

IN THE SUPREME COURT OF MISSISSIPPI

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DOCKET NO. 2007-IA-00565-SCT

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BARTHEL D. WAGGONER and JACQUELINE M. WAGGONER  
(APPELLANTS)

versus

EDWARD A. WILLIAMSON, Individually; EDWARD A. WILLIAMSON,  
P.A.; and MICHAEL J. MILLER  
(APPELLEES)

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APPELLANTS' REPLY BRIEF

INTERLOCUTORY APPEAL - ADAMS COUNTY CIRCUIT COURT  
No. 03-KV-0151-J

Oral Argument Requested

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Respectfully submitted on the 6<sup>th</sup> day of June 2008 by:

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**NO. 2007-IA-00565-SCT**

**EDWARD A. WILLIAMSON, Individually;  
EDWARD A. WILLIAMSON, P.A.; and  
MICHAEL J. MILLER, Individually**

**APPELLEES**

**APPELLANTS' REPLY BRIEF**

**NOW INTO COURT** come the Appellants Barthel D. Waggoner and Jacqueline M. Waggoner, hereinafter the "Waggoners", to file this Reply Brief in response to the January 3, 2008 Brief of the Appellees Edward A. Williamson and Edward A. Williamson, P.A. ("Williamson") and the April 22, 2008 Brief of Appellee Michael J. Miller ("Miller"). The Waggoners herein respond to the issues raised by Williamson and Miller and re-identify the genuinely disputed issues of material fact improperly ruled upon by the trial court thereby providing this Court the legal basis to reverse the partial summary judgment favoring Appellees Williamson and Miller.

**I. INTRODUCTION**

In their respective Appellee Briefs, Williamson and Miller attempted to confuse and mislead this Court concerning the legal and factual issues presented in this case. In doing so, Williamson and Miller actually highlight and discuss many of the genuinely disputed issues of material fact the Waggoners presented to the trial court in opposition to summary judgment. The Williamson and

Miller Appellee Briefs even go as far as to dispute the very causes of action pled by the Waggoners. Williamson attempts to characterize the instant case as one based entirely in contract, and Miller instead focuses upon the Waggoners' breach of fiduciary duty cause of action.<sup>1</sup> The Williamson and Miller fail to recognize and address the Waggoners' four causes of action:

- 1) Breach of Fiduciary Duty;
- 2) Breach of Contract;
- 3) Negligent Misrepresentation; and
- 4) Fraud.<sup>2</sup>

Additionally, Williamson's Appellee Brief falsely asserts that the Waggoners' breach of contract and negligent misrepresentation causes of action were subject to the trial court's summary judgment ruling but does not substantiate this assertion in any way.<sup>3</sup> **In reality, the trial court left each of the Waggoners' four causes of action intact and instead ruled upon specific, factual disputes between the Waggoners and Appellees. The trial court's ruling improperly narrowed the scope of facts that the Waggoners can present to a jury in support of the four causes of action and improperly eliminated the remedy of attorney fee forfeiture available as the result of Williamson's and Miller's breaches of the fiduciary duties owed to the Waggoners.**

Furthermore, the Appellee Briefs include factual assertions and arguments related to the settlement of the *Annette Williams, et al. v. American Home Products*

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<sup>1</sup> Williamson Appellee Brief, p. 1 and Miller Appellee Brief, p. 1.

<sup>2</sup> Original Complaint, R. vol. 1, p. 1-19 & Amended Complaint R. vol. 2, p. 168 - 182.

<sup>3</sup> Williamson Appellee Brief, p. 1, paragraph 2.

Corp. litigation that this Court has previously addressed and rejected.<sup>4</sup> The Appellees waste this Court's time and resources and create the appearance of disregard for this Court's rulings by persisting in their unfounded and previously rejected assertions and arguments.<sup>5</sup>

In response, the Waggoners submit Williamson and Miller's arguments in support of the partial summary judgment are at best disingenuous and designed to confuse rather than clarify the genuinely disputed issues of material fact. The Waggoners also submit the trial court improperly decided these genuine disputed issues of material fact and argue herein that this Court, as it has in similar circumstances, should reverse the partial summary judgment and remand this matter in its entirety for a trial on the merits. **Specifically, this Court has in similar circumstances involving the validity of a release deemed that the "clear light of the whole truth" and "all surrounding conditions" should be presented to a jury so that they "may rightly decide which story bears the impress of verity":**

"No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity."<sup>6</sup>

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<sup>4</sup> Multiple references herein will be made to the Court's opinion in *Edward A. Williams, Individually, and Edward A. Williamson, P.A. v. Lisa Edmonds and Larry Edmonds*, 880 So. 2d 310 (MS 2004). The *Williamson v. Edmonds* opinion was attached as Exhibit 10 to the Waggoner's *Opposition to the Motion for Summary Judgment*.

<sup>5</sup> *Id.*

<sup>6</sup> *Kansas City, M. & B. Ry. Co. v. Chiles*, 38 So. 498, 499 (Miss. 1905).

## **II. GENUINELY DISPUTED ISSUES OF MATERIAL FACT AND RELEVANT QUESTIONS OF LAW**

The Waggoners presented numerous genuinely disputed issues of material fact in opposition to Williamson and Miller's motions for summary judgment and specifically did so through opposition memorandums; affidavits from both Barthel and Jacqueline Waggoner; and Itemizations of Disputed Facts. Williamson and Miller through their respective Appellee Briefs have highlighted rather than denied the existence of these genuinely disputed issues of material fact enumerated below. Additionally, the Waggoners address several questions of law raised by Appellee Williamson and Miller.

### **1. THE APPELLEE'S BREACH OF THE STANDARD OF CONDUCT SUPPORTS LIABILITY FOR THEIR BREACH OF THE STANDARD OF CARE**

Appellees Williamson and Miller either do not understand the Waggoners' breach of fiduciary duty cause of action or have purposefully mischaracterized the case by arguing the Waggoners attempt to boot-strap a breach of a rule of professional conduct into a cause of action for damages. In actuality, the Waggoners allege Williamson and Miller breached the fiduciary duty of loyalty, owed to the Waggoners, and Williamson and Miller engaged in self-dealing behavior in their intentional, wrongful mismanagement of the AHP Settlement. The Rules of Professional Conduct are standards of conduct whereas the fiduciary duty of loyalty gives rise to a standard of care that an attorney owes



to his clients. Standards of conduct, when violated, are influential in determining whether a standard of care, i.e. a fiduciary duty, has been violated.

Appellees' Expert Witness Michael Martz, the former General Counsel for the Mississippi Bar Association and the lawyer responsible for overseeing prior disciplinary proceedings involving Appellee Michael Miller, characterized the relationship between standards of conduct and care in Mississippi Courts by making the following statement in his deposition:

"To be quite candid with you, most Courts don't really recognize that there's a strong difference between a standard of care and a standard of conduct. Our Court kind of uses the terms almost synonymously, but the difference in the standard of conduct is that the lawyer's conduct, the way he actually handled the case, and made the distribution, would have to conform with the obligations of the - or substantially conform to the obligations under the Rules of Professional Conduct."<sup>7</sup>

The Waggoners claim the Appellees breached fiduciary duties owed to them and point to the breach of a standard of conduct, i.e. Rule 1.8(g), to demonstrate how Williamson and Miller in actuality breached their standard of care. Similarly, other jurisdictions in evaluating misdeeds related to aggregate settlements have evaluated their corresponding rules of professional conduct in establishing liability on the settling attorneys. See *Quintero v. Jim Walters Homes, Inc.*, 709 S.W.2d 225, 230 (Tex. App. Corpus Christi Dist. 1986) and *New York Diet Drug*

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<sup>7</sup> Vol. 7, p. 993, transcript p. 47, ln. 18 - transcript p. 48, ln. 15.

*Litigation v. Wyeth – Ayerst Laboratories*, 2007 WL 969426, \*4 (N.Y. Sup. March 27, 2007).<sup>8</sup>

Miller also contends the trial court ruled the Mississippi Rules of Professional Conduct may not be considered in evaluating the appropriateness of Miller's conduct with respect to possible punitive damages.<sup>9</sup> In contradiction thereto, this Court in *Bradfield v. Schwartz* ruled the Rules of Professional Conduct may, at a minimum, be considered in awarding punitive damages.<sup>10</sup> Based on the foregoing, Williamson and Miller's breach of standard of conduct is relevant to the trial court's determination of a breach in the standard of care and damages.

## **2. NO DISPUTE EXISTS THAT THE AMERICAN HOME PRODUCTS SETTLEMENT WAS AN AGGREGATE SETTLEMENT**

Despite Appellees' argument and characterization that a breach of Rule 1.8(g) does not give rise to a cause of action for damages, the Appellees nevertheless continue in their efforts to propound a falsehood on the Court regarding the nature of the AHP settlement. Specifically, Appellees continue to allege the claims in the *Annette Williams, et al. v. American Home Products Corp.*

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<sup>8</sup> Miller seeks to distinguish Texas Rule 1.8(f) with Mississippi Rule 1.8(g) contending the Texas rule is broader; Assuming that is the case, Miller would be required to disclose less under the Mississippi Rule to be compliant; a lower standard not satisfied. In reality disclosing the "participation of each person in the settlement" under the Mississippi rule and disclosing the "nature and extent of participation of each person in the settlement" under the Texas rule creates no quantifiable difference.

<sup>9</sup> Appellee Miller's brief, p. 12 - 14.

<sup>10</sup> *Bradfield v. Schwartz*, 936 So.2d 931 (Miss. 2006).

litigation were "individually evaluated, litigated, and settled."<sup>11</sup> As disputed on summary judgment, the Waggoners maintain the settlement of the *Annette Williams* litigation was an aggregate settlement thereby triggering the requirements and mandatory disclosures of Mississippi Rule of Professional Conduct 1.8(g):

(g) A lawyer who represents **two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients**, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, **unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.** (emphasis added)

Specifically, the Waggoners' *Memorandum in Opposition to the Motions for Summary Judgment* quoted paragraphs 4 and 5 of the April 24, 2001 American Home Products settlement letter:<sup>12</sup>

"4. In settlement of the Diet Drug Cases and in consideration for (i) the releases and dismissals provided by the individual Settling Claimants and (ii) the further obligations of the Settling Attorneys and Settling Claimants as provided herein, **AHP shall make payments to the Settling Claimants in the total amount of \$73,500,000 ("the Settlement Amount")**, subject to the terms and adjustments below, such payment to be made by delivery to the Settling Attorneys as agents of the Settling Claimants as provided in paragraph 11 hereof."

"5. **The division of the Settlement Amount among the Settling Attorneys and the Settling Claimants is the sole responsibility of the Settling Attorneys and the Settling Claimants:**

a. AHP shall not be responsible for, or participate in, any allocation, whether (i) as between the Settling Attorneys

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<sup>11</sup> Williamson Appellee Brief, p. 2 and Miller Appellee Brief, p. 3.

<sup>12</sup> Record, Vol. 11, pp. 1498-99.

and the Settling Claimants or (ii) as among any of the Settling Attorneys or (iii) as among any of the Settling Claimants. **The Settling Attorneys represent that they have complied and will comply with Rule 1.8 of the ABA Model Rules of Professional Conduct or the applicable state counterpart(s).**"

This Court in its August 12, 2004 opinion in *Williamson v. Edmonds* found that **"On April 24, 2001, Williamson negotiated an aggregate settlement on behalf of the 31 clients and their spouses in *Annette Williams, et al v. American Home Products Corp.* in the Circuit Court of Holmes County."**<sup>13</sup> The Court continued in the *Williamson v. Edmonds* opinion to hold that **"[u]nder Mississippi Rule of Professional Conduct 1.8(g), Williamson obtained a lump sum aggregate settlement for all of his clients during settlement negotiations."**<sup>14</sup> Because this Court has previously found the American Home Products settlement was an aggregate settlement, no further consideration of this issue is necessary.

**3. WHETHER THE WAGGONERS KNOWINGLY AGREED TO THE DISBURSEMENT STATEMENT AMOUNTS IS AN ISSUE OF FACT**

**The over-arching disputed issue in this matter is whether or not the Waggoners could knowingly agree to any of the terms of the Disbursement Statement in light of Williamson's and Miller's knowing and willful omissions, representations, and acts of fraud. The Appellees fail to cite any action or specific communication from Williamson or Miller that, even if deemed**

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<sup>13</sup> *Edward A. Williams, Individually, and Edward A. Williamson, P.A. v. Lisa Edmonds and Larry Edmonds*, 880 So. 2d 310, 314 (MS 2004).

<sup>14</sup> *Id.* at 320.

credible, would have permitted the Waggoners to knowingly agree to the individual line items in the June 25, 2001 Disbursement Statement.<sup>15</sup> Determining whether a party has knowingly agreed or made an informed consent to participate in an aggregate settlement requires a factual inquiry and the weighing of those facts for credibility.<sup>16</sup>

The Waggoners could not have knowingly agreed to the terms of the June 25, 2001 Disbursement Statement and could not have made an informed consent to participate in the aggregate AHP settlement because of Williamson's and Miller's intentional and admitted failure to disclose the existence of the aggregate settlement and accordingly, their failure to disclose:

- a. The amount of the aggregate settlement;
- b. The existence and nature of all claims involved in the aggregate settlement; and
- c. The participation of each person in the aggregate settlement including the basis for the calculations, distribution and accounting of the proceeds of the settlement with AHP.<sup>17</sup>

Additionally, Pages 11 - 22 of the Waggoners' Second Appellants' Brief filed with this Court on January 29, 2008 provide numerous, detailed examples in the Record why knowing agreement to the Disbursement Statement and informed consent to participation in the AHP aggregate settlement was an impossibility for the Waggoners. The Record in this matter is clear that, had there been full and

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<sup>15</sup> Williamson Appellee Brief, pp. 9 - 11.

<sup>16</sup> *Cole v. Wiggins*, 487 So.2d 203 (Miss., 1986). (Whether patient gave informed consent by signing authorization forms was issue of fact precluding summary judgment in medical malpractice action.)

<sup>17</sup> Waggoner Opposition Memorandum to Motions for Summary Judgment, Record, Vol. 11, p. 1500.

complete disclosure, the Waggoners would not have agreed to the terms of the June 25, 2001 Disbursement Statement and to participation in the AHP aggregate settlement about which they were intentionally misled.<sup>18</sup> **"The hand of fraud had written the plaintiff's signature to the so called release,"**<sup>19</sup> and based thereon, this Court should reverse the partial summary judgment and remand this matter to the Adams County Circuit Court for a trial on the merits.

**4. THE AMERICAN HOME PRODUCT SETTLEMENT RELEASE DOCUMENTS DO NOT ABSOLVE THE APPELLEES OF THEIR FIDUCIARY DUTY**

In their Appellee Briefs, Williamson and Miller argue the *American Home Products Confidential Release, Indemnity and Assignment* and the *Qualified Settlement Fund Settlement Agreement and General Release* provided a full and complete explanation of the terms and conditions of the Qualified Settlement Fund.<sup>20</sup> Williamson and Miller then make the extraordinary leap of illogic that because the Waggoners neither "questioned nor objected" to executing these two instruments that "they had knowledge of all terms and conditions of the underlying settlement."<sup>21</sup> Nothing could be further from the truth, and Williamson and Miller contradict even their own admissions that the existence of the aggregate settlement, much less the disclosures required by MRPC 1.8(g), was intentionally withheld from the Waggoners.

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<sup>18</sup> Waggoner Affidavits, E. vol. 1, p. 51-54 and E. vol. 1, p. 55-58.

<sup>19</sup> *Smith v. St. Louis & S.F.R. Co.*, 73 So. 801, 803 (Miss. 1917).

<sup>20</sup> The referenced instruments are at E. Vol. 7 pp. 955-963 and E. Vol. 7 pp. 964-970.

<sup>21</sup> Williamson Appellee Brief, p. 11.

A clear reading of these two instruments reveal neither discusses the basis of the Waggoners' claims: settlement amounts, itemization for expenses, attorney fee percentages, contributions to the Mississippi Trial Lawyer's Association, or the payment of Multi-District Litigation Expenses, i.e. the items for which the trial court granted the partial summary judgment. The two instruments were created by Ms. Helene Madonick, the lawyer for American Home Products, and were explained to the Waggoners in a meeting with Glinda "Kookie" Bowles in the parking lot of the Scott County, Mississippi Courthouse.<sup>22</sup> The notary who signed the documents attesting to the appearance of the Waggoners in Neshoba County was not even present at the meeting and notarized the documents based upon a cell phone conversation, and furthermore, Williamson was also not present despite his representation to this effect.<sup>23</sup>

In further support of their untenable position, Williamson and Miller contend the *American Home Products Confidential Release, Indemnity and Assignment* and the *Qualified Settlement Fund Settlement Agreement and General Release* prevented Appellees from disclosing to the Waggoners the information necessary for the Waggoners to make an informed decision to participate in the AHP aggregate settlement.<sup>24</sup> In its *Edmonds* opinion, this Court has already considered and rejected this argument from Appellee Williamson in the context of the same AHP aggregate settlement and should now, again reject this

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<sup>22</sup> Glinda "Kookie" Bowles Deposition, E. vol. 4, 461-462, transcript pp. 142-148.

<sup>23</sup> Id. at E. vol. 462-463, transcript pp. 148 - 149.

<sup>24</sup> Williamson Appellee Brief, pp. 13 - 15, citing E. vol. 7 pp. 955 - 963 and E. vol. 9, pp. 964 - 970.

argument from Williamson and Miller.<sup>25</sup> In response to Williamson's same argument advanced here, this Court in *Edmonds* held that "[m]ere joint representation cannot act as shield against an attorney malpractice action," and furthermore, that Miss. Rule of Evidence 502 and MRPC 1.8 (g) dictate that Williamson was required to disclose "the amount of the settlement, and the basis for the calculations, distributions and accounting of the proceeds of the settlement with American Home."<sup>26</sup> With respect to the two AHP documents, the Court in *Edmonds* held, "The confidentiality agreement and the QSF order were put into place to prevent public dissemination of any information indicating the existence of litigation or settlement, not to prevent the Edmondses from obtaining information relating to the case they participated in as plaintiffs."<sup>27</sup>

Also, for the reasons articulated by the Court in *Edmonds* concerning joint representation, this Court should reject Appellee's argument that MRPC 1.6(a) & (e) precluded disclosure of information necessary for the Waggoners to make an informed decision.<sup>28</sup> **The Waggoners maintain that Appellees argument in this respect is a tacit admission of Appellees' failure to provide the Waggoners the information necessary for informed consent to the AHP settlement because Appellees maintain defensively that they could not make the disclosures necessary to comply with MRPC 1.8 (g).** Additionally, Appellees freely admit

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<sup>25</sup> *Edward A. Williams, Individually, and Edward A. Williamson, P.A. v. Lisa Edmonds and Larry Edmonds*, 880 So. 2d 310 (MS 2004).

<sup>26</sup> *Edward A. Williams, Individually, and Edward A. Williamson, P.A. v. Lisa Edmonds and Larry Edmonds*, 880 So. 2d 310, 320 (MS 2004).

<sup>27</sup> *Id.* at 321.

<sup>28</sup> Williamson Appellee Brief, pp. 15 - 16.



that they could have complied with all disclosure requirements by seeking and securing individualized client authorizations and disclosures of the AHP settlement.<sup>29</sup> However, Appellees made no effort to obtain these individualized authorizations and now instead attempt to justify their misdeeds by pointing to the Waggoners' settlement amount. Clearly, these two release instruments don't release Williamson and Miller of their fiduciary obligations.

**5. THE WAGGONERS' GROSS SETTLEMENT AMOUNT DOES NOT ELIMINATE WILLIAMSON AND MILLER'S FIDUCIARY OBLIGATIONS**

In arguing their fiduciary duty of loyalty was satisfied, Williamson and Miller contend that no breach of duty could have occurred because the settlement amount allocated to the Waggoners was purportedly fair and reasonable.<sup>30</sup> This circular logic supports the untenable proposition that a lawyer's wrongful acts and admitted failure to disclose required information to clients is justified as long as the outcome of the case is generally favorable.

Additionally, Miller makes the extrapolated argument that the purported fairness and reasonableness of the Waggoners' gross settlement translates into knowing agreement by the Waggoners to the gross settlement amount, contingency fee amount of forty-five percent, MDL fees and MTLA contributions. The Waggoners have consistently and again herein dispute their

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<sup>29</sup> Williamson Appellee Brief, p. 15, ¶ 2.

<sup>30</sup> Appellee Williamson's brief, p. 16 - 17 and Appellee Miller's brief, p. 8 - 11.

ability to knowingly agree to the AHP settlement because of Williamson's and Miller's admitted lack of disclosure.

Appellees incorrectly argue that Williamson's own deposition testimony and uncorroborated e-mail correspondence from Williamson to his secretary Glinda "Kookie" Bowles resolves any dispute whether the Waggoners extended Williamson settlement authority.<sup>31</sup> The Waggoners have testified to the contrary and deny having ever provided Williamson, and certainly not Miller who they deny knowing was engaged in representing them, any form of settlement authority. It is telling that with over 60,000 Discovery documents related to the claims of more than forty-five people, not a single document has been produced by which Appellees received settlement authority from the Waggoners.

The Appellees unsubstantiated arguments concerning the amount of the gross settlement ignore the Waggoners' consistent contention that the settlement was not fair and reasonable because Williamson and Miller failed to disclose the aggregate settlement and improperly and fraudulently allocated aggregate settlement funds to individuals who did not take the diet drugs produced by AHP and who did not have injuries related to the diet drugs. Ultimately, Appellees' attempted justification of their misdeeds on the basis of the gross settlement amount must fail. Even Appellees' own expert, Michael Martz,

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<sup>31</sup> See Appellee Williamson's brief, pp. 17 - 18.

testified that no amount of recovery by a lawyer justifies or creates a basis for overlooking a breach of the fiduciary duty owed to the client(s).<sup>32</sup>

**6. THE EXISTENCE OF COMPENSATORY DAMAGES IS A QUESTION OF FACT**

Appellees contend the Waggoners have no compensatory damages. The Waggoners, as thoroughly discussed in their Second Appellants' Brief and presented to the trial court, are prepared to demonstrate at trial compensatory damages totaling \$1,165,228.10.<sup>33</sup> The Waggoners calculated these damages with the assistance of expert forensic accountant and fraud examiner Donna Ingram and contend these damages result directly from Williamson's and Miller's multiple breaches of the fiduciary duty of loyalty.

Even assuming compensatory damages did not exist, case law supports the remedy of attorney fee forfeiture for a lawyer's breach of the fiduciary duty of loyalty.<sup>34</sup> In a holding similar to the Adams County Circuit Court in the instant action, the Texas trial court in *Burrow* granted summary judgment to the Defendant attorneys without considering the fiduciary duties the attorneys owed to their clients. The *Burrow* trial court found "the settlement of the plaintiffs' claims in the Phillips accident suit was fair and reasonable, plaintiffs had therefore suffered no actual damages as a result of misconduct by the attorneys, and absent actual damages plaintiffs were not entitled to a forfeiture of any the

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<sup>32</sup> Deposition of Michael Martz, P. Vol. 7, p. 1005, transcript p. 96, lns. 2-8.

<sup>33</sup> Ingram Affidavit, E. vol. 4, p. 536, ¶ 5.

<sup>34</sup> *Burrow v. Acre*, 997 S.W.2d 229 (Tx. 1999).

attorneys' fees."<sup>35</sup> **However, on appeal, the Texas Supreme Court remanded the case to the trial court finding that actual damages are not a prerequisite to a forfeiture of attorney's fees for breach of fiduciary duty and held:**<sup>36</sup>

It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. . . . The main purpose of forfeiture is not to compensate an injured principal, even though it may have that effect. Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty.<sup>37</sup>

The Waggoners contend the Adams County Circuit Court was clearly wrong in its observations and holding related to the issue of compensatory damages in the instant case. The Waggoners are prepared to demonstrate compensatory damages; however, even if this were not the case, based upon the holding in *Burrow*, the Waggoners would have a remedy at law for the Appellees' breach of the fiduciary duty of loyalty.

### **III. CONCLUSION AND PRAYER**

**"Issues of fact sufficient to require reversal of a summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite."**<sup>38</sup> In the case of *Dailey v. Methodist Medical Center*, the Mississippi Appellate Court cited this Court and ruled, **"On a motion for summary judgment, the lower 'court is prohibited from trying the issues; it**

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<sup>35</sup> *Burrow v. Acre*, 997 S.W.2d 229 (Tx. 1999).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 238.

<sup>38</sup> *Doe ex rel. Doe v. Wright Sec. Services, Inc.*, 950 So.2d 1076, 1079 (Miss. Ct. App., 2007) (citing *McMillan v. Rodriguez*, 823 So.2d 1173, 1177 (Miss., 2002)).

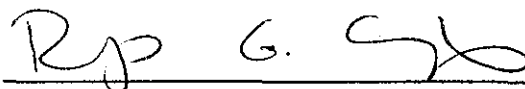
may only determine whether there are issues to be tried.'"<sup>39</sup> "After viewing evidentiary matters in a light most favorable to the nonmoving party, this Court will . . . reverse the decision of the trial court if triable issues of fact exist." *Frith v. BIC Corp.*, 863 So.2d 960, 962 (Miss., 2004) (internal citations omitted).

**NOW WHEREFORE**, Appellants - Plaintiffs Barthel D. Waggoner and Jacqueline M. Waggoner respectfully pray that, after Oral Argument and due consideration of the facts, law, and arguments made by the Waggoners, this Court enter an Order reversing the trial court's partial summary judgment and remanding this matter to the Circuit Court for Adams County for further proceedings including a trial by jury in accordance with the ruling of the Court.

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<sup>39</sup> *Dailey v. Methodist Medical Center*, 790 So.2d 903, 914 (Miss. Ct. App., 2001) (quoting *Palmer v. Anderson Infirmary Benevolent Assoc.*, 656 So.2d 790, 795 (Miss.1995)).

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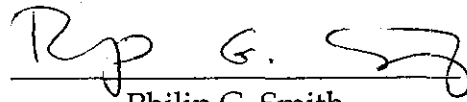
**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Appellants' Reply Brief* filed by Barthel D. Waggoner and Jacqueline M. Waggoner has been served this 6th day of June 2008 on the Circuit Court of Adams County and on opposing counsel of record via the United States Postal Service, postage prepaid and properly addressed to the following:

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