IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2010-CA-01947

LEON BERRYMAN, Individually and
On behalf of Ariel Berryman, a Minor — APPELLANTS

vs.

GLYNES H. LANNOM, INDIVIDUALLY AND
AS THE PERSONAL REPRESENTATIVE OF ZACHARY AND
JACOB D. LANNOM, DECEASED, AND DANIEL LANNOM

APPELLEES

Appealed from the Chancery Court of Desoto County, Mississippi
Docket no. 08-06-1182
Honorable Vicki Cobb

BRIEF OF APPELLEE, DANIEL LANNOM

ORAL ARGUMENT NOT REQUESTED

Respectfully Submitted:

Nicholas J. Owens, Jr. #[redacted]
Attorney for Appellee, Daniel Lannom
214 Adams Avenue
Memphis, TN 38103
Phone: 901-525-0616

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of Court of Appeals may evaluate possible disqualifications or recusal:

John Booth Farese, Esquire (Attorney for Glynes Lannom)
P.O. Box 98
Ashland, MS 38603

Nicholas J. Owens, Jr. (Attorney for Daniel Lannom)
214 Adams Avenue
Memphis, TN 38103

Femi Salu (Attorney for Berrymans)
Attorney for Appellants
2129 Stateline Road West, Suite A
Southaven, MS 38671

***Appellee disagrees with Appellant's listing of other interested parties; the final order was entered in October of 2010 and the only appeal was filed by Berryman so the order is final as to all others parties

Nicholas J. Owens, Jr. #[redacted]
Attorney for Appellee Daniel Lannom

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1. The Appellants are not entitled to any of the interpleaded funds because a hearing was set to determine who the money should be distributed to and they failed to introduce any evidence that they had any legal right to the funds and the Chancellor properly decided the petition based on the record and evidence (or lack thereof) before her;

2. Appellees did not violate any rules of law or ethics when they presented the Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom to the Desoto County Chancery Clerk and he delivered the interplead funds to them;

3. Appellants appeal is frivolous, thus entitling Appellees to attorney fees and costs because this appeal was filed as a result of the negligence of Appellants Counsel, who appeared at the October 25, 2010 hearing unprepared, did not file a written response to Appellee's Petition seeking disbursement of the interpleaded funds, did not introduce any proof was to why his client was entitled to interpleaded funds, never claimed that he did not receive notice of the hearing until long after the hearing date, and never requested a continuance of the hearing.

STATEMENT OF THE CASE

Nature of the case. Appellee Daniel Lannom disagrees with Appellant's Statement of the Case and submits his own statement. On April 17, 2007, Daniel Lannom tragically lost both of his teenage sons in an automobile accident in Desoto County, Mississippi. The accident was caused when Larry Setzer crashed into the rear of the automobile being driven by Glynes Lannom and occupied by Phillip Bieselin, Zachary Lannom and Jacob Lannom. Phillip Bieselin, an occupant in the Lannom vehicle, was rendered a quadriplegic as a result of the accident. The appellants were allegedly across the street from the accident in an 18 wheeler when, after the major impact between the Setzer vehicle and the Lannom vehicle, the Lannom vehicle rolled across the entire intersection of Airways and Goodman in Desoto County (a wide intersection) and bumped into the Berryman 18 wheeler. The impact with the 18 wheeler was so severe that Leon Berryman and Ariel Berryman were injured so badly that though Ariel Berryman refused treatment at the scene and had no complaints to the EMTs, she and her father incurred chiropractic treatment which began on May 21, 2007, over one month after the automobile accident that is the subject of this suit. In December of 2007, Glynes Lannom filed a wrongful death action against Setzer and, in May of 2008, Appellee Daniel Lannom joined in the suit. Shortly after the Appellees suit against Setzer in Circuit Court, Esurance, Setzer's insurance company, due to the size of the claims asserted against Lannom ,filed this action to interplead its liability limits of $50,000. In its Petition, Esurance sought that it be allowed to deposit the $50,000 with the Chancery Court and sought a declaration that doing so would completely absolve Setzer from liability for the accident. In their answers to the interpleader, **both the Appellees and the Appellants** denied that Setzer would be absolved from liability by Esurance's depositing the $50,000 with the Court.

The statute of limitations for filing suit against Setzer expired on April 17, 2010. At that point, no suits had been filed against Setzer other than those filed by the Lannoms. In September of 2010, Esurance deposited the $50,000 with the Chancery Clerk. Shortly thereafter, on October 13, 2010,

Appellee Daniel Lannom, by and through his attorney, filed the Petition Seeking that the Deposited Funds be Disbursed to Danny Lannom and included in the petition that half of the funds be disbursed to the boys mother, Appellee Glynes Lannom. Said petition was served on all interested parties, including the Appellants' attorney on October 12, 2010, with notice that it would be heard on October 25, 2010.

On the day of the October 25, 2010 hearing, before the case was called by the Chancery Court, the undersigned and Attorney Farese noticed that Attorney Salu was in the courtroom but had not filed a response to Appellee's Petition Seeking that the Deposited Funds be Disbursed. As a courtesy to Mr. Salu, the undersigned and Mr. Farese approached Mr. Salu to ask his position on the petition. Mr. Salu said he opposed the petition because he believe his clients were entitled to a portion of the interpleaded funds. Since no settlement could be reached, it was decided that Chancellor Cobb should hear the matter. When the case was called, Mr. Salu never announced to anyone that he did not have notice of the hearing, nor did he ask for a continuance. Chancellor Cobb was gracious enough to allow Mr. Salu to be heard even though he had filed no response. Mr. Salu produced no evidence of his client's damages or any evidence that one of his clients was a minor other than his own statements. After hearing the matter, Chancellor Cobb ruled that the Lannoms were entitled to the interplead funds. An order was immediately entered which reflected her ruling and said order was presented to the Chancery Clerk who, pursuant to the order, delivered the funds as stated in the order.

On November 8, 2010, Attorney Jamie Howell filed a petition for a temporary restraining order on behalf of his client Phillip Bieselin. Mr. Howell admitted he received the notice of the hearing but it failed to make it on his calendar because he had been in intense preparation for a products liability trial. Said temporary restraining order was granted. No joinder was ever filed by the Appellants. After the TRO was issued, the issue between Bieselin and the Lannoms was resolved and the TRO was dissolved on January 3, 2011. Appellants did not file any post trial motions for stay until January 19, 2011, almost three months after Chancellor Cobb's ruling.

On April 11, 2011, after the Appellant's Statement of Evidence in Absence of a Transcript and Appellee's Objection to Appellant's Statement of Evidence in Absence of Transcript were filed, the Court set the hearing to determine what the Statement of Evidence should be. At that hearing, Chancellor Cobb ruled that the Appellees rendition of the facts was the accurate statement of the facts and that the Appellants statement of the facts did not represent the Court's recollection of what occurred on October 25, 2010. Further, the Court denied Appellant's Motion for Stay pending the appeal as same was not timely filed.

ARGUMENT

1. Why the Appellants are not entitled to interplead funds

It should be noted that counsel for the Appellants has worked hard to muddy the waters in this case and to divert the Court's attention from the real issues in this case. Without even addressing the subject of whether two individuals who decline treatment at the scene of the accident and then, over one month later, seek chiropractic treatment, are deserving of any of interplead funds when, as a result of the accident, one person was rendered a quadriplegic and the two others lost their teenage sons in the accident, the question of whether the Appellants are entitled to any of the interplead funds comes down to one issue: whether the Chancellor, on October 25, 2010, was provided any proof or the record showed that the Appellants had any legal and viable claim to the funds.

In her order dated May 25, 2011 (Record page 94), Judge Cobb found, in sum, that the Appellants' statement of evidence in absence of the transcript did not represent her recollection of the events of October 25, 2010 but that the Appellee's statement of evidence in absence of the transcript was accurate. This corroborates the Appellees position that at the hearing of October 25, 2010: 1) Appellants' counsel never stated that he did not receive notice of the hearing; 2) never asked for a continuance of the hearing; and 3) never introduced any proof showing that his clients had a legal or viable claim to the interpleaded funds. (Record page 84-85). In Owen v. Owen, 798 So.2d 394, Miss.,2001, the Supreme Court cited the following rules:

> The chancellor's findings will not be disturbed "unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Bell v. Parker, 563 So.2d 594, 596-97 (Miss.1990). When no specific findings appear in the record, this Court generally presumes that "the chancellor resolved all such fact issues in favor of the appellee." Maslowski v. Maslowski, 655 So.2d 18, 20 (Miss.1995). In cases where that presumption applies, the chancellor's decision will not be overturned if supported by substantial, credible evidence. Tedford v. Dempsey, 437 So.2d 410, 417 (Miss.1983).

Id. at . p 398.

Thus, it is to be presumed that there was no assertion of lack of notice or a request for continuance by

the Appellants at the October 25, 2010 hearing. Nor was there any evidence that either of the Appellants had any right to the funds. The assertion that no notice was received by Appellant's counsel was not made until much later. Further, Appellants cannot seriously contend that a chancellor would refuse to grant a continuance had Appellant's counsel asked for a continuance on a first setting. Since Appellant's counsel failed to request a continuance so he could introduce proof of his client's alleged damages and their right to the interpleaded funds, he waived his right to now say that the Chancellor committed error. "This Court has often enforced waivers when there has been no request for a continuance." Kindred v. Columbus Country Club, Inc., 918 So.2d 1281, 1286 (Miss.2005) (plaintiff waived right to complain about the exclusion of witnesses unknown until trial by failing to ask for a continuance or mistrial). This Honorable Court should not grant the Appellants requests because their attorney failed to file a written response to a petition, failed to introduce proof at a hearing, and failed to ask for a continuance for a hearing that he was allegedly unprepared for and did not know about, even though this was never stated at the October 25, 2010 hearing. That is the real issue in this case and the Chancellor decided this matter correctly.

In response to the Appellant's argument that passage of time is not fatal to appellant's entitlement to interplead funds, Appellee Daniel Lannom submits that this is false. On page 6 of the Berrymans brief, it asserts that the Berrymans were not interested in pursuing additional claims outside the interpleaded funds. However, when reviewing the Berryman's answer to the Amended Complaint of Esurance, paragraph 7 of the Berryman's Answer states:

> "Leon Berryman would deny that Larry Setzer is entitled to be personally released based on payment by Esurance, his liability carrier." (page 16).

Which is it? Appellant's counsel cannot say in his brief that his clients only wanted interpleaded funds but, in his clients' Answer to the Esurance Complaint, say that payment by Esurance would not absolve Mr. Setzer. The Appellants' Answer makes it clear that they were reserving the right to pursue a claim against Mr. Setzer personally. Appellees, in their Answer, took the same position as the Appellant, but **Appellees followed through** and sued Setzer in Circuit Court to keep the claim against Setzer viable. In fact, had the Lannoms not filed the Circuit lawsuit against Setzer, Esurance would have probably had no reason to even move forward with the interpleader in Chancery Court. It is also worth noting that after filing the interpleader, Esurance could have at any time decided to voluntarily dismiss its suit because, in its complaint, Esurance conditioned payment of its limits on everyone agreeing to release Setzer. There

was no agreement on the part of Esurance to distribute the money to all claimants. Had Esurance decided to voluntarily dismiss the interpleader, that would mean the only viable claims against Setzer would have been the ones asserted in the suit that the Appellees filed in Circuit Court. Appellants argument that the mere filing of an Answer to an interpleader automatically entitles them to some of the interpleaded funds is false, especially when they assert in that Answer that they are reserving the right to make a claim against Setzer above and beyond the insurance proceeds in an interpleader action seeking a release for Setzer.

Appellants reliance on the Noble House case is misplaced because it is not analogous to the facts at bar. In that case, neither WW Plumbing nor Ransom had filed suit against Noble House and the court would not allow WW Plumbing to allege statute of limitations when it had not filed suit itself. It was an estoppel argument. In the case sub judice, the Appellees actually have filed suit against the tortfeasor Setzer so they should not be estopped from making this argument against Appellants. Secondly, in the Noble House case, all parties were in privity so direct actions would be allowed. That is not true in a case such as this where the Appellees and Appellants would be required to filed suit against Setzer, not Esurance. No direct action against Esurance would exist under these facts. The law in Mississippi is that the liability carrier is not sued in automobile accident cases, the insured is.

As stated before, after the statute of limitations had expired in April of 2010, Esurance could have changed its mind, dismissed the interpleader action and decided to defend this matter. At that time, no agreement had been reached regarding how the funds would be divided and nobody wanted to grant a release to Setzer. Had Esurance voluntarily dismissed the interpleader on April 18, 2011, the only viable claims at that time would have been those of the Lannoms. Esurance deposited its $50,000 with the Chancery Court on September 10, 2010, several months after the statute of limitations against Setzer had expired.

After the funds were deposited, the hearing was set to determine who would receive the funds. Proper notice was given to all interested parties (Record 93). At the hearing, the record before the Chancellor was that **only** the Appellees had filed a wrongful death suit against Setzer for the loss of their two teenage sons (Record 32-46). Appellants did not introduce any proof of the viability of their claim or their damages, nor was there proof that the statute of limitations had not expired because one of the Appellants was a minor. The only "proof" in this entire case that Ariel Berryman was a minor was

submitted **in Appellant's Statement of Evidence in Absence of Transcript, Attached Exhibit P-2 (Record page 77).** Ironically, this document shows that Ariel Berryman was not injured in the least during the collision. The document is a refusal of treatment form that states Arial did not lose consciousness, was ambulatory and that there was no airbag deployment. **This document, which purportedly would show that Ariel Berryman was a minor at the time of the incident, was not introduced or admitted during the October 25, 2010 hearing and no attempt was made by Appellant's counsel to introduce it.** It is too late to try to admit that information now that this matter is before the Supreme Court. No request for continuance was made by Appellant Counsel in order to allow Appellants to admit proof that the statute of limitations had not expired as to Ariel Berryman. Incidentally, all that Appellants had to do was timely file a civil suit against Setzer and this case would not even be before this Honorable Court. They had three years to do so but they did nothing. Therefore, the Chancellor was correct when she ruled that the Appellees were entitled to all of the interpleaded funds because she was provided no evidence that there were any other viable claims to the interpleaded funds.

Finally, Appellants assertion that the Chancellor should have taken additional evidence from Appellees is absurd. The record was before the Chancellor and she could see from the wrongful death complaints filed by the Appellees that a husband and a wife lost their two teenage sons in the accident as a result of Setzer's negligence and that those were the only viable claims. The statute of limitations had long expired. It is obvious that Appellees would be entitled to much more than $50,000 if the matter were tried. Since no other claimants had viable claims and the Appellees had timely filed the wrongful death suits, the Chancellor rightly awarded the $50,000 to the Lannoms, the parents who tragically lost their two teenage sons.

2. Why the withdrawal of interpleaded funds did not violate any rules of law or ethics

Appellants citation to Rule 62(a) is flawed. Said rule states the following:

(a) Automatic Stay; Exceptions. Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the disposition of a motion for a new trial. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is

taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

Where in the record is there any evidence of any execution by Appellees? Where in the record is there proof of "proceedings" being taken by the Appellees for the enforcement of the judgment? In this matter, it is undisputed that the Chancellor entered the order disbursing the funds, the order was presented to the Chancery Court Clerk and the funds were paid by the clerk as stated in the Order. One cannot seriously argue that handing an order to the Chancery Clerk and receiving a check from him constitutes "execution" or "proceedings," both of which are legal terms of art.

Secondly, Appellants did not file any post trial motions seeking reconsideration of the Court's ruling and did not seek a stay until almost three months later. Had they done this, although they would still be wrong, they would be in a much stronger position. Their argument that a TRO filed by another party who admitted he received the notice of hearing but failed to put it on his calendar (See Record page 88) would somehow protect them is unsupported by the law. Nowhere in Bieselin's petition does it mention a request for any protection for the Appellants (See Record P-3, TRO dated November 8, 2011). Each party must protect its own interests. A complaint filed on behalf of "John Smith" does not toll the statute of limitations for "Jim Johnson" even if Johnson was in the same automobile accident. Further, the TRO (Record P-3) clearly states in the last paragraph that the focus of the TRO was to determine "the rightful share of Philip Bieselin." The Appellants names are not mentioned in the Temporary Restraining Order entered on Bieselin's Motion for TRO. Once Bieselin's TRO was dissolved (Record P-4), there was no requirement for the Lannoms attorneys to retain any of the insurance proceeds.

Regarding Appellants request for sanctions against Counsel for Appellees, this was not raised at the trial court level. This Honorable Court has stated time and again, an issue not raised before the lower court is deemed waived and is procedurally barred. See, e.g. Davis v. State, 684 So.2d 643, 658 (Miss.1996); Cole v. State, 525 So.2d 365, 369 (Miss.1987). However, even if it had, Appellants cannot point to any statute or rule that Appellees have violated. Appellant's request should be denied for the same reasons stated in the prior paragraph.

3. Appellants appeal is Frivolous

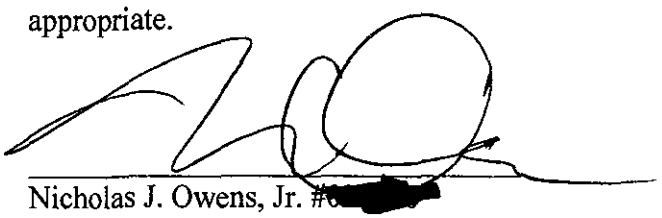
Rule 38 of the Mississippi Rules of Appellate Procedures states as follows:

In a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.

This appeal was filed solely so that Appellant's counsel could attempt to divert attention from his errors in handling this matter. As confirmed by the Chancellor in her order (Record 94-96) adopting the Appellees Statement of the Evidence in the Absence of Transcripts of Proceeding (Record 78-93), Appellants Counsel appeared at the October 25, 2010 hearing, did not file a written response for the hearing, did not introduce any proof was to why his client was entitled to interpleaded funds, never claimed that he did not receive notice of the hearing, and never requested a continuance of the hearing. Two attorneys and the Chancellor confirm the foregoing. Additionally, all that had to be done to obviate this entire appeal was the simple drafting of a complaint on behalf of his clients against Setzer and filing it in the Circuit Court. That is it! Whether he wants to believe it or not, Appellant Counsel's negligence is why this matter is currently before this Honorable Court. Had Appellant's counsel simply responded to the petition, been prepared for the hearing, asked for a continuance of the hearing or filed a Circuit Court lawsuit, this appeal could have been avoided. As a result of his negligence, counsel for Appellees have spent considerable amount of time in preparing a response to this appeal by attending hearings to determine the evidence in April of 2011, reviewing Appellants' filings, and preparing this brief. Pursuant to the aforecited rule, Appellee Daniel Lannom requests that this Honorable Court award damages against Appellant's counsel for attorneys fees and costs incurred in the preparation of this matter, and, if necessary, set a hearing to determine same.

CONCLUSION

Wherefore, premises considered, Defendants pray that this court affirm the Chancellor's ruling in all respects, find that this was a frivolous appeal and award attorneys fees and expenses to be assessed against Appellant's counsel. Appellee Daniel Lannom prays for other relief this court may deem appropriate.



Nicholas J. Owens, Jr. #[redacted]
214 Adams Avenue

Memphis, TN 38103
(901) 525-0616

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of this Brief of Appellee has been forwarded to the following persons by United States mail, postage prepaid this September 27, 2011.

Nicholas J. Owens, Jr

Femi Salu
P.O. Box 842
Southaven, MS 38671

John Booth Farese
P.O. Box 98
Ashland, MS 38603

Kathy Gillis, Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205

Honorable Vicki Cobb
P.O. Box 1104
Batesville, MS 38606-1104