

**WALTER E. JAMES,
ANTOINETTE HOPKINS,
AUDREY RAYMOND AS
TUTOR FOR HEIR MICHAEL
A. JAMES AND THE ESTATE
OF WALTER K. JAMES**

*** NO. 2004-CA-1132
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

VERSUS

**MAISON ORLEANS II, INC.,
ET AL.**

*** * * * ***

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-9700, DIVISION "J"
Honorable Nadine M. Ramsey, Judge**

*** * * * ***

Judge Max N. Tobias, Jr.

*** * * * ***

ON REHEARING

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr., Judge Max N. Tobias Jr., Judge Edwin A. Lombard, Judge Roland L. Belsome)

***ARMSTRONG, C.J., CONCURS
BAGNERIS, J., CONCURS IN PART AND DISSENTS IN PART FOR
THE REASONS ASSIGNED BY JUDGE BELSOME
BELSOME, J., CONCURS IN PART AND DISSENTS IN PART WITH
REASONS.***

**THOMAS G. ROBBINS
THE LAW FIRM OF ROBERT J. CALUDA
METAIRIE, LOUISIANA 70002
COUNSEL FOR DEFENDANT/APPELLEE**

**ANDREW C. WILSON
BURKE & MAYER
NEW ORLEANS, LOUISIANA 70163-2000
-AND-
CLARENCE ROBY, JR.**

NEW ORLEANS, LOUISIANA 70119
COUNSEL FOR APPELLANTS/INTERVENORS, PETER A.
BARBEE
AND BARBEE & ASSOCIATES

JUDGMENTS REVERSED AND VACATED; REMANDED.

JULY 27, 2005

Appellee, Robert J. Caluda (“Caluda”), has filed an application for rehearing coupled with a motion to supplement the record with a copy of the answer filed by his clients, Michael A. James and Antoinette Hopkins, to the intervention filed by appellants, Peter A. Barbee and Barbee & Associates, L.L.C. (collectively “Barbee”). Prior thereto, but before the opinion was rendered, Caluda also supplemented the record with Barbee’s answer to Caluda’s petition for reconvention along with Barbee’s answer to the interrogatories propounded to him. Because some of these pleadings were absent from the appellate record we reviewed, we are now required to consider them. In light of the new pleadings, we must amend our earlier opinion, and consider other issues raised in the appeal, which were pretermitted due to the procedural problems of this matter.

Barbee filed three peremptory exceptions in this court before the opinion was rendered. Pursuant to La. C. C. P. art. 2163, the appellate court

must consider peremptory exceptions filed for the first time in this court.

The first two exceptions, no right of action and no cause of action, relate to the fact that Caluda filed a cross-claim/reconventional demand without being a party to the litigation. Obviously, this pleading was actually a petition for intervention. Although Caluda did not seek leave of court before filing his intervention, Barbee filed an answer to the intervention (referred to as a reconventional demand in the answer). Thus, we find that these exceptions were waived.

The third exception filed by Barbee involves the non-joinder of a party under Articles 641 and 642 pursuant to La. C. C. P. art. 927(A)(3). In particular, Barbee argues that Caluda failed to join as a defendant attorney Perrin Butler (“Butler”), who was attorney of record and Barbee’s co-counsel in the underlying litigation. La. C. C. P. art. 641 states as follows:

A person shall be joined as a party in the action when either:

(1) In his absence complete relief cannot be accorded among those already parties.

(2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:

(a) As a practical matter, impair or impede his ability to protect that interest.

(b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

We note that in his cross-claim/reconventional demand, Caluda named only Barbee as a defendant. However, he failed to name Barbee and Associates, Barbee's law firm and, more importantly, Butler, who was counsel of record in the underlying litigation. In fact, Butler was the only attorney listed on every pleading filed on behalf of Walter E. James, individually and as administrator for the Estate of Walter Kerry James, although the contingency fee contract was signed by Barbee alone. It is also noted that Butler participated in the underlying trial as counsel for James, et al. Therefore, we find that Barbee and Associates and Butler have an interest in the fee that Caluda was awarded against Barbee. In addition, we find that the interests of Barbee, his law firm, and Butler are so interrelated that a complete and equitable adjudication of the controversy cannot be made unless they are joined in the action. *Pecoraro v. The Napoleon Room, Inc.*, 95-00511 (La. App. 5 Cir. 12/13/95), 666 So. 2d 1151.

In *James Minge & Associates v. Hanover Insurance Co.*, 96-2308 (La. App. 4 Cir. 4/2/97), 692 So. 2d 728, this court found that a successor attorney was an indispensable party in a lawsuit where the plaintiff sued to

recover his fee from a client and its insurer in order to insure that the client did not pay an excessive fee. In the case at bar, Caluda claims that he is entitled to recover fees from Barbee based on the amount of work each attorney performed. We assume that Barbee and Butler divided the fee in some manner based on the services each provided to their clients. Thus, the work performed by all three attorneys must be examined in order to determine a fair division of the attorney's fees.

An adjudication made without making a person described in Article 641 a party to the litigation is an absolute nullity. *Frey v. American Quarter Horse Association*, 95-157, p. 7 (La. App. 5 Cir. 7/25/95), 659 So.2d 849, 852. When an appellate court notices the absence of indispensable parties to a suit on appeal, the appropriate remedy is to set aside the judgment and remand the matter for joinder of the absent parties and retrial. *Succession of Treadaway*, 01-0080 (La. App. 4 Cir. 3/7/01), 782 So. 2d 1142; *Terrebonne Parish School Bd. v. Bass Enterprises Production Co.*, 02-2119 (La. App. 1 Cir. 8/8/03), 852 So.2d 541, *writ denied*, 03-2873 (La. 1/9/04), 862 So.2d 985. Consequently, we set aside the judgment in favor of Caluda and remand the matter to the trial court for a new trial.

Based on the foregoing, we grant the peremptory exception of non-joinder of a party pursuant to La. C. C. P. art. 641, reverse and vacate all

judgments rendered below, and remand for a new trial.

JUDGMENTS REVERSED AND VACATED; REMANDED.