

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

**Lubertha Welch**

**Appellant**

**versus**

**cause #2007-CA-01475**

**Mortgage Electronic  
Registration Systems, Inc.**

**Appellee**

**BRIEF OF APPELLANT**

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

**Lubertha Welch**

**Appellant**

**versus**

**cause #2007-CA-01475**

**Mortgage Electronic  
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 in the case. These representations are made in order that the justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Lubertha Welch, plaintiff/appellant
2. William H. Pettey, Jr., counsel for plaintiff/appellant
3. Mortgage Electronic Registration Systems, Inc., defendant/appellee
4. Robert Schwartz, counsel for defendant/appellee

I.

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**TABLE OF CASES**

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**STATEMENT OF CASE**

Comes Now the Appellant, Lubertha Welch, appearing by and through her attorney, and files this his Memorandum Brief in the above referenced cause, and would respectfully show unto the Court the following:

**FACTUAL HISTORY**

This case has a long history, but one that can best be surmised as follows. Lubertha Welch is an elderly woman living in Harrison County, Mississippi, and that she owned as a co-tenant certain real property located in Harrison County. The property is described as follows:

Commencing at Southwest corner of Lot 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 southerly parallel to the east margin of North Nicholson Avenue a distance of 50 feet, thence westerly a distance of 105 feet to the east margin of North Nicholson Avenue, thence northerly a distance of 50 feet to the point of beginning.

Mrs. Welch had a long history of illness, both physical and mental, and lived on her property, with her daughter. She had a deed of trust on her property, and sought to refinance the deed of

trust and to take some funds out of the equity in order to do certain improvements on the property. She, however, at this time, lacked the mental capacity to understand what she was doing, and executed said deed of trust without understanding the contents thereof and in fact did not actually execute the documents at the closing but rather her daughter, Diane Welch, actually signed the documents for her. She was at the time suffering from the effects of Alzheimer's Disease. and had been since 1996. At this same time, Lubertha Welch executed a deed from herself to herself and Diane Welch which is recorded in deed book 1516 page 313 in the Harrison County deed records. AS she was suffering from the effects of Alzheimer's Disease and failed to understand the effects of what she was doing, both the deed and the deed of trust are void. Subsequent thereto, the plaintiff defaulted on the note and the underlying deed of trust was foreclosed, said Substituted Trustee's deed being filed December 7, 2001 and being recorded in deed book 1564 page 570 of the deed records of Harrison County, Mississippi. She did not receive all of the funds from the refinance other than the repayment of the existing deed of trust, and the remainder of the funds actually went to her daughter, who "assisted" Mrs. Lubertha Welch in the execution of the closing documents. Suit was filed by Mrs. Lubertha Welch to set aside the deed and the Substituted Trustee's deed due to lack of capacity as a result of her suffering from Alzheimer's Disease. The case was dismissed by Order of the Chancery Court subsequent to Hurricane Katrina, when the Plaintiff's counsel's office had sustained heavy damage from the Hurricane, and the Plaintiff's counsel had no way of contacting the Plaintiff, and had not heard from the Plaintiff in some time.

Upon the Plaintiff locating her attorney, she then filed a Motion to Set Aside Order so that the matter could be reinstated, and proceed to trial on the merits. Said Motion was denied by the

Chancery Court, hence this appeal.

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**SUMMARY OF ARGUMENT**

That under *Brown v. Credit Center, Inc.* and MRCP Rule 60, that the Motion to Set Aside Order should have been granted.



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**ARGUMENT**

This case was decided by the Chancery under Rule 60, which should only be cautiously given. *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss.1983).

In *Brown v. Credit Center, Inc.*, 444 So.2d 358 (Miss.1983) the Court held that

The trial court, must consider all things before it - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If in this view the moving party is entitled to judgment as a matter of law, summary judgment should be forthwith in his favor. *Otherwise the motion should be denied.*(emphasis added).

In the above referenced matter, the court based its granting of the Defendant's Motion to Dismiss on the Order rendered previously, when the Plaintiff and Plaintiff's counsel had lost contact due the effects of Hurricane Katrina on the Gulf Coast, when numerous people were displaced and unable to contact one another. In fact the undersigned has to this date been unable to return to his pre-Katrina office, and people are still operating out of temporary facilities. Under the maxims of equity, the court should have granted the Plaintiff's Motion to Set Aside Order so as to allow the case to proceed on the merits.

For these reasons, the denial of the Motion to Set Aside Order should have been granted

and the matter remanded to the Chancery Court of Harrison County for trial on the merits.

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**CONCLUSION**

In conclusion, the appellant prays that upon a hearing hereon, that this Honorable Court should reverse the denial of the Motion to Set Aside Order in favor of the Appellee and remand the case for a full hearing on the merits before the Chancery Court of Harrison County.

Respectfully submitted this the 13th day of March, 2008.

Lubertha Welch, appellant

by: 

William H. Pettey, Jr., bar # 

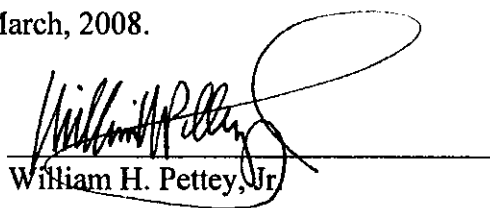
# CERTIFICATE OF SERVICE

I, William H. Pettey, Jr., counsel for the Appellant, Lubertha Welch, do hereby certify that I have this date mailed by U.S. First Class Mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Memorandum Brief to:

Hon. Robert Schwartz, Esq.  
Counsel for Mortgage Electronic Registrations Systems, Inc.  
2355 B Pass Road  
Biloxi, MS 39531

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

Witness my signature, this the 13th day of March, 2008.



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**ABSTRACT OF RECORD**