2010-CA-01947 RT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

WHY ORAL ARGUMENT WILL NOT BE HELPFUL

Berrymans submit that oral argument will not be helpful in the disposition of this appeal for the following reasons:

1. Appellee Glynes Lannom failed to state reasons in his brief why oral argument will be helpful in the disposition of this appeal. *See* M.R.C.P Rule 34, the relevant portion of which is reproduced below.

> The party requesting oral argument shall, in his or her brief or letter, include a concise statement of the reasons that oral argument will be helpful to the court. Unless a party desiring oral argument complies with this requirement, he shall not be heard orally except by special permission or order of the appropriate appellate court.
>
> Miss. R. Civ. P. Rule 34

2. This appeal involves a narrow issue of law and the dispositive issue or set of issues has been authoritatively decided in *Noble House Inc. v. W & W Plumbing and Heating, Inc.*, 881 So. 2d, 337 (Miss. Ct. App. 2004).
3. Attorney for Appellee Daniel Lannom, Nicholas Owens, has filed his brief of argument. His brief clearly stated that "Oral Argument Not Requested."
4. The facts and legal arguments are adequately presented in the briefs and records filed by appellants and appellees, and the decisional process would not be significantly aided by oral argument.

APPELLANTS' ARGUMENT IN SUPPORT OF REPLY TO THE BRIEF OF GLYNES LANNOM

I. JUDGMENT OF HONORABLE CHANCELLOR WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS AND / OR ABUSE OF CHANCELLOR'S DISCRETION

Berrymans re-state and adopt their Brief of Argument and reply to Daniel Lannom's Brief of Argument. In addition, Berrymans submit that filing of answer and assertion of claim to

the interpleaded fund is sufficient in law for them to establish a legal and viable claim. This issue is pretty much settled law. *See Noble House supra.*

In response to the assertion of Glynes Lannom that if Larry Setzer cannot be held legally liable for an injury, then his insurer (i.e. Esurance) has no duty whatsoever to pay for such an injury, Berrymans submit Larry Setzer and his insurer (i.e. Esurance) had already accepted liability for Berrymans' injuries. Record p. 48. Larry Setzer insurer had proposed that the $50,000.00 in liability insurance be divided equally between the above referenced claimants, or their representatives in exchange for a full release of all claims against Mr. Setzer. This offer was acceptable to Berrymans.

Further on the above, Berrymans assert that Glynes Lannom acknowledged in his pleading that Berrymans and all defendants to the interpleader action suffered injuries. *See* Record p. 22. Relevant portion of Glynes Lannom's pleading is as follows:

> Interpleader-Defendant Glynes Lannom would affirmatively state and show that the Complaint for interpleader itself reveals the unreasonable position taken by Esurance in this matter to-wit: Esurance is seeking "full and final releases and indemnification agreements in favor of – Larry Setzer" in exchange for a payment of a mere $ 50, 000.00 with said sum to be divided among eight (8) injured parties. (Underlining is mine).

Leon Berryman and Ariel Berryman, a minor were among the eight (8) parties that Glynes Lannom admitted in his pleadings were injured. Glynes Lannom's assertion that Larry Setzer was not legally liable for the injuries of Leon and Ariel Berryman has no merit.

Further on the above, the Petition of Danny Lannom and Glynes Lannom were founded solely on the three-year statute of limitations and did not in any way reference pleadings of Berrymans. Glynes Lannom is therefore, precluded from raising this issue on appeal. *See* M.R.C.P. Rule 8 (f) which provides as follows:

"All pleadings shall be so construed as to do substantial justice."

Miss. R. Civ. P. Rule 8 (f)

In response to Glynes Lannom's assertion that Larry Setzer was not found legally liable, Berrymans submit that the two stages necessary for the determination of an interpleader action were not followed by Honorable trial judge. *See* Miss. R. Civ. P. Rule 22. Contrary to the assertion of Glynes Lannom, the trial judge failed to hear evidence whether the Plaintiff is entitled to interplead the Defendants as required by the first stage of the rules of interpleader action. In addition, the trial judge failed to make a determination on the merits of adverse claims as there were no witnesses to testify in support of the adverse claims made by the parties.

In response to Page 8, No. 14 of Glynes Lannom's brief, Berrymans submit that the statement of evidence in absence of transcript of proceedings included events and facts that transpired in the absence of Chancellor Vicki Cobb. The trial judge's finding that Daniel Lannom and Glynes Lannom's rendition of the facts is an accurate statement of events at the hearing, failed to take into account rendition of events that took place both before the hearing and after the hearing of October 25, 2010.

As the Chancellor's judgment of October 25, 2010 was based solely on the ground that the claims of any other person against Larry Setzer would be time-barred as a matter of law, Berrymans submit that Chancellor's judgment was manifestly wrong and constitutes a reversible error.

II. ATTORNEYS FOR DANIEL LANNOM AND ATTORNEY FOR GLYNES LANNOM ACTED IMPROPERLY BY RECEIVING THE $50,000 INTERPLEADER FUNDS FROM THE CHANCERY CLERK ON OCTOBER 25, 2010 WITHOUT COMPLIANCE WITH COURT RULES

In response to assertion of Glynes Lannom that the use of the term "shall" in the judgment of October 25, 2010 means "do it now," Berrymans submit that the use of the term "shall" does not excuse compliance with the rules of court. If the trial judge had wanted the judgment to be enforced without compliance with the rules, she would have stated this clearly in her judgment.

Further on the above, and in response to Glynes Lannom's assertion that the provisions of M.R.C.P Rule 62 (a) are designed and intended to protect judgment creditors, Berrymans submit that there is no ambiguity whatsoever in the provisions of M.R.C.P Rule 62 (a). In addition, the entire provisions of Rule 62 (a) clearly stated that,

> "no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after the latter of its entry or the disposition of a motion for a new trial."

It is clear from the above that contrary to the assertion of Glynes Lannom, Rule 62 (a) applies to enforcement of all judgment with the exception of injunctions. *Pilgrim Rest Missionary Baptist Church v. Wallace*, 835 So.2d 67 (Miss. 2003). In this case, the Supreme Court clearly stated that in addition to providing "no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after the latter of its entry or the disposition of a motion for new trial," Rule 62 (a) provides exception only in an interlocutory or final judgment in an action for an injunction.

In addition to the above, Berrymans submit that Glynes Lannom failed to provide any case law to support his assertion that applicability of Rule 62 (a) is only limited to judgment

debtors. It is submitted therefore, that Rule 62 (a) is applicable to judgment debtors as well as any party that has received judgment in its favor.

Glynes Lannom's assertion that the failure of Attorney for Berrymans to ask for continuance on October 25, 2010 somehow validated the judgment is an attempt to becloud the main issue in this appeal. It is submitted that the issue of whether or not counsel for the Berrymans ought to have requested for a continuance on October 25, 2010 is completely irrelevant as the judgment of the Honorable Judge Vicki Cobb was not based on this issue. The trial judge's judgment was based solely on an issue of law to-wit, whether the three-year statute of limitations has extinguished all claims of Berrymans. It is submitted that filing of answer to the interpleader-complaint by Berrymans, which said answer asserted claims to the interpleaded funds, is all that is required to assert a legally viable claim to the interpleaded fund. Chancellor's judgment based solely on this issue of law is a reversible error.

Berrymans adopt all their submissions in reply to the brief of Danny Lannom. As the interpleaded fund was withdrawn by attorneys for Daniel Lannom and Glynes Lannom immediately after the judgment of October 25, 2010 and without compliance with M.R.C.P Rule 62 (a), Berrymans submit that the conduct of these gentlemen was improper and violated applicable court rules, ethical rules, or ethical duties.

III. HEARING OF OCTOBER 25, 2010 WAS PROCEDURALLY WRONG

Berrymans adopt their brief of argument and reply to the brief of Danny Lannom. In addition, Berrymans submit that the hearing of October 25, 2010 failed to follow the procedure as provided in Miss. R. Civ. P. Rule 22, to-wit:

> There was no hearing within the meaning of M.R.C.P Rule 22. No witness testified on behalf of the Lannoms. Lannoms failed to provide any evidence to support their claim for damages. Both the Lannoms and the Berrymans did not call any witness to testify. Court reporter note clearly stated that the matter was heard on an ex parte day in Desoto County, and as such, there is no record of this proceeding.
>
> Record p. 75.

On this ground alone, the judgment of October 25, 2010 ought to be set aside.

IV. SUPREME COURT'S DECISION IN SETZER V. STATE IS COMPLETELY IRRELEVANT TO THIS APPEAL

Berrymans submit that the decision of the Supreme Court in *Setzer v. State*, 2009-KA-00752-SCT, 54 So.3d 226, 228 (¶ 3) (Miss. 2011) is completely irrelevant to this appeal for the following reasons:

A. Berrymans were not witnesses in *Setzer v. State*.

B. Berrymans were never summoned nor invited to appear as witnesses.

C. Berrymans were not parties in Setzer v. State.

D. Berrymans did not in any form have notice of the proceeding in Setzer v. State.

Consequently, Berrymans submit that the decision in *Setzer v. State* is neither *Res Judicata* nor Issue Estoppel in this appeal. Glynes Lannom's issue and submission that Berrymans filed a frivolous appeal was based solely on the decision in *Setzer v. State*. As the decision in *Setzer v. State* cannot be Res Judicata or Issue Estoppel in this appeal, Glynes Lannom assertion that Berrymans filed a frivolous appeal is without any merit. Berrymans adopt their entire reply filed in response to the Brief of Danny Lannom.

In response to the assertion of Glynes Lannom that Leon Berryman did not present evidence that his "truck was damaged in the accident of April, 17, 2007," Berryman submits that this evidence would have been presented if the Judge had set the matter down for trial and taken

evidence of witnesses as provided for by M.R.C.P Rule 22. Failure of the trial judge to take evidence of witnesses is a violation of procedural rules in Interpleader actions. On this ground alone, the judgment of October 25, 2010 ought to be set aside.

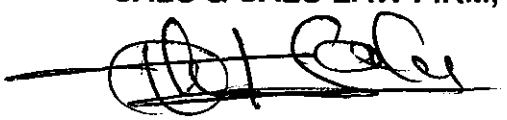
CONCLUSION

Berrymans submit as follows:

1. Honorable Chancellor was manifestly wrong, clearly erroneous and / or abused her discretion when she entered an order granting the entirety of the $50,000 interpleader funds to Daniel Lannom and Glynes Lannom.
2. The attorney for Daniel Lannom and Glynes Lannom acted improperly by receiving the $50,000 interpleader funds from the chancery clerk on October 25, 2010 in violation of M.R.C.P Rule 62 (a).
3. Berrymans' appeal is not frivolous as it raises substantial issue of law and procedure on whether the Berrymans, who filed answer to the complaint for interpleader action and asserted claim to only the interpleaded fund, are required to file independent civil action to be entitled to the interpleaded fund.

Respectfully submitted this the 20th day of October, 2011.

SALU & SALU LAW FIRM, PLLC



Femi Salu, MSB#[redacted]
Attorney for Appellants
2129 Stateline Road West Suite A
Southaven, MS 38671
662-342-7007

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 Brief of Glynes Lannom to the following:

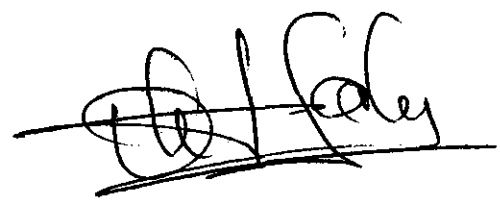
John Booth Farese, Esq.
Farese, Farese & Farese
P.O.Box 98
Ashland, MS 38603
(Attorney for Glynes H. Lannom, Individually and as Personal Representative of Zachary D. Lannom, Deceased and Jacob D. Lannom, Deceased)

Nicholas Owen, Esquire
Owens and Owens Law Firm
214 Adams Avenue
Memphis, TN 38103
(Attorney for Daniel Lannom, Individually and as Personal Representative of Zachary D. Lannom, Deceased and Jacob D. Lannom, Deceased)

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

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

This day, Thursday, October 20, 2011



Femi Salu