12-15268-BB

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FREDDY LOCARNO BALOCO, *et. al.*,
Plaintiffs / Appellants,

v.

DRUMMOND COMPANY, INC., *et. al.*,
Defendants / Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama; Case No.: 09-00557 CV-RDP
The Honorable R. David Proctor

APPELLANTS' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, appellants certify, that to the best of counsel's knowledge, the certificate of interested persons filed in Appellants' Opening Brief and Appellees' Response Brief is complete.

/s/ Terry Collingsworth

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INTRODUCTION

This is the second time Plaintiffs-Appellants are appealing issues related to the District Court's dismissals based on *res judicata*. All Plaintiffs-Appellants bring claims for their own damages caused by Defendants' war crimes and extrajudicial killings, committed against their fathers. They sue under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350. The District Court granted summary judgment against the original eight Plaintiffs and dismissed four new Plaintiffs, ruling all their claims are barred by nonparty preclusion.

Defendants argue as if the Supreme Court never decided *Taylor v. Sturgell*, 553 U.S. 880 (2008) and as if this Court never held the eight original children-Plaintiffs had standing to bring *separate* legal claims under the ATS and TVPA for their own injuries arising from their fathers' deaths. *See Baloco v. Drummond Co., Inc.*, 640 F.3d 1338, 1345-47 (11th Cir. 2011). Regarding *res judicata*, this Court already held that although the mothers of some plaintiffs were parties in *In re Juan Aquas Romero v. Drummond*, Case No. CV-03-BE-575-W ("*Drummond I*"), it could "not presume that they intended to represent their children's *separate legal interests* . . . ." *Id.* at 1351 (emphasis added).

Defendants argue incorrectly that two exceptions to the general rule against nonparty preclusion apply. First, seeking to shoehorn the relationship between the

mothers in *Drummond I* and Plaintiffs into the narrow legal relationships category under *Taylor*, they rely on one, distinguishable case from the Southern District of Florida. That case, however, fails to counter the myriad of cases refusing to expand *Taylor*'s qualifying relationships beyond those rooted in *property* law or contractual rights.

Second, Defendants argue the children were adequately represented by disproportionately focusing on a shared interest in holding Defendants liable and citing inapplicable class action authority. *Taylor* and its progeny establish that a shared interest alone is insufficient and courts cannot create *de facto* common-law class actions. Nevertheless, even if there were an alignment of interests, Defendants fail to satisfy the second prong of adequate representation: that the mothers understood and intended to represent their children's *separate legal interests* or that the District Court in *Drummond I* protected the children's interests.

Regarding the new Plaintiffs, their mothers did not participate in *Drummond I*, and the mothers in *Drummond I* likely had conflicting interests with children from *different* mothers. Defendants ignore the District Court's failure to analyze *Taylor's* second prong of adequate representation concerning whether the mothers understood they represented these new children-Plaintiffs.

Next, Defendants never cross-appealed their claim that the District Court erroneously assumed the eight original children were not parties in *Drummond I*,

and this Court lacks jurisdiction to consider that argument. Regardless, *Baloco* forecloses many of these arguments. It is undisputed that the new Plaintiffs could not have been parties to *Drummond I*.

Finally, Defendants fail to overcome Plaintiffs' showing that the District Court erred when it admitted the mothers' deposition testimony from *Drummond I* and struck the mothers' and children's declarations. The depositions contain inadmissible legal conclusions and hearsay. The Court erroneously struck the declarations, which did not *directly contradict* testimony in the *same* case. Moreover, there was no ground to exclude the children's declarations because they did not testify in *Drummond I*.

This Court should reverse the District Court's grant of summary judgment and dismissal.

ARGUMENT

I. Plaintiffs' Claims Are Not Barred by Nonparty Preclusion.

A. Plaintiffs Have Separate *Causes of Action* Under the TVPA.

In *Baloco*, this Court held as a matter of first impression "the TVPA expressly creates a separate cause of action for the wrongful death claimant through which 'any person' fitting that description can sue for TVPA damages." 640 F.3d at 1347. Despite this holding, Defendants argue that whether the children have separate damage claims is irrelevant for nonparty preclusion because the

parties are aligned on the question of liability. Resp. 16. Alignment of interests in liability is insufficient to apply the doctrine of nonparty preclusion. *See infra* §II.B. This is particularly significant here because the TVPA's purpose to deter tortious conduct "is better served by allowing more than one affected plaintiff to bring separate lawsuits." *Baloco*, 640 F.3d at 1347. Therefore, the question of whether *res judicata* bars Plaintiffs' claims cannot be determined on the basis that Plaintiffs do not have their own claims. Uniform case law and treatises agree wrongful death claimants have separate *causes of action*. *See* Appellants' Opening Brief (AOB) 21-23.

B. No Substantive Legal Relationship Exists Between the Plaintiffs and the Mothers in *Drummond I*.[1]

The only qualifying substantive legal relationships *Taylor* identified were those of "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor," all of which originate from "the needs of property law." 553 U.S. at 894. Defendants do not contest that the relationships at issue here do not involve traditional property or contract interests. Rather, Defendants seek to shoehorn the relationships into the property exception. In support, Defendants cite a single distinguishable case from the Southern District of Florida. Resp. 23-24

[1] Even under a clear error standard, the District Court's *erroneous* determination that the mothers and children had a substantive legal relationship under *Taylor* is reversible. *See EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1286 (11th Cir. 2004) (reversing clearly erroneous finding of privity under "virtual representation" or "control" exceptions for nonparty preclusion).

(quoting *Allen v. Sch. Bd. for Santa Rosa Cnty.*, 787 F.Supp.2d 1293, 1296-07 (N.D. Fla. 2011)).

In *Allen*, the court noted in dicta, without holding, that a "relationship of employer/employee may fall within" the substantive legal relationship exception. 787 F.Supp.2d at 1296-07. *Allen*, however, involved a challenged consent decree, which bound "heirs, successors, and assigns," and permanently enjoined the conduct of school officials and their "employees," among others. *Id.* at 1295-96. An injunction binds parties to the suit as well as "the parties' officers, agents, servants, employees, and attorneys." Fed. R. Civ. P. 65(d)(2)(A) & (B). Here, *Drummond I* never purported to bind non-parties and no additional protections were afforded the children. Nor is the preclusive effect of a judgment as broad as that of a Rule 65 injunction. Further, *Allen* did not analyze the bounds of *Taylor*'s substantive legal relationships exception.

Defendants' other cases exclusively address legal relationships that involve property law, pre-date *Taylor*, or applied the now-rejected "virtual representation" doctrine. Resp. 18-24. *Cf.* AOB 17-18 (citing cases upholding *Taylor's* limitations); *Id.* at 20 (distinguishing Defendants' cases). *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665 (5th Cir. 2003), also does not advance Defendants' position. *Vasquez* precluded a decedent's parents from bringing suit after an estate representative previously sued because both the estate representative

and parents exclusively sought "wrongful death damages *on behalf of*" the decedent. *Id.* at 667. Here, Plaintiffs *exclusively* bring their own claims, not those "on behalf of" the deceased; the former were not brought by the mothers in *Drummond I*.[2] RE (Vol. I) 60, ¶¶18-29. Thus, the mothers and children were not "heirs to the same right" or successors-in-interest to their mothers' personal claims. AOB 19-20.

Defendants' argument that "beneficiaries of an earlier suit brought by a proper representative are later precluded from suing a second time" is equally unpersuasive. Resp. 22, 25. Defendants' cases require a determination that the nonparties were beneficiaries of the earlier suit, something Defendants cannot demonstrate because the mothers in *Drummond I* did not bring claims on behalf of all heirs. Supp. RE 63-3, Third Am. Compl. (TAC) (*Drummond I*), ¶¶15-18. For example, in *Hill v. Watts*, 1986 WL 16119 (4th Cir. 1986), the decedent's mother brought suit as an estate administrator and subsequently brought claims for her own damages and on behalf of the decedent's minor children. *Id.* at *1. The court concluded the claims were precluded because the children were included in the previous suit. *Id.* at *4. The mothers in *Drummond I* sued only "on behalf of" the decedents and for their own wrongful death claims. Supp. RE 63-3, TAC ¶¶15-18.

[2] *Vasquez* is also distinguishable because it involved an injunction, which enjoined "plaintiffs, their attorneys, their agents, and all persons acting on behalf of plaintiffs, or in concert with any and all of the plaintiffs or their attorneys." 325 F.3d at 671.

Plaintiffs have their own, separate causes of action under the TVPA, *Baloco*, 640 F.3d at 1347, which were not pursued in *Drummond I*, and the children were not beneficiaries of the mothers' previous survival suit.[3]

Further, Defendants fail to acknowledge the one TVPA case allowing multiple, successive claims brought by different wrongful death claimants. *See Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F.Supp.2d 46 (D.D.C. 2008). *Fisher* involved siblings who sued under the TVPA for the wrongful death of their brother after the decedent's legal representative previously settled claims. AOB 21. The defendant argued the settlement barred any subsequent claims because there could be only "one 'death suit' on behalf of a victim." *Fisher*, 541 F.Supp.2d at 54. The plaintiffs countered that they "are not bringing this action on behalf of their brother . . . but rather for their own personal injuries" and the court allowed the suit to proceed. *Id*. *Fisher* makes clear subsequent TVPA cases can be brought by wrongful death claimants for their own "personal injuries" following resolution of claims "on behalf of" the decedent. *Id*.

[3] Defendants' other cases are also inapposite. *See* Resp. 22. *Ross v. Bd. of Educ. Of Twp. High School Dist. 211*, 486 F.3d 279, 285 (7th Cir. 2007) precluded a lawsuit because the parties in the two cases were "literally identical"—in both suits the child was suing through her parents as her next of friend. Here, Defendants have not demonstrated that Plaintiffs were parties to *Drummond I* or that the mothers in *Drummond I* were suing as Plaintiffs' next of friend. *Baloco*, 640 F.3d at 1350-51. *Carter v. City of Emporia*, 815 F.2d 617, 619 (10th Cir. 1987) applied state law to determine the preclusive effect of a prior state law claim; federal law applies here. *See supra* §I.B.

In seeking to expand *Taylor*, Defendants argue a trustee-beneficiary relationship is a substantive legal relationship justifying nonparty preclusion. Resp. 19, 24. Defendants concede "[t]he Supreme Court has not directly addressed whether heirs have a substantive legal relationship with the estate's personal representative or with other beneficiaries of the estate for preclusion purposes." *Id.* at 18. Still, they argue: "[w]hen an action is brought 'by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment.'" *Id.* (quoting *Chicago, R.I. & P. RY. Co. v. Schendel*, 270 U.S. 611, 620 (1926)). In *Chicago, R.I.*, however, the relevant statute established the administrator in the previous suit could sue "not in his own right or for his own benefit, or that of the estate, but . . . [only for the] benefit of the widow" who subsequently sought to relitigate the issues. 270 U.S. at 620. Thus, the previous suit could *only* be brought in a representative capacity and there was no doubt there was an "identity of parties." *Id.* Here, *Baloco* clarified the mothers and children have separate causes of action under the TVPA, and whether the mothers represented those separate interests is disputed. 640 F.3d at 1347. *Chicago, R.I.* did not address *Taylor*'s substantive legal relationships.

Nor does Defendants' reliance on *Spokane & I.E.R. Co. v. Whitley*, 237 U.S. 487 (1915), save their arguments. Resp. 19. There, the Supreme Court applied Idaho law to find the nonparty was represented by the administratrix, but *if* she

were not, then the nonparty would *not* be bound. 237 U.S. at 496. This merely begs the question in this case: whether the children were represented in *Drummond I*.

Defendants' reliance on Alabama law to support their argument that "the personal representative of an estate" may be "equated" with a trustee or fiduciary" also is meritless. Resp. 19, 24. First, Defendants fail to cite any case indicating Alabama law governs whether a substantive legal relationship exists, which is a question of federal law. *See Taylor*, 553 U.S. at 891; *Schor v. Abbott Labs.*, 457 F.3d 608, 615 (7th Cir. 2006); Restatement (Second) of Judgments § 87 (1982); *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 715 (5th Cir.1975). State law merely governs when determining whether a federal suit is barred by a prior state suit. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Hill*, 1986 WL 16119, at *2. *Taylor* does not endorse the application of state law to federal nonparty preclusion.

Second, the underlying analogy to a trustee or fiduciary relationship is misplaced. *Taylor* considered "suits brought by trustees, guardians, and other fiduciaries" in the context of *representative* suits where the nonparty "was 'adequately represented by someone with the same interests who was a party' to the suit," *not* in the context of substantive legal relationships. 553 U.S. at 894 (quoting *Richards v. Jefferson*, 517 U.S. 793, 798 (1996)). Thus, where a trustee,

guardian, or other fiduciary relationship exists, representation still must be adequate. *Id.* at 900; *see also infra* §I.C.1.

In conclusion, *Taylor* counseled adherence to "crisp rules with sharp corners" and the substantive legal relationship exception cannot be expanded to include Plaintiffs and the mothers from *Drummond I*. 553 U.S. at 901.

C. The Plaintiffs Were Not Adequately Represented by the Mothers in *Drummond I*.

The children were not adequately represented in *Drummond I* and thus their claims are not barred by nonparty preclusion.

1. The Mothers Were Not Fiduciaries.

Defendants' argument that the children were adequately represented because the mothers acted as fiduciaries is based on their assertion that "[t]he mothers sued in *Drummond I* as personal representatives of the decedent's estates for wrongful death claims," Resp. 27-28, and personal representatives of an estate are equated with a trustee or beneficiary, *id.* at 19, 24. Plaintiffs already addressed this flawed argument. *See supra* §I.B. The TAC, the *operative complaint* in *Drummond I*, indicates the mothers brought claims on behalf of their deceased spouses and for their own individual damages, and not on behalf of the estates or "all heirs." Supp. RE 63-3, TAC ¶¶15-18. Nothing indicates the mothers brought separate wrongful death claims for their children. *See Baloco*, 640 F.3d at 1351.

Absent Defendant's unsupported fiduciary arguments, there is no basis to

claim adequate representation, as a close family relationship does not qualify. *See* AOB 18-19, 22-23; *Wood v. Borough of Lawnside*, 2009 WL 3152114, at *6 (D.N.J. Sept. 28, 2009) (rejecting adequate representation where claims arose out of the same incident, but it was not shown the wife "purported to represent" the husband's interests in the prior suit); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 863 (5th Cir. 1985) (family's independent wrongful death claims not precluded by father's previous litigation of his own claim). Even when plaintiffs are similarly situated or seek the same kind of relief, this does not establish adequate representation. *See Access for Disabled, Inc. v. Fort Lauderdale Hospitality, Inc.*, 826 F.Supp.2d 1330, 1336 (S.D. Fla. 2011).

Finally, Defendants misunderstand *Taylor*'s reference to class actions, guardians, trustees, and fiduciaries. The existence of these relationships cannot be presumed and the requirements for adequate representation still must be satisfied. *See Taylor*, 553 U.S. at 900; *Nielsen v. U.S. Bureau of Land Management*, 252 F.R.D. 499, 511 (D. Minn. 2008).

2. Defendants Cannot Overcome Their Failure to Satisfy *Taylor*'s Two-Part Adequate Representation Test.

Taylor's two-part adequate representation test requires: (1) "the interests of the nonparty and her representative are aligned, . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty . . . ." 553 U.S. at 900 (citations

omitted). Defendants fail to satisfy both prongs.

a. The Plaintiffs' and Mothers' Interests Were Not Aligned.

A common interest in the litigation outcome and use of the same lawyer are *not* sufficient to establish an alignment of interests. *See id.* at 897-98; *Palma v. Safe Hurricane Shutters, Inc.*, 615 F.Supp.2d 1339, 1346 (S.D. Fla. 2009) ("[A] mere showing of parallel interests or even the use of the same attorney in two suits was insufficient . . . . "). Defendants attempt to expand the concept of "aligned interests" by resorting to class action cases. Resp. 38-39. *Taylor* explicitly rejected attempts to create "common-law class action[s]." 553 U.S. at 901.

Defendants cite *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. 2008), to argue a two-part test determines the alignment of interests: (1) whether there was an "incentive to litigate" "shared interests," and (2) "whether the absent parties' interests were in fact vigorously pursued and protected." Resp. 29. But Defendants misleadingly cite to *Pelt*'s analysis of the preclusive effect of *class actions* on absent class members. *Id.* (citing *Pelt*, 539 F.3d at 1287). Indeed, in *Pelt* the beneficiaries of the non-class action were not bound by the previous judgment, and the court indicated the failure to seek class certification may be evidence that the plaintiffs did *not* represent nonparties. 539 F.3d at 1289. *Pelt*'s two-part test has never been applied outside the context of class actions.

Even if this Court applies *Pelt*'s class action test, the mothers' interests were

not aligned and they did not vigorously pursue their children's interests. First, the mothers were not aware the children had separate legal interests because this Court had not ruled on this matter of first impression. *See Baloco*, 640 F.3d at 1351; *see also Jones v. SEC*, 115 F.3d 1173, 1181 (4th Cir. 1997) (holding interests are aligned only when parties pursue the "same legal right"). Indeed, Defendants previously argued before this Court that the children had no standing to sue under the TVPA and thus did *not* have separate claims. Appellees' Resp. 38-40 (filed on Mar. 29, 2010), Case No. 09-16216, *Baloco v. Drummond Co., Inc.*

Second, it is undisputed the District Court never ensured the mothers vigorously pursued the children's separate legal claims and adequately represented their interests. *See* AOB 35-36. This Court already decided this issue, *Baloco*, 640 F.3d at 1351, and it is now law of the case, *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994).

Next, to demonstrate the mothers' and children's interests were aligned, Defendants rely on distinguishable cases where organizations suing on behalf of their members precluded later member actions. Resp. 29. For example, *Yankton Sioux Tribe v. U.S. Dept. of Health and Human Services*, 533 F.3d 634, 640-41 (8th Cir. 2008), addressed the preclusive effect of a suit by a tribe on behalf of all enrolled members. The plaintiff's interests in *Yankton* "derive[d] solely from his status as an individual member of the Yankton Sioux Tribe," and thus were

aligned. *Id*. By contrast, the children's interests in this case do *not* derive from the mothers' claims or those brought on behalf of the decedent or by any other wrongful death beneficiary. *See Baloco*, 640 F.3d at 1347 ("the [TVPA] permits multiple suits . . . [and] it is appropriate [for] wrongful death claimants to be able to sue *alongside* representatives of the deceased. . . .") (emphasis in original).

Defendants also cite *Amos v. PPG Industries, Inc.*, 699 F.3d 448, 450 (6th Cir. 2012), a membership case that undermines their arguments. Resp. 29. The circuit court held that even where the second litigants' "core allegation was identical to the one" in the previous action, this was insufficient to demonstrate aligned interests. 699 F.3d at 450. Indeed, "the whole point of [*Taylor*] was to cut the adequate-representation exception down to size" and sometimes claims will be relitigated with different outcomes because the Supreme Court is a "stickler about the due process rights of nonparties." *Id.* at 452-53.

Defendants also blur the elements of *res judicata* by citing cases focusing on whether the claims are the same, which is irrelevant to whether the children's and mothers' interests were aligned. Resp. 33 (citing only cases discussing the identity of claims where adequate representation was not at issue). These courts never determined whether the parties' interests were aligned for purposes of adequate representation. For *res judicata* to apply, *all* elements must be met and if one is unsatisfied, the claims are not barred. *See NAACP v. Hunt*, 891 F.2d 1555, 1560

(11th Cir. 1990). Identity of parties and identity of claims are distinct elements of *res judicata* that must be independently satisfied. *Id.*; *see also Taylor*, 553 U.S. at 887-88, 905 (same claims, but nonparty's interests were not adequately represented).

Finally, Defendants characterize *Bartels Trust ex rel. Cornell University v. U.S.*, 88 Fed.Cl. 105, 113 (Fed. Cl. 2009), *aff'd*, 617 F.3d 1357 (Fed. Cir. 2010), which rejected adequate representation where a party was not legally obligated to litigate on behalf of the nonparty, as an outlier. Resp. 31. *Bartels* applied well-established principles and has been cited with approval. *See Harris v. County of Orange*, 682 F.3d 1126, 1133 (9th Cir. 2012) (holding organization did not adequately represent members without the legal capacity to seek damages on behalf of retirees); *Anaheim Gardens v. U.S.*, 107 Fed.Cl. 404, 414 (Fed. Cl. 2012) ("[T]he earlier party must have had some legal obligation to vindicate the rights of the nonparty later precluded." (quoting *Bartels*, 88 Fed. Cl. at 113)).

For all these reasons, Defendants have not demonstrated the mothers' and children's interests were aligned.

b. The Mothers Did Not Understand They Represented the Children's Separate Legal Interests, and No Special Procedures Protected These Interests.

Defendants claim the mothers need not have understood they were representing their children's separate legal interests—only that they were acting in

a representative capacity. Resp. 36. This is a distinction without a difference, and it defies logic for a party to meaningfully represent an absent party in a non-class action without understanding the nature of their claims. Defendants rely on the pleadings and depositions to bolster their argument, but this evidence is either incompetent or inconclusive.

First, Defendants argue Plaintiffs are bound by their pleadings as judicial admissions. Resp. 35-36. This Court already determined the pleadings were inconclusive, and it could not "presume [the mothers] intended to represent their children's separate legal interests . . . ." *Baloco*, 640 F.3d at 1351. Regardless, the TAC does *not* state the mothers represented the children's separate claims. Supp. RE 63-3, ¶¶15-18.

Second, deposition testimony from *Drummond I* is not admissible because a statement of legal opinion in a previous case cannot constitute a judicial admission in a subsequent case. *See AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009); *Weinstein Co. v. Smokewood Entm't Grp., LLC*, 664 F.Supp.2d 332, 339 n.4 (S.D.N.Y. 2009); *Blake v. Race*, 487 F.Supp.2d 187, 205 n.13 (E.D.N.Y. 2007).

Even if admissible, the depositions did not address the primary issue: whether the mothers understood they were acting in a representative capacity or "intended to represent their children's separate legal interests." *Baloco*, 640 F.3d at

1351. Indeed, it is inconceivable that the mothers could have expressed a view about the scope of representing the children when this Court had not decided this matter of first impression.

Third, Defendants seek to bolster their position by referring to declarations never submitted to the District Court. Resp. 8, 35. "[A] federal appellate court may examine only the evidence which was before the district court when the latter decided the motion for summary judgment." *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 n.3 (11th Cir. 1992); *see also Blackshear v. Dowling*, 2009 WL 297710, at *2 (11th Cir. Feb. 9, 2009). This Court should not consider the additional evidence Defendants now proffer.

Even if considered, these prior declarations do not save Defendants' position. First, they contain improper legal conclusions. *See infra* §III. Second, these declarations were filed prior to the TAC, which removed the children's names and references to them. *See* Supp. RE 63-3. Additionally, the declarations do not state the mothers represented the children's separate interests, but only that they sued Defendants for their family's suffering. Appellees' Mot. to Supp. Rec., Exs. A-D. The reasonable inference from the deposition testimony, coupled with the mothers' and children's new declarations submitted in support of summary judgment, is that the mothers were not commenting on whether they legally represented their children's separate interests and they did not understand

themselves to be acting in a representative capacity.

3. The New Plaintiffs Were Not Adequately Represented by the Mothers in *Drummond I*.

Defendants have not shown the four new children-Plaintiffs, whose mothers were not parties to the litigation, are now barred from litigating their own claims. First, Defendants have demonstrated no fiduciary or legal obligation of the mothers to represent children from *different* mothers. *See supra* §C.1. Second, there is no basis to assume the interests of the original children or their mothers were aligned with those of the new children-Plaintiffs, and it is likely their interests conflict. *See Amos*, 699 F.3d at 452 ("[I]t is easy to imagine instances where the two groups' interests might conflict.")

Next, Defendants argue the mothers did not need to know who the children from *different* mothers were to understand they represented them. Resp. 38. In order to understand one acts in a representative capacity, one must understand who is represented and their interests. *See New Hampshire Ins. Co. v. Flowers Ins. Agency, LLC*, 2010 WL 1294363, at *3 (M.D. Ala. Mar. 30, 2010) (holding no adequate representation where "there was absolutely no evidence showing . . . that Blue Water thought it was representing Flowers's interests . . . ."). This is especially true here because the mothers in *Drummond I* sought damages on behalf of the decedent and for their own damages, but not on behalf of all heirs. Supp. RE 63-3, TAC ¶¶15-18. Defendants try to overcome this conundrum by citing class

action case law. Resp. 38-39. The Supreme Court has rejected the creation of such "common-law" class actions. *See infra* §II.B.2.

Finally, Defendants' argument that the complaints in *Drummond I* demonstrate the mothers represented the interests of "all heirs," "no matter which wife or companion may have given birth to the child," is simply inaccurate. Resp. 38. The operative TAC did not state the mothers represented all heirs, *see supra* §I.A, and "[t]he pleadings alone are simply insufficient to assure us that those asserting claims for the minor children in *Drummond I* have interests identical to those being asserted by the Children in this action." *Baloco*, 640 F.3d at 1350. Defendants are foreclosed from relitigating this argument.

The "new" children's claims were not adequately represented in *Drummond I*.

II. The Eight Original Plaintiffs Were Not *Proper* Parties in *Drummond I*.

The eight original children-Plaintiffs were not parties for the purpose of *res judicata*.

A. This Court Should Not Consider Defendants' Belated Arguments Concerning Party Preclusion.

Defendants' seek reversal of the District Court's assumption "that the children in *Baloco* were not actual parties to *Drummond I*." 2012 WL 4009432, at *8. Because Defendants failed to cross-appeal this issue, this Court lacks

jurisdiction to consider such arguments. *See Wexler v. Lepore*, 385 F.3d 1336, 1338 n.3 (11th Cir. 2004) ("Appellee-Defendants did not cross-appeal that portion of the lower court's decision; we do not consider those doctrines here."). If this Court, however, reaches whether the original eight Plaintiffs were parties in *Drummond*, it should conclude they were not.

B. The Eight Original Plaintiffs Were Not *Proper* Parties in *Drummond I*.

Defendants assert the eight original Plaintiffs were parties in *Drummond* I and were adequately represented. Resp. 39-48.[4] Both contentions are wrong.

1. The TAC, Notice of Identities, and Depositions Do Not Demonstrate the Children Were Proper Parties in *Drummond I*.

This Court has already held the TAC and Notice of Identities are insufficient to determine whether the minor children were parties in *Drummond I*:

> Although their mothers were also plaintiffs in *Drummond I*, we cannot presume that they intended to represent their children's separate legal interests because the Notice did not indicate that the children were present in the suit by and through their mother and next friend.

Baloco, 640 F.3d at 1351.The mere listing of a child in a complaint as a plaintiff does not alone ensure that the child is a proper party in that suit. *Id.* It is immaterial whether the children in this case were the same children identified at any point in *Drummond I* because:

[4] It is undisputed that the "new" Plaintiffs were never parties to *Drummond I*, nor did their mothers participate in *Drummond I*.

> [i]n light of the minority status of the plaintiffs in *Drummond I*, [the Court's] inquiry into the substantial identity of the parties in the two cases requires more than one step. Even if we assume that the five children whose claims the district court dismissed on *res judicata* grounds are the same individuals identified as the children of the deceased in the *Drummond I* suit, this does not necessarily resolve the question of whether they were parties in the prior suit for the purposes of imposing a *res judicata* bar.

Id. at 1350. Thus, Defendants' reliance on the TAC and Notice of Identities is unpersuasive and has been rejected by this Court.

The mothers' depositions also fail to demonstrate the children were parties to the suit for purposes of *res judicata*. Whether the mothers identified the names of their children is irrelevant to whether they intended to represent their children's separate legal claims. *Id.* at 1351. Additionally, the mothers' declarations show they did not intend for their children to be part of the *Drummond I* litigation. AOB 33, 51. Finally, the mothers' deposition testimony is inadmissible. *See infra* §III.

The TAC, Notice of Identities, and mothers' depositions and declarations do not demonstrate the children were parties for the purpose of preclusion.

2. The Children Were Not Represented in *Drummond I* and the District Court Failed to Appoint a Guardian Ad Litem or Issue Another Order Protecting the Children.

Defendants contend the mothers served as "general guardians" in *Drummond I*, and thus Federal Rule of Civil Procedure "17(c)(1) controls the question of who may represent a minor." Resp. 42. There is no legal presumption that a parent automatically represents a child when both have suffered an injury.

See Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist., 873 F.2d 25, 30 (2d Cir. 1989). And the mothers here did *not* represent their children.

This Court invoked Rule 17(c)(2) because it could not "presume the mothers intended to represent their children's separate legal interests" and thus could not conclude the children were represented in *Drummond I*. *Baloco*, 640 F.3d at 1351. In these circumstances, Rule 17(c)(2) requires district courts to "appoint a guardian ad litem—or issue another appropriate order—to protect a minor . . . who is unrepresented in an action." *Id.* at 1350-51 (quoting *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 38-39 (5th Cir. 1958)).

Defendants contest the applicability of *Roberts*, despite this Court's reliance on it. Resp. 43-44. In *Roberts*, the court reversed the district court for failing to consider appointing a guardian ad litem until after the judgment. 256 F.2d at 38-39. Defendants do not dispute that *Roberts* must apply if this Court finds the mothers did not represent the children's separate interests in *Drummond I.* Resp. 43.

To counter *Roberts*, Defendants cite *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980) and *Burke v. Smith*, 252 F.3d 1260 (11th Cir. 2001). In *Croce*, the Fifth Circuit found a minor child was adequately represented because there was no question the mother brought the suit on behalf of the child. 623 F.3d at 1093. *Croce* made clear that Rule 17(c)(1) only applies if the record demonstrates the

minor is represented. *Id.* (distinguishing *Roberts*); *see also Burke v. Smith*, 252 F.3d at 1264 (appointing guardian ad litem may be neglected if the minor was in fact represented, unless there is a conflict of interest).[5] These cases[6] are not applicable because the mothers did not represent the children's separate legal interests in *Drummond I.*

Unable to overcome the undisputed fact that no guardian ad litem was appointed and the District Court did not issue an order to protect the children's interests, *Baloco* 640 F.3d at 1351, Defendants try to convince this Court that the mothers' deposition testimony shows they were representing the children. Resp. 41. The deposition testimony is inadmissible. *See infra* §III. Even if considered, the mothers did not testify whether they represented their children's "separate legal interests." *Baloco*, 640 F.3d at 1351. There was no inquiry in the depositions concerning what the non-lawyer mothers meant or understood when they said "yes" to questions using the undefined, legal term "on behalf of." AOB 33. Moreover, the mothers' and children's declarations show the children were not involved in *Drummond I*. *See infra* §III.

[5] The court's duty to ensure the children were represented was even more important because the claims were originally brought using pseudonyms. *See Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000) (noting that "without Appellee's identity in the public record, it is difficult to apply legal principles of res judicata and collateral estoppel.").

[6] Defendants' citation to *Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1185 (S.D. Fla. 2000), *aff'd*, 212 F.3d 1338 (11th Cir. 2000) is also inapposite because it was clear the parents represented the minors' interests and there is no reason to displace the parent absent a conflict of interest.

Finally, Defendants argue it was "immaterial" that the TAC did not contain reference to a "next friend." Resp. 46. Defendants are seeking reconsideration of this Court's determination that "nothing in the complaint or any other document" allowed it to "confirm that the legal interests of the *Drummond I* children were properly represented by a guardian ad litem or other court appointed representative." *Baloco*, 640 F.3d at 1351. Defendants' cases are distinguishable because they considered the issue of representation *before final judgment*, and plaintiffs did not question the adequacy of representation. *See* Resp. 47 (citing, e.g., *Gonzalez-Gonzalez-Jimenez de Ruiz v. United States*, 231 F. Supp. 2d 1187, 1196-97 (M.D. Fla. 2002) (suit as a "next friend" was not necessary because it was clear the children's interests were represented); *Hall v. Time Ins. Co.*, 671 F.Supp. 768, 769 (M.D. Ga. 1987) (considering suing capacity before judgment).

Roberts made clear that *res judicata* does not bar a case where the children were not represented, and the court cannot *after the fact* justify a failure to consider the children's representation because they contend the children were, in hindsight, adequately protected. 256 F.2d at 39. The district court in *Drummond I* never considered the mothers' deposition testimony and did not ensure the children were represented. The judgment in *Drummond I* cannot bind these children.

III. The District Court's Evidentiary Errors Should Be Reversed.

A. The Mothers' Deposition Testimony and Prior Declarations Address Issues of Legal Capacity, Not Facts, and Are Inadmissible.

Numerous courts in this Circuit have found conclusory statements regarding legal relationships are inadmissible. *See Alea London Ltd. v. Cook*, 2007 WL 5376619, at *2 n.2 (N.D. Ga. 2007) (statement concerning authorization to act on behalf of party was a legal conclusion and therefore not considered on summary judgment); *Crumpton v. Sunset Club Properties, L.L.C.*, 2011 WL 767403, at *2 (M.D. Fla. 2011) (claims "set[ting] forth no facts . . . but merely track[ing] the statutory language" were "mere conclusory statements and therefore have no value"); *Connell Leasing Co. a Div. of Connell Rice & Sugar Co., Inc. v. JF Equities Acquisition, Inc.*, 731 F.Supp. 1539, 1544-45 (S.D. Fla. 1989).

In this case, Defendants asked the mothers conclusory questions concerning on whose behalf the claims were brought. AOB 44. Because Defendants made no inquiry concerning the mothers' understanding of the claims they were purportedly bringing "on behalf of" their children or whether they were representing their children's separate legal claims, the mothers' testimony cannot be characterized as "facts" addressing their *understanding* of their legal capacity or representation. *See Torres v. Cnty of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985) (whether party "had been discriminated against" was a legal conclusion absent questioning regarding factual basis for this assertion).The fact that Defendants now conclude the

mothers' answers determine the legal capacity in which they sued in *Drummond I* is tantamount to evidence the questions and answers concern impermissible legal conclusions.[7]

Additionally, the conclusory statements by Plaintiffs' mothers are not admissible as "opinion testimony" under Federal Rules of Evidence 701 or 704 because these statements were not based on "personal observation." *See Carter v. Decision One Corp.,* 122 F.3d 997, 1005 (11th Cir. 1997) (admitting expert testimony under Rules 701 and 704 where the "opinions came at the conclusion of their testimony and w[ere] based on their perceptions of the reasons for [these conclusions]"); *see also Connell Leasing Co.*,731 F.Supp. at 1544-45. As discussed above, the same cannot be said of the mothers' testimony.

Similarly, the mothers' prior declarations that Defendants belatedly raise on appeal were filed in 2002-2003 before the TAC and Notice of Identities and thus are not dispositive. *See supra* §I.C.2.Three mothers state they were seeking damages for the suffering of their families, including minors, and "on behalf of [their] husband's estate." Appellees' Mot. to Supp. Rec., Exs. B-D. One did not mention minors at all. *Id.*, Ex. A. To the extent Defendants glean the mothers' legal status from these declarations, they are also inadmissible legal conclusions for the

[7] Several of the children became adults during the pendency of the litigation. Thus, even if Plaintiffs' mothers asserted they were representing their minor children, this would be irrelevant to these adult Plaintiffs. *See* RE (Vol. II) 69, Pls' Statement of Undisputed Facts (PSUF) ¶7.

same reason the deposition testimony is inadmissible.

B. The Mothers' Out of Court Statements Are Inadmissible Hearsay, Not Subject to Any Exception or Exemption.

It is undisputed the mothers' testimony constitute out of court statements, inadmissible unless a hearsay exception applies.

Defendants first claim the mothers' statements are verbal acts of admission authorized by the children and admissible under Federal Rule of Evidence 801(d)(2)(C). Resp. 51. Many of the minor children had no knowledge of the lawsuit and Defendants do not explain how minors could authorize representation. RE (Vol. II) 69-5, ¶4; 69-6, ¶3; 69-9, ¶5; 69-10, ¶4. Others reached the age of majority during the litigation and there is no evidence they authorized the mothers to speak on their behalf. RE (Vol. II) 69, Pls' Statement of Undisputed Facts (PSUF) ¶7. Further, an "admission" requires more than a conclusory statement. *See Harden v. American Airlines*, 178 F.R.D. 583, 585 (M.D. Ala. 1998) ("'admission' would not bind the court, being a legal conclusion").

Second, the mothers' deposition testimony is not inconsistent with their new declarations, *infra* §III.C, and thus is not admissible under Federal Rule of Evidence 801(d)(1)(A). *See* AOB 49-53. In their new declarations, the mothers merely clarify their lack of understanding regarding their legal capacity and the scope of their prior representation. *Id.*

Finally, Defendants present no evidence supporting their claim that

Plaintiffs' mothers are unavailable to testify, Resp. 52, therefore, their deposition testimony is not admissible as prior sworn testimony. Fed. R. Evid. 801(b)(1).

C. It Was Clear Error to Strike Plaintiffs' and Their Mothers' New Declarations.

Defendants do little to contest Plaintiffs' assertion that the District Court erred when it struck the Plaintiffs' and mothers' declarations as "sham declarations." Resp. 52-54. A declaration can be stricken *only* when it "[1] contradicts, [2] without explanation, [3] previously given *clear* testimony." AOB 49. The District Court never analyzed these elements. *Id.* (citing RE 95 (Vol. II), Mem. Op. at 20 n.14). Defendants' reliance on *Brassfield v. Jack McLendon Furniture, Inc*., 953 F.Supp. 1424 (M.D. Ala. 1996), and *Israel v. Sonic-Montgomery FLM, Inc*., 231 F.Supp.2d 1156 (M.D. Ala. 2002), is misplaced. In *Brassfield*, the court extensively analyzed a series of factual questions in the deposition *before* striking portions of Plaintiffs' affidavit because it was "inherently inconsistent" and not "merely" an issue of credibility. 953 F.Supp. at 1430-31. And, *Sonic-Montgomery* recognized the "Eleventh Circuit [has] expressed *grave doubt* whether the *Van T. Junkins* rule"[8] applies to a witness, as opposed to a party, even when the witness has "a similar but unrelated lawsuit pending." 231 F.Supp.2d at 1163 (admitting majority of affidavit by *witness* who

[8] *Van T Junkins & Assocs., Inc. v. U.S. Indus., Inc.,* 736 F.2d 656, (11th Cir. 1984), on which the District Court relied, was limited by *Lane v. Celotex Corp.,* 782 F.2d 1526 (11th Cir.1986) and *Tippens v. Celotex Corp.,* 815 F.2d 66 (11th Cir. 1987).

was involved in similar lawsuit and made arguably contradictory statements). The mothers' new declarations are not inconsistent with their prior testimony, and they contain *factual* information about their roles and the children's roles in *Drummond I*, which are relevant to the adequate representation analysis. AOB 49-54.

Finally, Defendants do not seriously address the admissibility of the eight original-Plaintiffs' declarations. These children did *not* provide testimony in *Drummond I* and thus it is impossible for their declarations to contradict prior testimony. AOB 52-53. It was clear error for the District Court to strike their declarations.

CONCLUSION

For all these reasons, Plaintiffs request that this Court reverse the District Court and remand for further proceedings.

Dated: February 5, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32 (a)(7)(C), I certify that Plaintiffs/Appellants Reply Brief complies with Rule 32 (a)(7)(B)(ii) in that it has a text typeface of 14 points and contains 6,853 words.

Respectfully submitted this 5th day of February 2013,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Reply Brief was served via FedEx overnight on this 5th day of February 2013, on the following:

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