IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CLARK SALES & RENTALS, INC.	*APPELLANTS*
V.	*CAUSE* NO. 2006-CA-01577
JAMES BRAXTON, ET AL	*APPELLEES*

CONSOLIDATED WITH

CLARK SALES & RENTALS, INC.	*APPELLANTS*
V.	*CAUSE* NO. 2006-CA-01852
JAMES McDUFF, ET AL	*APPELLEES*

On Appeal from the Circuit Court of Issequena and Sharkey Counties, Mississippi
Cause No. 02-0016
Cause No. 02-101

SUPPLEMENTAL BRIEF OF APPELLEE

Dewitt T. Hicks, Jr.
Hicks & Smith, PLLC
710 Main Street, Second Floor
Post Office Box 1111
Columbus, MS 39703-1111
Telephone: (662) 243-7300
Facsimile: (662) 327-1485

Counsel for Appellees

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CLARK SALES & RENTALS, INC.	*APPELLANTS*
V.	*CAUSE* NO. 2006-CA-01577
JAMES BRAXTON, ET AL	*APPELLEES*

CONSOLIDATED WITH

CLARK SALES & RENTALS, INC.	*APPELLANTS*
V.	*CAUSE* NO. 2006-CA-01852
JAMES McDUFF, ET AL	*APPELLEES*

CERTIFICATE OF INTERESTED PARTIES

Fred Krutz, Esq.
Edwin S. Gault, Jr. Esq.
Daniel J. Mulholland, Esq.
Brian B. Hannula, Esq.
FORMAN PERRY WATKINS KRUTZ & TARDY, LLP
Post Office Box 22608
Jackson, Mississippi 39201-4099

Dewitt T. Hicks, Jr.
Hicks & Smith, PLLC
710 Main Street
Regions Bank, Second Floor
P. O. Box 1111
Columbus, MS 39703

Abel Manji
THE O'Quinn Law Firm
2300 Lyric Center Bldg.
440 Louisiana Street
Houston, TX 77002

Ramel L. Cotton, Esq.
Roy K. Smith, Esq.
SMITH RUSHING COTTON & ROBINSON
4793 McWillie Drive
Post Office Box 9366
Jackson, MS. 39286-9366

Darrell L. Barger
HARTLINE, DACUS, BARGER, DREYER & KERN, L.L.P.
800 North Shoreline Blvd
Suite 2000 – North Tower
Corpus Christi, TX 78401

Hon. Isadore Patrick
Warren County Circuit Court
Post Office Box 351
Vicksburg, Mississippi 39181

Dated: February 29, 2008

Dewitt T. Hicks, Jr.

TABLE OF AUTHORITIES

CASE LAW

OTHER AUTHORITIES

Legend: **T.T. = Trial Transcript**

R.E. = Record Excerpt.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CLARK SALES & RENTALS, INC.	***APPELLANTS***
V.	***CAUSE* NO. 2006-CA-01577**
JAMES BRAXTON, ET AL	***APPELLEES***

CONSOLIDATED WITH

CLARK SALES & RENTALS, INC.	***APPELLANTS***
V.	***CAUSE* NO. 2006-CA-01852**
JAMES McDUFF, ET AL	***APPELLEES***

SUPPLEMENTAL BRIEF OF APPELLEE

INTRODUCTION

Pursuant to the Court's Order of February 20, 2008, come now the Appellees and file this Supplemental Brief addressing the mirror image case of *Choctaw, Inc., et al v. Campbell-Cherry-Harrison-Davison-Dove,* 965 So.2d 1041 (Miss. 2007) as it impacts these cases. The Appellees respectfully submit that the decision in *Campbell-Cherry, supra,* is compelling and controlling on all issues in this case. Here, as in *Campbell-Cherry,* the case of *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So.2d 493 (Miss. 2004) was decided after these suits had been filed and the cases had been removed to multi-district litigation, Southern District of Texas, District Court Judge Janice Graham Jack presiding. In *Campbell-Cherry* approximately 4,200 plaintiffs were involved in litigation filed in the Circuit Court of Noxubee County, Mississippi against 131 unrelated defendants. Here, suit was filed on behalf of approximately 181 plaintiffs in both cases against 73 defendants. Agreed voluntary dismissals have been made in the instant case. Approximately 164 plaintiffs were dismissed promptly after remand and negotiations for

dismissal immediately began on the remaining 17 cases which were subsequently dismissed by agreed orders. Despite the agreement to bear their own costs, 12 of the 73 defendants filed motions for sanctions and 8 of the 12 defendants elected to file this appeal.[1] As this Court noted with emphasis in *Campbell-Cherry,* as shown by this italicized finding, *Judge Jack...remanded the CCHDD Plaintiffs to the Mississippi State Court on June 30, 2005 for lack of subject matter jurisdiction.* ***She criticized the opinions supporting the silicosis claims,*** *despite her admitted lack of jurisdiction to render ruling as to the cases except to remand."*

The same dispositive issue is involved in this appeal as was involved in the *Campbell-Cherry* appeal: "Whether the trial court erred in denying the defendant's motions for sanctions against the O'Quinn Law Firm under *The Litigation Accountability Act of 1988.*"

POINT 1

THE STANDARD OF REVIEW IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION.

In *Campbell-Cherry*, this Court followed its decision in Scruggs v. Saterfiel, 693 So.2d 924, 927 (Miss. 1997). This Court noted that Mississippi Code Annotated Section 11-55-3(a) provides that a claim is without substantial justification when it is "frivolous, groundless in fact or in law, or vexatious, as determined by the Court." Further, this Court specifically approved the following holding in Scruggs v. Saterfiel, *supra:* "When reviewing a decision regarding the imposition of sanctions pursuant to the Litigation Accountability Act, ***this Court is limited to consideration of whether the trial court abused its discretion."*** In the instant cases the Lower Court found:

[1] The O'Quinn Law Firm represented 2400 similarly situated plaintiffs in the State of Mississippi and following this Court's ruling in Mangialardi and Canadian National filed agreed orders of dismissal in each of those cases. It is noteworthy this limited group of defendants filed motions for sanctions in just these two cases before Judge Patrick subsequent to filing agreed orders of dismissal.

1. "That the record reflects that the plaintiff's attorneys relied upon a nationally accepted method used in prior mass tort cases, i.e. mass screening of persons who potentially may have a silica claim, due to injuries incurred as a result of exposure to silica...

2. ..."That these mass screenings were conducted by a physician, Dr. Harron, who had obtained a national certification to do such screenings."

3. "That such screenings were accepted by the courts of Mississippi as the indicia of reliability, an attorney, who represented a potential plaintiff, could rely on them prior to filing his claim in a court in Mississippi." Exhibit A is the trial court's findings and rulings.

The record in this case clearly shows the basis for this finding and establishes that the lower court did not commit manifest error. A history of exposure to silica was taken. Appellee respectfully submits that the involvement of the O'Quinn Law Firm in obtaining and confirming the history of exposure was prudent and proper due diligence. Clear indications of silicosis had to be found before the O'Quinn firm would represent a client. Important steps were taken in the O'Quinn attempt to validate the claims. Those steps include:

1. A screening company, N & M, Inc. was retained to assist them. Any potential clients meeting the criteria required by the then medical literature would be accepted.

2. The most important step of securing x-ray findings was taken in each instance.

3. Latency and work history was established and confirmed. O'Quinn Law Firm required potential clients have occupational exposure to silica with appropriate latency.

4. A B-reader is a physician certified by the National Institute for Occupational Safety and Health, a U.S. governmental agency that is a part of the Center for Disease Control and Prevention. A B-reader was employed by the screening company of N & M, Inc. This process had been used for years in mass tort litigation as a mechanism of properly determining whether a party has a claim.

5. In addition to the exposure history, the x-ray, analysis by a B-reader, each party had a physical examination and/or a pulmonary function test performed and a medical report by the diagnosing physician was given.

The lower court properly found that the O'Quinn Law Firm received bonified diagnoses of silicosis at the time that the suit was filed.

A copy of the documentation filed by the O'Quinn Law Firm showing these facts upon which the court based its ruling is attached as Exhibit B, and incorporated herein by reference. Clearly, the lower court did not commit manifest error in its findings. When the facts involved in the screening process described by this Court in its *Campbell-Cherry* opinion are set forth, the facts in these instant cases clearly constitute a mirror image of appropriate diagnostic processes.

POINT 2

THE LOWER COURT PROPERLY REFUSED TO FOLLOW THE ADVISORY OPINION OF THE MDL COURT WHICH LACKED SUBJECT MATTER JURISDICTION.

The lower court found and properly ruled "that the record reflects that subsequent to the Daubert Hearings in federal court in Texas, the plaintiffs and attorneys entered into negotiations with the defendants to dismiss all applicable cases in this state, including the cases *sub judice.*" In *Campbell-Cherry*, the Court noted that, as in the instant case, the suits were brought pursuant to the then current Mississippi joinder rules, based on recent opinions in the area of joinder. At the time suit was filed, the plaintiffs did not have the benefit of this Court's holding in *Mangialardi, supra.* The decision by this Court clarified the application of joinder pursuant to the Mississippi Rules of Civil Procedure 20. Of the approximately 181 plaintiffs who filed in each case, 164 were promptly dismissed by an Agreed Order and negotiations were immediately commenced (as the lower court properly found) for dismissal of the remaining 17 plaintiffs' cases. Agreed Orders of Dismissal are attached as Exhibit C for the Court's ready reference.

As this Court noted in *Campbell-Cherry*, and as it was specifically ruled in Bean v. Boussard, 587 So.2d 908, 912 (Miss. 1991), sanctions are not justified if the plaintiffs had some hope of success when the suits were filed. After the detailed screening process, each plaintiff had more than a hope of success when suit was filed. After *Mangialardi* and the clarification of the law on joinder, and the cases were remanded, the cases were dismissed primarily through agreed orders as shown by Exhibit C, attached hereto. The suits filed were not frivolous or vexatious, but were grounded in law and fact. The suits were filed with strong hope of success based upon the law at that time and the well established screening mechanism.

Clearly there had not been any delay for an unreasonable period of time. Most significantly, there has not been a single case in which the suit has been shown to be fraudulent, frivolous, or vexatious. Appellants do not cite to any individual plaintiff who did not have the diagnosed silicosis. Again, the facts in this case are a mirror image of *Campbell-Cherry*. Dates outlined in the procedural history of *Campbell-Cherry* are virtually the same here. This Court noted in *Campbell-Cherry* "based on the background of the case, including its long history of transfers and the period of time allowed by the MDL Court for discovery, we fail to see how CCHDD plaintiffs delayed the litigation for purpose of harassment. The grounds for the dismissal were based on a recent clarification of the law in Mississippi regarding joinder pursuant to Mississippi Rules of Civil Procedure 20."

POINT 3

THE RULINGS OF JUDGE JACK DO NOT CONSTITUTE COLLATERAL ESTOPPEL, LAW OF THE CASE, OR JUDICIAL ESTOPPEL.

As this Court noted in *Campbell-Cherry* "the defendants also maintained that Judge Howard was bound by the doctrine *res judicata* to adopt the rulings of Judge Jack. Judge Howard expressly rejected the defendant's position. The doctrine of *res judicata* applies 'only to

questions actually litigated in the prior suit, and not the questions which might have been litigated.' *Mayor and Board of Aldermen v. Home Builders Association of Mississippi*, 932 So.2d 44, 59 (Miss. 2006)....'*Res judicata* reflects the refusal of the law to tolerate a multiplicity of litigation. Here the CCHDD plaintiffs raised the issue of subject matter jurisdiction, and the MDL Court agreed. Under the facts of this case, Judge Howard found that since Judge Jack had admittedly lacked subject matter jurisdiction, the Circuit Court was not bound by her rulings in the CCHDD plaintiffs on remand. See *Rayner v. Ratheon & Company*, 858 So.2d 132, 138 (Miss. 2003) (citing *Home Builders Association of Mississippi, Inc. v. The City of Madison,* Miss. 143 F.3d 1006 (5th Cir. 1998). (The federal court's comments regarding the merits of Rayner's claims will not subject his new action to the doctrines of *res judicata* or claim preclusion because those 'comments' concerning the merit of his claims were made without subject matter jurisdiction and cannot be used against his new action.)" Clearly this Court's ruling was correct and is controlling on this issue.

The ruling of the Lower Court "that the record reflects that subsequent to the Daubert Hearing in the federal court in Texas, the plaintiff's attorneys entered into negotiations with the defendants to dismiss all applicable cases in this state, including the cases *sub judice*." This ruling clearly was not manifestly erroneous but was manifestly correct based upon the record establishing the relevant facts.

POINT 4

THE COURT WAS CORRECT IN NOT ALLOWING ADDITIONAL DISCOVERY.

This Court noted in *Campbell-Cherry* "as the record demonstrates, the discovery allowed by Judge Jack in the MDL federal court provided sufficient discovery for the circuit court to proceed with the motions for sanctions. Judge Howard conducted a hearing on the defendant's motions for sanctions. At the conclusion of the hearing, Judge Howard reserved his ruling. After

examination of the record, Judge Howard declined to award sanctions against CCHDD and he denied the request for additional discovery. Finding no abuse of discretion in the circuit court's ruling, we hold that this assignment of error is without merit." Similarly, Judge Patrick considered identical issues in these cases. After considering the evidence and oral argument, he likewise did not abuse his discretion in refusing to allow additional discovery since the discovery conducted in the MDL federal court is clearly adequate. There is no manifest error in this ruling.

CONCLUSION

The facts and law in these cases are a mirror image of the facts and law in the *Campbell-Cherry* case. Appellees respectfully submit that the decision in *Campbell-Cherry* is *res judicata* and respectfully request that the ruling of the lower court in denying the motion for sanctions be affirmed.

Respectfully submitted this 29th day of February, 2008.

THE O'QUINN LAW FIRM

BY: _____
DEWITT T. HICKS, JR. MSB [redacted] OF COUNSEL:

Hicks & Smith, PLLC
710 Main Street
Regions Bank, Second Floor
P. O. Box 1111
Columbus, MS 39703
(662) 243-7300
(662) 317-1485 Facsimile

CERTIFICATE OF SERVICE

I Dewitt T. Hicks, Jr., do hereby certify that I have this day served, via U.S. First Class Mail, a true and correct copy of the foregoing pleading to the following:

Fred Krutz, Esq.
Edwin S. Gault, Jr. Esq.
Daniel J. Mulholland, Esq.
Brian B. Hannula, Esq.
FORMAN PERRY WATKINS KRUTZ & TARDY, LLP
Post Office Box 22608
Jackson, Mississippi 39201-4099

Abel Manji
THE O'Quinn Law Firm
2300 Lyric Center Bldg.
440 Louisiana Street
Houston, TX 77002

Ramel L. Cotton, Esq.
Roy K. Smith, Esq.
SMITH RUSHING COTTON & ROBINSON
4793 McWillie Drive
Post Office Box 9366
Jackson, MS. 39286-9366

Darrell L. Barger
HARTLINE, DACUS, BARGER, DREYER & KERN, L.L.P.
800 North Shoreline Blvd
Suite 2000 – North Tower
Corpus Christi, TX 78401

Hon. Isadore Patrick
Warren County Circuit Court
Post Office Box 351
Vicksburg, Mississippi 39181

This the 29th day of February, 2008.

DEWITT T. HICKS, JR.

APPENDIX

Tab 1	**Exhibit A**	Trial Court's Findings and Ruling
Tab 2	**Exhibit B**	Documentation filed by O'Quinn Law Firm upon which the Court based its ruling
Tab 3	**Exhibit C**	Agreed Orders of Dismissal