

2007-CA-01010

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-CA-01010

ILLINOIS CENTRAL RAILROAD COMPANY

APPELLANT

V.

EDWIN L. BROUSSARD

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF WARREN COUNTY

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

I. **INTRODUCTION**

In the Brief of Appellant, Illinois Central explicitly set forth its position that, as a matter of policy, "No person, corporation, or other entity should ever be required by the laws of this State to incur even a penny of expense in the defense of a lawsuit filed by a person or party that does not exist." Brief of Appellant, at p. 5. Counsel for Appellee do not address this contention, and the Brief of Appellee fails to refute the grounds supporting this position.

Rather, Broussard's counsel attempt to obfuscate the issues by incorrectly describing the applicable standard of review and by introducing facts which have no evidentiary support in the Record.

The Brief of Appellee largely ignores the facts and authorities relevant to the issues, and merely offers a list of excuses for their conduct which have no evidentiary basis in the Record. Nevertheless, the following point remains: Broussard's counsel filed a Complaint in his name some one year and eight months following his death. Regardless of any excuse offered by Broussard's counsel, the Complaint was a nullity under Mississippi law and the trial court properly dismissed the lawsuit on this basis.

Broussard's counsel have failed to show that the trial court employed the proper standards in denying Illinois Central's Motion for Attorneys Fees and Expenses pursuant to M.R.C.P. 11 and the Mississippi Litigation Accountability Act of 1988, Miss. Code Ann. § 11-55-1, et seq; that the trial court made proper inquiry into the relevant factors to determine the propriety of attorneys fees and expenses; and that the trial court found facts upon sufficient evidence to deny Illinois Central's Motion for Attorneys Fees and Expenses.

For the reasons set forth in the Brief of Appellant, and as set forth below, the trial court erroneously denied Illinois Central's Motion for Attorneys Fees and Expenses under M.R.C.P. 11 and the Mississippi Litigation Accountability Act. Accordingly, Illinois Central respectfully requests this Court to issue an Opinion awarding it reasonable attorneys fees and expenses incurred in the defense of this lawsuit and in this appeal, in an amount to be determined subsequently by the trial court.

II.

ARGUMENT¹

Illinois Central Railroad Company asserts its legal arguments in support of this Appeal, as follows, to wit:

A. The Trial Court Erred in Denying Illinois Central's Motion for Attorney Fees and Expenses Pursuant to M.R.C.P. 11 and the Mississippi Litigation Accountability Act of 1988, Miss. Code Ann. § 11-55-1, et seq.

In the Brief of Appellee, Broussard's counsel misstate the applicable standard of review in this Court. Plaintiff asserts that this Court should review the trial court's decision under an "abuse of discretion" standard. Brief of Appellee, p. 1, 3, and 4.

However, the trial court's decision of whether to impose sanctions under the Mississippi Litigation Accountability Act and M.R.C.P. 11 raises a question of law, and the standard of review of the trial court's decision is de novo. In re: Estate of Ladner v. Ladner, 909 So.2d 1051, 1055 (Miss. 2004). "Where the court has exercised its discretionary authority in such a way that it misperceives the correct legal standard, the deference customarily afforded trial courts is pretermitted because the error has become one of law." Bean v. Broussard, 587 So.2d 908, 913

¹References in this brief should be construed as follows: R.=Circuit Clerk's Record; T.=Court Reporter's transcript; R.E.=Appellant's Record Excerpts; Ex.=Citations to the Hearing Exhibits.

(Miss. 1991) (citing Nationwide Mut. Ins. Co. v. Evans, 553 So.2d 1117, 1119 (Miss. 1989)). As described in Section 3 and Section 4 of this Reply Brief, the trial court employed an improper legal standard in its determination of the issues, resulting in a de novo review in this Court.

However, even assuming under the facts of this particular case that this Court will review the trial court's Order under an "abuse of discretion" standard, an abuse of discretion may be found where the trial court has misapplied the law or made an unreasonable decision (see Cruse v. Nunley, 699 So.2d 941 (Miss. 1997)); where the trial court was manifestly wrong, clearly erroneous, or where the trial court applied an erroneous legal standard (see Estate of Johnson v. Moore, 735 So.2d 231 (Miss. 1999)); and where the trial court's ruling is unsupported by credible evidence (see Regency Nissan, Inc. v. Jenkins, 678 So.2d 95 (Miss. 1995)).

Under either standard, the trial court's Order denying Illinois Central's Motion for Attorney Fees and Expenses should be reversed by this Court.

1. Analysis of standards under M.R.C.P. 11 and the Mississippi Litigation Accountability Act.

Just as Broussard's counsel have misperceived the Standard of Review to be applied by this Court on appeal, Broussard's counsel have also misperceived and misstated the standards of liability under M.R.C.P. 11 and the Mississippi Litigation Accountability Act.

Mississippi Rule of Civil Procedure 11(a) requires every pleading to be "signed by at least one attorney of record in that attorney's individual name," which "constitutes a certificate . . . that the attorney has read the pleading or motion; **that to the best of the attorney's knowledge, information, and belief there is good ground to support it**; and that it is not interposed for delay." (Emphasis added). Mississippi Rule of Civil Procedure 11(b), provides that where the pleading "**is frivolous or is filed for the purpose of harassment or delay**, the court may order such a party, or

its attorney, or both to pay the opposing party or parties the reasonable expenses incurred by such other party and by their attorneys, including reasonable attorneys' fees."

The Mississippi Litigation Accountability Act states that a party is subject to costs and attorneys fees when "an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification." Miss. Code Ann. § 11-55-5(1). The Act also provides that an action or claim is brought "without substantial justification," when it is "frivolous, groundless in fact or in law, or vexatious, as determined by the Court." Miss. Code Ann. § 11-55-3(a).

To determine whether a claim is frivolous pursuant to Miss. Code Ann. § 11-55-3(a), the Supreme Court adopts the definition of "frivolous" found in M.R.C.P. 11. Scruggs v. Saterfiel, 693 So.2d 924, 927 (Miss. 1997); Leaf River Forest Products, Inc. v. Deakle, 661 So.2d 188, 197 (Miss. 1995). For the purposes of the Mississippi Litigation Accountability Act and M.R.C.P. 11, a claim is frivolous **"only when, objectively speaking, the pleader or movant has no hope of success."** Stevens v. Lake, 615 So.2d 1177, 1184 (Miss. 1993); Tricon Metals & Serv., Inc. v. Topp, 537 So.2d 1331, 1335 (Miss. 1989).

In the Brief of Appellee, Broussard's counsel alternatively imply that the inquiry should be whether there was "intent. . .to file a frivolous pleading" (Brief of Appellee, at p. 1, 5), whether the pleading was filed "without proper seriousness" (Brief of Appellee, at p. 3), and whether the lawsuit was filed "for purpose of harassment or delay" (Brief of Appellee, at p. 1, 5, 7). While admittedly an inquiry into whether a lawsuit is filed "for purpose of harassment or delay" may be a relevant inquiry in some settings, this assertion was never advanced by Illinois Central in this case. However, Illinois Central has repeatedly and consistently asserted that the filing of a "frivolous" pleading, i.e. a pleading which on its face "has no hope of success," is conduct which requires the imposition of sanctions under M.R.C.P. 11 and the Mississippi Litigation Accountability Act. See M.R.C.P. 11;

Miss. Code Ann. § 11-55-3(a); Scruggs v. Saterfiel, 693 So.2d 924, 927 (Miss. 1997); Leaf River Forest Products, Inc. v. Deakle, 661 So.2d 188, 197 (Miss. 1995); Stevens v. Lake, 615 So.2d 1177, 1184 (Miss. 1993); Tricon Metals & Serv., Inc. v. Topp, 537 So.2d 1331, 1335 (Miss. 1989).

2. **Filing a lawsuit in the name of a plaintiff who is dead, and who had died over one year and eight months before suit was filed in his name, requires the assessment of sanctions under M.R.C.P. 11, and the Mississippi Litigation Accountability Act.**

Counsel for Broussard have not argued in the Brief of Appellee that the dismissal of the underlying lawsuit against Illinois Central was improper or unjustified under Mississippi law. Broussard died approximately one year and eight months before the Complaint was filed on his behalf, naming him as the party plaintiff. Accordingly, as the trial court ordered, the dismissal of Broussard's Complaint was eminently proper. See Humphreys v. Irvine, 14 Miss. 205, 1846 WL 2909 (1846); Owen v. Abraham, 102 So.2d 372, 373 (Miss. 1958); Griffith's *Mississippi Chancery Practice* § 591; Banakus v. United Air Craft Corp., 290 F. Supp. 259, 260 (D.C.N.Y. 1968) Adelsberger v. United States, 58 Fed. Cl. 616, 618 (Fed. Cl. 2003); Chorney v. Calahan, 135 F. Supp. 35, 36 (D. Mass. 1955); Pasos v. Eastern S.S. Co., 9 F.R.D. 279, 281-282 (D. Del. 1949).

Broussard died approximately one year and eight months prior to the filing of this lawsuit by his counsel, rendering this lawsuit a nullity from its inception. His death prior to the filing of the Complaint provided Illinois Central with a complete defense to the lawsuit. Again, this fact and this rule of law is not seriously disputed by Broussard's counsel.

When a defendant has a complete defense to the lawsuit, the plaintiff has no hope of success on the claims. Tricon Metals & Serv., Inc. v. Topp, *supra*, 537 So.2d at 1336. As discussed in Tricon Metals & Serv., Inc. v. Topp, where the pleader has no hope of success on his claims, the pleading is deemed "frivolous" under M.R.C.P. 11 and the Mississippi Litigation Accountability Act.

Tricon Metals & Serv., Inc. v. Topp, *supra*, 537 So.2d at 1335; Scruggs v. Saterfiel, *supra*, 693 So.2d at 927. Illinois Central's arguments are not a "stretch" under existing Mississippi law, but rather are appropriate applications of the decisions of this Court.

Rather than distinguish this case from prior precedent, Broussard's counsel offers this Court a series of excuses as to why the filing of a Complaint in the name of a deceased individual should not be sanctioned under M.R.C.P. 11 and the Mississippi Litigation Accountability Act. Illinois Central will address each of these excuses, but respectfully submits to the Court that no evidentiary basis for any of these excuses exists in the Record. In fact, this litany of excuses raises matters for further consideration by the Court.

Broussard's counsel state that Broussard's claim was part of a multi-plaintiff action involving 147 plaintiffs filed in October 2003, and that Broussard's claims were severed out in November 2005. Brief of Appellee, at p.4. Broussard's counsel further state that they had an obligation "to Broussard to attend to his claim before the running of the statute of limitations." Brief of Appellee, at p. 5. However, Broussard's counsel also had a duty under M.R.P.C. 1.4 to keep their client reasonably informed of the status of the lawsuit. In November 2005, Broussard had, in fact, been dead for over a year, illustrating the expanse of time in which his counsel had not communicated with him. While Broussard's counsel claim a duty to re-file the Complaint prior to the expiration of the statute of limitations, M.R.C.P. 11 and the Mississippi Litigation Accountability Act impose a duty on Broussard's counsel to verify that any Complaint filed on his behalf was not frivolous and had good grounds for support. Mississippi law has shown that there were no good grounds for support for the filing of the Complaint in this case, and that the Complaint is indeed frivolous under the meaning the law ascribes to it. Further, the statute of limitations was tolled while Broussard's claim was pending as a part of the multi-plaintiff action between 2003 and 2005. See Canadian

National/Illinois Central R.R. Co. v. Smith, 926 So.2d 839, 845 (Miss. 2006). **Regardless of this law, no evidence exists in the this Record establishing when the statute of limitations began to run, or when the statute of limitations would have expired.**

Broussard's counsel also offered the excuse that, "Phone calls often went unanswered during the entire time that Broussard was alive and it sometimes took weeks of effort before he could be reached to discuss his case." Brief of Appellee, at p.5; see also Brief of Appellee at p.1, 7. Further, Counsel for Broussard state, "Appellant implies that counsel for Broussard did not complete 'a minimal investigation' and that 'minimal attempts to communicate' were not made. Appellant has no clue regarding the communication efforts made by counsel." Brief of Appellee, at p. 7. Unfortunately, that is true. However, neither did the trial court, nor does this Court. There is no evidence in the Record of any attempt to contact Broussard.

Broussard's counsel stated that certified mail sent to him prior to filing their Motion to Withdraw on May 2, 2007, was returned as unclaimed. Brief of Appellee, at p.2, 7. While this may be true, it would ostensibly reflect the one and only attempt to reach Broussard by certified mail between August 2004 and some time in 2007. **Nevertheless, the Record in this case is void of evidence of any efforts by Broussard's counsel to call him, to write him, or to otherwise communicate with him between his death on August 4, 2004 and the filing of the Complaint in this case on April 12, 2006. Accordingly, there is no evidentiary basis supporting the trial court's Order.**

Broussard's counsel further assert that, "In late 2006, after being unable to communicate with the client, counsel for Broussard attempted to get the case dismissed and communicated with counsel for Appellant." Brief of Appellee, at p.6. Counsel for Appellant does agree that in November of 2006, there was some discussion between counsel regarding why Broussard had not responded to

discovery, and the possibility of dismissal of the lawsuit. This conversation occurred on November 15, 2006. At this stage of the litigation, Broussard had been dead for approximately two years and seven months, a fact which had not been communicated to Illinois Central's counsel.

In any event, Broussard's counsel never attempted to dismiss the case. Even after Illinois Central filed a Motion to Dismiss showing to the trial court that Broussard was, in fact, dead, a fact discovered by Illinois Central's counsel in its own investigation, Broussard's counsel never responded to the Motion; Broussard's counsel merely filed a Motion to Withdraw. This Motion to Withdraw could have been filed at any time in this litigation, as could a Motion to Dismiss. However, either would likely require either consent by Broussard or adequate notice to him; again, attempts to obtain his consent or to provide notice to him would have disclosed his death.

Broussard's counsel have argued that their actions fall within the purview of Bean v. Broussard, 587 So.2d 908 (Miss. 1991), and that they acted properly under the facts of this case. Brief of Appellee, at p. 5-6. However, the facts detailed in the preceding paragraph clearly distinguish the present case from Bean v. Broussard. There is no evidence in this case that Broussard's counsel ever discovered that the underlying lawsuit was frivolous, and Broussard's counsel never filed any Motion to Dismiss this case. Broussard's counsel admit that they never knew, or had any reason to know, of Broussard's death, even after Illinois Central filed its Motion to Dismiss in this case advising them of Broussard's death. Brief of Appellee, at p. 6.

Counsel for Broussard have also stated that during the pendency of this litigation, "No one from the Broussard family contacted counsel, and no one answered the numerous phone calls." Brief of Appellee, at p. 2. Further, Broussard's counsel state that "To this date, no one from the Broussard family has contacted counsel." Brief of Appellee, at p. 5. Nevertheless, Broussard's counsel have listed Broussard's children as interested parties to this appeal. See Brief of Appellee, Certificate of

Interested Persons, p. i. Broussard's counsel obviously possess knowledge of the identity of Broussard's children, but conspicuously absent from the Record in this cause is any effort on the part of Broussard's counsel to contact his children to ascertain Broussard's whereabouts either prior to or during the pendency of this lawsuit.

3. The trial court erred in applying an improper standard when considering the imposition of sanctions in the form of attorneys fees and expenses under M.R.C.P. 11 and the Mississippi Litigation Accountability Act.

The trial court did not analyze whether the complaint was "frivolous" under M.R.C.P. 11, or whether the lawsuit was filed with "substantial justification" as required by the Mississippi Litigation Accountability Act. The trial court granted a dismissal of the lawsuit on the basis that it was a nullity under Mississippi law, but denied Illinois Central's motion for attorney fees and expenses without consideration of the proper standards under M.R.C.P. 11 or the Mississippi Litigation Accountability Act. See Brief of Appellant, at p. 7-9, 11; see, *supra*, at p. 3-5.

The trial court limited its summary inquiry to whether Broussard's counsel were guilty of "egregious conduct," without any discussion of the standards under M.R.C.P. 11 and the Mississippi Litigation Accountability Act. T. 11-12; R.E. 59-60. Neither the Mississippi Litigation Accountability Act, M.R.C.P. 11, or the cases interpreting them require proof of "egregious conduct." The trial court also did not conduct an appropriate inquiry into the factors required by Miss. Code Ann. § 11-55-7. See Foster v. Ross, 804 So.2d 1018, 1025 (Miss. 2002); Jackson County School Bd. v. Osborne, 605 So.2d 731, 735 (Miss. 1992); Leaf River Forest Products, Inc. v. Deakle, 661 So.2d 188, 197 (Miss. 1995).

Counsel for Broussard has stated that "the lower court was correct in finding that there was no intentional filing of a lawsuit without merit and was not filed for purposes of delay or harassment." Brief of Appellee, at p. 7. This finding was never made by the trial court. See R.E. 59-

60. The trial court limited its summary inquiry to whether Broussard's counsel were guilty of egregious conduct, and ignored the legal standards under M.R.C.P. 11 and the Litigation Accountability Act articulated above. Further, as above at p. 6-9, and reiterated briefly below, the trial court based its decision on these issues without any evidentiary support in the Record.

4. The trial court erred in finding facts based upon insufficient evidence or no evidence when denying Illinois Central's Motion for Attorneys Fees and Expenses under M.R.C.P. 11 and the Mississippi Litigation Accountability Act.

Broussard's counsel provided no evidence in support of their allegations in opposition to Illinois Central's Motion for Attorney Fees and Expenses. Broussard's counsel never filed any response to Illinois Central's Motion for Attorney Fees and Expenses. No evidence was submitted to the trial court for consideration or for review either prior to or at the May 22, 2007 hearing. The trial court could not have properly exercised discretion in declining to award attorneys fees and expenses under Miss. Code Ann. § 11-55-7, when no evidence was offered by Broussard's counsel on behalf of their argument at the hearing. See, *supra*, p. 6-9.

The complete absence of evidence in the Record supporting counsel's argument illustrates that the lower court had no grounds in fact for its decision; the net effect is that an abuse of discretion lies where the trial court's ruling is unsupported by credible evidence. See Regency Nissan, Inc. v. Jenkins, 678 So.2d 95 (Miss. 1995).

**V.
CONCLUSION**

Mississippi Rule of Civil Procedure 11 and the Mississippi Litigation Accountability Act foster a purpose for the deterrence of frivolous filings, and, to that end, authorize the trial courts to award attorneys fees and expenses incurred by parties forced to defend frivolous complaints.

The facts of this lawsuit are clear and are not in great dispute. Broussard's counsel filed this lawsuit approximately one year and eight months following Broussard's death, and under the standards articulated for M.R.C.P. 11 and the Mississippi Litigation Accountability Act by this Court, the filing of this lawsuit was frivolous, was without good grounds for support, and was filed without substantial justification.



Despite the fact that this lawsuit was, in fact, a "frivolous" lawsuit under the interpretations crafted by this Court, Illinois Central was required to defend this lawsuit, and incurred attorneys fees and expenses in its defense. Given the purpose of M.R.C.P. 11 and the Mississippi Litigation Accountability Act to deter frivolous filings, Illinois Central respectfully submits that it should not be required to incur any expense in the defense of a lawsuit that, under Mississippi law, was "a nullity" from its inception.

Illinois Central Railroad Company respectfully requests that this Court reverse and render that portion of the trial court's May 29, 2007 Order which denied the Motion for Attorney Fees and Expenses, and direct that Broussard's counsel be assessed the attorney fees and expenses incurred by Illinois Central in the defense of this case, including those attorney fees and expenses incurred as a result of this Appeal.

Respectfully submitted,

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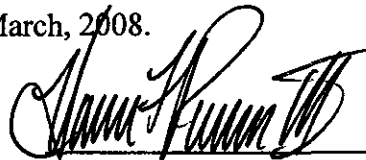
CERTIFICATE OF SERVICE

I, Glenn F. Beckham, of counsel to Defendant-Appellant, Illinois Central Railroad Company, do hereby certify that I have this day caused to be mailed, postage prepaid, a true and correct copy of the above and foregoing documents unto:

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CERTIFIED this the 12th day of March, 2008.



GLENN F. BECKHAM