

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-02146

WOODROE WILSON SELLARS, AS A WRONGFUL  
DEATH BENEFICIARY OF AND ON BEHALF OF THE  
WRONGFUL DEATH BENEFICIARIES OF  
NETTIE MAE DILL, DECEASED

APPELLANT

V.

WALGREEN CO., D/B/A WALGREENS  
AND JANE DOE

APPELLEE

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BRIEF OF APPELLEE, WALGREEN CO.

ORAL ARGUMENT IS NOT REQUESTED

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APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MS

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AND JANE DOE

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AND JANE DOE

APPELLEE

CERTIFICATE OF INTERESTED PERSONS


The undersigned counsel of record certify that the following list of persons have an interest in the outcome of the above-styled case. The following representations are made in order that the Judges of Court may evaluate possible disqualification or recusal:

1. Walgreen Co., Defendant and Appellee;
2. Holland, Ray, Upchurch & Hillen, P.A., attorneys for Appellee.;
3. Robert K. Upchurch, attorney for Appellee.;
4. Janelle M. Lowrey, attorney for Appellee
5. James D Moore, attorney for Appellant;
6. Woodroe Wilson Sellars, Plaintiff and Appellant;
7. Bobby R. Sellars, Wrongful Death Beneficiary;
8. Venison Sellars, Wrongful Death Beneficiary;
9. Johnnie Sellars, Wrongful Death Beneficiary;
10. Lisa Sellars, Wrongful Death Beneficiary;

11. Tammy Sellars, Wrongful Death Beneficiary;
12. Jason Shelton, attorney for Appellant;
13. Jamie R. Franks, Jr., attorney for Wrongful Death Beneficiaries;
14. William R. Wheeler, Jr., attorney for Wrongful Death Beneficiaries;

Respectfully submitted, this the 1<sup>st</sup> day of August, 2007.

WALGREEN CO., D/B/A WALGREENS  
AND JANE DOE

BY:   
\_\_\_\_\_  
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### **STATEMENT REGARDING ORAL ARGUMENT**

The issue presented for appeal in this matter can be resolved on the basis of the record and briefs of the parties. Oral argument is not necessary.

## **STATEMENT OF THE ISSUES**

1. Did the Circuit Court properly grant Walgreens' Supplemental Motion for Summary Judgment?
2. Can affidavits be used to create a legal duty?



## STATEMENT OF THE CASE

### A. Statement of the Proceedings.

1. On March 15, 2005, Plaintiff, Woodroe Wilson Sellars, as a wrongful death beneficiary of, and on behalf of the wrongful death beneficiaries of Nettie Mae Dill, deceased, filed his Complaint in the Circuit Court of Lee County, MS alleging negligence of Walgreens' pharmacist for not filling prescriptions of Nettie Mae Dill. The Plaintiff's Complaint failed to include a statement that the Plaintiff did not tender payment for the prescriptions. The Plaintiff did not attach to the Complaint the certificate of expert consultation required by §11-1-58 of Miss. Code Annotated. (C.P. at 4; R.E. at 1)<sup>1</sup>

2. On January 03, 2006 Walgreens filed its Motion for Summary Judgment asking the Court to dismiss the Plaintiff's Complaint on the grounds that the Plaintiff had failed to establish a *prima facie* case of professional negligence against Walgreens. After receiving the Plaintiff's response to its Motion, Walgreens elected not to call up for hearing its Motion for Summary Judgment. (C.P. at 27; R.E. at 2)

3. On June 06, 2006 Walgreens filed a Supplemental Motion for Summary Judgment premised upon the Plaintiff's failure to allege a duty on the part of a pharmacist to fill the prescription when the customer will not pay for the prescription. (C.P. at 141; R.E. at 3)

4. On October 02, 2006, the Trial Court heard Walgreens' Supplemental Motion for Summary Judgment. (Tr. at 2-16; R.E. at 5) As of the date of the hearing, the Plaintiff had not filed any response to Walgreens' Supplemental Motion for

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<sup>1</sup> Throughout this Brief, C.P. represents Clerk's Papers; R.E. represents Walgreens Record Excerpts; Tr. represents Transcript of the Proceedings, and Ex. represents Exhibits.

Summary Judgment. *Id.* On October 6, 2006, the Trial Court requested the Plaintiff's attorney file a response to the Supplemental Motion for Summary Judgment.

5. On October 26, 2006, pursuant to the Court's request, the Plaintiff filed his Brief in Response to Walgreens' Supplemental Motion for Summary Judgment but did not cite any statute, rule or case which created a legal duty on the part of a pharmacist to fill a prescription when the customer will not pay for the prescription. (C.P. at 152; R.E. at 4)

6. On November 10, 2006, Walgreens filed its Rebuttal to the Plaintiff's Response to Walgreens' Supplemental Motion for Summary Judgment. (C.P. at 158; R.E. at 6)

7. On November 21, 2006, the Court entered an Order granting Summary Judgment for Walgreens. (C.P. at 212; R.E. at 7)

B. Statement of the Facts.

On March 8, 2005, the pharmacist on duty at Walgreens' Tupelo, MS store was asked to fill three prescriptions for Nettie Mae Dill. The person presenting the prescriptions for Ms. Dill sought to have the prescriptions filled without paying Walgreens the cost of the prescriptions. The question presented by this appeal is: Does a pharmacist have a duty to fill a prescription when the customer will not pay for the prescription.

## **SUMMARY OF THE ARGUMENT**

The Circuit Court of Lee County correctly held that a pharmacist does not have a legal duty to fill a prescription for a customer who will not pay for a prescription and granted summary judgment to the Defendant, Walgreens, and the Plaintiff appealed. The question for decision by this Court is whether summary judgment was properly granted.

In order to have a professional negligence claim, there must be a duty on the part of the defendant to the plaintiff. Whether or not a duty exists is a question of law. Plaintiff has cited no case law or statute imposing a duty on a pharmacist to fill a prescription when a customer will not pay for the prescription. This issue sought to be raised by the Plaintiff is procedurally barred from consideration because of the Plaintiff's failure to cite any authority in support of his argument.

Plaintiff also attempts to appeal issues that were not the basis for the granting of summary judgment and those issues are not properly before this Court and are procedurally barred from consideration. Even if those issues were relevant to this appeal, the granting of the summary judgment must be affirmed since the Plaintiff has failed to cite any authority that affidavits can be used to create a legal duty. Plaintiff has also failed to cite any authority in support of his irrelevant argument that attaching an attorney's certificate and two affidavits of expert witnesses to the Complaint 11 months after filing of the Complaint meets the requirements of §11-1-58.

## ARGUMENT

### STANDARD OF REVIEW

On appeal the Court reviews *de novo* the lower court's granting of Walgreen's Supplemental Motion for Summary Judgment.

"if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56. A fact is material if it "tends to resolve any of the issues, properly raised by the parties." *Webb v. Jackson*, 583 So.2d 946, 949 (Miss.1991) (citing *Mink v. Andrew Jackson Casualty Ins. Co.*, 537 So.2d 431, 433 (Miss.1988) (quoting *Mississippi Road Supply v. Zurich-American Insurance Co.*, 501 So.2d 412, 414 (Miss.1987)). The evidence must be viewed in the light most favorable to the non-moving party. If, in this view, the moving party is entitled to a judgment as a matter of law, then summary judgment should be granted in his favor. Otherwise, the motion should be denied. *Brown v. Credit Center, Inc.*, 444 So.2d 358, 362 (Miss.1983).

*Prescott v. Leaf River Forest Products, Inc.*, 740 So. 2d 301, 308-309 (Miss. 1999) (quoting *Morgan v. City of Ruleville*, 627 So.2d 275, 277 (Miss.1993)).

- I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS THERE IS NO LEGAL DUTY ON THE PART OF A PHARMACIST TO FILL A PRESCRIPTION WHEN THE CUSTOMER WILL NOT PAY FOR THE PRESCRIPTION.

The Plaintiff appeals from an Order Granting Summary Judgment to Walgreens on their Supplemental Motion for Summary Judgment.. (C.P. at 212; R.E. at 7)

Walgreens sought "...dismissal of the Plaintiff's complaint on the grounds that the Walgreens Pharmacy has no duty to fill a prescription..." (C.P. at 141; R.E. at 3) The Court expressly found "...that the Plaintiff has failed to cite a Mississippi statute, rule or case which establishes a legal duty on the part of a pharmacist to fill a prescription, and

the court is of the opinion that summary judgment should be granted.” (C.P. at 212; R.E. at 7).

The Plaintiff makes no meaningful argument that the trial court erred in finding there is no legal duty on the part of a pharmacist to fill a prescription. Instead the Plaintiff summarily argues that summary judgment was inappropriate because he produced affidavits from two expert witnesses who stated that there was a duty on the part of Walgreens’ pharmacist to fill prescriptions. A legal duty is a matter of law and cannot be established by affidavit. The Plaintiff failed to cite any supporting authority in support of his argument that an affidavit of an expert witness can establish the legal duty. “An appellant court is not required to consider an argument which is not supported by authority.” *Howard v. State*, 945 So.2d 547, 558 (¶ 30) (Miss. 2002) (finding that the Appellant’s “cursory argument without either citing to specific instance in the record of an abuse of discretion by the trial court or without further reason or explanation amounted to a lack of meaningful argument to appellate review and constituted a waiver of the issue).

The existence of a legal duty is a question of law. See *Fair v. Town of Friars Point*, 930 So.2d 467, 470 (Miss.App.,2006) (citing *State Farm Auto Ins. Cos. v. Davis*, 887 So.2d 192, 194(¶ 7) (Miss.Ct.App.2004)). “Whether a duty exists in a negligence case is a question of law to be determined by the court.” *Belmont Homes, Inc. v. Stewart*, 792 So.2d 229, 232 (Miss.,2001) (citing *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 174 (Miss.1999)). See also *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir.1971) (applying Mississippi law).

"Whether a duty is owed in a negligence action is a question of law and on appeal is reviewed de novo." *Belmont Homes, Inc. v. Stewart*, 792 So.2d at 232. See also *Scafide v. Bazzone*, 2006 WL 2604662, \*6 (Miss.App.) (Miss.App.,2006)

"There is a presumption that the judgment of the trial court is correct, and the burden is on the appellant to demonstrate some reversible error to this Court." *Branch v. State*, 347 So.2d 957, 958 (Miss.1977). "Supporting the argument of his issues with reasons and authorities is part of an appellant's burden on appeal." *Pate v. State*, 419 So.2d 1324, 1325-26 (Miss.1982).

"In the absence of meaningful argument and citation of authority, this Court generally will not consider the assignment of error." *Govan v. State*, 591 So.2d 428, 431 (Miss.1991). See also *Stidham v. State*, 750 So.2d 1238 (Miss.1999) (the appellant has a duty to show by plausible argument with supporting authorities how the lower court erred); *Rush v. State*, 749 So.2d 1024, 1026 (Miss.1999) (appellate court did not address six issues raised on appeal where appellant did not discuss or cite authority); *Sumrall v. State*, 758 So.2d 1091, 1094 (Miss.Ct.App.2000) (an issue not argued in brief is considered abandoned and waived). *Randolph v. State*, 852 So.2d 547, 558 (Miss.,2002)

"The appellant has the duty to make more than mere assertions and should set forth reasons for his arguments and cite authorities in their support." *White v. State*, 818 So.2d 369, 371 (¶7) (Miss. App. 2002) (citing *Clark v State*, 503 So.2d 277, 280 (Miss. 1987)). Further... "if the party does not provide this support, this Court is under no duty to consider assignments of error when no authority is cited." *Drennan v State*, 695 So.2d 581, 585-586 (Miss. 1987).

The Plaintiff, in violation of Miss. R. App. Proc. 28(a)(6), has failed to cite any supporting authority in his argument. Further, the Plaintiff has not made a meaningful argument and has set out mere assertions that a legal duty may be established by expert witness affidavit. Based on the foregoing this Court should decline to consider this assignment of error and hold that this assignment of error is procedurally barred from review.

Walgreens respectfully submits that there is no duty on the part of a pharmacist to fill a prescription, let alone to fill a prescription for free. No duty has been alleged by the Plaintiff, and the Plaintiff has failed to cite any authority that established a legal duty on a pharmacist to fill a prescription.

To create a genuine issue of material fact in this case, the Plaintiff must establish the conventional tort elements of duty, breach, proximate cause and damage. *Palmer v Biloxi Regional Medical Center, Inc.*, 464 So.2d 1346, 1354 (Miss. 1990) (citing *Phillips v Hull*, 516 So.2d 488, 491-92 (Miss. 1992)). Specifically, the plaintiff must first prove the existence of a duty on behalf of Walgreens' pharmacist to fill the prescriptions referenced in the Plaintiff's Complaint. See *Drummond v. Buckley*, 627 So.2d 264, 268 (Miss. 1993). (Emphasis added)

Duty is an essential element of a claim of professional negligence. "Actionable negligence cannot exist in the absence of a legal duty. *Moore ex rel. Moore v. Memorial Hosp. of Gulfport*, 825 So.2d 658, 662 (¶11) (Miss. 2002).

In his Complaint, the Plaintiff alleges that Walgreens' pharmacist was negligent in "failing to fill Ms. Dill's prescriptions." (C.P. at 4; R.E. at 1). The Plaintiff's Complaint does not allege any legal duty on the part of Walgreens or its pharmacist to fill Ms. Dill's prescriptions. A legal duty must be shown as a part of the Plaintiff's *prima facie* case of

negligence, and the Plaintiff did not establish that Walgreens' pharmacist had a legal duty to fill Nettie Mae Dill's prescriptions, and the Plaintiff's Complaint was properly dismissed. *Moore*, 825 So.2d at 662 (¶11).

II. THE AFFIDAVITS OF PLAINTIFF'S EXPERTS WERE NOT THE BASIS OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT.

The Plaintiff states that "...Walgreens' pharmacist owed a duty to act as a reasonably prudent pharmacist would in the same or similar circumstances." (Brief for Appellant at 9) Plaintiff references to affidavits of a pharmacist and physician filed in response to Walgreens' Motion for Summary Judgment. The Plaintiff does not cite any law or statute which supports the Plaintiff's contentions that legal duty may be established via affidavits.

"Our law is clear that an appellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved." *Acker v. State*, 797 So.2d 966, 967 (Miss.2001) (quoting *Lambert v. State*, 574 So.2d 573, 577 (Miss.1990)). See also *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss. 2001). "Failure to cite relevant authority obviates the appellate court's obligation to review such issues." *Simmons v. State*, 805 So.2d 452, 487 (Miss.2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss.1998)). Consequently, the "affidavit" issue is not properly before the Court and is procedurally barred from consideration. *Byrom v. State*, 863 So.2d 836, 853 (Miss.,2003).

"The appellant has the duty to make more than mere assertions and should set forth reasons for his arguments and cite authorities in their support." *White v. State*, 818 So.2d at 371 (¶7) (citing *Clark v State*, 503 So.2d 277, 280 (Miss. 1987)). Further... "if the party does not provide this support, this Court is under no duty to consider assignments of error when no authority is cited." *Drennan v State*, 695 So.2d at 585-



586; *Howard v. State*, 945 So.2d 547, 558 (¶30) (Miss. 2002) (finding that the Appellant's "cursory argument without either citing to specific instance in the record of an abuse of discretion by the trial court or without further reason or explanation amounted to a lack of meaningful argument to appellate review and constituted a waiver of the issue).

Based on the foregoing this Court should decline to consider this assignment of error and hold that this assignment of error is procedurally barred from review.

The affidavits of a pharmacist and physician submitted by the plaintiff in response to Walgreens' Motion for Summary Judgment cannot be used to establish a legal duty.

In order to establish professional negligence against the Walgreens' pharmacist, the Plaintiff must prove: (1) the existence of a duty on the part of the pharmacist to conform to a standard of care; (2) a failure to conform to that standard of care; and (3) an injury to plaintiffs proximately cause by a breach of the standard of care. *McCaffrey v. Puckett*, 784 So.2d 197, 205 (Miss. 2001); *Drummond*, 627 So.2d at 268.

A Plaintiff may establish a breach of the standard of care by expert testimony; however, before there can be a breach of a standard, there must be a duty to conform to a standard of care. Legal duty is clearly a question of law to be determined by the court. "Whether a duty exists in a negligence case is a question of law to be determined by the court." *Belmont Homes, Inc. v. Stewart*, 792 So.2d at 232 (citing *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 174 (Miss.1999)). See also *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176, 1181 (5th Cir.1971) (applying Mississippi law). The trial court was not called on to address the issue of standard of care because the question decided by the Court was whether or not there was a legal duty on the part of the pharmacist to fill a prescription and the Court was not called upon to decide the standard applicable to a

pharmacist who undertakes to fill a prescription and the standard of care was not an issue addressed by the trial court in its Order Granting Summary Judgment to Walgreens and the standard of care is not an issue before this Court.

III. THE PLAINTIFF'S FAILURE TO ATTACH A CERTIFICATE OF CONSULTATION TO THE COMPLAINT WAS NOT A BASIS OF THE TRIAL COURT GRANTING SUMMARY JUDGMENT.

The Plaintiff's failure to attach the certificate of consultation required by §11-1-58, Miss. Code Annotated, was not a basis for the Trial Court granting Walgreens' Supplemental Motion for Summary Judgment and is not an issue properly before this Court. The issue presented to the trial court for decision was whether or not there was a legal duty on the part of a pharmacist to fill a prescription. The Plaintiff fails to cite to a specific instance in the record of an error by the trial court regarding the certificate of consultation which is understandable because the lack of a certificate of consultation was never a basis for Walgreens' Supplemental Motion for Summary Judgment. "The appellant bears the burden of showing some reversible error by the trial court. The failure to do so constitutes a waiver." *King v. State*, 857 So.2d 702, 726(¶ 77) (Miss. 2003) (citing *Branch v. State*, 347 So.2d 957, 958 (Miss.1977)).

"Failure to cite any authority in support of claims of error precludes this Court from considering the specific claim on appeal." *Graves v. Dudley Maples, L.P.*, 950 So.2d 1017, 1022 (Miss.,2007).

Consequently, the issue of the Plaintiff's failure to attach the certificate of consultation required by §11-1-58, M.C.A., is not properly before the Court and is procedurally barred from consideration. *Byrom v. State*, 863 So.2d at 853.

Even if the Plaintiff's failure to attach the certificate of consultation had been an issue, the lower court would have been justified in dismissing the Plaintiff's Complaint

for the failure of the Plaintiff to comply with §11-1-58 by not attaching to the Complaint a certificate executed by the attorney for the Plaintiff.

The Plaintiff cites Miss. Code Ann. §11-1-58(7) to support his position that his claim should not be dismissed for failure to comply with §11-1-58. (Brief for Appellant at 9) "The plaintiff, in lieu of serving a certificate required by this section, may provide the defendant or defendants with expert information in the form required by the Mississippi Rules of Civil Procedure. Nothing in this section requires the disclosure of any "consulting" or non-trial expert, except as expressly stated herein." Miss. Code Ann. §11-1-58(7)

The Plaintiff is incorrect. This Court first addressed the issue of strict compliance with Miss. Code. Ann. §11-1-58 in *Walker v Whitfield Nursing Center, Inc.*, 931 So.2d 583 (Miss. 2006). This Court in *Walker* held that strict compliance applies when the court examines whether the requirements of Miss. Code Ann. §11-1-58 were satisfied. *Id.* at 588-589.

In the recent case of *Caldwell v. North Mississippi Medical Center, Inc.* 2007 WL 1501099, (Miss.) (Miss.,2007) this Court upheld its reasoning and holding set forth in *Walker v Whitfield Nursing Center, Inc.*, *supra*.

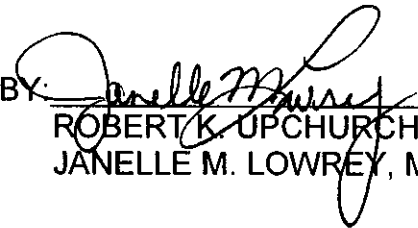


In the case *sub judice*, the Plaintiff filed his complaint on March 15, 2005. On January 03, 2006 Walgreens filed its motion for summary judgment. On February 02, 2006 the Plaintiff filed his response to Walgreens motion for summary judgment attaching the attorney's certificate and the affidavit of two expert witnesses. The attorney's certificate and expert information was supplied 11 months after filing of the complaint, clearly outside the time for compliance as stated in sub-section (b).

## CONCLUSION

The Circuit Court was correct in granting Walgreens' Motion for Summary Judgment. The Plaintiff produced no case law or statute that established a duty of a pharmacist to fill a prescription. The Plaintiff's failure to cite any authority in support of his claims of error precludes this Court from considering the specific claims on appeal. Accordingly, Walgreens' requests the Court to affirm the ruling of the Circuit Court of Lee County, Mississippi, granting summary judgment.

Respectfully submitted, this the 1<sup>st</sup> day of August, 2007.

WALGREEN CO., D/B/A WALGREENS  
AND JANE DOE

BY:   
ROBERT K. UPCHURCH, MSB #   
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And Jane Doe

CERTIFICATE OF SERVICE

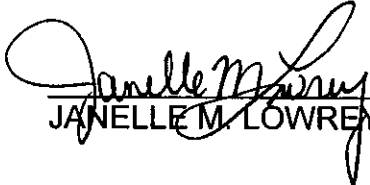
I, JANELLE M. LOWREY, one of the attorneys for the Appellee, Walgreen Co., D/B/A Walgreens and Jane Doe., do hereby certify that I have this day mailed by United States Mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee, Walgreen Co., D/B/A Walgreens and Jane Doe to:

Honorable Paul Funderburk  
Circuit Court Judge  
P. O. Box 1100  
Tupelo, MS 38802

James D. Moore  
Attorney for Appellant  
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Tupelo, MS 38802

Jason Shelton, Attorney for Appellant  
218 N. Spring Street  
Tupelo, Ms 38802

Dated this the 1<sup>st</sup> day of August, 2007.

  
JANELLE M. LOWREY

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-02146

WOODROE WILSON SELLARS, AS A WRONGFUL  
DEATH BENEFICIARY OF AND ON BEHALF OF THE  
WRONGFUL DEATH BENEFICIARIES OF  
NETTIE MAE DILL, DECEASED

APPELLANT

V.

WALGREEN CO., D/B/A WALGREENS  
AND JANE DOE

APPELLEE

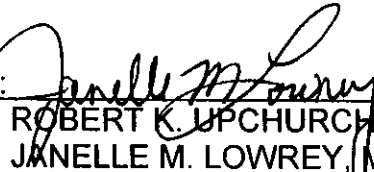
CERTIFICATE OF FILING

I, JANELLE M. LOWREY, one of the attorneys for the Defendant/Appellee,  
Walgreens Co., D/B/A Walgreens and Jane Doe., do hereby certify that I have this day  
mailed the original and three copies and an electronic disk of the Brief of Appellee,  
Walgreens Co., D/B/A Walgreens and Jane Doe., by U. S. Mail, postage prepaid to Ms.  
Betty W. Sephton, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson,  
MS 39205-0249.

Respectfully submitted, this the 1<sup>st</sup> day of August, 2007.

WALGREEN CO., D/B/A WALGREENS  
AND JANE DOE

BY:

  
ROBERT K. UPCHURCH, MSB # [REDACTED]  
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