IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2010-TS-00379

VICKIE E. NEAL AND SHIRLEY A. BOLTON — APPELLANTS

VS.

JOSLYN MANUFACTURING COMPANY AND DANAHER CORPORATION — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLEES JOSLYN MANUFACTURING AND DANAHER CORPORATION

ORAL ARGUMENT NOT REQUESTED

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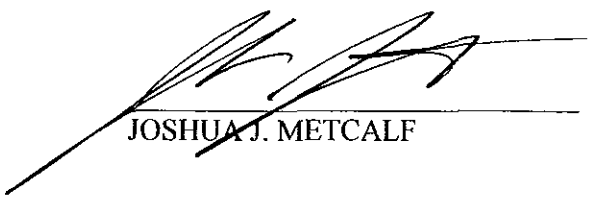
IN THE SUPREME COURT OF MISSISSIPPI

VICKIE E. NEAL AND SHIRLEY A. BOLTON	**APPELLANTS**
VS.	**CASE NO. 2010-TS-00379**
JOSLYN MANUFACTURING COMPANY AND DANAHER CORPORATION	**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 this Court may evaluate possible disqualification or recusal.

1. Appellants Vickie E. Neal and Shirley A. Bolton.
2. Earnestine Alexander, attorney for Appellants Vickie E. Neal and Shirley A. Bolton.
3. Appellees Joslyn Manufacturing Company and Danaher Corporation.
4. Joshua J. Metcalf, Walter G. Watkins, III, and Forman Perry Watkins Krutz & Tardy LLP, attorneys for the Appellees.
5. Honorable Robert B. Helfrich, Forrest County Circuit Court.



JOSHUA J. METCALF

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I. STATEMENT OF THE ISSUES

Did the trial court properly dismiss the claims of Appellants, when Appellants had signed full and final releases of all claims against Appellees, when Appellees had funded a Qualified Settlement Fund, and when Appellants' only objection to the dismissal at the trial court level was that the action should be stayed pending the resolution of Appellants' legal malpractice arbitration action against their former counsel?

II. STATEMENT OF THE CASE

Despite the fact that Vickie E. Neal and Shirley A. Bolton signed full and final releases of all claims against Joslyn Manufacturing Company and Danaher Corporation and have filed with the Jasper County Circuit Court to claim the settlement funds that have been paid into the Court registry on their behalf, Neal and Bolton continue to pursue this frivolous appeal. In fact, each of the issues presented in Appellants' brief has been waived, has previously been decided by this Court, or is otherwise without merit.

As noted in Defendants' Motion to Dismiss Frivolous Appeal and for Sanctions, the litigation history involving Vickie E. Neal and Shirley A. Bolton (hereinafter collectively "the Bolton Sisters" or "Appellants") includes more than ten plaintiffs' firms (at least seven firms since Appellants terminated their original counsel in early 2007), a legal malpractice arbitration in Washington, D.C. against their original counsel, and actions in both state and federal courts. Joslyn Manufacturing Company and Danaher Corporation (hereinafter "Defendants" or "Appellees") sincerely hope that this frivolous appeal is the final chapter in nearly ten years of litigation that should have ended in 2007 when the Bolton Sisters (with the advice of counsel) signed full and final releases of all claims they had against Defendants. Because Appellants have

continued to pursue this appeal without any legal basis for doing so, the Court should dismiss this appeal and sanction them for their conduct.

A. Background and Procedural History

Appellants' claims were part of more than 1000 mass-filed claims against Defendants and other companies in Jasper County between 2001 and 2002 alleging various illnesses resulting from exposure to treated wood. Their claims were part of the *Susana Barnes, et al. v. Powe Timber Company, et al.* matter, which was a 30-plaintiff case filed in Jasper County on December 6, 2001. R. 15.[1] On February 24, 2005, Judge Robert G. Evans granted Defendants' Motion to Sever and Transfer Venue, and transferred the *Barnes* case and several others to Forrest County because venue was improper in Jasper County. R. 459. There were several other cases in which venue was proper in Jasper County, and those cases remained pending in Jasper County.

On January 18, 2007, after years of intense litigation, and shortly before the Jasper county trial of *Ronald Morgan v. Powe Timber Company, et al.*, Defendants entered into a binding agreement whereby plaintiffs' counsel, on behalf of plaintiffs, agreed to settle all related claims against Defendants for a fixed amount of money that would be paid by Defendants into a qualified settlement fund to be administered by a special master. All plaintiffs, including Appellants, were represented by Dana Kirk, Collen Clark and several other attorneys. Counsel for Defendants had been informed throughout several years of settlement discussions that plaintiffs' counsel were acting with the authority of their clients in conducting settlement discussions, and ultimately, in settling the claims of their clients. Subsequent to the settlement,

[1] The record in this case is made up of several non-sequentially numbered sets of documents. The first set, numbered 0001-0858 will be referred to as "R." The second set, labeled by the Clerk's office as "Supplemental Filed 2/23/11" and numbered 0001-0221 will be referred to as "R2." The third set, labeled by the Clerk's office as "Supplemental Volume Filed 4-15-11" and numbered 1-9 will be referred to as "R3."

Judge Evans signed an Agreed Order Establishing a Qualified Settlement Fund, Appointing of Special Master and Claims Administrator, and Sealing Confidential Settlement Agreement. R. 644.

For procedural and administrative purposes, the *Ronald Morgan* case in Jasper County was agreed upon as the case in which to file Qualified Settlement Fund-related pleadings. Pursuant to the settlement agreement, Defendants paid a fixed amount of money into the Qualified Settlement Fund in full satisfaction of all claims pending against them in Jasper and Forrest counties. All plaintiffs with cognizable claims were to submit their claims to the Qualified Settlement Fund, where Special Master Butch Cothren would analyze the claims and divide the money from the fund among the qualifying claimants.

Because the vast majority of the claimants in the litigation did not have any injury which even the experts hired by plaintiffs' counsel could causally relate to exposure to Defendants' treated wood, Defendants filed motions for summary judgment in all of the related Forrest county cases and noticed them for hearing on March 30, 2007. R. 619. Appellants were among the plaintiffs whose claims could not be supported by their own experts. The docket reveals that on or about March 30, 2007, Appellants, along with their two brothers, a sister, and numerous other disgruntled plaintiffs, filed motions to terminate their relationship with Kirk and the other attorneys who had negotiated the settlement with Defendants. R. 9-10, R2. 4-5. They also filed motions to continue the Defendants' motion hearing. *Id.*

Defendants re-noticed their motions for summary judgment for hearing on May 18, 2007, and then continued the hearing again to June 29, 2007. During that time, the five Bolton siblings hired James Dukes, Sr. of Hattiesburg to represent them. Defendants took the position that the Bolton family was bound by the January 18, 2007 agreement that was entered into by Kirk and

the other attorneys who had represented them before the representation was terminated in March of 2007. Dukes argued on behalf of the Bolton family that they were not bound by the January 18, 2007 settlement agreement, but he nevertheless began discussions with Defendants and the Boltons' former attorneys about the circumstances under which the Bolton family would agree to submit to the Qualified Settlement Fund and discontinue their suit against Defendants. Defendants filed a third amended notice of hearing on July 13, 2007, re-setting their causation motion for summary judgment for hearing before Judge Helfrich on July 30, 2007. R3 2; Appellees' R.E. Tab 6, 000031. Dukes was copied on the certificate of service. *Id.* Because Defendants were continuing to discuss the Bolton family's situation with Dukes, Defendants agreed to continue the motion as it pertained to each of the Bolton family members.

On July 30, 2007, Defendants argued their causation motion for summary judgment. Kirk confessed the motion on behalf of the plaintiffs he still represented who did not have any injury that could be causally related to Defendants. T. 8; Appellees' R.E. Tab 7, 000040. Dukes appeared on behalf of the Bolton family. T. 5; Appellees' R.E. Tab 7, 000037. Several *pro se* plaintiffs appeared at the hearing in order to contest Defendants' motion, but none of them presented competent evidence in opposition to Defendants' motion, and their claims were dismissed along with the plaintiffs represented by Kirk who could not prove that their alleged injuries were causally related to Defendants. T. 19-21; Appellees' R.E. Tab 7, 000051-53. Judge Helfrich signed an order dismissing these claims the same day. R. 664.

Defendants continued their discussions with Dukes during the remainder of the summer, and both Charles Bolton and Frazier Bolton agreed to submit their claims to the Qualified Settlement Fund. In fact, Appellants and their sister initially agreed at the same time to submit their claims to the Qualified Settlement Fund, however, they changed their minds shortly

thereafter and again refused to submit their claims to the Qualified Settlement Fund. In the late summer or early fall of 2007, the Bolton Sisters ended their relationship with Dukes and hired Brad Pigott and the law firm of Pigott, Reeves and Johnson to represent them and to pursue a legal malpractice claim against Kirk and the other attorneys who had entered into the January 18, 2007 settlement agreement on their behalf. Counsel for Defendants met with Pigott on September 24, 2007 and discussed with him Defendants' position that Appellants and their sister were bound by the January 18, 2007 agreement. Defendants informed Pigott that if the Bolton Sisters continued to refuse to submit their claims to the Qualified Settlement Fund for resolution by the Special Master, Defendants would bring on for hearing the causation motion for summary judgment they had filed in March and had previously continued at Dukes' request.

On September 25, 2007, Defendants noticed their motion for summary judgment for hearing on October 19, 2007 and faxed a copy of the notice to both Pigott and Dukes. R3. 5-7; Appellees' R.E. Tab 8, 000054. Over the next three weeks, Defendants continued to correspond and confer with Pigott as he and his firm evaluated the Bolton Sisters' legal position and talked with them about their options.

Given their history and recent difficulties with the Appellants and their sister, Defendants informed Pigott and his firm that if, by October 18, 2007, Appellants and their sister had not agreed to submit to the Qualified Settlement Fund and provided signed releases of any and all claims against Defendants, Defendants would have no option but to go forward with the previously-noticed October 19, 2007 hearing on Defendants' causation motion for summary judgment. On October 18, 2007, counsel for Defendants stayed in constant contact with attorneys from Pigott, Reeves and Johnson in an effort obtain a commitment from them on behalf of their clients to resolve the matter amicably without the need for a hearing on Defendants'

motion the next day. At 4:44 p.m., counsel for Defendants received an email from Cliff Johnson attaching copies of Vickie Neal and Linda Bolton's executed releases. At approximately 7:32 p.m., counsel for Defendants received from Johnson an email attaching a document signed by Appellant Shirley Bolton stating that:

> Pursuant to your conversations with Brad Pigott earlier this week and with me this afternoon, it is my understanding that you have committed to participate in the Qualified Settlement Fund rather than pursuing your claims against Joslyn Manufacturing Company and Danaher Corporation in Forrest County Circuit Court. It is my further understanding that due to your use of medication prescribed following your recent surgery you seek only additional time to review the Release provided to you earlier today.
>
> Please confirm by signing this e-mail that the statements contained herein accurately reflect your decision regarding participation in the Qualified Settlement Fund and your request for additional time to review the Release. Once you have signed below, please fax the document to me at 601-354-7854.

Because each of the Bolton Sisters had consented to submit their claims to the Qualified Settlement Fund, Defendants agreed not to pursue their motion for summary judgment the next day.

On October 29, 2007, Pigott faxed Defendants' counsel executed copies of full and final releases signed by each of his clients (R2. 25 and 31; Appellees' R.E. Tabs 9 and 10, 000057 and 000063), along with a cover letter wherein he admitted that although they did not approve of the conduct of their former lawyers, Appellants were bound by the January 2007 settlement and that they would submit their claims to the Qualified Settlement Fund and pursue their malpractice claims against their former attorneys. Shortly after Appellants provided Defendants with full and final releases of all claims, Pigott filed a legal malpractice arbitration action on behalf of Appellants and their sister against Kirk and the other attorneys who had represented them.[2]

[2] Upon information and belief, Appellants and Linda Bolton ended their relationship with Pigott and went through two additional sets of lawyers in the arbitration action, before finally losing the arbitration on the merits after a trial in early 2010.

On June 6, 2008, Judge Evans entered an Order Approving Report of Special Master and Authorizing Disbursement of Settlement Funds. This order accepted, approved, and ratified the Report of Special Master Cothren and authorized the distribution of the funds in accordance with the schedule of payments provided by Special Master Cothren. By the summer of 2009, Special Master Cothren had paid out nearly all the claims submitted to the Fund, and he filed a motion to interplead the unclaimed settlements (including Appellants' funds) from the Fund into the registry of the Jasper County Circuit Court. R. 782. Judge Evans granted the motion. By the fall of 2009, essentially all of the claimants had been paid except Appellants and Linda Bolton, who had inexplicably failed to take any action to claim their respective settlement payments.

On September 2, 2009, Defendants filed a Motion to Dismiss the *Barnes* case because Defendants had fully funded the Qualified Settlement Fund, and because the Appellants and Linda Bolton had signed full and final releases of all claims against Defendants. R. 665; Appellees' R.E. Tab 11, 000070. Defendants initially noticed their Motion to Dismiss for hearing on September 25, 2009. In response to Defendants' Motion to Dismiss, Appellants and their sister filed a Motion for Stay of Proceedings Pending Arbitration (R. 670, 677; Appellees' R.E. Tabs 12 and 13, 000075 and 000082) and a Motion for Continuance. At the hearing on September 25, 2009, Appellants and their sister asked the court for an additional 90 days to obtain counsel, and argued that the Federal Arbitration Act preempted the court's consideration of Defendants' motion to dismiss. T. 25-29; Appellees' R.E. Tab 3, 000013-000017. Appellants never questioned the validity of the releases they had signed. In fact, Appellants' sister even stated that "What we're asking the Court today is for the continuance as well as to have any settlement amounts that's allocated to the three of us still be held currently where they are until the process is complete and then we have no problem coming back once some of these issues are

sorted out in terms of what occurred." T. 28-29; Appellees' R.E. Tab 3, 000016-000017. At the conclusion of the hearing, Judge Helfrich granted the Appellants and their sister an additional 90 days to obtain counsel. T. 30; Appellees' R.E. Tab 3, 000018.

Defendants re-noticed the motion for hearing on Judge Helfrich's December civil motion day (December 11, 2009), but shortly before the hearing date arrived, Appellants and their sister complained that a December 11 hearing date would not afford them the full 90 days Judge Helfrich had given them. Accordingly, Defendants continued the hearing once again - to the court's January civil motion day on January 29, 2010. At the hearing, an attorney appeared on behalf of Appellants and their sister to ask the court for another continuance. Their attorney requested another continuance and pointed out to the court that the Appellants and their sister "have been involved in arbitration in Washington[,] DC involving this suit. One of the concerns of dismissal of this suit is that it may impact the arbitration in Washington, DC." T. 35; Appellees' R.E. Tab 4, 000023. Appellant Neal then spoke on her own behalf and explained to the court why Dukes and Pigott no longer represented her or her sisters. T. 36; Appellees' R.E. Tab 4, 000024. She also informed the court that she had a folder full of the names of the numerous attorneys in Hattiesburg and throughout Mississippi who had declined to pursue her case against Defendants, because they "simply did not have the expertise." T. 37; Appellees' R.E. Tab 4, 000025. Judge Helfrich stopped Ms. Neal when she stated that the only attorney she had been able to find with the "expertise" to pursue the case against Defendants had informed her that the attorney could not pursue the case because counsel for Defendants "don't do anything about [sic] tell lies and she said she could not deal with that." T. 38; Appellees' R.E. Tab 4, 000026. Neither Appellants nor their attorney questioned the validity of the releases.

After hearing from Appellants' attorney and Neal, and after noting that he had received a fax the day before from Bolton requesting that he continue the hearing because of the arbitration in Washington, DC, Judge Helfrich stated that because the arbitration had no effect on the present matter, and because Appellants and their sister had released all claims against Defendants, he had "no choice but to grant the defendant's [sic] motion. This matter cannot continue on and on and on and on." T. 39; Appellees' R.E. Tab 4, 000027.[3]

At the same time that Judge Helfrich was hearing Defendants' Motion to Dismiss at the courthouse in Hattiesburg, Appellant Bolton was in the United States District Court for the District of Columbia asking United States Magistrate Judge Alan Kay to grant an *ex parte* Motion for Temporary Restraining Order preventing the Forrest County Circuit Court from dismissing the Appellants' claims (Misc. Case No. 10-00091(RWR)(AK)). Bolton misguidedly argued to the District Court that because Appellants were involved in an arbitration of their legal malpractice claims against their former attorneys, the Federal Arbitration Act prevented the Forrest County Circuit Court from dismissing Appellants' claims against Defendants. Magistrate Judge Kay, in a very thorough opinion that was later adopted by District Judge Roberts, explained that the federal court did not have jurisdiction over the claims pending in Forrest county. Appellants did not object to the Magistrate Judge Kay's Report and Recommendation or District Judge Roberts' adoption of the Report and Recommendation.

On February 26, 2010 – the same day Appellants filed their Notice of Appeal – Appellants and Linda Bolton, by and through yet another attorney (Andrew MacDonald), filed a Motion to Disburse Funds in the *Ronald Morgan* case in Jasper County. Thus, at the same time they are claiming their settlement money from the Qualified Settlement Fund, Appellants are pursuing the instant appeal. Defendants have not objected or taken any action to prevent

[3] Linda C. Bolton did not appeal the dismissal order.

Appellants from obtaining their settlement funds. Upon information and belief, Appellants' quest to withdraw their settlement funds was hampered by liens put in place by the lawyers who represented Appellants in the Washington, DC arbitration, although counsel for Defendants has been informed by MacDonald that those liens now have been invalidated and that he is unaware of any obstacles to Appellants retrieving their funds from the court registry.

III. SUMMARY OF THE ARGUMENT

The only issue for the Court to decide is whether the trial court properly dismissed the claims of Appellants, when Appellants had signed full and final releases of all claims against Defendants, when Defendants had funded a Qualified Settlement Fund, and when Appellants' only objection to the dismissal at the trial court level was that the action should be stayed pending the resolution of Appellants' legal malpractice arbitration action against their former counsel. The issues raised by Appellants' Brief have either been waived, have previously been decided by this Court, or are otherwise without merit.

IV. ARGUMENT

A. The Only Issue for the Court to Decide is Whether the Trial Court Erred in Dismissing Appellants' Claims When Appellants had Released all Claims Against Defendants, When Defendants had Funded a Qualified Settlement Fund, and When Appellants' Only Objection to the Dismissal at the Trial Court Level was that the Action Should be Stayed Pending Resolution of Appellants' Legal Malpractice Arbitration Action Against Their Former Counsel

As discussed at length above, Appellants spent months (from March 2007 through the end of October 2007) consulting with their attorneys about the effects of the settlement agreement that had been entered into by Kirk and the other attorneys they terminated in March of 2007. After this lengthy period, Appellants determined that the proper course of action was to

release all claims they had against Defendants, submit their claims to the Qualified Settlement Fund, and to pursue a legal malpractice action against their former counsel.

When Defendants' Motion to Dismiss was presented to Judge Helfrich, Appellants did not dispute that Defendants had fully funded the Qualified Settlement Fund or that the Appellants had signed releases of any and all claims they had against Defendants. T. 22 and 31; Appellees' R.E. Tabs 3 and 4. To the contrary, as is demonstrated by their written responses to Defendants' Motion to Dismiss and the statements made on the record at the hearings Judge Helfrich conducted on Defendants' Motion to Dismiss, Appellants' only substantive objection was that they were engaged in an arbitration in Washington, DC and that they believed that the Federal Arbitration Act prevented a Mississippi court from taking any action on their claims against Defendants.

After giving Appellants four months to seek new counsel and to respond to Defendants' Motion to Dismiss, after reviewing the releases signed by Appellants, and after hearing that there was no dispute that Defendants had fully funded the Qualified Settlement Fund and that Appellants' funds were being held for them in the registry of the Jasper County Circuit Court, Judge Helfrich signed an order dismissing their claims with prejudice. R. 684; Appellees' R.E. Tab 2. Judge Helfrich also rejected Appellants' argument that the Federal Arbitration Act had any applicability to Appellants' underlying toxic tort claim. Appellants have not questioned the correctness of Judge Helfrich's ruling on the applicability of the Federal Arbitration Act.

Because Appellants did not dispute that they had released all claims against Defendants, that Defendants had funded the Qualified Settlement Fund, or that Appellants' funds were being held for them in the registry of the Jasper County Circuit Court, and because Appellants' Federal

Arbitration Act objections were without merit, Judge Helfrich was correct in dismissing Appellants' claims with prejudice.

B. Appellants' Questions Presented are a Distraction from the Issue Discussed Above

1. Appellants' First Issue was Literally Never Considered by the Trial Court

Appellants first raise the question of "Whether the Trial Court erred in deciding that the Appellants could be bound by the Settlement Agreement." This issue is completely irrelevant to the Court's consideration of the matters presented on appeal. It is clear from Appellants' Brief that the "Settlement Agreement" they are referring to is the January 18, 2007 settlement agreement. *See* Appellants' Brief at 21, 22-24. The issue of the enforceability of the January 18, 2007 agreement was not, however, presented to Judge Helfrich for review, and Judge Helfrich never expressed an opinion as to the enforceability of that agreement. In fact, the moment Appellants signed full and final releases of all claims against Defendants and agreed to submit their claims to the Qualified Settlement Fund, the issue of whether the January 18, 2007 agreement was enforceable became moot.

After giving Appellants four months to seek new counsel and to respond to Defendants' Motion to Dismiss, after reviewing the releases signed by the Bolton Sisters, and after hearing that there was no dispute that Defendants had fully funded the Qualified Settlement Fund and that the Bolton Sisters' funds were being held for them in the registry of the Jasper County Circuit Court, Judge Helfrich signed an order dismissing their claims with prejudice. R. 684; Appellees' R.E. Tab 2. Because the issue of the enforceability of the January 18, 2007 agreement was never presented to Judge Helfrich, and because he never issued any opinion as to

the enforceability of that agreement, there is literally no ruling on this issue from which to appeal.

2. Appellants' Second Issue has been Waived and is Completely Without Merit

Appellants next raise the issue of whether the releases they signed in October of 2007 are "void and unenforceable" due to allegations of fraud and "the validity of the construction of the releases themselves." *See* Appellants' Brief at 22. Mississippi courts have continually held that an issue cannot be raised for the first time on appeal. *Albert v. Allied Glove Corp.*, 944 So.2d 1, 7 (Miss. 2006) (holding that a party cannot raise a new issue on appeal "since doing so prevents the trial court from first having the opportunity to address this error"); *see also Crowe v. Smith*, 603 So.2d 301, 305 (Miss. 1992) and *Cooper v. Lawson*, 264 So.2d 890, 891 (Miss. 1972). As discussed above, Appellants never raised the issue of the enforceability of the releases they had signed – either to allege irregularities in the procurement of the releases or to question the construction of the releases. A review of the hearing transcripts demonstrates that Appellants did not raise any of these issues to the trial court. In *Albert v. Allied Glove Corp.*, this Court barred certain issues from being raised on appeal after noting that the record did not demonstrate that the issues had been raised at the trial court level. 944 So.2d at 7. As it did in *Albert v. Allied Glove Corp.*, this Court should not consider any issues relating to the enforceability of the releases Appellants signed because they are being raised for the first time on appeal.

a. Even if Appellants' Fraud and Duress Claims are not Waived, Such Claims are Absurd

Even if the issues relating to the enforceability of Appellants' releases had not been waived, Appellants' claims of fraud and duress are absurd. Throughout the months leading up to their execution of the releases, Appellants were represented by some of the best attorneys in the

state. James Dukes, Sr. has practiced for more than 40 years, and his reputation speaks for itself. The law firm of Pigott, Reeves and Johnson was also eminently qualified. Brad Pigott is a former United States Attorney, Cliff Johnson is a former Assistant United States Attorney, and Carlton Reeves has recently become a United States District Judge for the Southern District of Mississippi. To borrow a favorite phrase from Appellants' Brief, "it is beyond peradventure" to think that Appellants were defrauded or improperly coerced into signing releases during the time they were represented by the attorneys listed above.

If Appellants had raised the issue of fraud and duress to Judge Helfrich, Defendants would have presented numerous pieces of evidence to the court to demonstrate the impossibility of such a contention, including: 1) evidence of months of ongoing discussions with counsel for Appellants, including Dukes and Pigott, 2) numerous emails between Appellants' counsel and counsel for Defendants on October 18, 2007, including the emails and signed acknowledgement on behalf of Appellant Shirley Bolton referenced in Section II.A above, and 3) written correspondence from Pigott dated October 29, 2007 enclosing signed copies of all releases, admitting that his clients had been bound to a settlement with Defendants, and recognizing that "our clients' only remedies for that conduct are through continuing their claims against those attorneys, and not through continuing the pursuit of their full judicial rights against Joslyn." Because the allegations of fraud and coercion were never raised to the trial court, Defendants never provided any of these materials to the court.

The evidence that actually is contained in the record leaves no doubt that Appellants were represented by capable counsel throughout the months leading up to the time they signed the releases at issue, and that they received notice of Defendants' actions. The Third Amended Notice of Hearing stamp-filed July 13, 2007 shows that Dukes received notice of Defendants'

hearing on their motion for summary judgment (R3. 2; Appellees' R.E. Tab 6), and the transcript from the July 30, 2007 summary judgment hearing reveals that Dukes was present on behalf of the entire Bolton family. T. 5; Appellees' R.E. Tab 7, 000037. Further, the Notice of Hearing stamp-filed September 27, 2007 was served on both Dukes and Pigott. R3. 5; Appellees' R.E. Tab 8).

Thus, even if Appellants' allegations of fraud and duress have not been waived, they are patently without merit.

b. Appellants' Releases are Valid and Enforceable Under Mississippi Contract Law

Appellants' contractual arguments, like their arguments on fraud and duress, are waived because they were not presented to the trial court in the first instance. Even if the Court considers the merits of Appellants' contractual arguments, however, Appellants still lose. It is well-settled under Mississippi law that "compromises are favored by law." *McCorkle v. Hughes*, 244 So.2d 386 (Miss. 1971). When examining any type of settlement agreement, a contract law analysis is appropriate. *Chantey Music Publ'g., Inc. v. Malaco, Inc.*, 915 So.2d 1052, 1055-56 (Miss. 2005); see also *Newell v. Hinton*, 556 So.2d 1037, 1042 (Miss. 1990). When Appellants, at the advice of their counsel, executed the releases at issue, a contract was entered into between Appellants and Defendants. It is a basic principle of the law of contracts that the essential elements of a contract are offer, acceptance, and consideration. *Whiting v. Univ. of S. Miss.*, 2011 WL 1168147, at *5 (Miss. 2011) (citing *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So.2d 1023, 1029 n. 3 (Miss. 2000)). All three elements are present in this case. Defendants offered to withdraw their summary judgment hearing and to fund the Qualified Settlement Fund if Appellants would sign releases of all claims against Defendants. Appellants accepted this offer and indicated their acceptance by signing the releases at issue. Further, the releases themselves

provide that in exchange for the right to submit their claims to the Special Master for consideration, Appellants would dismiss their cases against Defendants. Defendants funded the Qualified Settlement Fund and the Special Master allocated funds to Appellants. Without a doubt, the releases in question satisfy the requirements of Mississippi contract law.[4]

3. Appellants' Third Issue is Duplicative of Issues One and Two

Appellants' third contention is merely a restatement of their first two contentions, and is without merit for the reasons discussed above.

4. Appellants' Fourth Issue was Decided by this Court on January 20, 2011

Appellants have continually sought and been denied permission to unseal confidential documents associated with the Qualified Settlement Fund located in Jasper County. This issue is also without merit. Appellants first raised this issue in 2010, when they asked this Court to expand the record to include numerous documents that Judge Helfrich never considered in dismissing Appellants' claims. This Court referred the issue of the proper content of the record to Judge Helfrich, who on September 8, 2010, after reviewing the parties' briefs on the issue, found that:

> [f]or its grant of the defendants' motion to dismiss, this court had no cause to look behind the undisputed fact that the plaintiffs had executed releases of all claims that formed the basis for this action. Consequently, documents filed in and retained by another court that were in no way considered by this court in rendering its decision are not now properly a part of the record of this case.

R2. 194-95. On September 21, 2010, Appellants filed an Amended Motion to Correct the Designation of the Record and to Unseal Settlement and Case Documents in the Jasper County Circuit Court Currently Under Seal in Support of Appealants [sic] Appeal, but on January 20, 2011, this Court denied Appellants' motion. Because both this Court and the trial court have

[4] What is truly outrageous is that Appellants argue to this Court that the releases are void and unenforceable while simultaneously attempting to collect their settlement funds in Jasper County.

previously determined that these records are not properly part of the record on appeal, this issue is without merit.

C. Sanctions are Appropriate Pursuant to Mississippi Rule of Appellate Procedure 38

Defendants have made numerous requests that Appellants dismiss this frivolous appeal, however, Appellants have refused and Defendants have been forced to incur significant expenses in responding to this appeal. Rule 38 of the Mississippi Rules of Appellate Procedure provides that this Court may award "just damages" including attorneys' fees and other expenses when the Court determines that an appeal is frivolous. Pursuing an appeal while simultaneously collecting settlement funds[5] paid by a defendant is the epitome of frivolity and bad faith. Taking into account the expenses incurred by Defendants in defending this appeal and the deplorable nature of Appellants' actions in pursuing this appeal while simultaneously claiming their settlement funds, damages pursuant to Rule 38 of the Mississippi Rules of Appellate Procedure are appropriate.

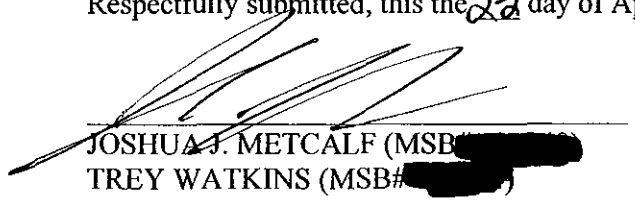
V. CONCLUSION

Defendants resolved this matter with Appellants more than three years ago and funded a Qualified Settlement Fund which was fully processed by the Special Master nearly two years ago. While Appellants may be unhappy with the conduct of their former attorneys, the settlement amount awarded to them by the Special Master, or the outcome of their legal malpractice arbitration, the bottom line is that Appellants released any and all claims they had against Defendants, and the majority of the issues raised by Appellants in the instant appeal were never presented to the trial court in the first instance. Furthermore, Appellants have actually

[5] It is important to note that these funds had remained untouched by Appellants for several years. On numerous occasions, Special Master Cothren attempted to disburse these funds to Appellants. Only upon the trial court's dismissal of their claims, did Appellants request their funds be disbursed.

filed pleadings to claim the settlement funds that were interplead by the Special Master into the registry of the Jasper County Circuit Court. Defendants deserve to be able to finally put this litigation behind them. Appellants' appeal should be denied and damages should be awarded against Appellants pursuant to Mississippi Rule of Appellate Procedure 38.

Respectfully submitted, this the 22nd day of April, 2011.



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CERTIFICATE OF SERVICE

I, Joshua J. Metcalf, one of the attorneys for Appellants, do hereby certify that this day I have served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to the following:

Honorable Robert B. Helfrich
Forrest County Circuit Court
Post Office Box 309
Hattiesburg, Mississippi 39403

Earnestine Alexander
The Alexander Law Group
6512 Dogwood View Pkwy Ste. E
Jackson, Mississippi 39213-7844

SO CERTIFIED, this 20th day of April, 2011.

Joshua J. Metcalf