2010 - CA - 01947 RT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Statutes and Rules**

## ARGUMENT IN SUPPORT OF REPLY

### APPELLANTS HAVE MADE A LEGAL AND VIABLE CLAIM TO THE INTERPLEADED FUND

In response to the Lannoms' assertion that Berrymans' have not made a legal and viable claim to the interpleaded fund, counsel submits that the sole issue presented to the trial judge by the Lannoms was a narrow issue of law that the claims of the Berrymans was time barred as a matter of law. *Records, pp. 50-51.* Final judgment of Honorable trial judge was based solely on the conclusion of law that the claims of any other persons against Larry Setzer would be time barred as a matter of law. *Records, pp. 52-53.* The Berrymans filed a valid answer that asserted claim to the interpleaded fund. *Records, pp. 15-18.* This was filed within time and is all the Berrymans were required to do to establish legal and viable claim to the interpleaded fund. *Noble House, Inc. v. W & W Plumbing and Heating, Inc*, 881 So. 2d 337 (Miss. Ct. App. 2004); Miss. R. Civ. Proc. 22. Judgment of the trial judge in this regard is a reversible error.

Further on the above and in response to the Lannoms' assertion that the Berrymans produced no evidence of their damages or any evidence that Ariel Berryman was a minor, Counsel submits that the Lannoms never raised this issue at the lower court and are precluded from raising this issue on appeal. In addition, Berrymans submit that the issue of capacity of Ariel Berryman is an affirmative defense that was not pleaded by the Lannoms. *Records, pp. 6-7, 16, 21.* Lannoms made a general denial but did not specifically plead this issue. *Records, pp. 4, 21.* A party desiring to raise an issue as the legal existence, capacity, or authority of a party will be required to do so by specific negative averment. This is consistent with past procedure which held that

affirmative defenses cannot be relied upon unless specifically pleaded. *See* Miss. Code Ann. 11-7-59(4) 1972; *White v. Thomason*, 310 So.2d 914 Miss. 1975.

Lannoms' assertion that the Berrymans failed to request for a continuance at the hearing of October 25, 2010 is completely irrelevant to the determination of this appeal. Berrymans' failure to request for continuance does not discharge the Lannoms from their burden. Miss. R. Evid. 301. The main issue in the case at bar is the Statute of limitations. This is an issue of law. The Lannoms claim to all the interpleaded fund was based on an erroneous premise of law. The Berrymans' appeal ought to be allowed on this ground alone.

Further on the above, the Berrymans assert that the Lannoms failed to provide any evidence to support their claim at the hearing of October 25, 2010 as follows:

1. Lannoms failed to call a single witness to support their claim. *See Records p. 75.* Official court reporter stated that the matter was placed on docket for hearing on the court's ex parte day in Desoto County, and as such there is no record of this proceeding.
2. Death certificate was not introduced in evidence.
3. Police accident report was not introduced into evidence.
4. All the learned trial judge was left to decide was the *ipse dixit* of Honorable John Farese and Nicholas Owens, attorneys for the Lannoms, who were not eyewitnesses and so could not testify as witnesses.

Berrymans' reliance on the *Noble House case* is well-founded and is the law in Mississippi. Lannoms' attempt to distinguish the case at bar from the *Noble House case* failed to attack the *ratio decidendi* in the *Noble House case.* The decision of the

Supreme Court in *Noble House case* that passage of time is not fatal to W & W Plumbing's entitlement to the interpled funds was not an *obiter dictum*. Furthermore, Mississippi Supreme Court's decision that pursuing statutory remedies is not a prerequisite to a Rule 22 interpleader action was not an *obiter dictum*. These were the *ratio decidendi* of our highest court in the State. It is the law in Mississippi and is applicable to all interpleader actions including the case at bar.

Further on the above and in response to the allegation of the Lannoms that failure of the Berrymans to file an independent civil action against Larry Setzer extinguished their right to the interpleaded fund, is with all due respect to counsel for the Lannoms, a misconception in law. An independent civil action is a statutory remedy that is not a prerequisite to a Rule 22 action. *Noble House, supra.*

Assertions and/or submissions of counsel for the Lannoms relating to injuries suffered by the Berrymans are not supported by the records and/or the evidence and should be ignored.

## WITHDRAWAL OF INTERPLEADED FUNDS VIOLATED RULES OF LAW AND ETHICS

Counsel for Lannoms misinterpreted M.R.C.P 62 (a) when he stated he was entitled to interpleaded fund without following the rules of court. Trial judge's judgment of October 25, 2010 only declared that the Lannoms were entitled to the interpleaded fund. The judgment did not state that execution should proceed immediately and / or without compliance with rules of court regarding execution of judgment. Lannoms' brief failed to address the fact that the interpleaded fund was withdrawn immediately after the

judgment and before any post trial motion could be filed. The brief also failed to address the fact that Berrymans filed a timely notice of appeal, which ought to constitute a stay. *Beaumont Homes, LLC v. Colonial/Jordan Properties, LLC,* 2009-CA-01173-COA, 2010-CA-00810-COA (MSCA).

In response to Lannoms' statement as to what constitutes "execution," Berrymans submit that violation of automatic stay provision of M.R.C.P 62 (a) is fatal to the case of the Lannoms. *See* M.R.C.P 62 (a) comments ("The automatic stay permits the party against whom judgment has been entered to determine what cause of post-judgment action he wishes to follow ..... If he prefers to appeal, he can file a Notice of Appeal and seek a stay pending appeal as provided in Rule 62 (c) and (d).") Berrymans are entitled to redress for the unlawful withdrawal of interpleaded fund in violation of M.R.C.P 62 (a).

## APPELLANTS' APPEAL IS NOT FRIVOLOUS

The allegation that the Berrymans filed a frivolous appeal is an attempt by Lannoms to hoodwink the court. Allegations of ill motive, negligence, errors, and frivolous appeal made by counsel for the Lannoms, confirmed the saying that "if the law and facts are not in your favor, you should bang the table to draw attention." To constitute a frivolous appeal, Berrymans must have filed an appeal that is without substantial justification, "and a "flagrant violation of long-standing Mississippi law." *Compere v. St. Dominic Jackson Memorial Hospital,* 2010-CA-00490-SCT (MSSC).

The Mississippi Appellate Courts have applied the following three part test, in determining "whether a case should proceed or be dismissed as frivolous: 1) does the

complaint have a realistic chance of success; 2) does it present an arguably sound basis in fact and law; and 3) can [the complainant] prove any set of facts that would warrant relief." *Huggins v. State,* 928 So.2d 981, 983 [(¶ 4)] (Miss.Ct.App.2006) (citing *Evans v. State,* 725 So.2d 613, 679 [(¶ 275)] (Miss.1997)). The appeal of the Berrymans involved a fundamental issue of law and procedure in Mississippi. It is certainly not frivolous.

## CONCLUSION

Counsel submits that the judgment of Honorable trial judge that Statute of limitations had extinguished the claims of the Berrymans was manifestly wrong, clearly erroneous and a reversible error. Premeditated withdrawal of interpleaded funds by counsel for the Lannoms on the same day judgment was delivered was a violation of Mississippi law that requires redress by the Supreme Court.

Submitted this the 10th day of October 2011.

## CERTIFICATE OF SERVICE

I, Femi Salu, of Salu & Salu Law Firm, PLLC do hereby certify that I have this day caused to be mailed by United States Mail a true and correct copy of the above and forgoing Appellants' Reply to the following:

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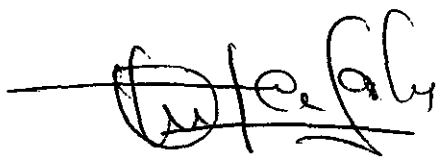
This day, Monday, October 10, 2011



Femi Salu