

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**Lubertha Welch**

**Appellant**

**VS**

**Cause No. 2007-CA-01475**

**Mortgage Electronics  
Registration Systems, Inc.**

**Appellee**

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

**BRIEF OF APPELLEE**

**ORAL ARGUMENT NOT REQUESTED**

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**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**Lubertha Welch**

**Appellant**

**VS**

**Cause No. 2007-CA-01475**

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Registration Systems, Inc.**

**Appellee**

**CERTIFICATE OF INTERESTED PERSONS**

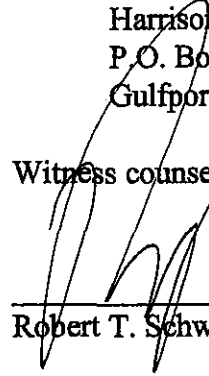
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lubertha Welch,  
address unknown,  
plaintiff/appellant;
2. William H. Pettey, Jr.,  
12303 Highway 49  
P.O. Box 1326  
Gulfport, Mississippi 39502  
counsel for plaintiff/appellant;
3. Mortgage Electronic Registration Systems, Inc.,  
9275 Sky Park Court Third Floor, Suite 300  
San Diego, CA 92123  
defendant/appellee;
4. Bank One National Association, as Trustee,  
1 Bank One Plaza, Suite ILI-0126(RFC)  
Chicago, IL 60670  
defendant/appellee;
5. Robert Schwartz, Esq.  
Schwartz, Orgler & Jordan, PLLC  
2355 Pass Road  
Biloxi, MS 39531  
counsel for defendant/appellee; and

6. First American Title Insurance Company,  
2075 Centre Pointe Blvd.  
Tallahassee, FL 32308  
interested and unnamed entity.

7. Honorable James Persons  
Harrison County Chancellor  
P.O. Box 457  
Gulfport, MS 39502

Witness counsel's signature, this May 14, 2008.



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Robert T. Schwartz, Attorney of record for Appellee

### STATEMENT OF NEED FOR ORAL ARGUMENT

Appellee would respectfully submit that oral argument would not be beneficial to the Justices in making their decision in this case. Appellee believes that there are no novel issues of law or fact which would make oral argument beneficial to the Justices hearing this matter.

Respectfully submitted,  
Bank One, As Trustee  
By: Schwartz, Orgler & Jordan, PLLC



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Robert T. Schwartz, its attorney

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## STATEMENT OF ISSUES

1. Whether the Chancery Court's denial of the Plaintiff's Motion to Set Aside a prior Judgment under M.R.C.P Rule 60 should be upheld.

## STATEMENT OF THE CASE

### *Course of Proceedings and Statement of Facts*

Comes now, Bank One National Association, as Trustee, (hereinafter "Bank One" or "Appellee") by and through its undersigned attorneys of record, Schwartz, Orgler & Jordan, PLLC, and recites their combined statement of the case and statement of facts relevant to the issues presented for review.

This case arises as an appeal from a final judgment rendered in the Chancery Court of Harrison County, Mississippi. The underlying action was commenced in the Chancery Court for the First Judicial District of Harrison County, Mississippi, on August 29, 2003, by Lubertha Welch<sup>1</sup>. The Plaintiff's original complaint filed in the lower court sought to set aside certain deeds and deeds of trust relating to property located in Harrison County, Mississippi, described as follows:

Commencing at the Southwest corner of Lot Six (6), Longview Subdivision, located in the Widow Ladner Claim, with the City of Long Beach, Mississippi, and from said point run thence southerly along the east margin of North Nicholson Avenue a distance of 142 feet to a point of beginning, running thence easterly and parallel to the north boundary of the Widow Ladner Claim a distance of 105 feet, thence run southerly parallel to the east margin of North Nicholson Avenue a distance of 50 feet, thence run westerly a distance of 105 feet to the east margin of North Nicholson Avenue, thence run northerly a distance of 50 feet to the point of beginning. (the "subject property")

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<sup>1</sup> See Complaint, Pages 1-4 of Clerk's Papers.

The Plaintiff, Lubertha Welch, was previously the owner of an undivided interest in the subject property together with her daughter, Diana Welch. In October of 2000, Diana Welch and Lubertha Welch borrowed money against the subject property from Mortgage Electronic Registration Systems, Inc. ("MERS"), which was secured by a paramount Deed of Trust against the subject property. Diana Welch and Lubertha Welch defaulted on their obligations to make payments under the Deed of Trust in favor of MERS, and the property was subsequently foreclosed by MERS, as evidenced by Substituted Trustee's Deed recorded in Book 1564 at Page 570.<sup>2</sup> The underlying action sought to make Lubertha Welch the sole owner of the subject property by setting aside the foreclosure sale to MERS and by setting aside a prior deed from Lubertha Welch. The Plaintiffs original cause of action was wrought with numerous deficiencies including the following:

1. The Plaintiff failed to name the actual owner of the property, Bank One, as a party to the litigation;<sup>3</sup>
2. The Plaintiffs failed to serve process on the named defendant, MERS or the actual owner of the subject property, Bank One<sup>4</sup>;
3. The Plaintiffs failed to deraign their title as required by Section 11-17-35; and
4. The Plaintiff misrepresented material facts regarding ownership of the property, service of process and the necessary parties in the litigation to the Chancery Court in obtaining an initial

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<sup>2</sup>See Trustee's Deed, on Pages 35-38, of Clerk's Papers.

<sup>3</sup>See Special Warranty Deed, on Pages 33-34, of Clerk's Papers, recorded February 20, 2002, more than 14 months prior to the Plaintiff filing their original complaint.

<sup>4</sup>See Motion for Default Judgment, Page 7-8, of Clerk's Papers.



Default Judgment which was later determined to be void.<sup>5</sup>

Upon learning of the instant suit, Bank One timely filed a motion to intervene in the action<sup>6</sup> and on January 21, 2005, the Chancery Court entered an order setting aside the prior default judgment based on the Plaintiff's failure to obtain service of process and based upon Bank One's interest in the property as Bank One had not been made a party to the original litigation.<sup>7</sup> As part of said order, Bank One was allowed to intervene in the litigation and the Plaintiff was required to amend their complaint to join Diana Welch (a co-owner of the subject property) and Susie Bowser (Conservator of the Plaintiff) as parties to the litigation within sixty (60) days.<sup>8</sup>

Plaintiff's failed to timely amend their complaint and on April 29, 2005, Bank One filed its Motion to Dismiss based on Plaintiffs failure to comply with the lower Court's Order.<sup>9</sup> On or about August 17, 2005, Bank One's Motion to Dismiss came on for hearing, at which time the Plaintiff was granted until September 15, 2005, to amend its pleadings and to serve all necessary parties with process.<sup>10</sup>

Plaintiffs again failed to comply with the Court's order and took no action of any type.

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<sup>5</sup> See Judgment confirming title, Page 55-61, of Clerk's Papers, and Order Setting Aside Default Judgment, Pages 62-65, of Clerk's Papers.

<sup>6</sup>See Motion to Intervene, Pages 25-61, of Clerk's Papers.

<sup>7</sup>See Order Setting Aside Default Judgment, Pages 62-65, of Clerk's Papers.

<sup>8</sup>See Pages 63-64, Clerk's Papers.

<sup>9</sup>See Motion to Dismiss; Page 66-68, Clerk's Papers.

<sup>10</sup> No written order was entered on August 17, 2005, regarding the additional time granted to Plaintiff, however the same was granted by the Court in chambers during a conference with all parties, and the same is not a disputed fact in this case.

Based upon Plaintiffs blatant contempt, Bank One filed a Supplemental Motion to Dismiss on April 14, 2006.<sup>11</sup> Bank One's Supplemental Motion to Dismiss came on for hearing on June 14, 2006, in the Chancery Court of Harrison County, Mississippi, at which time the Chancery Court found in favor of Bank One and dismissed the Plaintiff's complaint with prejudice due to Plaintiff's multitude of failures to comply with two (2) previous orders and what was a total disregard of the Rules of Civil Procedure and the Chancery Court's directions<sup>12</sup>.

Welch did not file any motion for reconsideration of the final judgment or any notice of appeal<sup>13</sup>. Thereafter, almost ten (10) months later Welch filed an motion to set aside the Court's final judgment.<sup>14</sup> Plaintiff's Motion was brought on for hearing on June 12, 2007, at which time the Plaintiff's Rule 60 Motion was denied<sup>15</sup>. Thereafter the Plaintiff filed a notice of appeal to this Court, creating the instant appeal.

#### **SUMMARY OF THE ARGUMENT**

Our Court's have consistently held that Rule 60 does not provide a party relief when there were other procedural remedies available to them, including timely filing a notice of appeal. Welch was given several opportunities by the Chancery Court to amend her initial complaint, and after repeatedly refusing to comply with these orders, her complaint was properly dismissed with prejudice. After this dismissal, Welch failed to timely file her notice of appeal within thirty (30) days as is required by M.R.A.P. Rule 4(a).

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<sup>11</sup>See Supplemental Motion to Dismiss, Pages 69-71, Clerk's Papers.

<sup>12</sup>See Final Judgment, Pages 72-76, Clerk's Papers.

<sup>13</sup>Mississippi Rules of Appellate Procedure 4(a).

<sup>14</sup>See Amended Motion to Set Aside Order, Pages 80-90, Clerk's Papers.

<sup>15</sup>See Judgment, Pages 112-113, Clerk's Papers.

Almost a year after the entry of the final judgment, Welch then files a Rule 60 motion but gives no support or legal basis for said motion<sup>16</sup>. Due to the fact that the Plaintiff failed to perfect an appeal of the Chancery Court's final judgment, Welch is barred from attempting to now seek relief through Rule 60. Furthermore, Welch failed in her brief to cite any legal authority which supports her contentions.

### STANDARD OF REVIEW

The Court is to review a denial of a Rule 60 motion for abuse of discretion. *R.K. v. J.K.*, 946 So. 2d 764, 776 (Miss. 2007). The same is clearly not governed by *Brown vs. Credit Center* as alleged by Welch in its brief.<sup>17</sup>

### ARGUMENT

***Welch's appeal to have the Final Judgment overturned fails as a matter of law.***

As stated above, it should first be noted that the only authority which Welch relies upon in her brief is wholly irrelevant to the instant matter and said case merely cites a standard for granting Summary Judgment which is irrelevant to a Rule 60 motion.<sup>18</sup> Based upon the same, Welch's appeal is frivolous and no reply should even be required of Bank One.<sup>19</sup> Welch has chosen to fail to cite any case law supporting the basis of her appeal and such appeal should be

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<sup>16</sup>See Transcript, Pages 7-15.

<sup>17</sup> It is important to note that the only case cited by Welch in its brief discusses the standard for the granting of summary judgment, an issue not before this Court. *Brown v. Credit Center, Inc.*, cited at 444 So. 2d 358 (Miss. 1983).

<sup>18</sup>*Brown v. Credit Center, Inc.*, cited at 444 So. 2d 358 (Miss. 1983).

<sup>19</sup>See *Webb vs. Desoto County*, 843 So. 2d 682 (Miss. 2003).

denied.

Furthermore, Welch has also failed to demonstrate under which prong of Rule 60 for which she seeks relief. Since Rule 60(a) only deals with clerical mistakes of which there is no allegation in the record or in Welch's brief, Bank One can only assume Welch is seeking refuge under Rule 60(b). Rule 60(b) sets forth six (6) provisions in which relief may be afforded to a litigant. Subsections one (1) through five (5) are clearly irrelevant to the instant matter and no allegation is made by Welch that relief should be granted under said provisions. Again, it can only be assumed, since no specific provision has been declared by Welch, that she is seeking relief under Rule 60(b)(6) which can be granted for "any other reason justifying relief from the judgment". See M.R.C.P. Rule 60.

Relief will only be given under M.R.C.P 60(b)(6) where it is demonstrated by the party seeking relief that "extraordinary and compelling circumstances" are present. *R.K.*, 946 So. 2d at 776. Mississippi Courts have made it quite clear that "Rule 60 is not a means for those who had procedural opportunity for remedy under other rules and failed, without cause, to pursue such avenues." *Id.* Furthermore, Rule 60(b) may not be used to gain additional time in which to perfect an appeal. *Lancaster v. Stevens*, 961 So. 2d 768, 774 (Miss.App., 2007). Additionally, "gross negligence, ignorance of the rules, ignorance of the law, or carelessness on the part of the attorney will not provide sufficient grounds for relief" under Rule 60(b). *Accredited Sur. and Cas. Co., Inc. V. Bolles*, 535 So. 2d 56, 58 (Miss. 1988).

Furthermore to seek relief under Rule 60(b)(6), the motion must be made "within a reasonable time". M.R.C.P. 60(B). Welch has made several attempts to claim the exigent circumstances of Hurricane Katrina are what brings her before this Court seeking relief, but the same is untrue. The truth of the matter is Welch had ample opportunity to pursue her original

complaint filed in 2003<sup>20</sup>, to amend the same in compliance with two (2) orders entered by the Chancery Court and more importantly to appeal the Final Judgment which was delivered by the Chancery Court if she was aggrieved by said decision.

As is clear from the record Welch refused to comply with the lower court's orders to amend the complaint and to effect service of process, and as a result her complaint was properly dismissed with prejudice<sup>21</sup>.

As stated above, Welch failed to timely file an appeal within 30 days as is required by Mississippi Rule of Appellate Procedure (4)(a), and as such Welch failed to pursue her procedural remedies outside of Rule 60. Based on this Court's ruling in *R.K.*, Welch cannot seek shelter in Rule 60 due to the fact that procedural remedies such as a timely appeal were not undertaken. Furthermore, the failure to file a timely appeal is nothing more than carelessness on the part of Welch, and this Court specifically stated in *Accredited Sur. and Cas. Co., Inc.*, that Rule 60(b) will not provide sufficient grounds for relief in instances such as these. *Accredited Sur. and Cas. Co., Inc. V. Bolles*, 535 So. 2d 56, 58 (Miss. 1988)

The cases cited herein coupled with the pertinent facts which have been set forth above clearly demonstrate Welch's argument is without merit. Hurricane Katrina in no way prevented Welch from complying with the Chancery Court's initial orders to amend the complaint and effect service of process. In addition, Hurricane Katrina did not stand in Welch's way of properly appealing the final judgment of June 14, 2006, as was required by law. Welch has even further undermined any argument she might have by failing to cite any legal authority which supports

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<sup>20</sup> More than two (2) years prior to Hurricane Katrina.

<sup>21</sup> It should further be noted that Welch was in contempt at the time the case was dismissed by the Chancery Court.

her position, and therefore, she has no legal basis whatsoever for this appeal and the same is wholly frivolous and should be a sanctionable event.

In that the Chancery Court did not abuse its discretion in denying Welch's Rule 60 motion, this Court should properly dismiss Welch's appeal and/or should affirm the lower court's judgment in denying the same.

#### **CONCLUSION**

Based upon (1) the failure of Welch to comply with the two (2) Chancery Court Orders to amend her complaint, (2) the case law cited above; (3) the failure of Welch to perfect a timely appeal; and (4) the fact that Welch has failed to cite any authority in her brief to support her alleged positions, this appeal should be properly dismissed and the judgment of the lower court should be affirmed with costs and attorneys fees being awarded to Bank One for the defense of this frivolous appeal.

Respectfully submitted on May 14, 2008.

Bank One, As Trustee  
By: Schwartz, Orgler & Jordan, PLLC

  
Robert T. Schwartz, its attorney

### CERTIFICATE OF SERVICE

I, ROBERT T. SCHWARTZ, do hereby certify that I have this day mailed, postage prepaid, via the U.S. Postal Service, a true and correct copy of the above and foregoing Brief to the following:

William H. Pettey, Jr.  
12303 Highway 49  
P.O. Box 1326  
Gulfport, Mississippi 39502

Chancellor James Persons  
P.O. Box 457  
Gulfport, MS 39502

This the 14<sup>th</sup> day of May, 2008.

  
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