Supreme Court advised the bar:

> The merits of this assigned error will not be reached for several reasons. First, [the Appellant] failed to cite any authority in support of this error and this Court has consistently held that an unsupported assignment of error will not be considered. (citations omitted).

To support their legal theories on which they seek to enjoin the sheriff from opening locked vehicles at the request of the vehicles' owners, other than under emergency situations, the locksmiths cite four sections of the Mississippi Code of 1972 and 43A C. J. S., *Injunctions* § 138 (1978). From our review and analysis of these authorities and the locksmiths' arguments which rest on these authorities, we hold that the locksmiths have presented no viable legal theory on which the chancellor might have enjoined the sheriff in accordance with the locksmiths' prayer for injunctive relief.

The following excerpt from the chancellor's bench opinion is an apt conclusion for our ultimate analysis and resolution of the locksmiths' issue: "The citizens of the State of Mississippi give their sheriffs very broad authority and discretion to perform the tough job of county law enforcement. This Court is not going to create limits that the Legislature has not seen fit to create." Neither is this Court. Therefore, we affirm the chancery court's final order of dismissal with prejudice which was entered pursuant to the chancellor's granting the sheriff's motion for summary judgment.

**THE FINAL JUDGMENT OF THE MADISON COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.**

> 1. The clerk's papers and the record contains indicia of the locksmiths' having deposed the sheriff and others, but their depositions were never introduced as evidence during the argument on the motion for summary judgment. Thus, we restrict our recitation of the evidence which the

parties adduced for the chancellor's consideration to their affidavits which were filed among the clerk's papers.