

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2011-CA-01587**

COAT

**IN THE MATTER OF THE ESTATE OF
KENNETH LEE DRAKE, DECEASED**

BENJAMIN LEE DRAKE

APPELLANT

VS

BENNIE LARRY DRAKE

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI**

**APPELLANT'S BRIEF
(Oral Argument Not Requested)**

Submitted By:

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**SUPREME COURT OF MISSISSIPPI
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APPELLANT

VS

BENNIE LARRY DRAKE

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

I, the undersigned counsel of record certify that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

BENJAMIN LEE DRAKE

PETITIONER/APPELLANT

JOHN R. McNEAL, JR., ESQ.

ATTORNEY FOR APPELLANT

JOHN D. FIKE, ESQ..

ATTORNEY FOR APPELLEE

BENNY LARRY DRAKE

RESPONDENT/APPELLEE

PHILIP W. GAINES, ESQ.

ATTORNEY FOR THIRD PARTY

HON. JOHN S. GRANT, III

CHANCERY COURT JUDGE

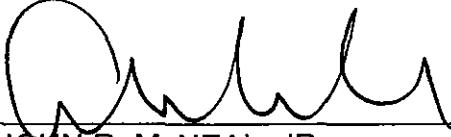

JOHN R. McNEAL, JR.

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<i>Venegas v Gurganus</i> , 911 So.2d 562 (Miss. App. 2005)	11
<i>Walker v. Parnell</i> , 566 So.2d 1213 (Miss. 1990)	14

OTHER AUTHORITIES

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5A Charles Alan Wrights and Arthur R. Miller, Federal Practice and Procedures, §1344, (2d ed 1990).

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60 C.J.S., Motions and Orders, §42, (1969)

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STATEMENT OF THE ISSUES

Issue No. 1: Whether or not the Appellee's Entry of Appearance in cause number 60,672 tolled the running of any Statute of Limitations in 60,672.

Issue No. 2: Whether or not Appellee's Entry of Appearance and Abandonment of Affirmative Defenses in cause number 60,672 waived said Affirmative Defenses.

Issue No. 3: Whether or not the Trial Court committed plain error, manifest error in law and/or an abuse of discretion in Dismissing Civil Action Number 67,148, because of expiration of Statute of Limitations.

Issue No. 4: Whether or not the Trial Court committed manifest error of in law or an abuse of discretion by withdrawing the Court's State Of Execution of Judgment Pending Appeal and ordering the funds in question to be disbursed.

Issue No. 5: Whether or not the Trial Court committed manifest error of law or an abuse of discretion by dismissing State Farm Insurance Company's Interpleader and Request for Declaratory Judgment.

STATEMENT OF THE CASE

This appeal proceeds from the Chancery Court of Rankin County, Mississippi wherein Benjamin Lee Drake brought a civil action alleging undue influence, fraud and other grounds against Benny Larry Drake therein seeking to set aside the Change of Beneficiary Form allegedly signed by the father of Benjamin Lee Drake, Kenneth Lee Drake, Deceased, and to set aside the conveyance of real property that Kenneth Lee Drake, Deceased, allegedly signed conveying said property to Appellee's Son.

A. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY CAUSE NO.: 60,672

Appellant, Benjamin Lee Drake, is the natural biological son and only heir of Kenneth Lee Drake, Deceased. Kenneth Lee Drake departed this life on December 29, 2006 while temporarily residing with his brother, Benny Larry Drake at 258 Reynolds Street, Pearl, Mississippi 39208.

Benny Larry Drake was Executor of Kenneth Lee Drake's Last Will and Testament. On or about January 25, 2007, Appellant was advised by Appellee that the deceased had left a life insurance policy with State Farm Insurance Company bearing number LF-1963-3151 issued on February 4, 2003 wherein Appellant was originally listed as the sole beneficiary. On June 28, 2004 Kenneth Lee Drake executed a Change of Beneficiary Form on said insurance policy changing the primary beneficiary to Appellee, Benny Larry Drake. Appellant was also informed at some time that in February 2004, Kenneth Lee Drake conveyed interest in real property owned by the Decedent in Richland, Mississippi unto Benny S. Drake, the son of Appellee, Benny Larry Drake.

That on January 25, 2007, Appellant filed his Petition to Open Estate and Other Relief in the Chancery Court of Rankin County, Mississippi in cause number 60,672. (R.E. #1)

On February 2, 2007, Appellant forwarded Appellee a Notice of Hearing putting him on notice of a hearing set for March 26, 2007 wherein the Court would hear Appellant's Petition to Open Estate and Other Relief. (R.E. #2)

That State Farm Insurance Company had informed the Appellant of its intention to file an Interpleader and Declaratory Relief which State Farm did on March 29, 2007. (R.E. #3). In light of this, the Appellant cancelled the hearing that was set for March 26, 2007.

On August 27, 2007, Appellee, Benny Larry Drake, entered a general appearance in cause number 60,672 in the Chancery Court of Rankin County, Mississippi by filing a Notice of Entry of Appearance signed by John D. Fike, Esquire, on behalf of Appellee. Said Entry of Appearance having been signed on August 23, 2007. (R.E. #4)

On August 31, 2007, Appellee filed a Motion to Dismiss with Prejudice the Appellant's Petition to Open Estate and Other Relief filed in cause number 60,672 alleging insufficiency of process. See R.E. #5. Appellee simultaneously re-filed his Notice of Entry of Appearance and a Notice of Hearing on said motion for October 2, 2007. (R.E. #6)

On October 2, 2007, a hearing was had on Appellee's Motion to Dismiss wherein Appellee abandoned his Motion to Dismiss and proceeded with the Appellant to move toward litigation and trial of cause number 60,672. See Transcript of Hearing of October 2, 2007 in cause number 60,672.

Subsequent to the October 2, 2007 abandonment of the Affirmative Defenses, the Appellee caused various subpoenas to be issued on November 7, 2007 and February 14,

2008. Said February 14, 2008 was a trial subpoena that Appellee had issued wherein witnesses were subpoenaed for trial testimony in this matter, cause number 60,672 on February 27, 2008 in Chancery Court of Rankin County, Mississippi. (R.E. #7)

On February 22, 2008, the Court entered an Order shortening the time to produce records requested by the Appellant. R.E. #8).

On February 27, 2008, Appellant and Appellee appeared in the Chancery Court of Rankin County, Mississippi in cause number 60,672 along with counsel for State Farm Insurance Company and announced ready for trial. Subsequent to a conference with the Chancellor, the trial was held in abeyance pending Appellee's obtaining further discovery.

On February 28, 2008, Appellee initiated discovery by filing a Notice of Filing of Discovery. (R.E. #9).

On March 20, 2009, the Chancery Clerk of Rankin County, Mississippi issued a Notice of Clerk's Motion to Dismiss cause number 60,672 to Appellant and Appellee, but failed to notice Philip W. Gaines, attorney for State Farm Insurance Company. (R.E.#10).

On April 21, 2009, the Clerk's Motion to Dismiss for want of prosecution was filed showing service on Appellant and Appellee but not to State Farm Insurance Company. (R.E. #11).

On April 27, 2009, the Chancellor in cause number 60,672 entered an Order of Dismissal Without Prejudice. (R.E. #12).

On September 17, 2009, Appellant filed his Petition to Open Estate in cause number 67,148. (R.E. #13).

On January 15, 2010, an Order to Probate Estate and Appoint Appellant as Executor was signed. (R. E. #14)

On March 8, 2010, Letters Testamentary were issued to Appellant. (R.E. #15).

On July 9, 2010, Appellee re-filed the same Motion to Dismiss, originally filed in cause number 60,672. (R.E. #16)

On August 12, 2010, the attorney for the Appellee filed a Notice of Hearing on the Motion to Dismiss and Turn Over Funds in cause number, 60,672. (R.E. #17).

**B. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY
CAUSE NO.: 67,148**

On August 13, 2010, Appellant filed a Petition to Set Aside Conveyance and Change of Beneficiary and Other Relief. Summons was issued on August 13, 2010 to Benny Larry Drake and to State Farm Life Insurance Company and served accordingly. (R.E. #18)

On August 16, 2010, Benjamin Lee Drake, individually and as Executor of the Estate of Kenneth Lee Drake, Deceased, filed an Amended Petition to Set Aside Conveyance and Change of Beneficiary and Other Relief. Summons was issued and served to Benny Larry Drake and to State Farm Life Insurance Company accordingly. (R.E. #19).

On October 8, 2010, the Chancery Court of Rankin County, Mississippi issued it's Opinion in cause number 60,672 and cause number 67,148 that the case was not right for Opinion and Judgment. (R. E. #20)

On December 2, 2010, the Appellant filed a Second Amended Petition to Set Aside Conveyance and Change of Beneficiary and Other Relief and caused a Rule 4 and Rule 81 Summons to be served on all Defendants. (R.E. #21)

On December 20, 2010, the Appellee filed an Amended Motion to Dismiss and Turn Over Funds. (R.E. #22).

On June 1, 2011, Appellee served counsel for the Appellant an Answer and Affirmative Defenses to Appellant's Second Amended Petition to Set Aside Conveyance and Change of Beneficiary and Other Relief. (R. E. #23).

On September 1, 2011, Appellee's Amended Motion to Dismiss and Turn Over Funds was heard. The Court entered it's Order on September 27, 2011 finding that the Statute of Limitations would have run on May 19, 2010 and further granted Appellee's request that the inter-pled funds should be released and disbursed to the Appellee, Benny Larry Drake.

It is from this Order that the Appellant appeals.

SUMMARY OF THE ARGUMENT

Appellant, Benjamin Lee Drake, timely filed a Petition To Open Estate and for Other Relief and to restrain State Farm Insurance Company from paying out proceeds in cause number 60,672 of the Chancery Court of Rankin County, Mississippi.

Appellant notified State Farm Insurance Company of the opposition to the Change of Beneficiary and State Farm subsequently filed it's Petition For Interpleader and Declaratory Relief on March 29, 2007.

State Farm Insurance Company certificated service of the Petition For Interpleader and Declaratory Relief to John R. McNeal, Jr., attorney for Appellant and Joseph S. Gatlin, III, Esquire, whom State Farm believed to be Appellee's attorney. On August 27, 2007, the attorney for Appellee, John D. Fike, entered a general appearance in cause number 60,672 and on August 31, 2007 filed a Motion to Dismiss With Prejudice the Appellant's petition.

On October 2, 2007 at a hearing on Appellee's Motion to Dismiss the Appellee abandoned said Affirmative Defenses and proceeded to engage in acts of litigation, including, requests for witness subpoenas in preparation of trial and on February 27, 2008, Appellant, Appellee and State Farm Insurance Company appeared before the Rankin County Chancery Court in cause number 60,672 and announced ready for trial.

After a conference with the trial Judge, the trial was held in abeyance pending additional discovery needed to resolve all issues.

On February 28, 2008 counsel for the Appellee filed his First Set of Interrogatories and Request for Production of Documents to the Appellant all in furtherance of litigation.

On March 20, 2009 the Chancery Clerk of Rankin County, Mississippi served, by mail, a Clerk's Motion to Dismiss in cause number 60,672 to the attorneys for Appellant and Appellee but failed to notice the attorney of record for State Farm Insurance Company as required by Rule 41(d)(1)(2) of the *Mississippi Rules of Civil Procedure*.

On September 27, 2009 the Chancellor entered an Order of Dismissal Without Prejudice in cause number 60,672.

On September 27, 2009 the Appellant filed his Motion to Open Estate and For Other Relief in cause number 67,148 in the Chancery Court of Rankin County, Mississippi.

On July 9, 2010 the Appellee's attorney filed a Motion to Dismiss in cause number 60,672 claiming the expiration of the Statute of Limitations.

On August 13, 2010, the Appellant filed an Amended Petition to Set Aside Conveyance and Change of Beneficiary and Other Relief.

On December 2, 2010 the Appellant filed a Second Amended Petition To Set Aside Conveyance and Change of Beneficiary and Other Relief.

On September 1, 2011 a hearing was had on Appellee's Motion to Dismiss and Turn Over Funds.

Appellant's position is that the general appearance of Appellee's attorney and participation in litigation waived the Affirmative Defenses and would have tolled the running of the Statute of Limitations.

The Clerk's failure to properly notice State Farm Insurance Company's attorney did not dismiss the Petition for Interpleader and Declaratory Relief. The said Petition remaining a viable pleading up until the September 1, 2011 Order of Dismissal being appealed from.

Appellant's subsequent re-filing in cause number 67,148 were timely filed and the Statute of Limitations would not have run prior to the filing of the original Petition in cause number 60,672 and the subsequent Petition.

The Trial Court erred as alleged in Issues 1 through 5.

ARGUMENT

Appellant, Benjamin Lee Drake, is the natural biological son and the only heir at law of Kenneth Lee Drake, Deceased. Kenneth Lee Drake departed this life on December 29, 2006 while temporarily residing with his brother, Appellee, Benny Larry Drake, at 258 Reynolds Street, Pearl, Mississippi 39208.

Simultaneously, Appellant learned that Kenneth Lee Drake, deceased, had conveyed his right, title and interest in the real property situated at 514 Plainview Circle, Richland, Mississippi 39218 unto Benny J. Drake, the son of Appellee, Benny Larry Drake.

On January 27, 2007, Appellant filed his Petition to Open Estate and For Other Relief in the Chancery Court of Rankin County, Mississippi in cause number 60,672. (R.E.# 3).

Appellant forwarded Appellee a Notice of Hearing on February 7, 2007 putting him on notice that the Petition to Open Estate and For Other Relief was set for hearing on March 26, 2007. (R.E. # 8).

Appellant simultaneously notified State Farm Insurance Company of his opposition to the Change of Beneficiary and advised them of the current Petition pending in the Chancery Court. State Farm subsequently filed its Petition for Interpleader and Declaratory Relief on March 29, 2007 when State Farm asked the Chancery Court of Rankin County, Mississippi to establish an obligation and designation of entitlement to the life insurance proceeds under State Farm Life Insurance Company policy insuring Kenneth Lee Drake, deceased..

Questions of law and fact were present and continued to be present that required to declaratory determination by the Chancery Court for State Farm Insurance Company, Benjamin Lee Drake and Benny Larry Drake to determine if Benny Larry Drake is entitled to payment of the policy proceeds as the designated primary beneficiary in accordance with the Change of Beneficiary Form or whether or not Benjamin Lee Drake is entitled to payment of the policy due to the invalidity of the Change of Beneficiary Form or any other applicable reason in law or equity.

On August 27, 2007, Appellee, Benny Larry Drake, entered a general appearance in cause number 60,672 in the Chancery Court of Rankin County, Mississippi by filing of a general Entry of Appearance signed by John D. Fike, Esquire, which states "Comes now

the undersigned and hereby gives notice of entry of appearance as attorney for Benny Larry Drake in the above styled and numbered cause. This the 23rd day of August, 2007". (R. E. # 49)

On August 31, 2007, John R. Fike, Esquire, attorney for Appellee, filed a Motion to Dismiss With Prejudice the Appellant's Petition to Open Estate and For Other Relief for insufficiency of process and insufficiency of service of process. (R.E. #37).

Appellee's entry of a general appearance in cause number 60,672 on August 27, 2007 waived any defense of insufficiency of process or insufficiency of service of process. (Mississippi does not recognize "special appearances" except where a party appears solely to object to the Court's jurisdiction over their person on grounds that the person is not amenable to process. *Isom v. Jernigan*, 840 So.2d 104, 107 (Miss. 2003) citing *Mladinich v. Kohn*, 250 Miss. 138, 156, 164, So.2d 785, 791 (Miss. 1964). One waives process and service however, upon making a general appearance. See *Arrow Food Distributors, Inc. v. Love*, 361 So.2d 324, 327 (Miss. 1978); *Sandifer v. Sandifer*, 237 Miss. 464, 115 So.2d 46 (1959). By sending John D. Fike to appear on his behalf Benny Larry Drake, Appellee subjected himself to the jurisdiction of the Rankin County Chancery Court in cause number 60,672 and waived all objects to process and service of process. *Pace v. Pace*, 16 So.3d 734 (Miss. App. 2009). This entry of appearance operated to effectively toll the statute of limitations retroactively to the date of filing the original Petition or, at worse, tolled the running of the statute of limitations from the date of Appellee's entry of appearance.

Appellee's attorney filed a Notice of Hearing on his Motion to Dismiss for October 2, 2007 at 8:30 a.m. and subsequently requested the Chancery Court of Rankin County, Mississippi, in cause number 60,672 to issue a subpoena duces tecum seeking information

on the deceased's party's public employee retirement system benefits.(R.E. # 53). At the hearing on Appellee's Motion to Dismiss on October 2, 2007 the Court discussed, at length, with Appellee's attorney, Mr. Fike, that his efforts to have said pleading dismissed was an exercise in futility and that a dismissal would only result in a re-filing and a re-service. At this same time the Court recessed and allowed Appellee's attorney to decide whether or not he wanted to bring his motion forward for a decision on whether or not he wanted to abandon the motion and move towards litigating all issues presently before the court. Appellee's attorney abandoned the motion and proceeded on to participate in litigating this matter and preparing for a trial. (T. Cause # 60,672). Appellee, subsequent to October 2, 2007, proceeded on in preparation of trial by way of subpoenaing witnesses, subpoenaing documents and preparing for a trial on February 27, 2008.

It is plain that Appellee abandoned his Motion to Dismiss on October 2, 2007 in *Cossitt v. Alfa Insurance Corp.* 726 So.2d 132, 135 (¶12) (Miss. 1998), Mississippi Supreme Court ruled that "the affirmative duty rests upon the party filing the motion to follow up his action by bringing it to the attention of the trial court". A motion that is not ruled upon is presumed abandoned, See. 60 C.J.S., *Motions and Orders*, §42, (1969); *Prather v McGrady*, 261 Ill. App. 3d 880, 199 Ill. Dec. 464, 634 N.E.2d 299, 303 (Ill. App. Ct. 1994). *Venegas v Gurganus*, 911 So.2d 562 (Miss. App. 2005). By voluntarily appearing, the Appellee's actions are inconsistent with his Motion challenging jurisdiction in that his actions in proceeding with litigation without availing himself of the hearing on the affirmative defense was inconsistent with his assertion with lack of jurisdiction as set out in *Pace v. Pace*, 16 So.3rd, 734 (Miss. App. 2009). In *Schustz v. Buccaneer, Inc.*, 850 So.2d 209 (Miss App. 2003), the Supreme Court stated "a widely respected and oft quoted

work which states in part . . . if Defendant appears in the action he must interpose any of these objections he may have by motion or in his answer or they will be deemed waived by virtue of Rule 12 (h)(1). *In addition, he should act in a timely fashion unless the court consider his conduct sufficiently dilatory or inconsistent with the later assertion of one of these defenses to justify declaring a waiver* (Emphasis added) citing 5A Charles Alan Wrights and Arthur R. Miller, *Federal Practice and Procedures*, §1344, (2d ed 1990). (Emphasis supplied).

Based on the foregoing History and Findings of Fact the Statute of Limitations as provided in §15-1-49 of *Mississippi Code of 1972, Annotated*, was tolled on January 25, 2007 with two (2) years eleven (11) months and three (3) days remaining. Said statute was also tolled by the filing of the Interpleader and Declaratory action by State Farm Insurance Company on March 29, 2007.

Appellee's entry of appearance on August 27, 2007 and his Motion to Dismiss filed August 31, 2007 were not acted on but were abandoned constituting a waiver of process by failing to timely seek the court's ruling on the affirmative defense. Instead the Appellee undertook to defend the case by way of seeking the issuance of subpoenas and summons from the court which constitutes an act in furtherance of litigation and waiving jurisdiction because he was actively seeking the Court's assistance in defending the action herein. His failure to procure the court's ruling on his affirmative defense constitutes abandonment and would not, in any way, justify dismissal based upon an August 31, 2007 motion that was abandoned and never brought on for a final determination. The Appellee's attempt to revise his motion after the dismissal of the case was improper and should have been dismissed. "A Defendant's failure to timely and reasonably raise and pursue the

enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process will ordinarily serve as a waiver of said affirmative defense". *MS Credit Center, Inc. d/b/a MS Loan Center v. Catherine Horton*, 926 So.2d 167 Miss. 2006). "Absent a reasonable explanation, failure to plead an affirmative defense according to Rule 8© will result in waiver of that defense. Because the doctor had actively engaged in litigation and had failed to provide a reasonable explanation for his failure to raise the defense he was prevented from using the otherwise outcome determinative defense". *Hutzel v. City of Jackson*, 33 So.3d 1116 (Miss. 2010) citing, *Estate of Grimes v. Warrington*, 982 So.2d 365, (Miss. 2008). In *East Mississippi State Hospital v. Adams*, 947 So2d 887 (Miss. 2007), the Supreme Court was asked to determine whether the Defendants, who had asserted the affirmative defenses of insufficiency of process and insufficient of service of process in their initial answer, but had continued to participate in the litigation, had waived those defenses. (Id at 889). Relying on *Horton*, the Court held that, "Because the Defendants had engaged in discovery and attended status conferences before reasserting these affirmative defenses nearly two years later, the Defendants had waived the right to assert them. (Id at 891)

Similarly in *Stuart v. University of Mississippi Medical Center*, 212 So.3d 544 (Miss. 2009), the Mississippi Supreme Court, failure to pursue a defense in a timely manner, while actively participating in a lawsuit, constitutes a waiver of that defense, citing *Grimes v. Warrington*, 982 So.2d 365, 369-70 (Miss. 2008); *East Mississippi State Hospital v. Adams*, 947 So.2d 887, 890-891 (Miss. 2007); *Ms Credit Center v. Horton*, 926 So.2d 167, 180 (Miss. 2006).

On January 26, 2007, the applicable statute of limitations pursuant to §15-1-49 of the *Mississippi Code of 1972, Annotated*, would have been tolled with two (2) years eleven (11) months and three (3) days remaining.

Rule 41(d) of the *Mississippi Rules of Civil Procedure* require that the Clerk of Court mail notice to attorneys of record advising them of any impending dismissal. *Walker v. Parnell*, 566 So.2d 1213 (Miss. 1990), where notice of dismissal under Rule 41(d) is not provided to a party or to a party's last attorney of record the dismissal violates the party's due process rights.

A dismissal cannot be reinstated at the expiration of the Court term unless it is defective or fraud, mistake or accident was involved, which it is if a party is not provided notice because of a mistake by the Clerk. Rule 41(d) also cites, *Cooley v. Burge* 797 So2d 294 (Ms. COA 2001). State Farm was not sent a copy of the Clerk's Notice of Dismissal or the Order Dismissing the case so therefore State Farm Insurance Company, a party to cause number 60,672 was not dismissed because of the lack of due process and failure to notice by the Clerk.

As a matter of fact, State Farm Insurance Company admitted that they did not get notice and took action in cause number 60,672. Mr. Gaines further stated that when he sought to move forward in cause number 60,672 is when he found out the case had been dismissed without having had notice. This constitutes an affirmative act to move forward on State Farm Insurance Company's Motion For Interpleader and Declaratory Relief. (T. cause number 67,148, Pg. 21, L. 15-29; Pg. 22, L.1-13).

Clearly, the notice was not provided State Farm Insurance Company and their actions in trying to move forward in cause number 60,672 was an affirmative act to

reinstate their Interpleader and request for declaratory relief. Additionally, the Statute of Limitations was tolled as to the date of State Farm's request for Interpleader and Declaratory Action from the date of the filing until the date of their dismissal on September 1, 2011. At the conclusion of the hearing in cause number 67,148 on September 1, 2011, the Court granted Appellant the authority to take an Interlocutory Appeal. (T. Pg. 29, L. 22-29), simultaneously stating that the conveyance of any funds would be stayed until such time as the Supreme Court makes a determination as to whether or not the Court is correct in its ruling. (T. Pg. 30, L.1-2).

Appellant subsequently filed a Petition for Interlocutory Appeal and out an abundance of caution, believing the Court's ruling constituted a Final Judgment, filed a regular appeal within the thirty (30) days after September 1, 2011. The Supreme Court subsequently denied the Interlocutory Appeal but took the direct appeal on what is perceived to be a final judgment as to the statute of limitations issue previously litigated. Therefore, it was an abuse of discretion by the trial court for the Chancellor to *Sue Spontae* lift the stay and rule and order disbursement of the funds to Appellee in the Court's Order of September 27, 2011 in cause number 67,148. (R.E.#113).

It is clear from the record in cause number 60,672 and cause number 67,148 of the Chancery Court of Rankin County, Mississippi that the statute of limitations in 60,672 was tolled and the Appellant's re-filing in 2010 was well within the applicable statute of limitations because of the waivers and entry of appearance previously set out which acting as tolling devices.

It is apparent that State Farm Insurance Company did not receive adequate notice under the rule on the Clerk's Motion to Dismiss and therefore they were not dismissed and

made an overt effort in cause number 60,672 to move forward on their interpleader and declaratory relief action which would constitute an act of reinstatement in the circumstances since they were unaware of the dismissal and were denied due process. This would further have tolled the statute of limitations until September 1, 2011.

The fact that the Interlocutory Appeal was granted and the Court had stated a stay of execution until the Supreme Court ruled on the matter was *sue spontae* lifted by the trial court such as to visit irreparable harm upon the Appellant and constituted an abuse of discretion knowing that there were issues, declaratory in nature and factual in nature that needed to be presented before the Court. The Court's dismissal in civil action number 67,148 was a manifest error in law.

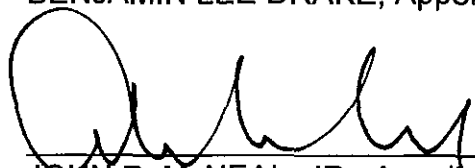
CONCLUSION:

As a result of the foregoing errors in law and abuse of discretion this Court should set aside the trial court's order of September 27, 2011 remand cause number 67,148 to the Chancery Court of Rankin County, Mississippi to proceed toward litigation.

Respectfully submitted, this the 15th day of November, 2012.

BENJAMIN LEE DRAKE, Appellant

BY:



JOHN R. McNEAL, JR., Appellant's Attorney

CERTIFICATE OF SERVICE

I, John R. McNeal, Jr., do hereby certify that I have this day caused to be delivered by United Postal Service, first class prepaid postage or facsimile/electronic transmission and/or by hand-delivery a true and correct copy of the above and foregoing Brief of Appellant as follows:

John D. Fike, Esq.
Ferguson & Fike
Post Office Box 89
Raymond, MS 39154

John Grant, III
Chancellor
Post Office Box 1437

Philip W. Gaines, Esq.
Currie, Johnson Griffin Gaines & Myers PA
P.O. Box 750
Jackson, MS 39205-0750

This the 15 day of November, 2012.



JOHN R. McNEAL, JR.