IN THE SUPREME COURT OF MISSISSIPPI

SHIRLEY BOLTON AND VICKIE NEAL

VS NO. 2010-CA-00379-SCT

POWE TIMBER COMPANY, ET. AL.

## CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record certifies that the following persons have an interest and outcome of this case. These representations are made in order for the Justices of the Supreme Court and Judges of the Court of Appeals to evaluate possible disqualification or recusal.

1. Shirley Bolton and Dr. Vickie Neal,
   Plaintiffs- Appellants

2. Walter G. Watkins, Jr., Esq.
   Joshua J. Metcalf, Esquire
   Forman Perry Watkins Krutz & Tardy
   200 South Lamar Street
   City Centre Building, Suite 100
   Jackson, MS 39201-4099

3. Any Judge, lawyer, elected official, insurer, special master, financial institution or trustee for the Mississippi Wood Chip Litigation Qualified Settlement Fund, elected official, or other person or organization which in any capacity is or has been previously affiliated with Defendants, Plaintiffs and Defendants Attorneys or other parties involved in the Settlement and Dismissal of Claims for Vickie E. Neal and Shirley A. Bolton.

4. Any current or former employee of Joslyn Manufacturing Company, Powe Timber Company, Danaher Corporation included but not limited to those individuals employed in connection with or claimants in the case styled Susana Barnes et. al. v Powe Timber Company, et. al. CI-500046 in the Circuit Court of Forrest County, Mississippi and the case styled as Ronald Morgan, et. al., vs. Powe Timber Company, et. al. Civil Action 15-0020 in the Circuit Court of Jasper County, Mississippi.

RESPECTFULLY submitted on the 18th day of February, 2011 by:

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# APPELLANTS' BRIEF

## I. ISSUES AND QEUSTIONS PRESENTED TO THE COURT

A. Whether the Trial Court erred in deciding that the Appellants could be bound by the Settlement Agreement?

B. Whether the Releases signed by the Appellants are void and unenforceable?

C. Whether the Trial Court Erred in Dismissing the Appellant's action with Prejudice?

D. Whether the records of the Ronald Morgan Action are relevant to the Appellant's appeal and therefore should be unsealed?

## II. STATEMENT OF THE CASE

### A. INTRODUCTION

When properly presented, it is believed that this Honorable Court will be able to clearly view the distinctive and substantial underlying events that give cause to the Appellants grievances and see the gravamen of the argument. As well, when properly presented, this Brief will go farther than merely presenting the Appellant's arguments. The Appellants are of the belief that this brief will also present a matter of somewhat first impression, *albeit* this impression is underscored and solidly supported by former opinions of this Honorable Court, the United States Supreme Court and the Fifth Circuit Court of Appeals. When these various authorities of law are combined and properly placed at the foot of the Appellant's argument it absolutely tilts the scales heavily in favor of the Appellants.

For this reason the Appellants would respectfully request the Honorable Justices of this

Mississippi Supreme Court review the matters presented herein with great care and concern. The Appellants make this request due to the fact the matters that will be addressed are of grave concern for at least two reasons: 1). the redress of grievances; and 2). the right of access by all citizens to the Courts.

This fundamental right that is held by the Appellants herein is further underscored and supported by additional fundamental and absolute rights. These fundamental rights, unconditionally and absolutely, ensure that no person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel or both[1].

These are constitutional rights guaranteed to citizens of these United States. It must not be forgotten that the Bill of Rights of both the Federal Constitution and the Mississippi Constitution ensures that all courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.

**B. PROCEDURAL HISTORY**

This Appeal arises from a case that began in December of 2001 where the Appellants were named as plaintiffs along with various other individuals in a suit for damages arising from injuries sustained from the exposure of treated wood products. On December 6, 2001, the Appellants along with other plaintiffs filed suit in the Circuit Court of the First Judicial District of Jasper County, MS.,

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Referencing; The First, Fifth, Ninth, and § 1, of The Fourteenth Amendment of the United States Constitution. Article 3 § 14, Article 3, § 24, Article 3, § 25, and Article 3, § 32 of the Mississippi Constitution.

at Cause No.: 11-0140[2]. Texas Attorney Dana G. Kirk, former counsel for the Appellants along with Mississippi Attorney Rance Ulmer signed the complaint for the plaintiffs and caused the suit to be filed. (Rec. Vol. I at 33).

The Appellees herein were identified as defendants along with Powe Timber Co., et. al. The suit was filed in the Circuit Court of the First Judicial District of Jasper County, and was later amended and re-filed in July of 2002. Acting upon a motion brought by the Appellees to sever and transfer venue for roughly 1,300 of the individual claims pursuant to Rule 82(d) Miss. R. Civ.P, the Court severed the claims..

On February 24, 2005 the Circuit Court of Jasper County issued an order granting Appellee's Motion to Sever and Transfer 1,291 of the plaintiff's claims to the Circuit Court of Forrest County. In issuing the order, the Circuit Court of Jasper County found that venue was improper in that jurisdiction and all, but six, of the plaintiffs' claims were transferred to the venue in the Circuit Court under the jurisdiction of Forrest County, MS. In its Motion before the Jasper County Circuit Court, the Appellees argued that venue in Jasper County was "***so blatantly improper***." The record is unclear as to whether the Appellant's's attorney raised any objections to the Appellee's Motion, and the Motion to Sever and Transfer was subsequently granted by the Trial Judge in Jasper County, MS. (Rec. Vol. IV at 561; ¶ (1.) & (2.)). The claims of the Appellants herein were among those cases that were severed and transferred to the Circuit Court of Forrest County, MS. Sometimes thereafter the Appellees moved the Circuit Court in Forrest County for an order to enforce the severance order issued by Judge Evans as discussed *supra,* severing the individual claims so that individual cause

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The Honorable Robert Evans (deceased) of Jasper County was assigned to preside over the matter.

numbers could be applied to each case.

On December 5, 2006, the Appellees filed a Motion to Dismiss the claims of the plaintiffs in Forrest County Circuit Court. In its motion the Appellee's main argument[3] was built around *Harolds Auto Parts, Inc., vs. Mangialardi*, 889 So.2d 493 (Miss. 2004). ( Rec. Vol. IV at 582-615) In it's Motion the Appellees point out yet again the severance and transfer of those claims that were sent to Forrest County, acknowledging that each claim was to be viewed independently, apart from the others. However, the Appellees came later on in the proceedings and now emphatically insist that the claims of the Appellants were in fact co-mingled with other claims and ultimately disposed of as discussed further *infra*.

On March 21, 2007, the Appellees filed a Motion for Summary Judgment and Counsel for the Appellants was discharged on March 29, 2007. After the discharge of Counsel, the Appellants were informed by another claimant that a settlement had been reached in January of 2007. This came as a surprise to the Appellants because prior to his discharge they were not informed by Counsel that a settlement had been reached. The Appellants were however informed that their Counsel would not object to summary judgment made by the Appellees because it had been determined that they suffered no actionable cause of action from their exposure. This dismissal never materialized.

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In citing ***Mangialardi***, the Appellees actually give credence to the Appellants arguments; specifically the argument that they cannot be grouped into a pool along with other plaintiffs. However, that is exactly what position the Appellees have taken. Notwithstanding the fact this most certainly was not a class action in the State Court but instead individual claims, where the rules and our law direct that each individual plaintiff is the master of his/her own complaint; the language found in the Appellees own pleadings, and its arguments presented through its attorneys, contend otherwise. The Appellees are asking this Court to find that neither the rules nor the law applies to the Appellants, much less to them.

As a result, the Appellants were clueless about any settlement reached in their claims against the Appellees. The Appellants were not informed of the material terms of the settlement by their attorney and their attorney did not seek or receive their consent or authority to enter into the Settlement Agreement. The Appellants were well aware of several things that are pertinent to this date in time; (1.) despite numerous requests for information regarding their case from former counsel, Dana Kirk[4], they had no knowledge of any settlement reached in their toxic tort claims; (2.) there had been no consent, and/or authority given by the Appellants to Dana Kirk, or anyone else for that matter to settle their claims; (3.) no amount regarding settlement had ever been provided to them; and specifically, (4.) that their toxic tort claims had been severed and removed from the venue and jurisdiction of the Jasper County Circuit Court and transferred to the venue and jurisdiction of the Forrest County Circuit Court upon a motion made by the Appellees who described venue in Jasper County for the Appellants claims "Blatantly Improper".

Furthermore, the Appellants were completely aware of the fact they had no interest, nor were otherwise vested into any other form of civil litigation whatsoever in Jasper County. This point is

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On March 29, 2007 the Appellants fired former counsel Dana Kirk. The contract between the Appellants and Kirk did not contain an association clause allowing Kirk to enlist the services of other counsel and therefore it goes without saying the termination of Kirk also included any other attorney Kirk had associated. The association, however, was not allowed pursuant to the language of the attorney-client contract. This would include Collen Clark, a non-attorney in the State of Mississippi, who was not only want of a license to practice law in this State, the record is absolutely devoid of any application for pro hac vice made by him or an order approving it. This information is critical in the case at hand because it was Collen Clark who appeared to sign the Memorandum of Understanding for the settlement between the parties, where Clark signed on behalf of the Plaintiffs. This was done even though he was not only was lacking authority to practice law in this State, he was specifically lacking authority to represent the Appellants, much less enter an agreement on their behalf.

essential because it relates to how more confusion was created by the form of notice that was provided to the Appellants. The Appellants, as of this day, have not received formal notice of the settlement of their claims or the material terms of the settlement.

The Appellants received documents from the Special Master that was designated as a notice of a settlement and notice that a fund had been established for it in Jasper County. The notice came in an envelope that referenced a drug settlement fund.

The Appellants again, were well aware of the fact that they were not involved in, nor otherwise vested into any other litigation, much less any other drug litigation for that matter. The Appellants properly addressed their concerns with the Circuit Court of Forrest County, which was the proper venue and proper jurisdiction; according to the Appellees who were aware that the Appellant's claims had been transferred to Forrest County Circuit Court by Judge Evans' February 5, 2005 order.

On March 21, 2007, the Appellees filed a Motion for Summary Judgment pursuant to Rule 56, Miss. R. Civ. P., in the Circuit Court of Forrest County, MS. (Rec. Vol. V at 619-622). In its Motion the Appellees argued *inter alia*, no genuine issues of material fact remained for a trial in the cause; no evidence existed that proved liability or could prove liability, and basically the claims of the plaintiffs in the Forrest County cases fail as a matter of law.

In a footnote the Appellees aver that pursuant to the severance order there were 1,355 individual cases in the Forrest County Circuit Court that summary judgment was being sought against. ( Rec. Vol. V at 619 Fn.(1.)) The claims of the Appellants were included among those the Appellees were seeking summary judgment[5] against.

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[5] As discussed further *infra*, the Appellees were in the Forrest County Circuit Court on March 21,

On July 31, 2007, the Circuit Court of Forrest County granted the Appellees Motion for Summary Judgment filed March 21, 2007. In the order the Trial Court dismissed all of the plaintiff's claims, except for the claims of the Appellants, finding that the Appellants did have an actionable interest at law against the Appellees. (Rec. Vol. V at 664)

The Appellees further argued in its Motion that until individual case numbers were assigned to the individual claims, it lacked the appropriate cause numbers to file motions for summary judgments[6] against the now 1,355 individual claims that were such as a result of being severed and transferred to Forrest County. The Appellee's argument concludes with it asserting how other Courts throughout Mississippi have required separate filings in other mass tort actions which have been

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2007 seeking summary judgment against the claims of the severed and transferred plaintiffs, which included the claims of the Appellants. However, it is later revealed by the Appellees that a settlement was purportedly reached in the matter on January 18, 2007. This information regarding the settlement that was later revealed in a response by the Appellees to a motion filed by the Appellants was not introduced in the argument for summary judgment. What is strikingly odd about the language in this motion is not what is written in it, but what is left out. The fact the Appellees make no reference whatsoever to the January 18, 2007 settlement agreement in its motion for summary judgment. The fact that the motion for summary judgment was brought by the Appellees more than two months later mind you, is not only interesting, but also highly suspecting and even more so questionable. However, this is not the only suspect and questionable act performed by the Appellees in this matter. What is discussed and revealed *infra* in this brief causes the eye of caution and concern to remain open and ever widening as each factual detail is revealed.

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On May 15, 2007, Dana Kirk, on behalf of the plaintiffs filed a Response to Appellee's Motion for Summary Judgment. In his response Kirk made it clear that he was not speaking for the Appellants. In his response Kirk asserts *inter alia*, that the plaintiffs could not provide a valid argument against summary judgment. Kirk asserts the plaintiffs have no valid argument to respond with in light of the opinion issued by the Mississippi Supreme Court in answering a certified question from the Fifth Circuit in the matter of *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1 (Miss. 2007). (Rec. Vol. IV at Pg. 561 ¶(3.)) Kirk concludes his response and avers to the Forrest County Circuit Court that the plaintiffs cannot in good faith oppose the motion for summary judgment. ( Rec Vol. IV at Pg. 562).

severed based on improper venue[7]. The Appellees went on to state that the claims of a number of the individual plaintiffs had already been severed and transferred to Forrest County, where venue there was found to be proper by the Jasper County Circuit Court. (Rec. Vol. IV at 560-576).

On March 29, 2007, The Appellants were told that Appellant's claims were being submitted for dismissal on Summary Judgment at a hearing that was scheduled for the next day, March 30, 2007 in the Circuit Court of Forrest County. Attorney Kirk informed the Appellants that he was not going to oppose Summary Judgment. Upon hearing this information, the Appellants dismissed Attorney Dana Kirk and became Pro Se' litigants. The Appellants notified the Court of the dismissal of Dana Kirk and properly acted upon that information and belief and filed several motions in the Circuit Court of Forrest County. The Appellants filed a motion seeking an Injunction to delay the disbursement of settlement proceeds and a motion to vacate the order by Judge Evans for establishment of Qualified Settlement Fund and Appointing a Special Master and Claims Administrator and Sealing of Confidential Settlement Information. In their Motion the Appellants[8] averred to the Court *inter alia*, that the settlement had been entered into without the knowledge, consent or notification of Appellant Shirley A. Bolton a party to this action. (Rec. Vol. V at 625 ¶(2.)).

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On May 26, 2005, in a reply to a response filed by the plaintiffs that had been transferred to the Forrest County Circuit Court, the Appellees again assert the issue of venue. "*While Plaintiffs apparently desire to avoid the consequences of their mass filing in an improper venue, the simple fact is that on February 24, 2005 and March 22, 2005, Judge Evans severed the claims in the above referenced matters, (*citing the claims transferred to Forrest County*) and transferred them to this Court pursuant to Rule 82(d) of the Mississippi Rules of Civil Procedure.* (Rec. Vol. IV at Pg. 578).

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Appellant, Dr. Vickie E. Neal, properly and timely filed an identical motion seeking an injunction along with Appellant Bolton. Dr. Neal also properly advised the Forrest County Circuit Court that any settlement that had been entered into on their behalf by Kirk was done so improperly and without

In addition, the Appellants averred that they were clueless of any of the terms of the agreement, they were explicitly clear in their Motion that they were never given their lawfully afforded option to reject[9] the Appellee's offer. The Appellant's Motion never advanced to a dispositive end, nor was it apparently given any other consideration by the Trial Court. (Rec. Vol. V at 625-634)

On May 11, 2007, the Appellees filed a response to the Appellant's Motion for an Injunction to Delay Disbursement of the Settlement Proceeds. The Appellee's cornerstone of its argument was that "Plaintiff's counsel, on behalf of Plaintiff, agreed to settle this and all related claims against Joslyn, and all of the Plaintiff's claims[10] against Joslyn are subject to the binding agreement entered into by the parties on January 18, 2007." (Rec. Vol. V at 636 ¶(1.)).

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her knowledge, consent, or notification. (Rec. Vol. at Pg. 629 ¶(2.)).

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The Appellants use the phrase "*Opt Out*" in their Motion when they refer to not being afforded the right to possibly reject any offer of settlement made by the Appellees. Opt out is an option available to plaintiffs in a class action suit. Mississippi Law does not allow class action suits in the State Court level. See; *Janssen Pharmaceutica Inc., v. Armond*, 866 So.2d 1092, 1102 (Miss. 2004).

10

In the Pro Sé pleadings filed by the Appellants with the Trial Court, it is admitted that much of the arguments are directed at the fraudulent acts and heinous conduct of former counsel Dana Kirk. However the Appellants were not the only plaintiffs that did not agree to this settlement, and most certainly were not the only plaintiffs to fire Kirk as counsel. This relates to the point the Appellants continue to hammer on, and that is they did not agree to any settlement agreement, and based upon the undisputable fact the claims had been severed into individual claims, each settling plaintiff would have had to agree. This was not a case where a Bellwether runs the entirety of the proceedings, and the Appellees know this fact, thus it is the Appellees who have consumed the Court's time and resources with frivolous objections. Had the Appellees not sought to seek shelter in a house covered with a paper thin facade of defense, but instead braved the weather and attended to its liabilities this matter would not be where it is at today.

The Appellees argued that the January 18, 2007 agreement[11] that was entered into by and between the Defendants and their former attorney was binding upon the Appellants because it was entered into by their former counsel on their behalf[12]. The only evidence that was provided in support of the Appellee's position to the Trial Court in it's response, outside of its written arguments, was a copy of the order from the Circuit Court of Jasper County. The order established the Qualified Settlement Fund (QSF) that purportedly was borne from the January 18, 2007 agreement, *albeit* the order that was attached is barely legible.

The Appellees also erroneously asserted in its response that the Appellants admit the "Joslyn Defendant's (Appellee) and Plaintiff's (Appellants) former counsel entered into a settlement agreement in the above referenced case." ( Rec. Vol. V at 636 §(1.)). The Appellants did not admit that Kirk as their attorney entered into a binding agreement, but instead were unambiguously clear and profoundly explicit in the fact that the agreement was entered into without their knowledge, consent and/or authorization.

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More confusion arises from the purported agreement reached on January 18, 2007 where later on it is found in various documents of communication between the Appellants and the Appellees that the agreement was reached on January 30, 2007. However, the record is devoid of any pleadings that reference this date. The Appellants understand that this is a matter for the Trial Court to address, but show it here along with the various other reasons that conclusively show that the Trial Court erred in dismissing the Appellants claims, especially with prejudice.

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Although it is admitted that the Appellants, who were representing themselves Pro Sé, used somewhat of a shotgun approach in their Motion for Injunction, a bullet was amongst the scatter. In their Motion, the Appellants properly noticed the Trial Court in Forrest County that this agreement was not, and could not be entered into by Kirk on their behalf. The Appellants asserted that not only did they have no knowledge of the agreement, much less its terms, they most certainly did not consent to it being entered into, nor did they authorize Kirk, or anyone else for that matter to do the same. Thus, the Appellants promptly and properly repudiated the validity of the agreement.

The Appellees further argue that the claims of the Appellants are subject to a binding agreement entered into between by the Parties on January 18, 2007[13]. (Rec. Vol. V at 636 §(1.)). The Appellees, in furthering its defense against the Motion for an Injunction filed by the Appellants, argued that, pursuant to the purported settlement agreement reached between the parties on January 18, 2007, Judge Evans, the Circuit Court Judge in Jasper County signed an agreed order establishing the Qualified Settlement Fund. (Rec. Vol. V at 636 §(1.)). Ironically the Appellees cite *Hastings v. Guillot*, 825 So. 2d 20, 24 (Miss. 2002) in support of its defense. (Rec. Vol. V at 637 §(1.) ¶(2.)).

In *Hastings*, this Supreme Court found that the law favors settlement of disputes by agreement of the parties and, ***ordinarily***, will enforce the agreement[14] which the parties have made, ***absent*** any fraud, mistake, or overreaching." Id at 24; *First Nat'l Bank v. Caruthers*, 443 So.2d 861,864 (Miss. 1983); *Weatherford v Martin*, 418 So. 2d 777, 778 (Miss. 1982) (Emphasis added). What causes the citation of this authority to be ironic is the undisputable fact that it was cited in a response by the Defendants to a motion filed by the Appellants, where the Appellants are explicitly clear in advising the Court, if a settlement had been entered into it was done so improperly by former Counsel who overreached his authority thereby committing a fraudulent act.

What is interesting though is that the purported "*binding agreement*" that was purportedly reached between the parties on January 18, 2007, was not attached to its response as an exhibit nor

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13 It was in this response filed by the Appellees that credence was given to the Appellants assertion to the Trial Court that a secret settlement had been entered into without their knowledge and/or consent.

14 The Supreme Court made it explicitly clear in *Hastings* that settlement agreements procured by fraud, mistake or overreaching ***will not be enforced***, and are in fact void and unenforceable.

was it introduced in open court or in-camera. In fact, this purported agreement that is the cornerstone of the Appellee's defense has never been produced, and it most certainly was not provided to the Forrest County Circuit Court, much less to the Appellants. The only evidence provided by the Appellees, which was not relevant evidence at all to support its arguments, was a copy of the order issued by Judge Evans establishing the Qualified Settlement Fund[15]. (Rec. Vol. V at 644-645).

Purportedly[16], Plaintiff Ronald Morgan, whose claim was not severed and transferred to Forrest County, but remained under the jurisdiction and venue of the Jasper County Circuit Court, made application for entry of an order establishing; (1) a qualified settlement fund; (2) for appointment of a Special Master to administer the fund; (3) for creation of a claims administration systems for the allocation and payment of individual settlement amounts to be paid out of the fund; (4) and (5) for an order sealing certain confidential settlement information. Subsequently thereafter,

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At a Motion Hearing held before the Forrest County Circuit Court on September 25, 2009, it was brought to the attention of the Court again that Appellants did not consent or authorize anyone to settle on their behalf. The fact regarding the Appellants notice of the purported settlement received from the Special Master and how it appeared to be from drug litigation was also presented. This discrepancy coupled with the fact the Appellants had properly and timely noticed the Court of the fact that the settlement was not agreed to by them raises the brow of concern that much higher and further opens the eye of scrutiny. This documented fact bolsters the assertion the Appellants have been wrongfully subjected to irreparable injury, and the questions that this case most certainly presents to the public is absolute proof that the public's interest is at stake because of the doubt it would place on not just the Trial Court and the Bar, but the judiciary as a whole. On its face, it appears that the Appellants have been blatantly denied their absolute fundamental constitutional rights to have their just day in Court. It is simply undisputable that the Courthouse door was shut on the Appellants, albeit it was shut on them in contradiction to a covenant and in breach of a contract entitled the United States Constitution.

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As the record is devoid of a copy of the motion Mr. Morgan would have made to the Circuit Court of Jasper County, nor is there any reference elsewhere to its wording, the Appellants have no choice but to apprise that the order arises from an application made by Mr. Morgan as a purported event.

it appears that the Jasper County Circuit Court issued an agreed order[17] granting Morgan's request in full.

The order, however, is absolutely devoid of language that would come even remotely near suggesting that it affected the Appellants. The language found within it makes no reference whatsoever to any of the terms of the agreement. The order did not include the amount of money the Appellees had agreed to, or would agree to pay into the fund. It further, did not contain any reference whatsoever to the claims of the severed and transferred plaintiffs that had been removed to Forrest County; nor does it contain any reference that could be construed as notice that all of the claims had been settled. The order makes not one reference to any other plaintiffs claim other than the claims of Morgan, and even then merely references the Plaintiff who made application for the order who is identified in the first sentence as Ronald Morgan.

The order further instructs that all documents filed in the case relating to the disbursement of the settlement, including but not limited to the all information pertaining to the development of a compensation allocation and claims administration system by the Special Master[18] be filed under

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Although the order itself is not dated, the Appellees assert it was entered by the Circuit Court of Jasper County on March 26, 2007. Also it is to be noted, the pleading the order was attached to asserts the claims were settled by the parties on January 18, 2007, but yet in its Motion for Summary Judgment filed with the Forrest County Circuit Court on March 21, 2007 no mention is made about this January 18th settlement, nor is there any reference and/or indication that a settlement had been reached some two months prior. It is only revealed after the Appellants moved the Court for an Injunction. What is interesting though is the undisputable fact that the Appellees earlier had argued that out of the roughly 1,400 claims filed, venue was proper in Jasper County for only six of those claims. However, the Appellees reversed their own position by suggesting that Jasper County is the appropriate venue to establish the fund for all of the claims and its order jurisdictionally sufficient to enforce the purported settlement.

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seal. The order concludes with the Court asserting jurisdiction over the fund until its proceeds are fully distributed. (Rec. Vol. V at 644-645).

In a letter dated September 13, 2007 from Trey Watkins, attorney for the Defendants sent to the Appellants, Watkins advises that the claims of the Appellants were being motioned for dismissal on the basis that they had refused to participate in the settlement fund. **(See Watkins Letter of September 13, 2007 attached hereto as Appellant Exhibit "1"and incorporated herein by further reference).**

On October 18, 2007, the Appellants received notice via email communication[19] that a hearing would be held the next day on a Motion for Summary Judgment brought by the Defendants against the Appellants for their refusal to participate in the settlement fund. The date of the purported hearing was October 19, 2007. The e-mail had attached to it releases for the Appellants to sign for the Defendants. The e-mail was sent at approximately 11:00 a.m. on the morning of Thursday October 18, 2007, and advised that representatives of the Defendants required that the Appellants must sign and return them by 4:00 p.m. that same day[20]. The e-mail further advised that if they did

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The Jasper County Circuit Court appointed James P. Cothern of Jackson, MS. as the Special Master.

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The e-mail originated from Trey Watkins, attorney for the Defendants and was forwarded by a colleague of the Appellants Counsel, who at the time, was out of town and who was not present or going to be present for the Summary Judgment Hearing that allegedly took place on Friday October 19, 2007 in the Circuit Court of Forrest County.

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The e-mail with the attached releases was first received by Appellant Dr. Vickie Neal and was signed and returned by fax at 4:02 p.m. that same day. Due to mitigating factors that were beyond her control, Appellant Shirley Bolton returned her signed release seven (7) days later on October 26, 2007 at 6:30 p.m. (5:30 C.S.T.). However, it is to be remembered exactly what circumstances the release, or rather than invalid release was signed, referencing the circumstances that were produced by trickery and deceit that gave birth to outright fraud. This most deplorable act that was created by

not sign the releases and return them as instructed their claims had been submitted for dismissal at the Summary Judgment Hearing scheduled to occur the next day, Friday October 19, 2007. **(See Watkins Letter of September 13, 2007 attached hereto as Appellant Exhibit "1"and incorporated herein by further reference).**

The Appellants, who both live outside[21] the State of Mississippi, could not arrange for travel to Mississippi on less than 24 hours notice. In addition to travel difficulty, Ms. Bolton was scheduled for a surgical procedure at that time. Their attorney was also out of town and could not be reached. Therefore, the Appellants, who were already under stress, especially Ms. Bolton, who is the natural sister of Dr. Vickie Neal, had less than ***Four (4) Hours***, without the assistance of counsel, to make a decision as to whether or not to sign the releases[22].

Not only does this pressure tactic that was utilized by the Defendants provide a perfect analogy of causing an individual to act under duress, what is revealed next provides evidence that cannot be contradicted that it was duress that was abhorrently applied against the rules and laws that govern a moral and decent society.

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the Defendants must not, and cannot be overlooked.

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Ms. Bolton lives in Columbia, Maryland and Dr. Neal lives in Desoto, Texas.

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The Appellants were placed in a position and provoked to act by the Defendants use of methods that not only evoke revulsion, but methods that most certainly not were produced, condoned and/or otherwise supported by the laws of this State, this Country or those of any moral law abiding society. This must be viewed for exactly what it is. The Appellants were left with only one way to view the situation, and that was; unless they signed the releases that the hearing for summary judgment would take place the very next day, and their claims would be dismissed. This is not how the American Justice System works.

As of the date that this Brief is being submitted to this Honorable Court, ***no*** Summary Judgment Motion that was scheduled to be heard on October 19, 2007 has been produced by the Defendants, and ***there is absolutely no evidence*** that such a motion ever existed, or was ever filed with the Trial Court, much less docketed to be heard, as the Defendants attorney had bullishly asserted to the Appellants in his letter of September 13, 2007, where the Appellants were fraudulently induced into signing the releases[23].

On September 4, 2009, the Appellees filed a Motion to Dismiss the claims of the Appellants, where again the cornerstone of its argument was the January 18, 2007 settlement agreement, now bolstered by the releases obtained by fraud as discussed *supra*. The Appellees erroneously asserted that "for reasons known only to the Appellants they had not yet claimed their portion of the settlement funds"[24]. The Appellees insert that, "All three have, however, signed releases of any claims they may have against Defendants. Vickie E. Neal and Linda C. Bolton signed releases on October 18, 2007 and Shirley Bolton signed her release on October 26, 2007." (Rec. Vol. V at 0666,

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The releases signed by the Appellants cannot stand any test of validity to be considered enforceable, much less binding. They were obtained by the making of statements that were known to be non-truths by the speaker; the same non-truth's the Appellants relied on as truth that induced them to act. Furthermore, the releases are to be construed as a contract, and when the rules of contract construction are applied they fail miserably. Thus, the Appellees argument that the Appellants have signed releases is a moot point of no effect.

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The Appellants made it explicitly clear why they had not claimed any of the funds from the settlement proceeds at the hearing on Appellees Motion to Dismiss held on September 25, 2009 and again on January 29, 2010. Dr. Vickie Neal, one of the Appellants herein, testified they had not gotten the funds because of, *inter alia*, aside from the fact they had no knowledge of the settlement and/or consent to it, there was also the apparent discrepancies regarding the derivation of the funds, where they appeared to be derived from Phen-Fen litigation, not Toxic Tort or Wood Chip. ( Rec. Vol. VII at Pg. 25, (§24-29)Transcript of Hearing).

§(2.)) The Appellees conclude the Motion by asserting; "Because Defendants have fulfilled their part of the settlement obligations[25], the Court should dismiss any and all claims against Joslyn Manufacturing Company and Danaher Corporation with prejudice and enter final judgment in their favor." (Rec. Vol. V at 667, §(3.) Conclusion))

The Trial Court granted the Appellee's motion and entered an order on January 29, 2010 dismissing the claims of the Appellants with prejudice. The Court found that the claims of the Appellants had been fully and finally resolved, and that the Appellees had fully funded the Qualified Settlement Fund. In rendering his ruling the Trial Court failed to observe the fact that the claims had been severed into individual claims, and the Appellants had properly noticed the Court in a timely fashion they had agreed to no such settlement. Additionally, the Trial Court made this ruling absent of any evidence whatsoever. The only thing that was presented by the Appellees that supported the theory an agreement was reached that was binding upon the Appellants, was again counsel's argument and a barely legible photocopy of the order issued by Judge Evans establishing the fund[26]. This was grossly insufficient and could not, and did not prove the existence of a binding agreement and its terms; it most certainly fails to provide even a modicum of proof that the agreement had been

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Although Joslyn and Danaher continue to assert it has fulfilled its part of the settlement obligation, just exactly what that obligation was/ is still a mystery. Not only are the Appellants entitled to know this information, as individual plaintiffs in a civil action they are required to be informed. They were not informed, and properly noticed the Trial Court of this critical fact.

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As if there were not enough issues regarding this settlement fund and the agreement that purportedly prompted the order that established it, communication between the parties refer to an order signed by Judge Helfrich in Forrest County that deals with settlement of the Appellants claims. However, the record is devoid of any motions that would have been brought to produce such an order, and there is no order found in the record.

fully funded. Once again this decision was based on nothing more than the arguments presented by counsel for the Appellees.

Final Judgment was entered by the Trial Court in the matter on January 29, 2010. After the Trial Court entered this order, the Appellants, Pro Sé at the time, appealed to this Court.

On February 26, 2010 the Appellants filed their notice of Appeal of the Trial Court's ruling to dismiss their claims with prejudice with this Court. On or about March 4, 2010 the Appellants filed for Designation of the Record with the Clerk of the Circuit Court of Forrest County. The Appellants designated that all files were needed by them from both the original Court in Jasper County, and the Trial Court in Forrest County, specifically Cause No. 11-0140 and 15-0020[27].

The Appellants subsequently filed a Motion to Correct the Designation of the Record upon discovering the records that were vitally essential and of the utmost necessity was not included in the records, notwithstanding the fact they had been requested.

In their Motion to Correct the Designation of the Record, the Appellants specifically point out that in their original motion filed on March 4, 2010, they had requested the files from the Jasper County Circuit Court and designated those records to be pertinent to their appeal. The Appellants also point out that this Court had granted a motion brought by the Appellants for an extension of time and provision of those records[28]. The Appellants specifically point out the fact of how the

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The Appellants also filed a Motion for Extension of Time for Designation of the Record with this Court on March 28, 2010. In their motion the Appellants point out the fact that originally their case was filed in the Circuit Court of Jasper County, and later severed and transferred to Forrest County, and that records from both of the Court's was needed to perfect their appeal.

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records from Jasper County for *Susana Barnes et al. vs. Powe Timber Co., et al* Cause No. 11-0140 and especially; *Ronald Morgan, et al. vs. Powe Timber Co., et al. Cause No. 15-0020*, were vitally essential to the Appellants being able to perfect their appeal. The Appellants again specifically point out the importance of the records from the *Morgan* case, because of the Appellee's assertion that the settlement fund was established under *Morgan*, which is defined as the Bellwether case that led to settlement.

This Court subsequently entered an order dismissing without prejudice the Appellant's Motion to Correct the Designation of the Record. This Court ruled that Appellant's motion should be filed with the Trial Court in Forrest County. This Court further ruled that Appellee's Motion to Dismiss Frivolous Appeal and for Sanctions would be passed for consideration with the merits of the Appeal. (Rec. Vol. V at 730)

The Appellants, acting upon the order of this Court, timely filed a Motion to Correct the Designation of the Record with the Trial Court in Forrest County. The Appellants point out, *inter alia,* the fact that the settlement fund was administered under the Jasper County Circuit Court under the auspices of Judge Evans, even though the majority of the cases, including the claims of the Appellants had been severed, and sent to the venue of the Circuit Court of Forrest County pursuant to an order signed by Judge Evans earlier on in the proceedings. The Appellants further explicitly point out the prior communication to the Court of the issues with the settlement releases, and that the foundation for the releases was the settlement fund set up by Judge Evans in Jasper County, appearing to be the basis for the dismissal with prejudice of their claims by the Trial Court in Forrest

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Appellants Motion for Extension of Time was granted by the Honorable Chief Justice, William Waller, Jr.

County. (Rec. Vol. V at 738-746)

The Appellees responded to the Appellants Motion to Correct the Designation of the Record and asserted that the Appellants were on a fishing expedition. In asserting the Appellants were "fishing", it is argued the Appellants were seeking to expand the record on appeal to include records that played no role in the Trial Court's decision to dismiss the Appellants claims. Among the remaining arguments made by the Appellants was that the Trial Court dismissed the Appellants claims because they had signed full and final releases. (Rec. Vol. V at 747-750).

Naturally however, the Appellees did not reveal to the Trial Court the circumstances behind the releases the Appellants were fraudulently induced into signing. When the Appellants attempted multiple times to reveal it again on the record, they were cut off. Furthermore for the Appellees to assert in its response that the case the records are sought from played no part in the Trial Court dismissing the Appellants claims is utterly ridiculous.

It is beyond peradventure to suggest that the case the records are sought from played no part in the Trial Court's decision to dismiss the Appellants claims. It is a documented and undisputable fact that the Trial Court dismissed the Appellants claims after finding the Appellees had fully funded the Qualified Settlement Fund. This settlement fund did not arise out of thin air or on its own; it arose from the settlement agreement apparently reached with Jasper County plaintiff Ronald Morgan, who made application to the Court seeking an order to establish the fund as discussed *supra*. This is the same Ronald Morgan referenced to in the order that was attached to a pleading filed earlier on by the Appellees.

Furthermore, this is also the same Ronald Morgan case that is referred to as the Bellwether that prompted the January 18, 2007 settlement agreement. It has been vigorously asserted by the

Appellees, time and time again throughout these proceedings, that the Appellants were bound by the January 18, 2007 settlement agreement.

And finally, once again, this is the same case the Court based its ruling upon when it found the Appellees had fully funded the settlement fund[29]. See; (Rec. Vol. V at 644-645; attached as Exhibit "A" to Appellee's response to Appellant's Motion for Injunction).

## III. SUMMARY OF THE ARGUMENTS

A. Whether the Trial Court erred in deciding that the Appellants could be bound by the Settlement Agreement?

The Trial Court erred when it found the Appellants were bound to the settlement agreement reached between the parties and the order issued by Judge Evans and the Jasper County Circuit Court when it did not review the agreement, the releases or the venue and jurisdiction of the agreement. The Trial Court made the decision that the Appellants were bound by the settlement agreement reached between the parties and the Order issued by Judge Evans of Jasper County Circuit Court without making a review of the agreements, the releases or the venue and jurisdiction of the

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In one breath the Appellees assert the settlement agreement that obviously arises from the Morgan case, which was the Bellwether, totally affects the Appellants claims, where the Appellees argue they are bound by the terms of this agreement and subsequent order issued by the Jasper County Circuit Court. The Appellees now assert that the Morgan case has nothing to do with the Appellants claims. Furthermore, the Appellee's argument that the dismissal of the Appellant's claims by the Trial Court in Forrest County had nothing to do with the Morgan case. This is soundly contradicted by the order of dismissal itself, where Judge Helfrich specifically found that the Appellees had established the settlement fund and fully funded it, which again only did arise from the Morgan case. However, Judge Helfrich based his findings on nothing more than the argument presented by counsel for the Appellees and a copy of the order signed by Judge Evans of Jasper County establishing the fund, *albeit* the copy provided was barely legible.

agreement, which were all placed into question by the Appellants.

B. Whether the releases signed by the Appellants are void and unenforceable?

The releases relied on by the Appellees are void and unenforceable on two grounds: the first being fraud and the second being the validity of the construction of the releases themselves. The Court, upon review will find that the releases were procured through fraud and the construction of the releases was flawed making the releases void and unenforceable.

C. Whether the Trial Court erred in dismissing the Appellant's action with Prejudice?

The trial court erred in dismissing the Appellant's action because the Appellants had placed the Court on notice that the releases were signed under fraudulent circumstances. After being notified by the Appellants, the Trial Court owed a duty to the Appellants to review the process leading up to the signing of the releases to ensure that fraud had not occurred.

D. Whether the records of the Ronald Morgan action are relevant to the Appellants appeal and therefore should be unsealed?

The Ronald Morgan records are relevant to the Appellant's appeal because there are discrepancies in when the agreement occurred and who was a party to the agreement. Without these records, these questions will remain unanswered and justice for the Appellants will not be fulfilled. The records must be unsealed or an "in-camera" review of the documents should be held so as to identify the Defendants who were a party to the agreement and the status of all other Defendants in the action.

## V. ARGUMENTS

### A. Whether the Trial Court erred in deciding that the Appellants could be bound by

**the Settlement Agreement?**

There are three major reasons why the Appellants cannot be bound by the Settlement agreement: 1) the Jasper County Court did not have jurisdiction; 2) The attorney who signed the "alleged" settlement agreement could not represent the interest of the Appellants and 3) the Appellants were not aware of a settlement agreement and had not been consulted prior to the execution of the agreement.

First, the claims of the Appellants had been severed and transferred to the Circuit Court of Forrest County upon Motion brought by the Appellees, where jurisdiction in Jasper County was characterized as "blatantly improper." Therefore, the Circuit Court of Jasper County had acknowledged by its own order that it had no authority to exercise any jurisdictional authority over the Appellants, and/or their claims. Pursuant to the order severing the cases, each individual case was then to be styled separately and brought on its own merits by which it alone would be adjudged, and not be group together with other claims by comparison. This was plain error by the Court committed in contradiction to the language articulated under the Doctrine of Priority Jurisdiction. Accordingly, this doctrine prohibits a court from taking jurisdiction over a matter, involving substantially the same parties and subject matter, if another court has acquired jurisdiction *John Hancock v. Farm Bureau Insurance Co.*, 403 So.2d 877, 878-79 (Miss.1981).

Secondly, the agreement that was purportedly reached, that the Appellees contend binds the Appellants because it was signed by their attorney has never been produced. The only thing that has been produced to the Appellants that purportedly represents the Settlement Agreement is a Memorandum Of Understanding that is dated January 30, 2007. Collen Clark, an attorney who had associated with Dana Kirk was the individual that signed on behalf of the Appellants. Mr. Clark was

not an attorney for the Appellants, nor was he, or is he, licensed to practice law in the State of Mississippi, nor had he ever applied for, or was granted pro hac vice. *Rule 8.4(a), (b), (c) and (d) of the Mississippi Rules of Professional conduct.*

In addition, the Appellants, who had made numerous, but yet unanswered request for information about their case from former counsel Dana Kirk, had no knowledge of the purported settlement agreement that was reached, apparently in secret without the Appellants knowledge, much less had they given their consent and/or authorization to Kirk, or anyone else for that matter to enter it on their behalf.

Lastly, the Appellants were not aware of a settlement agreement and had not been consulted prior to the execution of the agreement. Mississippi Law generally adheres to the principle that a party is charged with knowledge of the terms of a contract that he signed. See *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006). The state's courts have recognized exceptions for releases procured under circumstances evidencing bad faith, disparity in bargaining power, coercion, duress, or other inequities.

**B. Whether the Releases signed by the Appellants are void and unenforceable?**

The Appellants were noticed by an e-mail that had attached to it releases to be signed by them. The Appellants were told that if they did not sign the releases the Appellees would be moving the next day to dismiss their claims for their refusal to participate in the settlement fund. The e-mail was sent to the attorney for the Appellants, and then forwarded to them by a colleague of their attorney who was out of town and could not be reached. The Appellants, who were without the ability to obtain advice from their counsel, were given roughly Four (4) Hours to make a decision of whether or not to sign the releases. Upon discovering the representations made in the e-mail by

counsel for the Appellees was a non-truth, downright dishonest and a scare tactic used to fraudulently induce them into signing, the Appellants promptly acted, and openly repudiated the validity of the releases. Unfortunately the Trial Court gave the Appellants repudiation of the releases no consideration, and in failing to do so the Trial Court erred.

The first being the fact they were procured by fraud, where the Appellants were induced to act and sign them. The standard for fraud is clear and convincing evidence. The Appellants in order to support the claim of fraud would have to show that a representation was made, that it was false, that it was material, that the Appellee knew that the representation was false, that it would cause the Appellants to act in a manner reasonably contemplated, that the Appellants were ignorant of the falsity of the representation and relied on its truth, that the Appellants had a right to rely upon the representation and that as a result an injury occurred. The Appellants were told that if they did not sign the releases their claims would be dismissed at a hearing on the next day. It is clear that this was not true because the record is devoid of a motion being heard on that day, October 19, 2007. The expectation and intent was to scare the Appellants into action in order to salvage their claims. The Appellants were unaware that a motion had not been filed and therefore they relied on the statements and as a result they were induced into signing releases that would later be utilized to dismiss their action. With the releases being obtained by the Appellees through the conscience making of non-truth's, that was known by the speaker to be just that, while knowing the Appellants would rely on the material misrepresentations made to them, and in fact was bound to rely on them is nothing less than fraud in the procurement.

Mississippi Law generally adheres to the principle that a party is charged with knowledge of

the terms of a contract that he signed. See *MS Credit Ctr., Inc*, 926 So. 2d 167, 177 (Miss. 2006). The state's courts have recognized exceptions for releases procured under circumstances evidencing bad faith, disparity in bargaining power, coercion, duress, or other inequities. A good example can be found in *Willis v. Marlar*, 458 So. 2d 722 (Miss. 1984). In Willis, the plaintiffs had been in an automobile accident with the defendant. The defendant's insurer issued a check and paid plaintiff's for their vehicle damage. Later the insurer's agent met the plaintiffs at a hurried meeting during their lunch break and had them sign a release. After discovering the agent had pulled a sleight of hand move on them after they received a check for just $424.00, the plaintiffs filed suit and challenged the validity of the releases. In reversing the trial court's order directing verdict for the defendant on the release, this Court held; that there was an issue of fact for the jury on the releases. See also; *Alexander v. Myers*, 219 So. 2d 160, 160-63 (Miss. 1969), holding that decision to submit issue to jury was affirmed where signature for release was procured by fraud and misrepresentation. Also see; *Tate v. Robinson*, 78 So. 2d 461 (Miss. 1955), held that issue of release's enforceability should have been submitted to the jury when injured party received a nominal sum for injuries, and relied on misleading representations made by adjuster who induced her to sign the release.

In reaffirming the above cited cases, this Court held in the matter of *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 757 (Miss. 2003) "What all the cases make clear is that where there are allegations made as to the validity of a release due to fraud, misrepresentation, adhesion or other inequities then the case properly goes to the jury or fact finder," after citing *Tate*, *Alexander* and *Willis*.

Looking at the time frame upon which the Appellants acted and repudiated the releases to the Trial Court, it cannot be said the Appellants did not act promptly, because they acted at the time they

discovered the fraud that had been committed in having them sign the releases. This Court has held that the discovery rule is to be applied when the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of wrongdoing in question, or it may be applied when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act. *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788, 794 (Miss. 1998) (citing *Smith v. Sneed*, 638 So. 2d at 1257 (Miss. 1994); *Staheli v. Smith*, 548 So. 2d 1299, 1303 (Miss. 1989)).

**C. Whether the Trial Court Erred in Dismissing the Appellant's action with Prejudice?**

It is undisputable that the Circuit Court of Jasper County already ruled that venue there was improper when the Appellants claims were transferred to Forrest County, rendering the Jasper County Circuit Court without jurisdiction, subject matter or personal. In February of 2005, upon advancing the Motion to Sever and Transfer as discussed *supra*, the Jasper County Circuit Court entered an order, finding, that venue was improper in that Court for the Appellant's claims to be adjudicated, transferring the claims of the Appellants to the venue in the Circuit Court, under the Jurisdiction of Forrest County. Therefore, pursuant to the Motion advanced by the Appellees, and the Jasper County Circuit Court's own order, jurisdictional authority had been relinquished over the Appellants and of their claims. Black letter law requires that a valid judgment requires jurisdiction of subject matter, or of the parties and due process of law. *Bryant v. Walters*, 793 So. 2d 933, 938. If a Court lacks jurisdiction or the requirements of due process are not met, the judgment is void and must be vacated. *Id.* at 937-38.

It was clearly erroneous for the Trial Court to compel that the Appellants be bound to the order

of the Jasper County Circuit Court. In fact, such compulsion was inappropriate. If the court is without jurisdiction–subject matter or personal–no one is bound by anything the court may say regarding the (de)merits of the case. *Petters v. Petters*, 560 So. 2d 722, 723 (Miss. 1990). Pursuant to the Motion to Sever and Transfer brought by the Appellees in the Jasper County Circuit Court, which advanced to a dispositive end in the Appellees favor, no order thereafter entered by the Jasper County Circuit Court could be held as valid regarding the Appellants.

This Court held in the matter of *Duvall v. Duvall*, 80 So. 2d 752, 755 (1955) "It is well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked, directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity." Furthermore, in light of the order issued by the Jasper County Circuit Court in February of 2005, transferring the claims of the Appellants to Forrest County, the Doctrine of Priority Jurisdiction attached, thereby prohibiting the Circuit Court of Jasper County from entering an order of a dispositive nature that could be used to assume jurisdictional control over the Appellants. The principles of priority jurisdiction provide that a controversy proceeds in the court of competent jurisdiction which first acquires the controversy, to the exclusion of jurisdiction in any other court. *Huffman v. Griffin*, 337 So. 2d 715, 719 (Miss. 1976). Accordingly, this doctrine prohibits a court from taking jurisdiction over a matter, involving substantially the same parties and subject matter, if another court has acquired jurisdiction. *John Hancock*., 403 So. 2d 877, 878-79 (Miss. 1981). Thus, due to the fact that an order had been entered by the Circuit Court of Jasper County transferring the claims of the Appellants to Forrest County, Jasper County was prohibited from taking jurisdiction back over the Appellants claims.

Therefore, based upon a substantial amount of black letter law, this Honorable Court should

reverse the Trial Court's order dismissing the Appellants claims with prejudice, where its findings were based on orders from proceedings held in the Circuit Court of Jasper County. Pursuant to the fact that when the claims were transferred, the doctrine of priority jurisdiction had attached in the case at hand, the Jasper County Circuit Court was prohibited from entering an order of a dispositive nature, or otherwise, that would, or could be used, to bind the Appellants under the terms of the settlement agreement.

The Appellants also cannot be bound to the agreement, because the agreement itself was entered into by an individual who was not an attorney for the Appellants, and in fact was not authorized to practice law in this State. An attorney acts as the agent for the client, albeit his duties are far greater than those of a mere agent otherwise, where is to not only adhere to the duties owed his client, but also the duties that are owed as an Officer to the Court. This duty to the Court falls on the shoulders of both the attorney for the Plaintiff and the attorney for the Defendant, and is to be observed with a profound respect by both sides. However it is beyond peradventure to suggest that in a civil proceeding the interest of the client can be disregarded, and decisions regarding the clients claims can be resolved without the client being consulted with by the attorney, and providing the attorney their consent. It is this undisputable fact that causes the principles of a Principal Agent relationship to apply in the matter at hand, because the Appellants were the principal, and the attorney was the agent, but the actual authority conferred upon the agent to bind the principal is based upon the conduct of the principal.

The power of an agent to bind his principal is not limited to the authority actually conferred upon the agent, but the principal is bound ***if the conduct of the principal*** is such that persons of reasonable prudence, ordinarily familiar with business practices, dealing with the agent might

rightfully believe the agent to have the power he assumes to have. *Steen v. Andrews*, 223 Miss. 694, 78 So. 2d 881, 883 (Miss. 1995). In light of the fact the Appellants promptly and openly repudiated that authority purportedly represented to the Appellees and the Court(s) by former counsel Dana Kirk, his associate Collen Clark, or anyone else for that matter, sufficiently answer the requirements under the first prong of the three prong test that is to be applied when testing the apparent authority of an agent. See; *Eaton v. Porter*, 645 So. 2d 1323, 1325 (Miss. 1994).

RESTATEMENT (SECOND) OF AGENCY, § 228 (1958). Section 228 of the Restatement, which the Mississippi Supreme Court adopted in *Sears Roebuck & Co. v. Creekmore*, 199 Miss. 48, 23 So.2d 250, 251 (1945), clearly requires that, in order to be within the scope of employment, the agent's conduct must be actuated, at least in part, by a purpose to serve the master. The Appellants promptly repudiated the acts of former counsel Dana Kirk and his associated Collen Clark, and made it explicitly clear that entering into the Settlement Agreement was not an act that was performed to serve the will and desire of the Appellants.

Furthermore, the Appellees have reiterated throughout these proceedings that relief for the Appellants does not lie with it. The Appellees have conceded and in fact acknowledged in open court that the Appellants and many others who were plaintiffs in this case, were victims of the fraudulent acts committed by Dana Kirk and his associate, Collen Clark. However the Appellees are attentive enough to stop short of admitting the complicity of their acts, but continue to affirmatively declare the Appellants are bound by acts committed by Kirk and Clark, even though the Appellees have conceded the acts were the sins of the former attorney(s) for the Appellants. Here the Appellees suggest that the sins of the attorney should be visited upon the client, but the Appellees are wrong as this cannot be done. See; Link *v. Wabash R. Co., 1962*,370 U.S. 626, 646, 82 S.Ct. 1386,1397.

Therefore, based upon ample evidence found in the record, and an abundance of authorities of law on the subject, this Honorable Court should reverse the Trial Court's order dismissing their claims with prejudice after finding that the Appellants were bound under the terms of the settlement agreement, that was entered into by an individual who was not only lacking the legal ability to do so, he was also devoid of the authority he purported to have, the same which was timely repudiated by the Appellants.

A settlement agreement is a contract. *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss. 1990). A meeting of the minds must exist between the parties in order to have a settlement. *Thomas v. Bailey*, 375 So. 2d 1049, 1052 (Miss. 1979). In order for a settlement agreement to be enforced, the party claiming the benefit of enforcement must prove beyond a preponderance of the evidence that there was a meeting of the minds. *Hastings v. Guillot*, 825 So. 2d 20, 23 (Miss. 2002). The Trial Court erred in finding that the Appellants were bound by an agreement, that was not only an agreement they had not given their consent to be entered into, which was due to the simple fact, it was an agreement they had no knowledge of, much less that it was being entered, it is also an agreement that the Appellants have never seen. The Trial Court erred because it was not at liberty to assume the averments made by counsel for the Appellees were accurate regarding the agreement. The Trial Court instead should have been concerned with the fact it had been made explicitly clear by the Appellants in repudiating the agreement that it could not, and in fact did not contain their communication to the Appellees, but instead appeared to arise from the secret thoughts of the parties that entered into it. In light of the fact the record is devoid of any proof the agreement itself, was ever presented by the Appellees to the Trial Court, for viewing in camera or otherwise to support its finding with regard to the agreement, evidence is found in this nonexistent fact that the Court's ruling

was not only based on insufficient evidence, it was based on no evidence whatsoever. At best, if anything that may have been presented to the Trial Court was the Memorandum of Understanding entered into by Collen Clark as discussed *supra.*

The record unfortunately does not reveal if the document titled "Memorandum of Understanding" was actually ever presented to the Trial Court, the Appellants are left to make an eerie guess as to this. However, to the extent of argument it was presented and the record is somehow devoid of this fact, before the Court could order that the Appellants be bound to it, the Court must first have had the ability to determine what if anything, the agreement covered. Although this would be somewhat impossible because the memorandum itself is profusely vague, ambiguous, devoid of any terms, much less essential terms, it contains nothing but broad strokes and is overall overly broad. However, again, simply for the sole sake of argument it is said the Court was presented with the memorandum to base its ruling; the Court would still have had to apply the basic principles of contract construction and interpretation. Before a court may order specific performance of a contract, the contract must be sufficiently definite on material terms. *Leach v. Tingle*, 586 So. 2d 799, 802 (Miss. 1991) citing *Duke v. Whatley*, 580 So. 2d 1267, 1272-1274 (Miss. 1991. If any essential terms are left unresolved, then no contract exists. *Busching v. Griffin*, 465 So. 2d 1037, 1040 (Miss. 1985). The primary purpose of all contract construction principles and methods is to be determined and record the intent of the contracting parties. *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989). When viewing a contract, a court should first examine the four corners of the contract to determine how to interpret it. *Rotenberry v. Hooker*, 864 So. 2d 266, 270 (¶ 14) (Miss. 2003) (citing *McKee v. McKee*, 586 So. 2d 262, 266 (Miss. 1990)). The only problem presented here is that which is obvious, and that is that the agreement itself has never been produced,

much less the documentation it arises from. The memorandum, if it was ever presented to the Court, was grossly insufficient in its content to order enforcement of any terms, much less for the Trial Court to find the Appellants were bound to it. A contract is unenforceable if its material terms are not sufficiently definite. Leach at 802.

Therefore the Trial Court erred in ordering enforcement of the terms of an agreement upon the Appellants, especially when it is an agreement that neither the Trial Court nor the Appellants have ever had privy of viewing. The only thing the record shows in an evidentiary manner that was presented to the Trial Court, was simply the averments made by counsel for the Appellees, and a barely legible copy of Judge Evans Order. It is a fact derived from well established law handed down by this Court that the Trial Court erred in dismissing the Appellants claims, based on nothing more than the argument made by the attorney for the Appellees, and a barely legible copy of Judge Evans order establishing the fund. When the two are combined together under one argument, it amounts to nothing more than parol and extrinsic evidence. Legal purpose or intent should first be sought in an objective reading of the words employed in the contract ***to the exclusion of parol or extrinsic evidence***. *Cooper v. Crabb*, 587 So. 2d at 241. Also see; *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208, 1214 (Miss. Ct. App. 1999)). (emphasis added)

Also, it is beyond peradventure that when a person willingly enters into an agreement that contains the understandings of the parties that have been communicated to each other, that person is in fact bound. In the matter at hand though, the Trial Court clearly erred when finding that the Appellants were bound to an agreement that they know absolutely nothing about, had never seen, or much less agreed to, but was in all fact an agreement that arises from the secret thoughts and communication of others, who had absolutely no authority whatsoever to enter it on behalf of the

Appellants.. However then, the essential terms are not only unresolved, they instead are totally absent, leaving the Appellants still clueless, because this document contains nothing that would clearly reflect the intent of the parties, and the essential terms by which it would be governed. Thus, due to the absence of any of the terms, the contract is not only unenforceable as it relates to the Appellants, based upon the memorandum of understanding, being the only thing provided, no contract exists in whole or in any part, and that which does not exist cannot be enforced. See *Leach* at 802, and *Century 21 Deep South Properties, Ltd. vs. Bobby Norris Keys*, 652 So. 2d 707 (Miss. 1995).

This Court has previously held that agreements such as this cannot be enforced upon a party, especially if that party is wanting of knowledge of not only the agreement, but the terms by which it is to operate. A reviewing court is concerned with what the contracting parties have said to each other, not ***some secret thought*** of one ***not communicated*** to the other. *Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001), also see; *Osborne v. Bullins*, 549 So. 2d 1337, 1339 (Miss. 1989). This Honorable Court should reverse the Trial Court's order that the Appellants are bound under the terms of the settlement agreement. (Emphasis added) A release being a written document where one party agrees to perform a specific act for another in exchange for a promise, the basic rules of contract law is the law that governs their execution and delivery. Former justices of this Mississippi Supreme Court have visited the topic of releases obtained by fraud, and an abundance of authorities is available. Under Mississippi law, where a written contract is procured by fraud committed by one party on another, the defrauded party may come forward, show the true facts, and avoid the contract. This option is available to the defrauded party because no contract exists that is procured by legal fraud. Citing; *Telephone Man v. Hinds County*, So. 2d. 208, 210-11 (Miss. 2001). Had it not been

for the fraudulent misrepresentations made to the Appellants regarding the disposition of their claims, they would have never signed them. But due to the circumstances of duress caused upon the Appellants by the Appellees, which provoked them to signing, the releases are absolutely void, not just voidable.

Secondly, with the releases being a written instrument that was designed to reduce the intentions of the parties, the rules of contract construction and interpretation apply. Notwithstanding the fact the releases cannot stand to pass the first test required, which is to show they were entered into by the Appellants of their own free will, and that no material misrepresentations were made by the Appellees, or any fraud was involved, the releases most certainly fail as a matter of law under the principles of contract construction must be applied.

The Mississippi Supreme Court has clearly established the rules that are to be applied to interpreting a contract. "When viewing a contract, a court should first examine the four corners of the contract to determine how to interpret it". Rotenberry, 864 So. 2d 266, 270 (¶ 14) (Miss. 2003) (citing McKee, 586 So 2d 262, 266 (Miss. 1990)). "The primary purpose of all contract construction principles and methods is to be determined and record the intent of the contracting parties" Kight, 537 So. 2d 1355, 1358 (Miss. 1989).

The Appellees contend that the Appellants claims should have been dismissed because they signed releases, *albeit* the Appellees have not confronted the Appellants claims regarding the circumstances the releases were signed under. For the sole sake of argument, even if it could be said the releases were signed under perfect conditions where both parties were in harmony, the releases still fail because they contain none of the essential terms that reveal exactly what the Appellants were to be provided and when by the Appellees in exchange for executing the releases. Mississippi Law

favors a determination that the terms of a contract are sufficiently definite, so as to carry out the reasonable intention of the parties. *Mississippi Highway Comm'n v. Patterson Enters.*, 627 So. 2d 261, 263 (Miss. 1993). It is also well settled Law that Mississippi Court's will not enforce a vague and ambiguous contract. Mississippi Courts will refuse to enforce a contract that is "vague" indefinite and ambiguous." *Sta-Home Health Agency, Inc. v. Umphers*, 562 So. 2d 1258-1260-61 (Miss. 1990).

"A contract is unenforceable if its material terms are not sufficiently definite". Leach, 586 So 2d 799, 802; citing *Duke v. Whatley*, 580 So. 2d 1267, 1272-1274 (Miss. 1991. "If any essential terms are left unresolved, then no contract exists". *Busching*, 465 So. 2d 1037, 1040 (Miss. 1985). "Legal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence". *Cooper*, 587 So. 2d at 241. Also see; *City of Grenada*., 755 So. 2d 1208, 1214 (Miss. Ct. App. 1999)).

When reviewing the releases in the case at hand, the issue is actually a non-issue, and that is the terms that should have been disclosed but were not, are required to be disclosed by law. It is the absence of the essential terms that cause this document to fail, and in no way can it sustain the Appellee's erroneous assertion that it is perfect, and should be enforced.

Other matters that are noticeable is the fact the releases fail to designate what, if anything, the Appellees are agreeing to do for the Appellants in exchange for their signing the releases, but yet in terms of what the Appellants are to do for the Appellees, the language is ample, and in fact completely one-sided, wholly in favor of the Appellees. This causes the releases to fail for being unconscionable, because it specifically discloses the benefits the Appellees are to expect, but nothing

in terms of what benefit or protection the Appellants are to expect. This Court has spoken to one sided agreements before, and they are not favored under our law. A much-quoted judicial definition is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." 7-*29 Corbin on Contracts § 29.4 (2009)* (quoting *Gimbel Bros. Inc. v. Swift,* 62 Misc.2d 156, 307 N.Y.S.2d 952, 954 (1970); *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445, 449 (D.C. Cir.1965)).

"Our precedent follows the ***Williams*** ("absence of meaningful choice") *See Entergy Miss., Inc. v. Burdette Gin Co.,* 726 So.2d 1202, 1207 (Miss.1998) (quoting *Bank of Indiana, Nat'l Ass'n. v. Holyfield,* 476 F.Supp. 104, 109 (S.D. Miss.1979)). Unconscionability can be procedural or substantive. *East Ford v Talyor,* 826 So.2d 709, 714. Under " substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between, the contracting parties." *Vicksburg Partners, LP v Stephens,* 911 So.2d 461, 521.

Substantive unconscionability is proven by oppressive contract terms such where there is a one-sided agreement, just as is found in the case at hand. Notwithstanding the fact the releases were procured by fraudulent methods arising from trickery and deceit that caused the Appellants to be wrongfully placed under duress, thereby inducing them to act and sign them, the mere fact alone the language in the releases is so blatantly one-sided is sufficient enough in itself to cause them to be voided, and have them set aside. ***Id.***

**D. Whether the records of the Ronald Morgan Action are relevant to the Appellant's appeal and therefore should be unsealed?**

Pursuant to the First and Fifth Amendment to the United States Constitution, as well as Article 3, Section 24, to the Constitution of the State of Mississippi, Appellant's have guaranteed rights of access to the Courts, which includes judicial records.

The Trial Court erred in refusing to unseal the settlement agreement and the associated documents, especially in light of the fact the request was made upon Motion by the Appellants. It is clear beyond peradventure thatAppellants have standing to make this request, and are in fact entitled under presumptive common-law rights to inspect and copy the records and documents. See for example; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

The Appellants in this matter have advanced no reason to explain why secrecy was necessary for the settlement agreement and the associated documents to be sealed, and in the absence of any such justification the documents must be opened and made available to the Appellants. See for example; *SEC v. Van Waeyenberghe*, 990 F.2d 845,-849 (5th Cir. 1983). (overturning district court's decision to seal documents without balancing the competing interests involved); *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987) (stating the district court's discretion to seal the record of judicial proceedings is to be exercised charily.)

In the matter at hand, the Defendant is seeking to enforce upon Appellant's purported terms contained within a settlement agreement, despite the fact Appellants have openly disputed the validity of the purported settlement. This purported settlement serves as an adjudication of the proceedings, save as to the Appellant's objections. An adjudication is a formal act of government, and the basis of which should be subject to scrutiny. However, without access to the

records that influenced the Judge's decision, how else are the Appellants to know what influenced the Judge's decision. Additionally, it is completely behooving that Appellees would seek to enforce terms of the purported settlement agreement upon the Appellants in light of the fact the Appellants have no clue as to what the written terms are. Here the Appellees are declaring the ability to enforce an agreement, which has been concealed from the Appellant's view.

This Court, as well as the United States Supreme Court and various circuit courts, including our Fifth Circuit, have held that openness serves to promote trustworthiness of the judicial process, as well as curbing judicial abuses. *Van Waeyenberghe*, 990 F.2d 845, 849 (C.A., (5 Tex.), 1983).. Furthermore, the record is devoid of any motion filed by the Defendant's to continue the impoundment of the records.

The Appellant's have no less of a right under the law to receive information about what triggered the Judge's decision to seal the records, than it has to know what was presented by the Defendant's to the Judge to influence the issuance of the order to seal the record. See for example; *In re The EXPRESS-NEWS CORPORATION*, 695 F.2d 807, 809 (C.A., (5 Tex.), 1982).

Furthermore, it appears from the apparent void in the record the Trial Court erred in sealing the records, for lack of the Defendant's to proceed in a procedurally[1] correct and proper manner. In the matter at hand, the Appellees never advanced any detailed document-by-document

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There is also no indication that the Trial Court engaged in a document by document review of the documents sealed. As well, it is apparent by the language found in the order that sealed the settlement agreement, or rather the language that is devoid, the Court did not explain the nature of

justification for maintaining secrecy of the sealed settlement agreement. Indeed, it appears the documents in question were all unilaterally designated as "confidential" by the Appellees. However, it is clear beyond peradventure that Appellants did not join in any motion to seal, and as such the Court clearly erred by ordering sealing without any adversary testing of the need for such staunch confidentiality.

The Trial Court at best had nothing more to rely on than unsworn and highly conclusory contentions of the Appellees about the need for confidentiality, especially the continued need for such. Yet again it cannot be denied that Appellant's have a right to view, inspect and copy these documents. In fact it is a fortiori that the First Amendment in itself guarantees them.

Moreover, it is highly unlikely that everything in the volume of sealed records contains content that is so sensitive that the need for confidentiality outweighs the Appellant's right of access to the judicial records. Especially when the Appellees are purportedly bound to the terms of the agreement, the Appellees obviously wish to keep secret.

The Ronald Morgan records are relevant to the Appellant's appeal because there are discrepancies in when the agreement occurred and who was a party to the agreement. Without these records, these questions will remain unanswered and justice for the Appellants will not be fulfilled. The records must be unsealed or an "in-camera" review of the documents should be held so as to identify the Defendants who were a party to the agreement and the status of all other Defendants in the action.

The Appellants were informed that a Settlement Agreement was reached. The Appellants, however, are unsure whether the agreement reached was the Memorandum of Understanding dated

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each document or why confidentiality was required. Much less why it should be continued.

January 30, 2007 or whether there is a order signed and dated at any time by Judge Hellfrich that memorializes the agreement. The record is devoid of any such agreement. The record is devoid of any discussion or motion that would allow the Forrest County Appellants to be made a part of the Jasper County Qualified Settlement Fund. The record is devoid of any action by the Forrest County Court ratifying the actions of the Jasper County Court. The record is devoid of any discussions or motions in regards to the other Defendants in this action.

Since the record in Forrest County does not reflect this information, it is probable that the Jasper County records would contain this information. If this information is not contained in the Jasper County records, the proceedings are suspect.

## VI. CONCLUSION AND PRAYER

The Appellants pray for a careful review of the record and this brief and would respectfully request that the Court reverses the Trial Court's dismissal of the Appellant's action with Prejudice.

The Appellants pray that the Court consider the validity of the Settlement Agreement and find that the document is not a valid agreement and should be set aside because the Agreement was not made by parties who were authorized to act on behalf of the Appellants and the terms of the Agreement does not conform with Contract law.

The Appellants request that the Court deem that the Release Agreements were acquired by Fraud and as a result the Appellants cannot be bound by the Release Agreements.

The Appellants pray that the Court will order that the records of the Ronald Morgan action which substantiates an agreement between the Appellees and the Appellants and the status

of the other Defendants be unsealed and provided to the Appellants for their review. If the Court finds that this request to be without merit, the Appellants request an in-camera review of the sealed documents in order to ascertain the true agreement between the parties.

CERTIFICATE OF SERVICE

I certify that I have mailed a true and correct copy of the Appellant's brief by United States mail or hand delivery to the parties listed below this the 18th day of February, 2011.

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