IN THE SUPREME COURT OF MISSISSIPPI

CLARK SALES & RENTAL, INC., ET AL., DEFENDANTS-APPELLANTS

V. No. 2006-CA-01577

JAMES BRAXTON, ET AL. PLAINTIFFS-APPELLEES

CONSOLIDATED WITH

AEARO, ET AL. DEFENDANTS-APPELLANTS

V. No. 2006-CA-01582

JAMES E. MCDUFF, ET AL. PLAINTIFFS-APPELLEES

On Appeal from the Circuit Courts of Issaquena and Sharkey Counties, Mississippi
Cause No. – 02-0016
Cause No. – 02-101

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS

Fred Krutz, MBN [redacted]
Edwin S. Gault Jr., MBN [redacted]
Daniel J. Mulholland, MBN [redacted]
Brian B. Hannula, MBN [redacted]
Forman Perry Watkins Krutz
& Tardy LLP
200 South Lamar Street, Suite 100
Post Office Box 22608
Jackson, MS 39225-2608
Telephone: 601-960-8600
COUNSEL FOR DEFENDANTS-
APPELLANTS ON APPENDIX A

ORAL ARGUMENT REQUESTED

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This Court has asked the parties for supplemental briefing addressing what impact, if any, its decision in *Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Dove*, 965 So.2d 1041, 1049 (Miss. Oct 04, 2007) has on this appeal. In short, the Court's reasoning in *Choctaw* for affirming the lower court's (the "Campbell Cherry court") denial of sanctions warrants the exact opposite result here – *i.e.* this Court should reverse the lower court in this matter (the "O'Quinn court") because of its erroneous refusal to sanction O'Quinn.[1]

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[1] In its Motion to File a Supplemental Brief and to Reschedule Oral Argument, O'Quinn argued that it should be permitted to "file an amended brief" to (1) set forth "critical facts" and "significant points of law" that it failed to include in its original briefing and (2) address the Court's decision in *Choctaw*. Because briefing in this case was complete on September 24, 2007 and this Court handed down *Choctaw* on October 4, 2007, the Court granted the parties the right to address *Choctaw's* impact on this appeal. But to the extent that O'Quinn attempts to use this opportunity to

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At issue in both this case and in *Choctaw* is defendants' requests for sanctions against the law firms of O'Quinn, Laminack & Pirtle, LLP ("O'Quinn") and Campbell-Cherry-Harrison-Davis and Dove ("Campbell Cherry"), respectively. These cases are factually similar in many respects because they both relate to fraudulent conduct by a number of plaintiffs' counsel in filing thousands upon thousands of claims based upon false diagnoses of silicosis. This phenomenon – and plaintiffs' counsel's role in creating it – was first uncovered during a three-day evidentiary hearing conducted by Judge Janis Graham Jack presiding over the federal silica Multi-District Litigation, Case Number 1553 ("MDL Court"). As noted in our prior briefing, Judge Jack extensively detailed her findings regarding the fictitious silicosis epidemic, which she determined had been "manufactured for money," in *In re Silica Prods. Liability Litig.*, 398 F. Supp. 2d 563, 581-82 (S.D. Tex. 2005) ("*In re Silica MDL*").

Notwithstanding the many substantive similarities shared by the two cases, however, it is the ***procedural*** distinctions regarding the MDL Court's subject matter jurisdiction over O'Quinn and Campbell Cherry that compel a different outcome here on sanctions than was the result in *Choctaw*.

In *Choctaw*, this Court determined that the Campbell Cherry court "correctly found that since Judge Jack admittedly lacked subject-matter jurisdiction, the [Campbell Cherry] court was not bound by her rulings as to the Plaintiffs on remand." *Choctaw*, 965 So.2d at 1049. As a result, the Campbell Cherry court was free to make its own findings regarding Campbell

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address facts and legal arguments that it failed to raise during the original briefing, Defendants-Appellants respectfully request that the Court disregard such argument on the grounds that they are not timely raised.

Cherry's conduct, which it did. The Campbell Cherry court ultimately found that Campbell Cherry's conduct was objectively reasonable and not subject to sanctions. Analyzing those new findings under an abuse of discretion standard, this Court determined that the Campbell Cherry court did not err in declining to sanction Campbell Cherry based upon those new findings.

But here, if this Court employs the same analysis as in *Choctaw*, a decidedly different outcome results: it is precisely because Judge Jack sanctioned O'Quinn that her findings have *res judicata* and collateral estoppel effect and should have been applied. As this Court stated "[t]he doctrine of *res judicata* 'applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated'" and "reflects the refusal of the law to tolerate a multiplicity of litigation." *Id.* (citations omitted). More specifically, *res judicata* requires the presence of four identities, all of which are satisfied with respect to the application of the MDL Court's findings to O'Quinn: "(1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made." *Pro-Choice Miss. v. Fordice*, 716 So. 2d 645, 665 (Miss. 1998); *Dunaway v. W.H. Hopper & Associates, Inc.*, 422 So. 2d 749, 751 (Miss. 1982).

There is no disputing that Judge Jack actually sanctioned O'Quinn in connection with the *Alexander* case, which was filed by O'Quinn in the Southern District of Texas and included approximately 100 of O'Quinn's 2,000+ silicosis clients. The *Alexander* case is virtually identical to the cases before this Court and O'Quinn represented the interests of all of its clients as a collective whole. O'Quinn does not contest the fact it fully participated in the MDL Court proceedings on behalf of all its clients, nor the fact that it chose not to appeal the MDL Court's

decision, but rather it paid the sanctions. Thus, *Choctaw* and *Rayner v. Ratheon Co.*, 858 So. 2d 132, 1138 (Miss. 2003) do not control here.[2]

But even though the MDL Court's findings should have been given *res judicata* or collateral estoppel effect, the O'Quinn trial court refused to do so with no explanation.[3] Instead, the O'Quinn court denied an evidentiary hearing and further discovery and made its own conclusions about the propriety of O'Quinn's conduct based solely on the briefs and oral argument by the parties. As contrasted below, these new findings are fundamentally at odds with Judge Jack's findings:

- Whereas the O'Quinn trial court summarily concluded that O'Quinn's screening process was "a nationally accepted method used in prior mass tort cases" (ARE Tab B; BR 1971; MR 1340), the MDL Court held (after hearing three days of evidence) that O'Quinn's methodology in obtaining silicosis diagnoses was anything but acceptable. Indeed, after detailing the screening process specifically employed by O'Quinn, Judge Jack concluded that it was an "ingenious method of grossly inflating the number of positive diagnoses" and "more the creation of lawyers than of doctors." *See In re Silica MDL*, 398 F. Supp. 2d at 634-35.

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[2] In *Rayner*, which is cited in *Choctaw* as support for not applying *res judicata* to the MDL Court's findings with respect to Campbell Cherry, this Court declined to apply the doctrine of *res judicata* or claim preclusion to "comments" made by a federal court that lacked jurisdiction. *Rayner*, 858 So. 2d at 1138. Here, Judge Jack's lengthy opinion cannot be considered mere "comments" about O'Quinn's conduct, over whom the MDL Court did have subject matter jurisdiction.

[3] Indeed, the O'Quinn court's only reference to the MDL Court's findings is its erroneous assertion that Judge Jack did not sanction O'Quinn merely because "the Plaintiff's expert in the Daubert hearing, Dr. Harron, refused to testify at the said Daubert hearing." (ARE Tab B; BR 1971; MR 1340.) Rather, that court sanctioned O'Quinn because of "the fact that Plaintiffs' counsel such as O'Quinn filed scores of claims without a reliable basis for believing that their clients had a compensable injury. . . ." *In re Silica MDL*, 398 F. Supp. 2d at 677 (citation omitted).

- Whereas the O'Quinn trial court held that an attorney could rely on the screening process "conducted by a physician" (ARE Tab B; BR 1972; MR 1341) the MDL Court found that O'Quinn's direct and extensive involvement in the diagnosing process precluded them from relying upon the doctors in order to shield themselves from responsibility:

> This is especially true because O'Quinn itself provided the inadequate occupational and exposure histories underlying the purported diagnoses. Once O'Quinn donned a lab coat and injected itself into the diagnostic process, it is reasonable to charge them with knowledge both of what is required for a medically-acceptable diagnosis, and of how far their diagnoses strayed from that standard. *In re Silica MDL*, 398 F. Supp. 2d at 675-76.

- Whereas the O'Quinn trial court found that "it has insufficient proof before it, other than suppositions, that would warrant sanctions" against O'Quinn (ARE Tab B; BR 1972; MR 1341), the MDL Court concluded that O'Quinn had gone about "filing and then persisting in the prosecution of silicosis claims while recklessly disregarding the fact that there is no reliable basis for believing that every Plaintiff has silicosis." *In re Silica MDL*, 398 F. Supp. 2d at 676. Judge Jack found it inconceivable that O'Quinn was not aware of the dubious nature of their claims at the time of filing:

> [I]t should have been apparent to O'Quinn in late-2003, as it was preparing to file a case with 100 Plaintiffs, all Mississippi or Alabama residents, that it was medically implausible for the Plaintiffs' silicosis diagnoses to have been accurate. . . . When considering the fact that O'Quinn not only filed the 100-Plaintiff *Alexander* case, but also was in the process of filing silicosis cases for over 1,900 other Plaintiffs (almost all of whom were Mississippi or Alabama residents), then the implausibility should have been even more starkly apparent.

In re Silica MDL, 398 F. Supp. 2d at 674-75. Based upon this, the Court found that "even at the time of *Alexander's* filing, O'Quinn exhibited a 'reckless disregard of the duty owed

to the court.'" *Id.* (citations omitted). The MDL Court found that O'Quinn's objective was simply to:

> inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system. This is apparently done in hopes of extracting mass nuisance-value settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim in the usual manner. *Id.*

Had the O'Quinn trial court applied the MDL Court's findings pursuant to *res judicata* and/or collateral estoppel principles, it should have concluded that sanctions against O'Quinn are warranted under the Mississippi Litigation Accountability Act. The Litigation Accountability Act plainly states that if the action or claim is "frivolous, groundless in fact or in law, or vexatious, as determined by the court," it lacks substantial justification and the party or attorney must be sanctioned. Miss. Code Ann. § 11-55-3(a) (1999). Thus, because the MDL Court already found that O'Quinn ""fil[ed] and then persist[ded] in the prosecution of silicosis claims while recklessly disregarding the fact that there is no reliable basis for believing that every Plaintiff has silicosis," the O'Quinn court committed reversible error by failing to apply those findings and declining to sanction O'Quinn pursuant to the Litigation Accountability Act.

Respectfully submitted,

Fred Krutz, MBN [redacted]
Edwin S. Gault Jr., MBN [redacted]
Daniel J. Mulholland, MBN [redacted]
Brian B. Hannula, MBN [redacted]

Forman Perry Watkins Krutz
& Tardy LLP
200 South Lamar Street, Suite 100
Post Office Box 22608
Jackson, MS 39225-2608

Telephone: 601-960-8600

COUNSEL FOR DEFENDANTS-
APPELLANTS ON APPENDIX A

CERTIFICATE OF SERVICE

I, Fred Krutz, one of the counsel for Defendants-Appellants in this appeal, hereby certify that I have this day caused to be mailed, U. S. Mail, first class postage prepaid, a copy of the foregoing Supplemental Brief of Defendants-Appellants to the following interested parties:

Abel Manji, Esq.
The O'Quinn Law Firm
440 Louisiana, Suite 2300
Houston, TX 77002

Dewitt T. Hicks, Jr., Esq.
Hicks & Smith, PLLC
P.O. Box 1111
Columbus, MS 39703

Honorable Isadore W. Patrick, Jr.
P. O. Box 351
Vicksburg, MS 39181-0351

This the 3rd day of March, 2008.

Fred Krutz