IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-IA-00565-SCT

BARTHEL D. WAGGONER AND
JACQUELINE M. WAGGONER — APPELLANTS

VS.

EDWARD A. WILLIAMSON, INDIVIDUALLY;
EDWARD A. WILLIAMSON, P.A.; and
MICHAEL J. MILLER — APPELLEES

BRIEF OF THE APPELLEES EDWARD A. WILLIAMSON, INDIVIDUALLY AND EDWARD A. WILLIAMSON, P.A.

Respectfully submitted on the 3rd day of January, 2008

James P. Streetman, III, MSB#[redacted]
Matthew A. Taylor, MSB #[redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, MS 39157
P.O. Box 13847
Jackson, Mississippi 39236
Telephone: 601-607-4800
Facsimile: 601-607-4801
mtaylor@sssf-ms.com

ATTORNEYS FOR EDWARD A. WILLIAMSON
and EDWARD A. WILLIAMSON, P.A.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-IA-00565-SCT

BARTHEL D. WAGGONER AND JACQUELINE M. WAGGONER — **APPELLANTS**

VS.

EDWARD A. WILLIAMSON, INDIVIDUALLY; EDWARD A. WILLIAMSON, P.A.; and MICHAEL J. MILLER — **APPELLEES**

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Barthel D. Waggoner and Jacqueline M. Waggoner, Natchez, Mississippi. Plaintiffs - Appellants

2. Edward A. Williamson and Edward A. Williamson, P.A., Philadelphia, Mississippi, Defendants - Appellees.

3. Michael J. Miller, Alexandria, Virginia, Defendant - Appellee.

4. Honorable Forrest A. Johnson, Circuit Judge for Adams County, Mississippi.

5. David Jefferson Dye, Esquire, David Jefferson Dye, L.L.C., 1204 Napoleon Avenue, New Orleans, Louisiana 70115. Attorney of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

6. Gregg L. Spyridon, Esquire, and Philip G. Smith, Esquire, Spyridon, Palermo & Dornan, L.L.C., 3838 North Causeway Boulevard, Suite 3010, Metairie, Louisiana 70002. Attorneys of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

7. James P. Streetman, III, Esquire and Matthew A. Taylor, Esquire, Scott, Sullivan, Streetman & Fox, P.C., Post Office Box 13847, Jackson, Mississippi 39236. Attorneys of record for Edward A. Williamson and Edward A. Williamson, P.A., Defendants - Appellees.

8. Those unsecured creditors identified within *In RE: Michael J. Miller,* No.07-02462, U. S. Bankruptcy Court for the Southern District of Mississippi.

Respectfully submitted on the 3rd day of January, 2008, by:

James P. Streetman, III, MSB#[redacted]
Matthew A. Taylor, MSB #[redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, MS 39157
P.O. Box 13847
Jackson, MS 39236
Telephone: 601-607-4800
Facsimile: 601-607-4801
mtaylor@sssf-ms.com

ATTORNEYS FOR EDWARD A. WILLIAMSON
and EDWARD A. WILLIAMSON, P.A.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2007-IA-00565-SCT

BARTHEL D. WAGGONER AND JACQUELINE M. WAGGONER — **APPELLANTS**

VS.

EDWARD A. WILLIAMSON, INDIVIDUALLY; EDWARD A. WILLIAMSON, P.A.; and MICHAEL J. MILLER — **APPELLEES**

AMENDED CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Barthel D. Waggoner and Jacqueline M. Waggoner, Natchez, Mississippi. Plaintiffs - Appellants

2. Edward A. Williamson and Edward A. Williamson, P.A., Philadelphia, Mississippi, Defendants - Appellees.

3. Michael J. Miller, Alexandria, Virginia, Defendant - Appellee.

4. Honorable Forrest A. Johnson, Circuit Judge for Adams County, Mississippi.

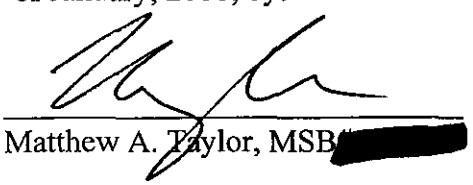
5. David Jefferson Dye, Esquire, David Jefferson Dye, L.L.C., 1204 Napoleon Avenue, New Orleans, Louisiana 70115. Attorney of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

6. Gregg L. Spyridon, Esquire, and Philip G. Smith, Esquire, Spyridon, Palermo & Dornan, L.L.C., 3838 North Causeway Boulevard, Suite 3010, Metairie, Louisiana 70002. Attorneys of record for Barthel D. Waggoner and Jacqueline M. Waggoner, Plaintiffs - Appellants.

7. James P. Streetman, III, Esquire and Matthew A. Taylor, Esquire, Scott, Sullivan, Streetman & Fox, P.C., Post Office Box 13847, Jackson, Mississippi 39236. Attorneys of record for Edward A. Williamson and Edward A. Williamson, P.A., Defendants - Appellees.

8. Those unsecured creditors identified within *In RE: Michael J. Miller,* No.07-02462, U. S. Bankruptcy Court for the Southern District of Mississippi.

Respectfully submitted on the 4TH day of January, 2008, by:



Matthew A. Taylor, MSB[redacted]

James P. Streetman, III, MSB[redacted]
Matthew A. Taylor, MSB #[redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, MS 39157
P.O. Box 13847
Jackson, MS 39236
Telephone: 601-607-4800
Facsimile: 601-607-4801
mtaylor@sssf-ms.com

ATTORNEYS FOR EDWARD A. WILLIAMSON
and EDWARD A. WILLIAMSON, P.A.

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

III. SUMMARY OF THE ARGUMENT

The instant action is a contract claim arising from Ed Williamson's representation of Barthel Waggoner as a plaintiff in a lawsuit filed in the Circuit Court of Holmes County, Mississippi, styled as *Annette Williams, et al. v. American Home Products*, Cause number 000-207. All claims and allegations asserted in this case flow from the contractual relationship between the parties in *Williams* litigation. The trial court correctly applied the principles of contract law in awarding partial summary judgment to Defendant.

In their *Amended Complaint*, Plaintiffs asserted claims of (1) breach of fiduciary duty; (2) breach of contract; (2) breach of contract; and (3) negligent misrepresentation. On March 27, 2006, the trial court granted summary judgment in favor of Williamson and Michael J. Miller as to the claims of breach of contract and negligent misrepresentation as to the breach of fiduciary duty of loyalty claim, the Waggoners' assert that Williamson charged an unreasonable fee and taxed unreasonable expenses. On that claim the trial court granted summary judgment in part and denied in part, finding that a genuine issue of material fact existed only as to the expenses charged in the underlying litigation.

In the hearing on Williamson's Motion for Summary Judgment, Judge Johnson specifically clarified the Court's summary judgment award:

> So in summary, the Court is going to grant Summary Judgment as to the other matters of this lawsuit: Portions of the amount of the settlement, the attorney's fees, the MDL fees, the MTLA contribution. The Court is going to deny it as to the expenses for the reasons set out, and it still remains as a matter of proof as to the propriety of these other expenses and how they came about, and in litigation will remain in effect as to these items of expenses as the Court has not granted Summary Judgment to. (T.R. p.76).

First and Foremost, as noted by the court below, this is a contract case. Waggoner agreed to the terms of his settlement, all deductions and the disbursement amount, as evidenced by his

signing of the Disbursement Statement. All claims alleged in this case flow from the Representation Agreement for representation in the underlying Phen-fen litigation and the Disbursement Statement which was executed by the client. If this Court reverses the lower Court's partial summary judgment award, all attorney contingency agreements in this State will be subject to invalidation. Given the contractual agreement between the parties, the trial court's summary judgment was appropriate and should be affirmed.

Factual Statement

The instant lawsuit relates to Ed Williamson's representation of Barthel Waggoner as a plaintiff in a certain lawsuit filed in the Circuit court of Holmes County, Mississippi, styled as *Annette Williams, et al. v. American Home Products, Cause number 000-207.* In the *Williams* case, Williamson represented thirty-one (31) Mississippi claimants who alleged injuries as the result of ingestion of the prescription diet drugs Phen-fen and Redux. Given the complex nature and difficulty of the litigation, Williamson associated Defendant, Michael Miller and Edward Blackman to assist in the trial and settlement of the case.

In the early morning hours of April 21, 2000, immediately prior to the start of trial, the parties to the *Williams* case reached a settlement. On behalf of Barthel Waggoner, a gross settlement of $3,008,961.75 was negotiated. Following deduction of attorney's fees and expenses, Waggoner received a net award of $1,472,100.50. Waggoner also received a refund of $4,970.00 for unused funds which were reserved for common benefit expenses on a pro-rata basis from each client, and a $30,089.62 refund from a Multi-District Litigation ("MDL") fee assessment.

In the settlement of the *Williams* case, each underlying claimants' claims were individually evaluated, litigated and settled. In the case of Barthel Waggoner, settlement authority of $600,000

was extended for net recovery, after fees and expenses. Because of the outstanding performance and negotiation skills of counsel, Waggoner ultimately received a net recovery of $1,472,100.50. Pursuant to the terms of the Representation Agreement, executed by Waggoner, the attorneys would be entitled to a forty-five percent (45%) contingency fee. The contingency fee was shared by Ed Williamson, Michael Miller and Edward Blackmon, with Mr. Blackmon receiving twenty percent (20%) of the fees, and the remaining fee split between Mr. Williamson and Mr. Miller, seventy percent (70%) and ten percent (10%), respectively.

On June 25, 2001, Barthel Waggoner executed a Disbursement Statement, specifically itemizing the fees, expenses and deductions from the gross settlement award. Expenses associated with the litigation of the Williams case were divided into case-specific expenses for each claimant and generic expenses, divided on a pro-rata basis. In Waggoner's case, he was taxed case specific expenses in the amount of $15,041.64 and generic expenses of $47,475.10. In addition to litigation expenses related directly to Ed Williamson's work in the litigation of the *Williams* Phen-fen lawsuit, every client was assessed a fee of six percent (6%) pursuant to MDL Order 1203. The money was deducted from the gross settlement by American Home Products before the settlement money was transferred to the settlement fund. Three percent (3%) of the MDL Fee was assessed as expenses and 3% was deducted directly from attorneys' fees. The MDL Fee deduction was paid into a fund established by the Court to fund the MDL Phen-fen litigation. From this fund, Williamson was able to obtain discovery from the MDL Phen-fen litigation, which was used in the underlying *Williams* case. Following the settlement of the *Williams* case, Judge Bartle, overseeing the national MDL litigation, determined that there was an excess in the MDL Fund and ordered a refund of 1/3 of the MDL deductions from state cases. Therefore, the MDL deduction in the *Williams* case, and

specifically for Barthel Waggoner, was reduced from 6% to 4%. Therefore, the clients received a refund of their MDL deduction, which, in Barthel Waggoner's case, was $30,089.62.

Finally, Barthel Waggoner approved a voluntary contribution of two percent (2%) of his recovery for a contribution to the Mississippi Trial Lawyers' Association Political Action Fund. This contribution was made by Waggoner, voluntarily, to assist future litigants in like cases.

In their *Amended Complaint*, the Waggoners assert the claims of (1) breach of fiduciary duty; (2) breach of contract; and (3) negligent misrepresentation.

IV. ARGUMENT

A. Preliminary Statement

In their Appellants' Brief, the Waggoners assert numerous alleged facts and authorities which were not before the trial court. The Appellants' Brief is not in compliance as it presents arguments, authorities and allegations which were not part of the summary judgment motion, response and briefs from which this appeal is sought. The Court should properly ignore any and all authorities and allegations which were not contained in the original pleadings.

B. Summary Judgment is Appropriate as to Waggoner's Claim of Breach of Contract

1. Waggoner executed a valid contingency contract

In rendering partial summary judgment, the trial court found that Waggoner executed a valid contingency contract and that various deductions from their gross settlement amount were provided by contract. If this Court affirms that Waggoner executed a valid contract, then Mississippi contract law applies, and all deductions agreed to therein were proper. Additionally, the net settlement amount distributed to Waggoner, after deductions is a product of contract. Simply, Waggoner agreed to the amounts, both distribution and deductions, and executed valid and binding contracts of agreement for same. Said contracts should be honored and not invalidated.

Under Mississippi law, a contract between a lawyer and client, including a fee contract, should be construed "as a reasonable person in the circumstances of the client would have construed it." *Tyson v. Moore*, 613 So.2d 817 (Miss. 1993) (citing *American Law Institute, Restatement (Third) of the Law Governing Lawyers* (T.D. No. 5 § 29A(2) (1992)). Accordingly, this Court must examine the contract at issue within its "four corners" and construe it "as a reasonable person in the circumstances of the client would have done." *Id.*

Further, the *Mississippi Rules of Professional Conduct* contain specific guidelines applicable to determining whether a contingency fee agreement is appropriate. Pursuant to *MRCP* 1.5(c):

> every contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

MRCP 1.5 (c).

The fee agreement executed by Waggoner for representation in the underlying *Williams* case provides that attorneys involved will be compensated on a gross basis and that the costs and expenses involved with the pursuit of his claim would come out of the claimants share of recovery:

> In the event of any recovery had by, settlement obtained for, or payment made to the client(s) in connection with the above referred to claim or right of action, Edward A. Williamson, shall be entitled to and shall be paid a percentage of the gross proceeds in accord with the following schedule.

(E. Vol. 1 pp. 3-6).

Further, Paragraph 6 of the Representation Agreement provides that "[A]ny such costs (of prosecuting Waggoner's claim), witness fees and expenses or litigation expenses advanced shall be deducted from the client(s) proceeds in the event of recovery."(E. Vol. 1 pp. 15-16). Based upon these provisions, the subject representation agreement clearly complies with the guidelines of *MRPC* 1.5(c). Plaintiffs have offered no proof which would demonstrate that a reasonable person, in the position of Waggoner, would construe any alternative meanings to the provisions of the Representation Agreement. In the absence of any ambiguity in the agreement, summary judgment as to the validity of the contract was appropriate as a matter of law.

There are no circumstances which serve to invalidate the subject Representation Agreement.

As stated here, the Representation Agreement contained an unambiguous statement of the attorneys fee and method for deduction of expenses.

2. The fee sharing agreement between the representing lawyers did not breach the Representation Agreement

Pursuant to *Mississippi Rule of Professional Conduct* 1.5(e), the division of fees between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer, *or* by written agreement with the client, each lawyer assumed joint responsibility for the representation; and (3) the total fee is reasonable. *MRPC* 1.5 (e) (emphasis added).

Pursuant to the Rule, a written agreement is not required to be signed by the client, unless each lawyer involved assumes joint responsibility for the representation. In the underlying *Williams* case, Williamson associated Michael Miller and Ed Blackmon as co-counsel for the plaintiffs; however, it is not disputed that Williamson was lead counsel and received seventy percent (70%) of the attorneys' fee due to his status in that position. The remaining attorney's fee was split between Blackmon and Miller, twenty percent (20%) and ten percent (10%), respectively.

As stated by expert witness, Michael Martz, Esq.:

Q. Did you review – Mr. Martz, did you review Rule 1.5(e) in preparation for today?

A. Fee-splitting? Yes.

Q. The division of fee between lawyers who are not in the same firm may be made only if the division is in proportion to the services performed by each lawyer. Is it your opinion that the – what is your opinion with respect to the proportion of services performed by each lawyer in this case?

A. What is my opinion?

Q. Yes.

A. Well, I'd have to rely on Mr. Williamson's determination that he was entitled to 70 percent, that Mr. Miller was entitled to 10 percent, and Mr. Blackmon was entitled to 20 percent. That seems reasonable to me, under the circumstances.

Q. Here by written agreement with the client, each lawyer assumes joint responsibility for the representation. Was there any – have you seen any written agreement with the client?

A. No. Nor have I seen any recommendation where it referenced that each attorney assumes joint responsibility for the representation. It's my understanding that Mr. Williamson was lead counsel.

* * *

Q. I'm trying to understand, Mr. Martz. Are you saying that the – you're not offering an opinion about whether there was improper fee sharing in this case?

A. Yes. I don't think there was improper fee sharing.

Even if a technical violation of *MRPC* 1.5(e) occurred, any such violation would not entitle Plaintiffs to any relief. Pursuant to Mr. Martz:

Q. Do you believe that Rule 1.5(e) was violated in this representation of the Waggoners?

A. I think it could be argued that there might be a technical violation of Rule 1.5(e), but in my opinion, I think there was substantial compliance, and there was sufficient substantial compliance by Mr. Williamson in order that he was able to render good, professional services to Mr. Waggoner.

Further, Plaintiffs own expert, Dane Ciolino has admitted that a violation of the *MRPC* does not necessarily translate to civil liability for lawyers.

A. . . . the scope of the Mississippi Rules of Processional Conduct just like the scope of the ABA rules, model rules, both make clear that a violation of the rules does not automatically translate into civil liability. It's just a factor to be considered in evaluation what the lawyer should have done or should not have done in any given case.

(E. vol. 1 p. 101).

In further support of the award of summary judgment, Plaintiffs failed to demonstrate that

Waggoner did not have knowledge of the joint representation between Williamson, Miller and Blackmon. Although numerous discussions with the underlying claimants regarding the joint representation, the joint representation occurred, was also extensively discussed at a joint claimant meeting informational conducted in Jackson, Mississippi during the course of the *Williams* Phen-fen litigation. (E. Vol. 1 p. 138). Moreover, Waggoner's knowledge of the joint representation with Miller and Blackmon is clearly evidence by his execution of the Disbursement Statement, which includes the following language:

> ...I further agree to hold the law offices of Miller & Associates, The Williamson Law Firm and Blackmon and Blackmon and any other attorney associated with my case harmless from any medical, hospital, nurses or other fees or claims which may exist now or in the future in connection with this matter.

(E. Vol. 1 pp. 3-6).

Based upon the knowledge of Waggoner and the foregoing analysis of *MRPC* 1.5(e), summary judgment was proper as a matter of law.

3. Williamson did not breach the terms of the Representation Agreement

In their *Amended Complaint*, Plaintiffs asserted that if the trial Court determined that the representation agreement executed by Waggoner in the underlying *Williams* case is a valid contingency fee contract, Williamson, nevertheless, breached the terms of the agreement by settling the Plaintiffs' claim against American Home Products without their knowledge, failing to provide a written statement and explanation of the resolution of the litigation, failing to provide a written statement of detailed expenses, and deducting Multi-District Litigation ("MDL") fees. In the court below, Plaintiffs failed to provide any evidence which would create a genuine issue of material fact as to each of theses allegations, and summary judgment was appropriate as a matter of law.

a. The settlement of the underlying litigation, deduction of fees and expenses and

disbursement of funds were done with the full knowledge of the Plaintiffs

Although Waggoner testified that he does not recall any discussions with the any member of the Waggoner law firm, the record is replete with evidence of correspondence which was forwarded to Waggoner from the Williamson Law Firm. Further, according to the testimony of Glenda "Kookie" Bowles, legal assistant for the Williamson Law Firm, Waggoner was in contact with the Williamson Law Firm and Mr. Williamson, personally, on a weekly basis early in the litigation and a daily basis in the weeks immediately prior to trial.

A. I want to say it was the month of March because Barthel was keeping pretty much just on a daily basis about that time because we were getting - - we were like in and out of negotiations during that time with Helen Madonick, and he had called on a daily basis to see how things were going. The - - Barthel did. And I guess this just kind of flashed in his mind.

* * *

Q. Specifically with respect to the trial and the jury selection process and what was taking place with - - with settlement negotiations and - - and during that one day, 48-hour, whatever it was, period there, what was Barthel's communication frequency with you - -

A. Oh - -

Q. - - personally?

A. - - gosh. Every two hours Barthel was calling. I told Barthel that Monday morning when he called, because he called about 8:00 or 8:30, somwhere right in there, right before we was having to go to court, and I said, "Well, Barthel, I got to go to court." I said, "They want to do some motions and stuff first and get them all oft of the way, and then they're going to start picking a jury."

* * *

A. Well, like I said, when it got closer to the trial, it would be "Are they in negotiations yet?"
"No, we hadn't got started yet."
"Well, when are they going to be in negotiations?"
Well, Wednesday before that Monday, they stated on negotiations, and then Barthel

was like - - and he'd call me a couple times a day - - and said, "Well, have they settled?"
"No, they hadn't settled yet."

(E. Vol. 4 pp. 460, 478).

Further, it is impossible for Plaintiffs to maintain that they did not receive an explanation of expenses or the resolution of the *Williamson* litigation. In addition to the Disbursement Statement, executed by the Plaintiffs on June 25, 2001, Plaintiffs were required to execute a Confidential Release, Indemnity and Assignment of claims against American Home Products which specifically explained and enumerated the details and scope of the settlement of the *Williams* case. (E. Vol. 7 pp. 955-963). Finally, Pursuant to the Order of the Circuit Court of Holmes County, establishing the Qualified Settlement Fund, Plaintiffs executed a Qualified Settlement Fund Settlement Agreement and General Release which provided a full and complete explanation of the terms and conditions of the Qualified Settlement Fund. (E. Vol. 7pp. 964-970). Plaintiffs offered no evidence that they questioned, nor objected to the terms of any of the referenced settlement documents. Further, Plaintiffs offered no evidence of any valid defenses which would invalidate any of the agreements. Based upon the Plaintiffs execution of the referenced documents, there is no genuine issue of material fact as to whether they had knowledge of all terms and conditions of the underlying settlement, and summary judgment was appropriate as a matter of law.

b. Deduction of MDL fees was required by law

Finally, Plaintiffs claim that the Representation Agreement was breached because of the deduction of Multi-District Litigation Fees is wholly without merit. During the course of the underlying *Williams* litigation, a national class-action Phen-fen case was pending in United States District Court for the Eastern District of Pennsylvania before the Honorable Louis C. Bartle.

Pursuant to MDL Order 1203 in the national litigation, every claimant in the state Phen-fen cases was to be assessed a fee of six percent (6%). Pursuant to the Court's Order, this fee was paid into a fund established by the Court to fund the MDL litigation. It was from this fund that Williamson was able to obtain the discovery materials from the MDL litigation, for use in the underlying Phen-fen case. Obtaining these materials saved the underlying claimants hundreds of thousands to millions of dollars in discovery costs.

In the settlement of the *Williams* case, the fee was deducted from the gross settlement by American Home Products before the settlement money was transferred to the settlement fund. Three percent (3%) of the fee was assessed as expenses and three percent (3%) deducted directly from attorney's fees. Following the settlement, Judge Bartle determined that there was an excess in the MDL fund and ordered a refund of 1/3 of the MDL deductions from the state cases. Therefore, the MDL deduction in the underlying case went from 6% to 4%. The clients then received a refund of their MDL deduction. Waggoner received a full refund pursuant to the Court's Order in the amount of $30,089.62. As Plaintiffs failed to demonstrate any merit to their claim of breach of contract based upon the deduction of MDL fees, summary judgment was appropriate as a matter of law.

C. Williamson is Entitled to Judgment as a Matter of Law on Plaintiff's Claim for Negligent Misrepresentation

Under Mississippi law, the elements of negligent misrepresentation are: (1) a misrepresentation or omission of fact; (2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public is entitled to expect of it; (4) that the plaintiff reasonably relied on the defendant's representations; and (5) that the plaintiff suffered damages as a direct and proximate result of his reasonable

reliance. *Skrmetta v. Bayview Yacht Club, Inc.* 806 So.2d 1120, 1124 (Miss. 2002) (citing *Spragins v. Sunburst Bank*, 605 So.2d 777, 780 (Miss. 1992)). In this case, Plaintiffs allege that Williamson misrepresented the terms and global nature of the settlement reached with American Home Products and the allocation of the settlement funds among the claimants. Specifically, pursuant to the testimony of Plaintiffs' expert witness, Dane Ciolino, Esq., Williamson breached the provisions of *Mississippi Rule of Professional Conduct* 1.8(g) in his the settlement of the underlying Phen-fen litigation.[1]

Pursuant to Rule 1.8(g):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims or against the clients...unless each client consents after consultation, including disclosure of the existence and nature of all the claims...and of the participation of each person in the settlement.

MRPC 1.8(g)

According to Plaintiffs, in order to comply with the requirements of Rule 1.8(g), Williamson should have informed each client, including Waggoner, of the nature of each other client's individual case against American Home Products and inform each of them of the amount of the other clients' individual settlements.

Despite Plaintiffs' assertions, the record clearly reflects that Williamson substantially complied with the requirements of Rule 1.8(g) because the disclosures given to Waggoner were adequate to protect his rights, as evidence by a net settlement amount over twice the value as the acceptable settlement authority given by Waggoner. Furthermore, Plaintiffs position fails to

---

[1] As previously stated, even if it is determined by this Court that a technical violation of the MRCP has occurred, such violation does not necessarily give rise to civil liability in tort. Plaintiff must prove the individual elements of each claim under Mississippi law.

account for the confidentiality requirements imposed upon Williamson in the settlement of the underlying case:

K. Confidentiality. The Claimant promises, covenants and agrees:

1. That neither Claimant, his/her family, his/her agents or representatives, nor his/her attorneys, their agents, representatives or employees, will disclose to any person or entity the amount of money paid in settlement of this case or any of the other terms and/or conditions of this Confidential Release relating to the settlement of these claims, except as may be necessary in the normal course and handling of this cause, as may be necessary to obtain tax advice regarding the settlement proceeds, as may be required by the applicable Rules of Civil Procedure or as may be necessary to comply with an order of the Court;

2. To keep the terms of this confidential Release strictly confidential and not to communicate the terms of this Confidential Release orally or in writing to any third party, except as permitted herein;

3. To respond to any inquiry from any print, television or other media source regarding: (i) the fact, existence, or terms of, and the negotiations and/or considerations leading to this Confidential Release with the statement (without elaboration), "No comment"; (ii) the merits of any case with the statement (without elaboration,), "No comment"; (iii) the status or disposition of any civil action with the following statement (without elaboration), The case has been continued and no new trial date has been set; or (iv) alternatively, if the civil action has been dismissed, to respond (again, without elaboration): The case has been dismissed;

4. To advise, or to have advised, any of their family members to whom they have made disclosures that such information is confidential and may not be disclosed;

5. To advise, or to have advised, all of their staff and employees to whom they have made disclosures that such information is confidential and may not be disclosed;

6. To take all necessary action to preserve the confidentiality of the terms of this Confidential Release, including but not limited to, filing motions and obtaining court order to close all future hearings and seal all future papers, when seeking court approval or otherwise referencing the terms of this Confidential Release in any civil action;

7. That any disclosure of the terms fo this Confidential Release is a material breach of this Confidential Release; and

8. That if Claimant knowingly breaches this confidentiality provision either directly or indirectly through its agents, representatives, employees or family members, then Claimant agrees to compensate AHP for the injury, loss or detriment suffered as a result of such breach. Claimant agrees that the amount of the damages sustained by such breach would be impractical or extremely difficult to determine and stipulates and agrees that such damages shall be set in the amount of Ten Thousand Dollars and No/100 ($10,000.00) for each such occurrence.

See (E. Vol. 7 pp. 955-963) (E. Vol. 7 pp. 964-970).

Further, Williamson provided Waggoner with as much detailed information as he could under limitations imposed by *MRPC* 1.6, which provide in pertinent part:

> Pursuant to Rule 1.6(a):
>
> A lawyer shall not reveal information, which is confidential or privileged by law, or relating to representation of a client, which a lawyer has reason to believe may be detrimental to the client or which client has requested not be disclosed.
>
> Pursuant to Rule 1.6(e):
>
> A lawyer may reveal such information to the extent required by law or court order.

Therefore, in order to fully and completely comply with all of the provisions of *MRPC* 1.8(g), Williamson would have had to seek and secure a waiver of the confidentiality and attorney-client privilege from each client and American Home Products. Plaintiffs offered no evidence which would support any actions or inaction in the disclosure of information which would constitute any claim of misrepresentation under the limitations imposed by law.

In addition, Plaintiffs failed to offer any evidence of any other alleged misrepresentations of Williamson which would support this claim. It is uncontradicted in the record of this case that Waggoner was fully informed as to every aspect of the litigation of the underlying case, including

discovery, pre-trial preparation and trial. Also, as Waggoner's claim against American Home Products was examined, litigated, negotiated and settled, individually, the procedure was accomplished with his full knowledge and consent. As Plaintiffs have failed to demonstrate a genuine issue of material fact as to their claim for negligent misrepresentation, summary judgment was required as a matter of law.

A. Partial Summary Judgment is appropriate as to Waggoner's claim of Breach of Fiduciary Duty

Plaintiffs allege that Williamson breached his fiduciary duty of loyalty by failing to act with utmost honesty, good faith, fairness, integrity and fidelity. Further, Plaintiffs assert that Williamson charged an unreasonable fee and taxed unreasonable expenses for the services rendered in connection with the *Williams* Phen-fen litigation. For the reasons stated, *infra*, Plaintiffs did not produced any evidence which demonstrated a genuine issue of material fact as to their claim of breach of fiduciary duty; and therefore, Williamson was entitled to summary judgment as a matter of law.

1. The settlement amount awarded to Waggoner was fair, reasonable and in excess of the settlement authority given

It is an uncontradicted fact that as a result of the efforts of Williamson in the litigation, negotiation and settlement of the *Williams* Phen-fen case, Waggoner was awarded a gross recovery of $3,008,861.75. Based upon Plaintiff's own admission in his deposition, there is no cause of action asserted for breach of fiduciary duty in reaching the gross settlement amount, as the recovery was fair and reasonable, given the extent of Plaintiff's injuries:

> Q. Do you believe that the over all settlement amount in $3,000,000.00 was fair as a gross settlement of your lawsuit?

A. If I had gotten my fair share it would have been very fair.

* * *

Q. My question is whether or not – but and excuse me, and it's not a question here today with regard to whether or not you think the goss amount of money is fair, because you've testified that you think the $3,000,000.00 as the gross amount is fair, is that right?

A. Yeah.

(E. Vol. 3 pp. 349).

As the gross settlement amount is not at issue in this litigation, there is no valid cause of action for breach of fiduciary duty in negotiating the settlement on his behalf.

In addition to Plaintiff's own admissions, it is an uncontradicted fact that the settlement amount negotiated on behalf of Plaintiff was in excess of settlement authority given. Based upon the deposition testimony of Ed Williamson, Plaintiff extended settlement authority in the amount of $600,000 for net recovery, after fees and expenses:

Q. Do you recall what your last communication with Barthel Waggoner consisted of, what was the last communication you had with Mr. Waggoner before the case was settled?

A. The last one would be when he and I talked on the phone, talked about his settlement authority being $600,000.00. I had disclosed – I had discussed with, well, when I don't know. It was sometime prior to within days or if not day before, no later than the week before we settled the case because I reaffirmed some things we discussed previously.

Q. And you don't recall when you first discussed, your testimony is you discussed settlement matters with Barthel Waggoner, do you know when those discussions first took place?

A. Many times. Before the first mediation would have been the first one, when we got the initial authority and then we renewed that authority and Kookie spoke with him several times and referred those conversations to me, I believe she spoke with Ms. Waggoner, as I recall, I can't speak for that, she'll have to speak for that herself.

Would have been back in January of the year we settled it because I spoke with Barthel a few times.

* * *

Q. But was there ever of a document produced Mr. Williamson that showed what the settlement authority was with each of these 31 clients?

A. No. The last time we got authority was the day before wen he knew we were going to be talking, he called during the day and the night of, we didn't have time to write letters.

Q. Well, how did you know the totals? Did you just do the math in your head?

A. We knew what the total of our clients minimum demands were. And we, and I knew when we passed that, I knew when we were in a position everybody was just going to be bumped up. I don't recall when it was, what day it was, but when I heard that a certain amount was on the table and I'm trying to think, it was 50 million dollars the morning of the second day of trial as I've been rehabilitated in my recollections to understood, before clients were called to come on up, I knew we were going to settle because we were in excess of our – of everybody's human desires, let alone the numbers.

(E. Vol. 1 pp. 145, 146).

This is further evidenced by direct correspondence from Williamson to Waggoner prior to trial, wherein Waggoner was advised that negotiations were proceeding upon granted settlement authority. Upon receipt of the correspondence, Waggoner made no attempt to contact Williamson, or any representative of the Williamson Law Firm to advise that they no longer had his authority to settle.

It is an uncontradicted fact that after fees and expenses, Waggoner received a net recovery for his claims in the *Williams* Phen-fen litigation in the amount of $1,472,100.50. Plaintiffs have produced no evidence, through testimony, or documentation which creates a genuine issue of material fact as to whether settlement authority was personally authorized by Plaintiff, nor that the

settlement amount negotiated and the recovery received was insufficient. Further, Plaintiffs wholly failed to produce any evidence which would prove any breach of fiduciary duty based upon Williamson's failure to act with honesty, good faith, fairness, integrity and fidelity. Simply, Plaintiff authorized an acceptable recovery for his use of the prescription drug, Redux. Through his intensive work up of Waggoner's case through the *Williams* litigation, Williamson was able to recover more than twice the amount authorized. As there is no genuine issue of material fact as to any breach of fiduciary duty, Williamson was entitled to summary judgment as a matter of law.

2. The attorney fee charged was reasonable

It is an uncontradicted fact that Williamson associated Defendant, Michael Miller, and Edward Blackmon as co-counsel to assist in the settlement and trial of the *Williamson* case. Through the combined efforts of all three (3) attorneys, a gross settlement was achieved on behalf of Plaintiffs in the amount of $3,008,961.75. Despite the fact that Mr. Williamson, Mr. Miller and Mr. Blackmon were each associated in and contributed to the litigation, negotiation and settlement of the underlying Phen-fen case, the instant lawsuit was only filed against Mr. Williamson and Mr. Blackmon. Therefore, the Plaintiffs could not maintain their claim that the attorney fee charged was unreasonable without inclusion of each individual attorney whom shared in the attorney fee. As such, this claim is moot. Notwithstanding, the record clearly establishes that the attorney fee charged was reasonable, and summary judgment on the merits of the claim was proper as a matter of law.

Pursuant to the Representation Agreement executed by Barthel Waggoner, the attorneys would be entitled a forty-five percent (45%) contingency fee:

> In the event settlement is obtained after suit is filed, and after time permitted for discovery, final pre-trial hearing or the commencement of trial preparation, whichever is earlier.

(E. Vol. pp. 15-16).

As discussed in further detail, *infra*, it is uncontradicted that Waggoner agreed to the contingent fee arrangement, and executed said agreement without duress. There is no defense to the validity of the instrument.

Notwithstanding Waggoner's own agreement to the terms of representation, Plaintiffs failed to offer any evidence, whatsoever, which would establish a claim that the forty-five percent (45%) fee or the monetary amount representing forty-five percent (45%) of the gross settlement was unreasonable. Rather, Plaintiff's own expert witness, Dane Ciolino, Esq. testified that he would offer no opinion as to the reasonableness of the attorneys fees charged; and therefore, the claim is not at issue in this litigation.

> Q. Are you going to give an opinion with regard to the amount of the attorneys' fees that were charged these folks?
>
> A. My opinion is that I don't have enough information at this point, and I don't' know if I'll ever have enough information to render an opinion on whether or not the fee charged by Mr. Williamson and Mr. Willer (sic) and Mr. Blackman is reasonable or was reasonable.

(E. Vol. 1 pp.88-89).

In addition to Plaintiffs' failure to offer any proof to demonstrate that the forty-five percent (45%) attorneys fee was unreasonable, the reasonableness of the fee is demonstrated by the factors enumerated in *Mississippi Rule of Professional Conduct* 1.5(a). Pursuant to Rule 1.5(a), the factors to be considered in determining the reasonableness of a fee are:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

As demonstrated by the testimony of Williamson's expert witness, Michael Martz, Esq., the percentage fee charged to Waggoner was fair and reasonable based upon the factors of MRPC 1.5(c) and other circumstances relevant to the representation in the underlying Phen-fen case:

A. I'm offering the opinion that in my opinion, the fee that Mr. Williamson and his co-counsel charged Mr. Waggoner for his representation of them is reasonable, under the factors that I considered.

Q. What factors did you consider?

A. I considered all those factors that are listed under Rule 1.5(c). In addition to that, I considered the factors that Mr. Williamson has a wonderful reputation, that Mr. Blackmon has an excellent reputation in Holmes County, the legal climate that existed at the time that this case was settled, the fact that venue was Holmes county, the reputation of the Trial Judge, the willingness if not eagerness that's been reported to me by American Home Products to settle this class of cases, as you call it an aggregate settlement, all of those factors, yes, sir.

As the Plaintiffs produced no evidence which would offer any proof in support their claim that attorney fees were not reasonable, summary judgment in favor of Williamson was appropriate, as a matter of law.

3. Waggoner voluntarily consented to and approved a contribution to the MTLA

Plaintiffs also alleged that Williamson coerced Waggoner to make a contribution to the Mississippi Trial Lawyers' Association in the amount of $30,042.87.

Following the settlement of the *Williams* case, each claimant was given the opportunity to voluntarily contribute two percent (2%) of their recovery to the Mississippi Trial Lawyers' Association Political Action Fund. The subject of the contribution was brought to the attention of the claimants through a correspondence by Ed Williamson of May 4, 2001, and accompanied by a "sign-off" form which identified whether the claimant authorized or did not authorize the voluntary contribution. On May 5, 2001, upon his own free will and without duress by Williamson, Waggoner authorized the voluntary contribution. (E. Vol. 7 p.p. 953-954).

Pursuant to the testimony of Kookie Bowles, the MTLA contribution authorization was not included in the original settlement packages distributed to the claimants in the *Williams* case. Rather, the idea developed at the insistence of Waggoner, himself, in order to assist future litigants in similar civil litigation. As Ms. Bowles has testified:

> Q. (By Mr. Dye) Ms. Bowles, I'm going to show you - - again, we're going through these pretty quickly. This next document is a two-page document, Bates stamped 006 through 007. Its identified as Exhibit 2 to the deposition of Barthel Waggoner, and ask, Ms. Boles, if you've seen this form previously?
>
> A. Oh, yeah. Let me tell you about this little form here. Now, Barthel is pretty sharp. When we started settling these cases, or at the point where were to settle these cases, Barthel called, and he said, "Kookie, " he says, "I've got something to ask."
> And I said, "Well, what's that, Barthel?"
> He said, "I want to know, do - - is there a fund set up somewhere in case people want - - people such as myself that have taken this diet pill want to, you know sue American Home Products but not have to go through such an expense like I have had to go?
> And I said, "Why, gosh, Barthel, I have no idea, " I said, "but I tell you what," I said, "Mr. Williamson will know that answer." I said, "Hold on just a minute and let me

let you talk to him." So I got Mr. Williamson on the phone and I said, "Mr. Williamson, Barthel needs to talk to you." I says - - I said, "He's got a question I have no answer to."
And he said, "Okay." He said, "Well, I'll talk to him." And so he gets him on the phone and a few minutes later Mr. Williamson comes out and he - - he has that look like he's in deep concentration about something somebody has said, you know, where he's sitting there, he's puzzling, he's slinging his glasses around and then he sticks them in his mouth, and he - - he's - - you could see the wheels turning in Mr. Williamson's mind. And he comes out, he goes, "You know, Kookie, " he said, "Barthel may have something there."
And I said, "What do you mean?"
He said, "I don't know, but I'll tell you in a bit." So he goes back and a few days later he comes back to me, he goes, "Well, what do you think about this?" He said - - he said, "I'm going to run it by Barthel and see what he says." And he said - - but he - - he had come up with this - - this poem, "Building a Bridge."

Q. Who came up with this poem?

A. Mr. Williamson did.

Q. Okay.

A. And he said, "You know, Barthel wanted to set aside some money for these people that's going to be coming into this next litigation that's coming up." And I said, "Yeah?"
And he said, "Well, " he says, "he just may have something there." And so I really didn't know what he and Barthel talked about other than this "Building a Bridge." And - - so Barthel's idea was pretty much what come out of this.

* * *

Q. Okay. You have talked earlier about some discussion that Barthel had stated off with you regarding possibly setting up a fund to help people in this situation. The way I understand it, and just correct me if I'm wrong, that the idea for the contribution to the MTLA fund grew our of a conversation and an idea from Barthel Waggoner to Ed Williamson?

A. Correct.

Q. Okay. Outside of what you've told us about that with the - - the private conversation between he and Ed and Ed coming out and - - having some discussion with you all, is there anything else that you wanted to add to that, or is there are details of the scenario that we don't have from your earlier testimony?

A. Other than - - like I said, when Mr. Williamson come out, her was sitting there

thinking and you could see the wheels working and him saying, "You know, Barthel may have something there, you know. That's a good idea."

Q. So, to your knowledge, you've never had any information that would indicate that Barthel Waggoner did not want to contribute to the MTLA?

A. No.

(E. Vol. 4 pp. 460,479).

In addition, Plaintiffs wholly failed to offer any evidence, whatsoever, of duress upon Waggoner in authorizing the contribution. Simply, Waggoner understood the nature of the contribution, the amount to be contributed, and voluntarily authorized the contribution. Without any evidence which would invalidate the execution of the authorization, Plaintiffs failed to demonstrate any genuine issue of material fact, and summary judgment was appropriate as a matter of law.

V. CONCLUSION

As stated herein, the trial court correctly applied the summary judgment standard to the facts of this case. Waggoner agreed to the terms of the Representation Agreement in the *Williams* litigation, the settlement amount, the attorneys fee, and all deductions from the gross settlement amount. Additionally, Waggoner admits that the settlement amount was fair and reasonable. As the parties' relationship was dictated by the four corners of the Representation Agreement contract and the Disbursement Statement, signed by Waggoner, partial summary judgment was proper as to all claims as awarded by the Court below. Based upon the above and foregoing argument and authority, Williamson respectfully requests that this Court affirm the trial court's award of partial summary judgment in this action.

RESPECTIVELY submitted this the 3rd day of January, 2008.

EDWARD WILLIAMSON, Individually;
EDWARD WILLIAMSON, P.A.,
RESPONDENTS

MATTHEW A. TAYLOR
JAMES P. STREETMAN, III

OF COUNSEL:

James P. Streetman, III (MSB #[redacted]
Matthew A. Taylor (MSB #[redacted]
Scott, Sullivan, Streetman & Fox, P.C.
725 Avignon Drive
Ridgeland, MS 39157
Post Office Box 13847
Jackson, Mississippi 39236-3847
Telephone: 601-607-4800
Facsimile: 601-607-4801

CERTIFICATE OF SERVICE

I, James P. Streetman, III, one of the counsel of record for the Appellees, **Edward Williamson, Individually; Edward Williamson, P.A.;** do hereby certify that I have this date caused to be delivered, via hand-delivery and United States Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

Honorable Forrest A. Johnson
Circuit Court Judge - Sixth District
State of Mississippi
Post Office Box 1372
Natchez, MS 39121

Robert C. Latham, Esquire
Jeremy Diamond, Esquire
Truly, Smith & Latham, PLLC
P.O. Box 1307
Natchez, MS 39121
Attorneys for Michael J. Miller

David Jefferson Dye, Esquire (pro hac admittee)
David Jefferson Dye, P.L.L.C.
1204 Napoleon Avenue
New Orleans, LA 70115

Gregg L. Spyridon, Esquire
Philip G. Smith, Esquire
Spyridon, Palermo & Dornan, L.L.C.
Three Lakeway Center, Suite 3010
Metairie, LA 70002-8335
Attorney for Petitioners

THIS the 3RD day of January, 2008.

MATTHEW A. TAYLOR
JAMES P. STREETMAN, III