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 D. LANNOM and JACOB B. LANNOM, Deceased; and DANIEL LANNOM — **APPELLEES**

Appeal from the
Chancery Court of DeSoto County, Mississippi
Cause Number: 08-06-1182

BRIEF OF APPELLEE GLYNES H. LANNOM

Oral Argument is Requested

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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 the Court of Appeals may evaluate possible disqualification or recusal:

Trial Judge:

Honorable Vicki B. Cobb
Chancellor
Post Office Box 1104
Batesville, Mississippi 38606

Attorney for Appellants Leon Berryman and Ariel Berryman:

Honorable Olufemi Salu
Salu & Salu Law Firm, PLLC
2129 Stateline Road West, Suite A
Southaven, Mississippi 38671

***Attorney for Appellee Daniel Lannom*:**

Honorable Nicholas J. Owens, Jr.
Attorney at Law
214 Adams Avenue
Memphis, Tennessee 38103

***Attorney for Appellee Glynes H. Lannom*:**

Honorable John Booth Farese
Farese, Farese & Farese, P.A.
Post Office Box 98
Ashland, Mississippi 38603

***Appellants*:**

Leon Berryman
Shelby County, Tennessee

Ariel Berryman
Shelby County, Tennessee

Appellees:

Glynes H. Lannom
2628 Hickory Hill
Nesbit, Mississippi 38651

Daniel Lannom
357 Shady Grove
Hernando, Mississippi

***Other Potentially Interested Parties*:**

Larry W. Setzer
MDOC # 148174
Mississippi Department of Corrections

THIS, this 11TH day of OCTOBER, 2011.

JOHN BOOTH FARESE. (MS #5136)
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Appellee Glynes H. Lannom would respectfully state to this Court that the issues involved in this appeal are neither complicated or complex. However, there is no transcript of the proceedings from the lower court. For this reason, oral argument would be helpful to the appellate court in understanding the proceedings below and the ruling of the trial court.

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case is quite simple. An insurance company, Esurance, issued a policy to Larry Setzer. Setzer was at fault in a horrible automobile accident which killed two young brothers, injured their mother, and left another individual a paraplegic. The limits of insurance coverage under the Esurance policy with Setzer were $25,000 per person and $50,000 per accident. Under elementary principles of insurance law, Esurance was contractually obligated to pay all sums for which its insured, Larry Setzer, became ***legally liable*** to pay for injuries to other persons injured in accident (up to the amount of $25,000 per individual and a total of $50,000 for all claims). Also, under elementary principles of insurance law, if Larry Setzer cannot be held legally liable for damages, then his insurer (*i.e.*, Esurance) has no duty whatsoever to pay anything for such damages.

Esurance, facing multiple claims and having only a total potential liability of $50,000, interpleaded the funds, and, after a hearing, the funds were disbursed pursuant to an order entered by the Chancery Court of DeSoto County. The Appellants, Leon Berryman and Ariel Berryman, are appealing the disbursement order, claiming they should have received a portion of the $50,000. Thus, the issues to be considered in this appeal are as follows:

ISSUE I: Whether the Chancellor was manifestly wrong, clearly erroneous, or abused the Chancellor's discretion when the Chancellor entered the order granting the entirety of the $50,000 in interpleader funds to Daniel Lannom and Glynes Lannom?

ISSUE II: Whether the attorney for Daniel Lannom and the attorney for Glynes Lannom acted improperly by receiving the $50,000 interpleader funds from the Chancery Clerk on October 25, 2010, pursuant to the *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* entered by the Chancellor on October 25, 2010?

ISSUE III: Whether Leon Berryman's appeal is frivolous and whether damages should be awarded to Appellee Daniel Lannom and Appellee Glynes Lannom?

* * * * * *

II. STATEMENT OF THE CASE[1]

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

The civil action giving rise to this appeal has its genesis in a fatal motor vehicle accident which occurred in DeSoto County, Mississippi, on April 17, 2007, and which subsequently led to the felony conviction of Larry W. Setzer for two counts of manslaughter by culpable negligence and for an additional count of aggravated DUI.[2]

1. ***Complaint for Interpleader*** [R. 5]: This civil action began on June 11, 2008, when Esurance Insurance Company ("Esurance") filed its *Complaint for Interpleader* as cause number 08-06-1182 in the Chancery Court of DeSoto County, Mississippi. [R. 5]

The *Complaint for Interpleader* alleged, *inter alia*, that Esurance had issued an automobile liability insurance policy to Larry W. Setzer which had limits of liability stated as $25,000.00 per person and $50,000.00 per accident.[3] The *Complaint for Interpleader* further alleged: that Setzer was involved in a multi-vehicle automobile accident in DeSoto

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[1]In this brief, citations to the Record will be denominated as "R." followed by the appropriate page number. No transcripts of the proceedings is available.

[2]See *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226 (Miss. 2011).

[3]The original *Complaint for Interpleader* actually incorrectly alleged that "[t]he limits of liability for the subject policy of insurance were $25,000 per person/$25,000 per accident." [R. 5-6] This typographical error was subsequently corrected by the filing of the *First Amended Complaint for Interpleader*, which was filed on February 11, 2009. [R. 27]

County, Mississippi, on April 17, 2007; that Zachary D. Lannom and Jacob D. Lannom died in the accident; that Phillip Bieselin was rendered a quadriplegic in the accident; and, that a wrongful death action had been filed against Setzer on behalf of Zachary D. Lannom and Jacob D. Lannom.[4] The *Complaint for Interpleader* alleged that Esurance had attempted to settle the claims against Setzer by "tendering the policy limits of $50,000 of the liability insurance covering Mr. Setzer at the time of the accident," but that "no agreement could be reached."[5] [R. 7] The *Complaint for Interpleader* was brought by Esurance pursuant to Rule 22 of the Mississippi Rules of Civil Procedure and sought an order from the Chancery Court of DeSoto County which would "discharge Mr. Setzer and Esurance from further liability to the Interpleader-Defendants herein, and all others who may make a claim against the fund ...." [R. 8] The *Complaint for Interpleader* sought "a judicial determination as to how [the $50,000.00] will be disbursed," stated that the money would be deposited with the Chancery Clerk "[o]nce this Court orders that [Esurance] is enttitled to interpleader relief," and requested that the Court "order the above named Interpleader-Defendants to execute full and final releases and indemnification agreements in favor of [Esurance] and its insured, Larry W. Setzer." [R. 8]

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[4]Zachary D. Lannom and Jacob D. Lannom are brothers and were 15-years-old and 12-years-old, respectively, at the time of their deaths. A true and correct copy of the *Complaint* filed as civil action number CV2007-0354 in the Circuit Court of DeSoto County, Mississippi, for the wrongful death of Zachary and Jacob Lannom may be found in the Record at pp. 33-43.

[5]The reason "no agreement could be reached" is because the attorneys for Esurance demanded "a full release of ***all claims*** against Mr. Setzer" in return for "the per accident limit of $50,000.00 in liability insurance to be divided equally" among Glynes Lannom, Daniel Lannom, Leon Berryman, Ariel Berryman, Phillip Bieselin, and Joaquin Gonzales. [R. 47-48 (emphasis added)]

2. ***Answer of Phillip Bieselin to Complaint for Interpleader*** [R. 10]: Phillip Bieselin filed the *Answer of Phillip Bieselin to Complaint for Interpleader* on June 24, 2008, which, *inter alia*, stated "Phillip Bieselin would deny that Larry Setzer is entitled to be personally released based on payment by Esurance, his liability carrier." [R. 10-11] Again, Phillip Bieselin "was left partially paralyzed" as a result of the accident.[6]

3. **Daniel Lannom's *Answer to Complaint for Interpleader*** [R. 13]: Daniel Lannom filed his *Answer to Complaint for Interpleader* on June 26, 2008, which, *inter alia*, requested that the Chancery Court of DeSoto County "require Esurance to prove the amount of its liability limits and award [Daniel Lannom] a full 'per/person' limit of the Esurance liability policy."[7] [R. 13-14]

4. ***Answer of Leon Berryman & Ariel Berryman to Complaint for Interpleader*** [R. 15]: The *Answer of Leon Berryman & Ariel Berryman to Complaint for Interpleader* was filed on July 2, 2008, and requested "that the Court award [Leon Berryman] and Ariel Berryman, a minor, a full per/person limit of the available liability proceeds ...." [R. 15-17] Notably, nowhere in the *Answer of Leon Berryman & Ariel Berryman to Complaint for Interpleader* is there any allegation or claim that either Leon Berryman or April Berryman suffered or sustained any injury in the accident. Furthermore, during the criminal prosecution of Larry Setzer which arose from the accident, the evidence established that the

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[6]See *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011).

[7]Again, Glynes Lannom brought a wrongful death suit against Larry Setzer (and a true and correct copy of the *Complaint* filed in the wrongful death action may be found in the Record a pp. 33-43). Daniel Lannom joined the wrongful death action as a plaintiff, and a true and correct copy of Daniel Lannom's *Amended Complaint for Damages* is found in the Record at pp. 44-46.

only persons who were significantly injured in the accident were Phillip Bieselin, Glynes Lannom, Jacob Lannom, and Zachary Lannom.[8]

5. ***Answer of Glynes H. Lannom to Complaint for Interpleader*** [R. 19]: Glynes H. Lannom filed the *Answer of Glynes H. Lannom to Complaint for Interpleader* on August 18, 2008, which, *inter alia*, specifically stated (at ¶ 3) that "a lawsuit has been filed in the Circuit Court of DeSoto County, Mississippi, against Larry W. Setzer for the wrongful death of Zachary D. Lannom and Jacob D. Lannom."[9] [R. 19-24] The *Answer of Glynes H. Lannom to Complaint for Interpleader* (at ¶ 12) asked the Court to "set this matter for a full hearing" and, following such hearing, to "enter an appropriate order ... which will adequately protect the interests of the parties hereto and which will serve the best interests of justice." [R. 24]

6. ***Petition Seeking that Deposited Funds by Disbursed to Danny Lannom*** [R. 50]: The *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom* was filed on October 13, 2010, which stated, *inter alia*, the following: that Esurance had deposited $50,000.00 with the Chancery Clerk; that "[t]he only lawsuits filed against Larry Setzer" as a result of the accident was the wrongful death action pending "Case No. CV2007-0354 in the Circuit Court of DeSoto County, Mississippi" brought by Daniel Lannom and Glynes Lannom as "the parents of Zachary and Jacob Lannom"; that the accident had occurred on April 17, 2007, and "[t]he three year statute of limitations for claims against Larry Setzer arising out of the automobile accident" had expired on April 17, 2010; and, that (other than

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[8]See *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011).

[9]Again, a true and correct copy of the *Complaint* filed as civil action number CV2007-0354 in the Circuit Court of DeSoto County, Mississippi, for the wrongful death of Zachary and Jacob Lannom may be found in the Record a pp. 33-43.

the claims of the Lannoms pending in the wrongful death action) any claim of any other person against Setzer "would be time barred as a matter of law." [R. 50-51] The *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom* requested that the Chancery Court of DeSoto County "divide evenly the $50,000" between Daniel Lannom and Glynes Lannom because "they are the only ones who have viable claims against Larry Setzer for the automobile accident of April 17, 2007," and because "[b]oth have suffered significant damages in the loss of two sons." [R. 51]

7. ***Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom*** [R. 52]: The *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* was filed on October 25, 2010. [R. 52] The order recites, *inter alia*, the following: that Esurance deposited $50,000.00 with the Chancery Clerk; that "[t]he only lawsuits filed against Larry Setzer for damages arising out of the accident of April 17, 2010 [sic] were filed by Glynes Lannom and Danny Lannom, the parents of Zachary and Jacob Lannom, both of whom were killed in the auto accident"; that the only lawsuit "currently pending" was the Lannom's wrongful death suit docketed as "Case No. CV2007-0354"; that "[t]he three year statute of limitations for claims against Larry Setzer arising out of the automobile accident ran on April 17, 2010," and the "claims of any other persons against Larry Setzer would be time barred as a matter of law"; and, that "Danny Lannom and Glynes Lannom should divide evenly the $50,000 as they are the only ones who have viable claims against Larry Setzer for the automobile accident of April 17, 2007." [R. 52-53] The order directed the Chancery Clerk to "disburse the $50,000 deposited by Esurance" by making one payment of $25,000 to "Daniel Lannom and his attorney" and one payment for $25,000 to "Glynes Lannom and her attorney." [R. 53]

8. ***Notice of Appeal*** [R. 55]: The *Notice of Appeal* was filed on behalf of Leon Berryman and Ariel Berryman on November 18, 2010. [R. 55]

9. ***Designation of Record*** [R. 58]: The *Designation of Record* was filed by Leon Berryman on December 6, 2010. [R. 58]

10. ***Additional Designation of Record*** [R. 61]: Glynes Lannom filed her *Additional Designation of Record* on December 14, 2010. [R. 61] The additional material Glynes Lannom requested be made part of the Record included the *First Amended Complaint for Interpleader*, which had been filed on February 11, 2009, as well as the exhibits attached thereto (which included a true and correct copy of the wrongful death complaint filed by Glynes Lannom against Larry Setzer in civil action number CV2007-0354 in the Circuit Court of DeSoto County).

11. ***Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings*** [R. 67]: Leon Berryman filed the *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* on December 22, 2010. [R. 67] This pleading will be more fully discussed in the *Statement of Facts Relevant to the Issues Presented for Review* section, *infra*.

12. ***Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings*** [R. 78]: The *Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* was filed on January 4, 2011. [R. 78] Glynes Lannom asserted that Leon Berryman's statement of the evidence was inaccurate and incorrect. Subsequently, the Chancellor entered an order which stated, *inter alia*, that Glynes Lannom's "rendition of the facts ... is an accurate statement ...." [R. 95] This pleading will be more

fully discussed in the *Statement of Facts Relevant to the Issues Presented for Review* section, *infra.*

13. ***Appellant's Rebuttal in Support of Statement of Evidence in the Absence of Transcripts of Proceedings*** [R. 99]: Leon Berryman filed the *Appellant's Rebuttal in Support of Statement of Evidence in the Absence of Transcripts of Proceedings* on January 19, 2011. [R. 99]

14. ***Order*** [R. 94]: The Chancellor entered an *Order* regarding the evidence in the absence of a transcript. [R. 94] Significantly, this order states:

> The Court finds that the Appellants' [*i.e.*, Leon Berryman and Ariel Berryman] statement of evidence in absence [] of transcript of the proceedings ... does not represent the Court's recollection of the events .... The Appellees' [*i.e.*, Daniel Lannom and Glynes Lannom] rendition of the facts ... is an accurate statement of the events at the hearing ...." [R. 95]

This order will be more fully discussed in the *Statement of Facts Relevant to the Issues Presented for Review* section, *infra.*

* * *

B. *STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW*

The statement of facts contained and set forth in the Appellants' brief filed in this appeal is inaccurate. There is no transcript of the evidence or proceedings in this case from the lower court. [R. 75] Rule 10(c) of the Mississippi Rules of Appellate Procedure ("M.R.A.P.") states, in pertinent part, as follows, to-wit:

> **(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available.** ***If no*** stenographic report or ***transcript*** of all or part of the evidence or proceedings ***is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection***. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. ***If the appellee objects*** to the statement as filed, ***the appellee shall file objections with the clerk of the trial court*** within 14 days after service of the notice of the filing of the statement. ***Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule***.
>
> **(d) Agreed Statement as the Record on Appeal.** In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.
>
> **(e) Correction or Modification of the Record.** ***If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth***. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted

> to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

[Emphasis added.]

As previously noted, *supra*, Leon Berryman filed the *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* on December 22, 2010. [R. 67] Subsequently, the *Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* was filed on January 4, 2011. [R. 78] Thereafter, Leon Berryman filed the *Appellant's Rebuttal in Support of Statement of Evidence in the Absence of Transcripts of Proceedings* on January 19, 2011. [R. 99]

Thus, a "difference" arose as to what truly occurred in the trial court; and, therefore, the Chancellor, acting pursuant to M.R.A.P. Rule 10 entered an *Order* which states, *inter alia*, as follows:

> The Court finds that the Appellants' [*i.e.*, Leon Berryman's] statement of evidence in absence of absence of [sic] transcript of the proceedings of October 15, 2010, in Hernando, Mississippi, does not represent the Court's recollection of the events which took place at a hearing on this matter; however, the Court will allow [Leon Berryman's] statement of evidence to be included in the record of this appeal so that the Court of Appeals or the Supreme Court may exercise independent judicial review of this matter. The Court finds that the Appellee's [*i.e.*, Daniel Lannom and Glynes Lannom] objection to [Leon Berryman's] statement of evidence is well taken. ***The Appellees'*** [*i.e.*, Daniel Lannom and Glynes Lannom] ***rendition of the facts***, as stated by the Court in the record of this hearing, ***is an accurate statement of the events at the hearing on October 15, 2010*** [sic], in Hernando, Mississippi.

[R. 95 (emphasis added)]

The "rendition of the facts" which the Chancellor held to be "an accurate statement" is set forth in the *Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* was filed on January 4, 2011. [R. 78]

In Leon Berryman's *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* filed on January 4, 2011, Berryman alleged that he was not served with notice that a hearing on the *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom* would be held on October 25, 2010, but the Chancellor found that all interested parties, including Leon Berryman, were served with both a copy of the *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom* as well as a notice that the petition would be brought on for hearing before the Chancellor on October 25, 2011.[10] [R. 81] More specifically, the Chancellor found that at the hearing on October 25, 2010, "the attorney for Leon Berryman and Ariel Berryman did not tell Chancellor Cobb that he did not receive notice of the hearing." [R. 81]

Significantly, "the attorney for Leon Berryman and Ariel Berryman did not file any response to Daniel Lannom's petition to disburse the $50,000" and "[t]he attorney for Leon

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[10]Nicholas J. Owens, Jr., the attorney for Daniel Lannom, attached his *Certificate of Service* to the *Petition Seeking that Deposited Funds to be Disbursed to Danny Lannom*, and the certificate reflects that the attorney for Leon Berryman, Olufemi Salu, was served with the petition. [R. 51] The cover letter for the petition was made an exhibit ("Exhibit A") to the *Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings*. [R. 93] The cover letter indicates it was mail to Olufemi Salu, Leon Berryman's attorney, and the cover letter specifically states that the "petition is set to be heard on Monday, October 25, 2010, at 9:00 A.M. in the Chancery Court of Desoto County." [R. 93]

Berryman and Ariel Berryman did not ask Chancellor Cobb for a continuance or for additional time to respond to [the *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom*]." [R. 81-82] Prior to the actual hearing on October 25, 2010, the attorney for Daniel Lannom and the attorney for Glynes Lannom talked to Leon Berryman's attorney in person at the courthouse in Hernando and advised Berryman's attorney that Daniel Lannom's "petition was uncontested and a hearing would be held as noticed." [R. 82] Furthermore, the attorney for Leon Berryman, Olufemi Salu, ***was present*** and ***did participate*** in the hearing conducted by Chancellor Cobb on October 25, 2011, as plainly stated in Berryman's *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings.*[11] [R. 69]

During the hearing on October 25, 2010, it was pointed out to the Chancellor that there had been no claim presented, and no evidence presented, that Ariel Berryman had sustained any injury or had suffered any damages whatsoever. [R. 83-84] Notably, in the *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* filed by Leon Berryman on December 22, 2010, contains this statement (at ¶ 4(e)):

> Leon Berryman was the driver of the truck in which his daughter, Ariel Berryman was a passenger. Both were injured and the truck was damaged in the accident of April 17, 2007. [R. 69]

There is not a scintilla of evidence whatsoever to support the allegation that both Leon Berryman and Ariel Berryman "were injured" in the accident, and this claim was not made until almost ***two months after*** the hearing on October 25, 2010. Also, Leon Berryman

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[11]It is also acknowledged in Leon Berryman's *Appellants' Brief in Support of Their Appeal from the Final Judgment of Honorable Vicki Cobb Delivered on October 25, 2010* (at p. 3) that Berryman's attorney "was present in court [and] participated and presented argument" during the October 25, 2010, hearing.

attached as "Exhibit P-2" to the *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* a photocopy of a two-page document purportedly generated by the Southaven Fire Department. The first page of the document, captioned "Patient Refusal of Treatment/Transportation," recites that the "Patient" is Ariel Berryman, "Age 10," and recites that transportation to any medical facility was refused. [R. 77] The second page of the document, captioned "Patient Refusal of Treatment/Transportation Narrative," recites that the patient "was in the sleeper of the truck when accident happen," recites that the patient was not having any difficulties, and recites that the patient's "father refused transport of [patient] to hospital." [R. 76]

Here it should be noted that the Mississippi Supreme Court, in discussing the evidence against Larry Setzer supporting Setzer's felony convictions, stated: "The driver of the 18-wheeler suffered no injuries." *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011). There is no mention whatsoever of Ariel Berryman suffering any injury in that case. It should also be noted that nowhere in the *Answer of Leon Berryman & Ariel Berryman to Complaint for Interpleader* which was filed on July 9, 2008, is there any allegation whatsoever that either Leon Berryman or Ariel Berryman had sustained any type of injury, or suffered any type of damages. [R. 15-17] Compare Leon Berryman's answer to the *Answer of Glynes H. Lannom to Complaint for Interpleader*, wherein Glynes Lannom states that a wrongful death action had been filed for the deaths of Zachary D. Lannom and Jacob D. Lannom. [R. 19-24] Finally, it should be noted that nowhere within Leon Berryman's *Appellants' Brief in Support of Their Appeal from the Final Judgment of Honorable Vicki Cobb delivered on October 25, 2010* filed in this appeal is there any claim

that either Leon Berryman or Ariel Berryman were either injured or sustained any type of damages as a result of the April 17, 2007, motor vehicle accident caused by Larry Setzer.

* * * * * *

III. SUMMARY OF THE ARGUMENT

ISSUE I: Whether the Chancellor was manifestly wrong, clearly erroneous, or abused the Chancellor's discretion when the Chancellor entered the *Order* granting the entirety of the $50,000 in interpleader funds to Daniel Lannom and Glynes Lannom?

To be entitled to a share of the interpleaded funds, a party had to demonstrate that they possessed a claim which was ***viable*** and had the potential of being reduced to a ***legally enforceable judgment*** against Larry Setzer (which would then trigger the contractual obligation of Esurance to indemnify Setzer). The Record demonstrates that Daniel Lannom and Glynes Lannom met this prerequisite, but that Leon Berryman and Ariel Berryman did not. Under this Court's limited standard of review this Court must affirm the Chancellor's decision and the appeal brought herein by Appellants Leon Berryman and Ariel Berryman must be denied.

* * *

ISSUE II: Whether the attorney for Daniel Lannom and the attorney for Glynes Lannom acted improperly by receiving the $50,000 interpleader funds from the Chancery Clerk on October 25, 2010, pursuant to the *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* entered by the Chancellor on October 25, 2010?

When the totality of the circumstances of this Record are considered, it is clear that neither the attorney for Daniel Lannom or the attorney for Glynes Lannom violated any applicable court rule, ethical rule, or ethical duty, and Leon Berryman's complaints under

Issue II are not well-taken and afford no basis for any relief sought by Berryman in this appeal.

* * *

ISSUE III: Whether Leon Berryman's appeal is frivolous and whether damages should be awarded to Appellee Daniel Lannom and Appellee Glynes Lannom?

At no time did either Leon Berryman or Ariel Berryman ever possess a viable claim to the interpleader funds; therefore, this appeal brought by Leon Berryman has no basis in fact or law and is frivolous. Rule 38 of the Mississippi Rules of Appellate Procedure states: "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." Appellee Glynes Lannom respectfully requests that this Court make a determination that this appeal is frivolous and that this Court award just damages and double costs to Glynes Lannom, specifically including attorneys' fees and other expenses which have been incurred by Glynes Lannom as a result of this frivolous appeal.

* * * * * *

IV. ARGUMENT

A. *STANDARD OF REVIEW*

Mississippi appellate courts apply "a limited standard of review to a chancellor's findings of fact." *A.B. v. Y.Z.*, No. 2009–CA–01575–SCT, 60 So.3d 737, 739 (¶ 11) (Miss. 2011). The standard of review has been stated:

> The Court employs a limited standard of review on appeals from chancery court. If substantial credible evidence supports the chancellor's decision, it will be affirmed. *Carrow v. Carrow*, 642 So.2d 901, 904 (Miss.1994). The Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or a wrong legal standard was applied. *Id.* citing *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990).

Reddell v. Reddell, 696 So.2d 287, 288 (Miss. 1997). More recently, the Mississippi Court of Appeals reiterated the standard of review:

> Our supreme court has established the standard of review that we employ when reviewing chancery court cases:
>
> > As for questions of fact, "[an appellate court] will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous." *Stanley v. Miss. State Pilots of Gulfport, Inc.*, 951 So.2d 535, 538 [(¶ 9)] (Miss.2006) (quoting *Williams v. Williams*, 843 So.2d 720, 722 [(¶ 10)] (Miss.2003)). Questions of law are reviewed de novo. *Biglane v. Under The Hill Corp.*, 949 So.2d 9, 14 [(¶ 17)] (Miss.2007) (citing *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss.1996)).
>
> *Harris v. Tom Griffith Water Well & Conductor Serv., Inc.*, 26 So.3d 338, 340 (¶ 7) (Miss.2010).

American Public Finance, Inc. v. Smith, No. 2009-CA-00608-COA, 45 So.3d 307, 310 (¶ 8) (Miss. App. 2010).

B. *ISSUES PRESENTED FOR REVIEW*[12]

ISSUE I: Whether the Chancellor was manifestly wrong, clearly erroneous, or abused the Chancellor's discretion when the Chancellor entered the *Order* granting the entirety of the $50,000 in interpleader funds to Daniel Lannom and Glynes Lannom?

This case is quite simple. An insurance company, Esurance, issued a policy to Larry Setzer. Setzer was at fault in a horrible automobile accident which killed two young brothers, injured their mother, and left another individual a paraplegic. The limits of insurance coverage under the Esurance policy with Setzer were $25,000 per person and $50,000 per accident. [R. 32] Thus, under elementary principles of insurance law, Esurance was contractually obligated to pay all sums for which its insured, Larry Setzer, became ***legally liable*** to pay for injuries to other persons injured in the April 17, 2007, accident, up to the amount of $25,000 per individual and a total of $50,000 for all claims arising from the April 17, 2007, accident. See, *e.g.*, *Association of Trial Lawyers Assur. v. Tsai*, No. 2002-CA-01659-SCT, 879 So.2d 1024, 1028 (¶ 15) (Miss. 2004) (an insurer has a duty to

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[12]Leon Berryman, in his Appellants' brief, states (under the caption *Appellants' Statement of Question Presented*, at p. 5) as follows, to-wit:

> It is submitted that the two issues to be determined in this appeal are as follows:
>
> a. Whether the Berrymans who filed Answer to the Complaint for Interpleader action and asserted claim to only the interpleaded fund, are required to file additional claim for them to be entitled to the interpleaded fund.
>
> b. Is the immediate withdrawal of interpleaded fund of $50,000.00 by attorneys for the Lannoms on October 25, 2010 in compliance with Mississippi statutes and rules of court?

For clarity, these issues are restated by Glynes Lannom in this brief.

indemnity its insured if the insured is "found legally liable" for the occurrence of a covered risk), and, *Caldwell v. Hartford Acc. & Indem. Co.*, 248 Miss. 767, 160 So.2d 209 (Miss. 1964). Also, under elementary principles of insurance law, if Larry Setzer cannot be held legally liable for an injury, then his insurer (*i.e.*, Esurance) has no duty whatsoever to pay anything for such an injury.

It is undisputed that the accident from which this litigation springs occurred on April 17, 2007.[13] [R. 6, 69] Any civil action against Larry Setzer to fix liability against Setzer for injuries sustained in the April 17, 2007, accident had to be filed prior to April 17, 2010, or it would be forever time barred by the applicable statute of limitations. *See* MISS. CODE ANN. §15-1-49(1) (amended 1990) ("All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after."). Thus, with regard to any person who was injured in the April 17, 2007, accident, unless such person had filed a civil suit against Setzer prior to April 17, 2010, there is no possibility whatsoever that Setzer could ever be ***legally liable*** to such person for injuries arising from the accident.

The Record in this civil action reflects that ***only one*** civil action was ever brought against Larry Setzer as a result of the April 17, 2007, accident, and this was Civil Action Number CV2007-0354 in the Circuit Court of DeSoto County, Mississippi, which was filed on December 7, 2007. [R. 6, 20, 28, 33] The only parties in this civil action are Glynes Lannom and Daniel Lannom, the mother and father of Zachary and Jacob Lannom (the young brothers who died in the accident). [R. 33, 44, 52]

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[13]See also *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 227 (¶2) (Miss. 2011).

The official *Comment* to Rule 22 of the Mississippi Rules of Civil Procedure, in pertinent part, states:

> The purpose of Rule 22, interpleader, is to permit a stakeholder who is uncertain if and to whom he is liable for money or property held by him to join those who are or who might assert claims against him and to thereby obtain a judicial determination for the proper disbursement of the money or property.
>
> ...
>
> Ordinarily, interpleader is conducted in two "stages." In the first, the court hears evidence to determine whether the plaintiff is entitled to interplead the defendants. In the second stage, ***a determination is made on the merits of the adverse claims*** and, if appropriate, on the rights of an interested stakeholder.

(Emphasis added.)

The $50,000 which Esurance paid to the Chancery Clerk under Rule 22 represented the maximum amount of money that Esurance could potentially have been required to pay as the insurer of Larry Setzer to indemnify its insured (*i.e.*, Setzer) for amounts its insured was found "legally liable" due to the occurrence of a risk covered by its insurance policy with Setzer. Again, if the insured (*i.e.* Setzer) was not found "legally liable" for an injury, Esurance would have no obligation to make a payment. In its *Complaint for Interpleader* (filed on June 11, 2008), Esurance listed the ***potential*** parties that ***might*** possess an ***enforceable*** claim against Larry Setzer, to-wit: Glynes H. Lannom, Daniel Lannom, Leon Berryman, Ariel Berryman, Phillip Bieselin, and Joaquin Gonzales. [R. 6-7] The Record reflects that, at the time of the hearing conducted on October 25, 2010, any potential claim against Larry Setzer possessed by Leon Berryman, Phillip Bieselin, and/or Joaquin Gonzales ceased to exist upon the expiration of the statute of limitations (which ran on April 17, 2010). To state it another way, after April 17, 2010, no legally enforceable judgment could be

obtained against Larry Setzer by Leon Berryman, Phillip Bieselin, and/or Joaquin Gonzales which could require Esurance to indemnify Setzer, and, therefore, Berryman, Bieselin, and Gonzales no longer had any viable claim to funds belonging to Esurance.

When the *Petition Seeking that Deposited Funds to be Disbursed to Danny Lannom* was brought before the Chancellor on October 25, 2010, the only potentially viable claims against Larry Setzer were the claims of Daniel Lannom, Glynes Lannom, and Ariel Berryman. The Lannoms' claims were viable because the pending wrongful death suit filed on December 7, 2007, as Civil Action Number CV2007-0354 in the Circuit Court of DeSoto County, Mississippi, could potentially result in a legally enforceable judgment against Setzer (and Esurance would then have been contractually obligated to indemnify Setzer upon to the limits of the insurance policy). It is undisputed that Daniel Lannom and Glynes Lannom are, respectively, the father and mother of Zachary and Jacob Lannom, that 15-year-old Zachary and 12-year-old Jacob died in the accident, and that Larry Setzer was solely responsible for the deaths of Zachary and Jacob.[14] Thus, when the *Petition Seeking that Deposited Funds to be Disbursed to Danny Lannom* was brought before the Chancellor on October 25, 2010, there was no question that Daniel Lannom and Glynes Lannom would be entitled to a share of the funds.

The only other person who possessed a potentially viable claim on October 25, 2010, was Ariel Berryman, and her potential claim retained its viability solely because she was a

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[14]The guilty verdict against Larry Setzer finding him guilty of two counts of manslaughter by culpable negligence (for the deaths of Zachary and Jacob Lannom) and guilty of one count of DUI causing death or permanent bodily injury (for injuries to Phillip Bieselin) was returned on February 13, 2009. See *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 229-230 (¶ 13) (Miss. 2011).

minor.[15] Of course, to be entitled to a share of the $50,000 interpleaded by Esurance, Ariel Berryman had to have ***some*** damages – without damages Ariel Berryman could never obtain a legally enforceable judgment against Larry Setzer (which could require Esurance to indemnify Setzer).[16] When the *Petition Seeking that Deposited Funds to be Disbursed to Danny Lannom* was brought before the Chancellor on October 25, 2010, it was directly brought to the Chancellor's attention that there was no evidence that Ariel Berryman had any damages whatsoever.[17] [R. 83-84] The attorney representing Ariel Berryman was present at the October 25, 2010, hearing and participated in the hearing. [R. 69] The attorney

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[15]MISS. CODE ANN. §15-1-59 (amended 1983) states:

> If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

[16]It is elemental that when asserting a claim for negligence "a plaintiff has the burden of proving (1) a duty, (2) a breach of that duty, (3) causal connection between the breach of the duty and the purported injury, and (4) damages resulting therefrom." *Duckworth v. Warren*, No. 2007-CA-01299-SCT, 10 So.3d 433, 439 (¶ 16) (Miss. 2009). See also, *e.g.*, *Mladineo v. Schmidt*, No. 2008–CA–02011–SCT, 52 So.3d 1154, 1162 (¶ 28) (Miss. 2010) ("The elements of a negligence claim are duty, breach of duty, proximate cause, and damages.").

[17]In the *Objection of Glynes H. Lannom and Daniel Lannom to Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* it is stated (at ¶ 7) that during the October 25, 2010, hearing it was pointed out to the Chancellor that there was no evidence that Ariel Berryman had any damages, and it is stated (at ¶ 5) that the attorney representing Ariel Berryman did not ask the Chancellor for a continuance or seek additional time to respond to the Lannom's petition seeking distribution of the funds. [R. 78-90] Here it should be remembered that in the *Order* entered by the Chancellor (entered on May 18, 2011, *nunc pro tunc* for April 11, 2011), it is stated: "The [Lannum's] rendition of the facts ... is an accurate statement of the events at the hearing on October 15, 2010 ...." [R. 95]

representing Ariel Berryman did not ask the Chancellor for a continuance or seek additional time to respond to the Lannom's petition seeking distribution of the funds. [R. 78-90, 95] Other than a mere ***single statement*** (contained in Berryman's *Appellants' Statement of the Evidence in the Absence of Transcripts of Proceedings* [see R. 69], which was filed on December 22, 2010 – almost two full months after the October 25, 2010, hearing) that both Leon Berryman and Ariel Berryman "were injured" in the April 17, 2007, accident, at no time has a scintilla of evidence been presented demonstrating that Ariel Berryman actually sustained any damages.[18] Again, as discussed *supra*, without damages, there can be no legally enforceable claim.

The *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* states:

> Danny Lannom and Glynes Lannom should divide evenly the $50,000 as they are the only ones who have viable claims against Larry Setzer for the automobile accident of April 17, 2007. Both have suffered significant damages in the loss of two sons. [R. 53]

The aforesaid *Order* constitutes a finding of fact by the Chancellor, and Glynes Lannom would respectfully state and show to this Honorable Court that when the entirety of the Record in this case is thoroughly examined that the aforesaid finding of fact and ruling by the Chancellor ***is not*** manifestly wrong, ***is not*** clearly erroneous, and ***is not*** an abuse of the Chancellor's discretion; and, therefore, under this Court's limited standard of review this

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[18]Again, in discussing the evidence against Larry Setzer supporting Setzer's felony convictions, the Mississippi Supreme Court stated: "The driver of the 18-wheeler suffered no injuries." *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011). Furthermore, there is no mention whatsoever of Ariel Berryman suffering any injury in that case in the Supreme Court's review of the facts.

Court must affirm the Chancellor's decision and the appeal brought herein by Appellants Leon Berryman and Ariel Berryman must be denied.

Furthermore, as previously noted, *supra*, Leon Berryman, in his Appellants' brief, states (under the caption *Appellants' Statement of Question Presented*, at p. 5) as follows, to-wit:

> It is submitted that the two issues to be determined in this appeal are as follows:
>
> a. Whether the Berrymans who filed Answer to the Complaint for Interpleader action and asserted claim to only the interpleaded fund, are required to file additional claim for them to be entitled to the interpleaded fund.
>
> b. Is the immediate withdrawal of interpleaded fund of $50,000.00 by attorneys for the Lannoms on October 25, 2010 in compliance with Mississippi statutes and rules of court?

With regard to the first question set forth above, Glynes Lannom would state that, under the specific facts of the case *sub judice*, the answer is emphatically "Yes!" Specifically, as discussed *supra*, to be entitled to a share of the funds, a party had to demonstrate that they possessed a claim which was ***viable*** and had the potential of being reduced to a ***legally enforceable judgment*** against Larry Setzer (which would then trigger the contractual obligation of Esurance to indemnify Setzer). The Record demonstrates that Daniel Lannom and Glynes Lannom met this prerequisite, but that Leon Berryman and Ariel Berryman did not. Simply filing a claim to the interpleaded funds (which is all the Berryman's ever did) did not entitle anyone to a share of the funds. Again, under this Court's limited standard of review this Court must affirm the Chancellor's decision and the appeal brought herein by Appellants Leon Berryman and Ariel Berryman must be denied. (The second question above will be discuss *infra*.)

ISSUE II: Whether the attorney for Daniel Lannom and the attorney for Glynes Lannom acted improperly by receiving the $50,000 interpleader funds from the Chancery Clerk on October 25, 2010, pursuant to the *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* entered by the Chancellor on October 25, 2010?

The hearing on the *Petition Seeking that Deposited Funds to be Disbursed to Danny Lannom* was held by the Chancellor on October 25, 2010, and, at the conclusion of the hearing, the Chancellor signed the *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom*. Immediately thereafter, also on October 25, 2010, the attorney for Daniel Lannom and the attorney for Glynes Lannom presented the aforesaid order to the Chancery Clerk and the Chancery Clerk disbursed the $50,000 interpleader funds to the attorneys pursuant to the terms of the Chancellor's order. [R. 87-88]

As previously noted *supra*, Leon Berryman, in his Appellants' brief, states (under the caption *Appellants' Statement of Question Presented*, at p. 5) as follows, to-wit:

> It is submitted that the two issues to be determined in this appeal are as follows:
>
> a. Whether the Berrymans who filed Answer to the Complaint for Interpleader action and asserted claim to only the interpleaded fund, are required to file additional claim for them to be entitled to the interpleaded fund.
>
> b. Is the immediate withdrawal of interpleaded fund of $50,000.00 by attorneys for the Lannoms on October 25, 2010 in compliance with Mississippi statutes and rules of court?

The first question has already been discussed under Issue I, *supra*. The second question is the subject discussed here under Issue II. Here it should be noted that Leon Berryman's brief in this appeal, in its discussion of this issue, also contains at least one erroneous statement of "fact," to-wit:

> The following facts are not disputed:
>
> ...
>
> III. The judgment subject-matter of this appeal did not make provision for immediate withdrawal of deposited fund [sic] of $50,000. See record, pp. 52-23.[19]

In truth and in fact the *Order Directing Disbursement of Deposited Funds to Danny Lannom and Glynes Lannom* states:

> It is therefore Ordered, Adjuged [sic] and Decreed that the Chancery Court Clerk of DeSoto County shall disburse the $50,000 deposited by Esurance Insurance Company by making the following payments: 1) payment in the amount of $25,000 to Daniel Lannom and his attorney Nicholas J. Owens, Jr. and 2) payment in the amount of $25,000 to Glynes Lannom and her attorney John Booth Farese.

[R. 53] Nothing in the order prohibited immediate disbursement of the funds, and, on its face, the use of the term "shall" means 'do it now.'

Leon Berryman argues in his brief in this appeal that the receipt of the $50,000 by the attorney for Daniel Lannom and by the attorney for Glynes Lannom constituted a violation Rule 62(a) of the Mississippi Rules of Civil Procedure ("M.R.C.P.").[20] Rule 62(a) provides, in pertinent part:

> 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 new trial.

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[19]See Leon Berryman's *Appellants' Brief in Support of their Appeal from the Final Judgment of Honorable Vicki Cobb Delivered on October 25, 2010*, at p. 9.

[20]See Leon Berryman's *Appellants' Brief in Support of their Appeal from the Final Judgment of Honorable Vicki Cobb Delivered on October 25, 2010*, at pp. 9-12.

Notably, the procedure for execution "to enforce a judgment for the payment of money" is provided by M.R.C.P. Rule 69.

Apparently, it is Leon Berryman's position that M.R.C.P. Rule 62(a) prohibited the attorney for Daniel Lannom and by the attorney for Glynes Lannom from accepting receipt of the interpleader funds (which were to be disbursed in accordance with the Chancellor's order) until at least ten (10) days after the Chancellor's order was filed on October 25, 2010.[21] As authority for this argument, Berryman's brief cites *In re Estate of Taylor*, 539 So.2d 1029 (Miss. 1989), in which the Mississippi Supreme Court observed: "It should also be noted regarding a stay of proceeding that under M.R.C.P. 62 that there is an automatic stay of a trial court judgment until the expiration of ten (10) days after its entry or the disposition of a motion for a new trial, whichever last occurs." *Id* at 1031-1032. In response to this argument, Glynes Lannom would state to this Honorable Court that M.R.C.P. Rule 62(a) has no application whatsoever in the case *sub judice*. The provisions of Rule 62(a), along with Rule 69, are designed and intended to protect judgment debtors. Neither Leon Berryman nor Ariel Berryman ever occupied the position of a judgment debtor in this civil action; instead, the Berryman's were merely potential "claimants" against the interpleaded funds.

Here it should again be pointed out that the attorney for Leon Berryman, Olufemi Salu, ***was present*** and ***did participate*** in the hearing conducted by the Chancellor on October 25, 2011, as is plainly stated in Berryman's *Appellants' Statement of the Evidence in the*

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[21]Leon Berryman's brief cites *In re Estate of Taylor*, 539 So.2d 1029 (Miss. 1989) for the proposition that "a trial court's judgment is automatically stayed until ten days after its entry or the disposition of a motion for new trial whichever last occurs," but *In re Estate of Taylor*

Absence of Transcripts of Proceedings. [R. 69] It should also again be noted that "[t]he attorney for Leon Berryman and Ariel Berryman did not ask Chancellor Cobb for a continuance or for additional time to respond to [the *Petition Seeking that Deposited Funds by Disbursed to Danny Lannom*]." [R. 81-82] The only action taken by the attorney for Leon Berryman was to file a *Notice of Appeal* on November 18, 2010, some twenty-one (21) days (***three weeks!***) after the October 25, 2010 hearing. [R. 55] Leon Berryman never sought relief under either M.R.C.P. Rule 59 (*New Trials; Amendment of Judgments*) or Rule 60 (*Relief from Judgment or Order*).

When the totality of the circumstances of this Record are considered, it is clear that neither the attorney for Daniel Lannom or the attorney for Glynes Lannom violated any applicable court rule, ethical rule, or ethical duty. Therefore, Glynes Lannom asserts to this Court that Leon Berryman's complaints under Issue II are not well-taken and afford no basis for any relief sought by Berryman in this appeal. Glynes Lannom would also state that this issue is also addressed by Daniel Lannom in the *Brief of Appellee, Daniel Lannom* (at pp. 12-13) previously filed in this appeal, and Glynes Lannom, by this reference, adopts and incorporates the arguments of Daniel Lannom presented in his brief, and Glynes Lannom joins in those arguments.

* * *

ISSUE III: Whether Leon Berryman's appeal is frivolous and whether damages should be awarded to Appellee Daniel Lannom and Appellee Glynes Lannom?

As previously discussed, *supra*, in its opinion in *Setzer v. State*, No. 2009–KA–00752–SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011), the Mississippi Supreme Court, reviewing the facts underlying Larry Setzer's felony conviction, stated: "The driver of the 18-wheeler suffered no injuries." The "driver of the 18-wheeler" is Leon Berryman. [R. 69] There is not a scintilla of evidence in the Record in this appeal that Leon Berryman suffered any injury. As previously discussed, without damages which are causally connected to the accident, Leon Berryman never had a viable claim to the interpleader funds. Notably, Leon Berryman now claims that his "truck was damaged in the accident of April 17, 2007." [R. 69] Assuming, *arguendo*, that this statement is true, Leon Berryman's rights to proceed against Larry Setzer expired on April 17, 2010, when the statute of limitations period ran out without Berryman filing suit.

Also as previously discussed, at no time has there ever been a scintilla of evidence that Ariel Berryman sustained any injury, and without damages Ariel Berryman could never obtain a legally enforceable judgment against Larry Setzer (which could require Esurance to indemnify Setzer).[22]

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[22]It is elemental that when asserting a claim for negligence "a plaintiff has the burden of proving (1) a duty, (2) a breach of that duty, (3) causal connection between the breach of the duty and the purported injury, and (4) damages resulting therefrom." *Duckworth v. Warren*, No. 2007-CA-01299-SCT, 10 So.3d 433, 439 (¶ 16) (Miss. 2009). See also, *e.g.*, *Mladineo v. Schmidt*, No. 2008–CA–02011–SCT, 52 So.3d 1154, 1162 (¶ 28) (Miss. 2010) ("The elements of a negligence claim are duty, breach of duty, proximate cause, and damages.").

Because neither Leon Berryman or Ariel Berryman ever possessed a viable claim to the interpleader funds, this appeal brought by Leon Berryman has no basis in fact or law and is frivolous. Rule 38 of the Mississippi Rules of Appellate Procedure ("M.R.A.P.") states: "In a civil case if the Supreme Court or Court of Appeals shall determine that an appeal is frivolous, it shall sward just damages and single or double costs to the appellee."

Appellee Glynes Lannom hereby respectfully requests that this Court make a determination that this appeal is frivolous and that this Court award just damages and double costs to Glynes Lannom, specifically including attorneys' fees and other expenses which have been incurred by Glynes Lannom as a result of this frivolous appeal.

Glynes Lannom would also state that this issue is also addressed by Daniel Lannom in the *Brief of Appellee, Daniel Lannom* (at pp. 13-14) previously filed in this appeal, and Glynes Lannom, by this reference, adopts and incorporates the arguments of Daniel Lannom presented in his brief, and Glynes Lannom joins in those arguments.

* * * * * *

V. CONCLUSION

Appellee Glynes Lannom asserts to this Court that when the entirety of the Record in this case is thoroughly examined it is clear that the finding of fact and ruling contained in the Chancellor's order to disburse the interpleader funds ***is not*** manifestly wrong, ***is not*** clearly erroneous, and ***is not*** an abuse of the Chancellor's discretion; therefore, under this Court's limited standard of review, this Court must affirm the Chancellor's decision and the appeal brought herein by Appellants Leon Berryman and Ariel Berryman must be denied.

Furthermore, because neither Leon Berryman or Ariel Berryman ever possessed a viable claim to the interpleader funds, this appeal brought by Leon Berryman has no basis in fact or law and is frivolous; therefore, pursuant to M.R.A.P. Rule 38 this Court should award just damages and double costs to Glynes Lannom, specifically including attorneys' fees and other expenses which have been incurred by Glynes Lannom as a result of this frivolous appeal.

RESPECTFULLY SUBMITTED, this, the 11th day of OCTOBER, 2011.

Glynes H. Lannom, ***Appellee***

By: _____

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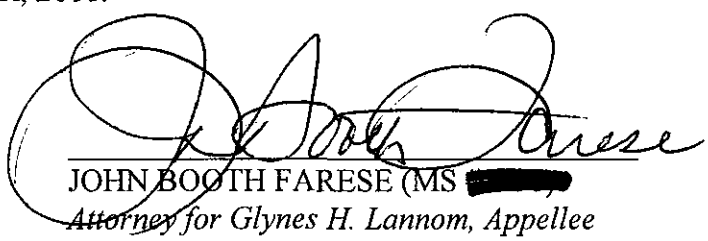
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing *Brief of Appellee Glynes H. Lannom* together with three (3) copies of same (pursuant to M.R.A.P. Rule 31(c)), and a CD-ROM containing an electronic copy of the brief stored in Adobe Portable Document Format (PDF) (pursuant to M.R.A.P. Rule 28(m)), in the regular United States Mail, postage pre-paid, addressed to:

Honorable Kathy Gillis
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 11th day of OCTOBER, 2011.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this date served a true and correct copy of the above and foregoing *Brief of Appellee Glynes H. Lannom* upon the following named persons by placing same in the regular United States Mail, postage prepaid, addressed as stated:

Trial Judge:

Honorable Vicki B. Cobb
Chancellor
Post Office Box 1104
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Attorney for Appellee Daniel Lannom:

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This the 11th day of OCTOBER, 2011.

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