IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Appeal No: 2010-TS-01947

LEON BERRYMAN, INDIVIDUALLY,
AND ON BEHALF OF ARIEL BERRYMAN, A MINOR ------ APPELLANTS

VS.

GLYNES H. LANNOM, INDIVIDUALY; GLYNES H. LANNOM
AS THE PERSONAL REPRESENTATIVE OF ZACHARY D. LANNOM, DECEASED;
DECEASED; GLYNES H. LANNOM AS THE
PERSONAL REPRESENTATIVE OF JACOB D. LANNOM, DECEASED;
DANIEL LANNOM, DECEASED;----------APPELLEES

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

APPELLANTS' BRIEF IN SUPPORT OF THEIR APPEAL FROM THE FINAL JUDGMENT OF HONORABLE VICKI COBB DELIVERED ON OCTOBER 25, 2010

ORAL ARGUMENT NOT 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 Courts of Appeals may evaluate possible disqualification or recusal.

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GLYNES H. LANNOM, Individually, and as the
Personal Representative of ZACHARY D. LANNOM, Deceased
(Defendant / Appellee)

GLYNES H. LANNOM, as the Personal Representative of
JACOB D. LANNOM, deceased
(Defendant / Appellee)

DANIEL LANNOM, individually and on behalf of
ZACHARY D. LANNOM, Deceased
(Defendant / Appellee)

LEON BERRYMAN, Individually and on behalf
Of ARIEL BERRYMAN, a minor
(Defendant / Appellant)

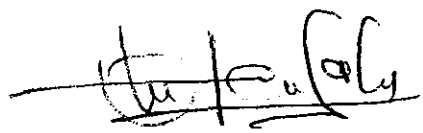
PHILLIP BIESELIN
(Defendant)

JOAQUIN GONZALES
(Defendant)

ESURANCE INSURANCE COMPANY
(Interpleader Complainant)

Certified this the 3rd day of August, 2011.

By me,



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STATEMENT OF THE CASE

Nature of the Case. The main facts leading to the filing of civil action by the parties are not in dispute. Appellants Leon Berryman and his daughter, Ariel Berryman, a minor (D.O.B: 1/10/1997) (hereinafter referred to as "The Berrymans"), appellees, Glynes Lannom, personal representative of Zachary Lannom, deceased; Daniel Lannom, personal representative of Zachary Lannom, deceased and Jacob Lannom, deceased (hereinafter referred to as "The Lannoms") and others not parties to this appeal (namely, Phillip Bieselin and Joaquin Gonzales) were involved with one Larry Setzer in a horrific multi–vehicle automobile accident that occurred in Desoto County, Mississippi on April 17, 2007. Mr. Setzer was insured with Esurance Insurance Company during the relevant period. Leon and Ariel Berryman, Glynes Lannom, Daniel Lannom, Phillip Bieselin and Joaquin Gonzales all made claims against Mr Setzer's Esurance policy. (See p.6 of records). As these claims greatly exceed the available per accident liability limit of Mr Setzer's Esurance policy of $50,000.00, Esurance Insurance Company filed a Complaint for interpleader on June 11 2008 with all claimants named as Interpleader Defendants. (See Records pp. 5-9). The Berrymans filed their Answer to the interpleader Complaint and asserted a claim against the interpleaded fund for himself and on behalf of Ariel Berryman, a minor. Records, pp. 15-18.

Esurance Insurance Company deposited the $50,000.00 policy limit with Desoto County Chancery Clerk on September 10 2010. Records, p. 2. On October 25 2010, attorneys for the Lannoms filed Petition seeking that Deposited

funds be disbursed to them. Records, p. 2, 50-51. Counsel for the Berrymans appeared in court on October 25, 2010 and presented argument against the petition. Honorable Vicki Cobb heard argument presented by attorneys for Berrymans and Lannoms before she ruled in favor of the Lannoms. The entire deposited fund of $50,000.00 was withdrawn immediately after the judgment by attorneys for the Lannoms.

Being dissatisfied with the judgment of the trial judge, counsel for the Berrymans filed this appeal.

Statement of Facts. This appeal was filed on November 18; 2010 by the Berrymans against the judgment of Chancellor Vicki Cobb delivered on October 25, 2010 in the Chancery Court of Desoto County.

The main facts leading to the filing of civil action by the parties are not in dispute. Appellants Leon Berryman and his daughter, Ariel Berryman, a minor (D.O.B: 1/10/1997), appellees and others not parties to this appeal were involved with one Larry Setzer in a horrific multi–vehicle automobile accident that occurred in Desoto County, Mississippi on April 17 2007. Mr Setzer was insured with Esurance Insurance Company during the relevant period. The Berrymans, Lannoms and others involved in the accident all made claims against Mr Setzer's Esurance policy. (See p.6 of records). As these claims greatly exceed the available per accident liability limit of Mr Setzer's Esurance policy of $50,000.00, Esurance Insurance Company filed a Complaint for interpleader on June 11 2008 with all claimants named as Interpleader Defendants. (See Records pp. 5-9).

It is not disputed that the Berrymans filed an Answer to the interpleader with a prayer that they be awarded the interpleaded fund. Records pp. 15-17.

The Lannoms thereafter filed a petition on October 13, 2010 seeking that the deposited funds of $50,000.00 be disbursed to the Lannoms. The sole reason for the petition was that the three-year statute of limitations for claims against Larry Setzer arising out of the automobile accident ran on April 17, 2010. Lannoms further asserted that they filed separate lawsuits for damages against Larry Setzer under Case No. CV2007-0354 in the Circuit Court of Desoto County, Mississippi. According to attorneys for the Lannoms, the claims of Berryman and any other persons with claims against Larry Setzer would be time barred as a matter of law for failure of appellant to file a separate and independent lawsuit against Larry Setzer for damages. See Records pp. 50-51.

Petition of the Lannoms was scheduled for hearing on the ex parte docket of the court on October 25, 2010. Berrymans' counsel maintained he was not served with hearing notice even though a certificate of service was filed. Notwithstanding the aforesaid, Berrymans' counsel, who was present in court for a different matter, participated and presented argument in opposition to appellees petition. The facts are not disputed that Chancellor Cobb neither heard testimony under oath from any witness on October 25, 2010 nor did she heard testimony under oath from any witness regarding damages suffered by the parties. Records pp. 67-69. Chancellor Cobb's judgment of October 25, 2010 where she granted petition to disburse interpleaded fund to only Lannoms was based solely on her acceptance of the assertion that the claims of Berryman and

any other persons against Larry Setzer would be time barred as a matter of law. Records pp. 52-53. Being dissatisfied with this Order, the Berrymans filed a Notice of appeal on November 18, 2010. See Record p. 55.

There was an unusual development immediately after Chancellor Cobb's judgment of October 25, 2010. Unknown to Berrymans' counsel, Honorable John Farese and Honorable Nicholas Owens, attorneys representing the Lannoms, proceeded to withdraw the $50,000.00 interpleaded fund immediately after the judgment and on the same day. In so doing, the Lannoms imposed on the Berrymans a fait accompli in respect of their claim to be compensated for injuries subject matter of this lawsuit.

A temporary restraining order against disbursement of interpleaded fund was entered by Chancellor Lundy (Chancellor Cobb was temporarily absent) on November 8, 2010. See Records pp. 3, 103-107. This order was discharged by Chancellor Cobb without notice to appellants. In fact, counsel for the Berrymans knew for the first time that the Temporary Restraining Order entered by Chancellor Lundy had been discharged when he was served with Lannoms objection to Berrymans' statement of evidence filed in court on January 4, 2011. See Records pp. 78, 87-88, 106-107.

Berrymans' counsel filed his motion for stay pending appeal on January 19, 2011 after it came to his attention that the previous temporary restraining order had been discharged. Chancellor's Cobb heard argument in support of the motion on April 11, 2011 and denied it on the same day. See record 94-95.

APPELLANTS' STATEMENT OF QUESTION PRESENTED

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?

1. ARGUMENT AND AUTHORITIES IN SUPPORT OF FIRST STATEMENT OF QUESTION PRESENTED

A. Passage of time is not fatal to appellants' entitlement to interpleaded funds

Chancellor Cobb's sole reason for the Order of October 25, 2010 was because the three-year statute of limitations for claims against Larry Setzer arising out of the automobile accident ran on April 17, 2010. In her order, she stated that the claims of the Berrymans and other persons against Larry Setzer to the interpleaded funds would be time barred as a matter of law. It is submitted that the order of Honorable Cobb is a reversible error for the following reasons:

Firstly, pursuing statutory remedies is not a prerequisite to a Rule 22 interpleader action. *Noble House, Inc. v. W & W Plumbing and Heating, Inc*, 881 So. 2d 337 (Miss. Ct. App. 2004); Miss. R. Civ. Proc. 22. In this case, Noble House and Ransom contend that any cause of action against them or claim to the interpled funds is time-barred. They suggest that because the statutes of

limitations have run on the remedies W & W Plumbing might have pursued, it is not entitled to share in the interpleader funds. Mississippi Supreme Court found no merit to this assignment of error. The appellate court further held that passage of time is not fatal to W & W Plumbing's entitlement to the interpled funds. Pursuing statutory remedies is not a prerequisite to a Rule 22 interpleader action.

Secondly, the Berrymans filed an Answer and asserted a claim to the interpleaded funds only. See Records pp. 15-18. They were not interested in pursuing additional claims outside the interpleaded funds. In addition, the complaint for Interpleader (Records pp. 5-9) and Berrymans' answer clearly joined issue and asserted claims to interpleaded fund.

Rule 22(a) of the Mississippi Rules of Civil Procedure provides for an interpleader action as follows:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

The action may be used "to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund." M.R.C.P. 22 cmt.

The comment to Rule 22 acknowledges that generally, "claimants will have asserted their claims to the interpleader fund in their answer to the stakeholder's complaint. If an order of interpleader is entered, each claimant must then traverse the claims of the other claimants, thus joining the issue. Alternatively, if the issues are already clearly defined in the claimants' initial pleadings, further pleadings may be unnecessary." M.R.C.P. 22 cmt. (emphasis added).

By their pleadings, the Berrymans asserted claims to the interpleaded fund; court's order that deprived the Berrymans of their right to interpleaded fund is a reversible error.

B. Statute has not run against claim of Ariel Berryman, a minor

Assuming for purpose of argument that an independent action ought to have been filed by the Berrymans against the tortfeasor, Larry Setzer, which is denied, counsel submits that statute of limitation had not run against Ariel Berryman, a minor, who was only 10 years old at the time of the accident. See Records, pp. 69, 70 and 77. See also Miss. Code 15-1-59. On this ground alone the Chancellor's judgment ought to be set aside.

C. Appellees failed to provide evidence of damages

Honorable Chancellor failed to take evidence of witnesses before her order directing disbursement of deposited funds. In so doing, her judgment occasioned a miscarriage of justice. Appellants are fortified in their view by the decision in *Chic Creations of Bonita Lakes Mall v. Doleac Electric Co.*,

> [t]he Rule 22 interpleader action provides only the procedural vehicle to assert claims to the specific funds. The rule by itself cannot be the basis for a pro-rata distribution. In order for the subcontractors to assert a valid claim to this fund they must do more than show that they are owed money by the contractor. They must demonstrate how they are entitled to a portion of this particular fund....

Chic Creations of Bonita Lakes Mall v. Doleac Electric Co., 791 So. 2d 254, 257 (¶ 10) (Miss.Ct. App. 2000).

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

D. Chancellor's Order sabotaged the intention of Rule 22 Interpleader action

Honorable Chancellor Cobb failed to take into consideration the intent of Rule 22 Interpleader action and the fundamental need to protect all claimants that have filed valid claims against the deposited fund. See the comment to MRCP Rule 22 provided below:

> Interpleader also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such a judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before his fellow claimants were able to establish their claims. The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy. *See*, e. g., *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (87 S. Ct. 1199, 18 L.Ed.2d 270) (1967).

Miss. R. Civ. Proc. 22 cmt.

Berrymans submit that the unfairness resulting from the Chancellor's Order directing disbursement of the entire deposited fund of $ 50, 000.00 to only two out of several claimants, was among the principal evils the interpleader device is intended to remedy. This is a reversible error.

2. ARGUMENT AND AUTHORITIES IN SUPPORT OF SECOND STATEMENT OF QUESTION PRESENTED

A. Withdrawal of deposited funds by attorneys for appellees immediately after judgment represents a threat to the administration of justice

The following facts are not disputed:

I. Counsel for the Berrymans presented arguments before Chancellor Cobb on October 25, 2010 in opposition to petitions seeking that deposited funds be disbursed to the Lannoms. See records, pp. 68 – 70, 82 – 88.

II. Chancellor Cobb's judgment of October 25, 2010 was delivered after hearing on the objection of Berrymans' counsel.

III. The judgment subject-matter of this appeal did not make provision for immediate withdrawal of deposited fund of $ 50, 000.00. See record, pp. 52 – 53.

IV. Case was closed immediately on 10/25/2010 without consent of Berrymans' counsel. See records, p. 2.

V. Counsel for the Lannoms withdrew deposited funds at 3:24 p.m. on October 25, 2010. See records, p. 3.

Mississippi Rules of Civil Procedure, Rule 62 (a) provides for automatic stays of judgment until 10 days after the latter of either the entry of a judgment or the disposition of a Motion for a new trial, whichever last occurs. This stay applies only to judgments as defined in MRCP Rule 54 (a), i.e. final judgment as in the case at bar. See the commentary on MRCP Rule 62 (a) ("The automatic Stay permits the party against whom judgment has been entered to determine what cause of post-judgment action he wishes to follow.")

Honorable John Farese and Nicholas Owens are officers of this honorable court. In addition, these gentlemen are seasoned practitioners aware of the provisions of MRCP Rule 62 (a). As officers of the court, counsels for the appellants have a duty to the court. "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others." Miss. R. Prof. Conduct Preamble. *See Miss. R. Prof. Conduct. 3.4 (c)* ("A lawyer shall not disregard standing rules of a tribunal made in the course of a proceeding.") *See also Miss. R. Prof. Conduct. 8.4 (d)* ("It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.")

The immediate withdrawal of interpleaded funds on the same day judgment was delivered, imposed on the Berrymans a *fait accompli* in respect of any post-judgment action their counsel may wish to follow.

Further on the above, counsel for the Berrymans submit that the conduct of Honorable John Farese and Nick Owens in disregarding the rules of court, was deliberate and an attempt to extinguish any right Berrymans might have to the interpleaded fund. The Berrymans are fortified in this belief by failure of Lannoms' attorneys to notice the dissolution of Temporary Restraining Order entered by Honorable Judge Lundy on November 8, 2010. See records, pp. 3 and 88. Attorney for Berrymans became aware of the dissolution of the TRO on January 4, 2011, upon receipt of Lannoms' objection to Berrymans' Statement of Evidence.

Rule 62(a) provides for automatic stays of judgments, with certain exceptions, until ten days after the later of either the entry of a judgment or the disposition of a motion for a new trial, whichever last occurs. This stay applies only to judgments as defined in Rule 54(a), and it only prevents enforcement of the judgment; it does not affect the appealability of the judgment nor prevent the time for appeal from running. *See Davidson v. Hunsicker*, 224 Miss. 203, 79 So.2d 839 (1955) (a judgment is not final until the motion for a new trial is overruled; the time period for perfecting an appeal commences on the day after the motion for a new trial is overruled); but cf. Miss. Code Ann. § 13-3-111 (1972) as amended by 1976 Miss. Laws, ch. 331 (clerks shall issue executions on all judgments and decrees after close of term of court at request and on the cost of the prevailing party).

Counsel for Berrymans submits that the Court's order of April 11, 2011 that Motion for Stay was not timely filed, was a perversion of the administration of justice. The Lannoms and their attorneys cannot in one breath deliberately sabotage the rules of court and in another breath assert that victims of their conduct failed to timely seek relief.

A Chancellor is a presiding officer of a court of law and equity. In *Lowrey v. Lowrey*, 25 So.3d 274 (Miss. 2009), this Court stated the following:

> "'A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous.'" "However, the Court will not hesitate to reverse if it finds the chancellor's decision is manifestly wrong, or that the court applied an erroneous legal standard." A chancellor's conclusions of law are reviewed de novo.

Id. at 285 (citations omitted).

It is submitted with all due respect that Honorable Chancellor failed to apply equitable considerations before she denied the Berrymans' motion for stay.

The Berrymans are fortified in their view by the decision of Mississippi Supreme Court in *in re Estate of Taylor*, 539 So.2d 1029 (Miss. 1989) (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).

Attorneys for Lannoms and their clients were in violation of the automatic stay provision of MRCP Rule 62 (a). Their conduct has occasioned irreparable harm to the Berrymans. It is submitted that sanctions against the Lannoms and their attorneys will be an appropriate remedy in this case. **This Court has stated that where there is no specific authority for imposing sanctions, courts have an inherent power to protect the integrity of their processes, and may impose sanctions in order to do so**. *Ladner v. Ladner*, 436 So.2d 1366, 1370 (Miss. 1983); recited in Wyssbord v. Wittjen, 798 So. 2d 352 at 368, No. 58.

Where no additional evidence is required and prima facie evidence exists on the face of the record, appellate court is in a position to order equitable remedy where trial judge abdicated its duties. Miss. R. App. P. 14(a). It is submitted with all due respect that an order mandating return of interpleaded fund to the custody of Desoto County Chancery Clerk and disgorgement of attorneys' fees by John Farese and Nicholas Owens will be an appropriate remedy in this case.

3. JUDGMENT SHOULD BE SET ASIDE AND REMANDED FOR DE NOVO HEARING BEFORE ANOTHER CHANCELLOR

In the event this appeal is allowed, appellants submit, with the greatest respect, that the case ought to be remanded to a different Chancellor for hearing of any outstanding issue for the following reasons:

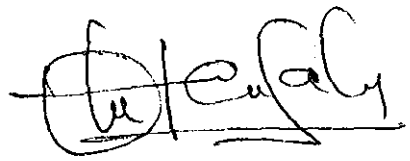
a. Honorable Chancellor Cobb's Judgment of October 25, 2010 was manifestly wrong and based on erroneous legal standard.

b. Chancellor Cobb had the opportunity to correct her error by extending the TRO against the disbursed fund (granted in her absence by Chancellor Lundy) but she compounded the harm to appellants when she dismissed the TRO without putting counsel for the Berryman's on notice.

c. Dismissal of Berrymans' motion for stay pending appeal was, with all due respect, a confirmation of appellants' belief that the Honorable Chancellor has no interest in protecting their interest.

In ***in re Carney***, 758 So.2d 1017, 1019 (Miss. 2000), **the Supreme Court held that chancery court's interpretation and application of the law is reviewed under a de novo standard**

As the entire judgment of Honorable Chancellor was based upon erroneous interpretation of the law, appellants submit that the best course of action is for the Supreme Court to decide all outstanding issue in this appeal without remanding any matter to the trial court. In the event the court elects to remand any outstanding issue to the trial judge, appellants submit that Chancellor Cobb has prejudged the substantive issues in this case and interest of justice demands that the case should be remanded to another Chancellor.



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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' brief of argument to the following:

John Booth Farese, Esq.
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Kathy Gillis, Supreme Court Clerk
Mississippi Supreme Court
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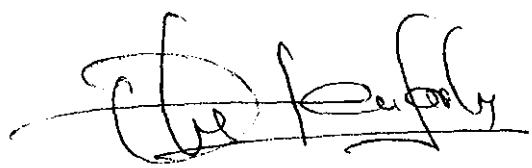
Jackson, MS 39205

This day Friday, August 05, 2011.



Femi Salu

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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AND ON BEHALF OF ARIEL BERRYMAN, A MINOR ------ APPELLANTS**

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PERSONAL REPRESENTATIVE OF JACOB D. LANNOM, DECEASED; DANIEL
LANNOM, DECEASED;----------APPELLEES**

APPELLANTS' CERTIFICATE OF SERVICE OF BRIEF ON THE TRIAL JUDGE

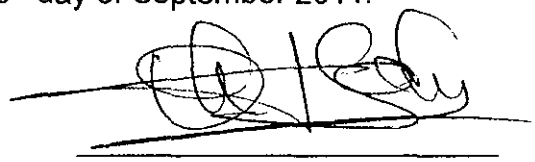
I, Olufemi Salu, attorney for appellant do hereby certify that I have this day sent by U.S mail postage prepaid, appellant's brief of argument to the trial judge at the address provided below:

Honorable Chancellor Vicki Cobb

P. O. BOX 1104

Batesville, MS 38606-1104

So Certify this the 9th day of September 2011.



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September 9, 2011

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RE: Esurance Insurance Company v. Glynes H. Lannom, Individually; Glynes H. Lannom as the Personal Representative of Zachary Lannom, Deceased; Glynes H. Lannom as the Personal Representative Of Jacob D. Lannom, Deceased; Daniel Lannom, Individually and on Behalf of Zachary D. Lannom, Deceased and Jacob D. Lannom, Deceased; Leon Berryman, Individually and on behalf of Ariel Berryman; Philip Bieselin; and Joaquin Gonzales
Chancery Court of Desoto County, Mississippi No. 08-06-1182

Dear Chancellor Cobb:

I am forwarding to you a copy of appellants' brief of argument pursuant to Supreme Court of Mississippi's letter of August 9 2011.

Sincerely yours,
SALU & SALU LAW FIRM, PLLC

Femi Salu

FS

CC

Honorable Kathy Gillis
John Farese, esq.
Nicholas Owens, esq.