

CAUSE NO. 2008-WC-392-COA

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

WAL-MART SUPERCENTER, and AMERICAN
HOME ASSURANCE COMPANY ,

APPELLANTS

v.

MELISSA WINTER

APPELLEE

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

REPLY BRIEF FOR WAL-MART SUPERCENTER and AMERICAN HOME ASSURANCE
COMPANY

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ORAL ARGUMENT REQUESTED

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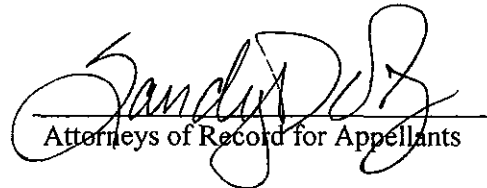
APPELLEE

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 their possible disqualification or recusal.

1. Wal-Mart Supercenter, Appellant
2. American Home Assurance Company, Appellant
3. Melissa Winter, Claimant
4. Tina M. Scott, Esquire and Rick Fox, Fox Law Firm, attorneys representing the Claimant.
5. Sandra T. Doty and Roxanne P. Case, Wilkins, Stephens & Tipton, P.A., attorneys for the Appellants
6. Honorable Andrew K. Howorth, Circuit Court Judge for the Circuit Court of Union County, Mississippi issued the Order Appellants now appeal from.

Dated this the 23rd day of December, 2008.


Attorneys of Record for Appellants

Sandra T. Doty
Roxanne P. Case

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REPLY ARGUMENT

I. STANDARD OF REVIEW

Appellee (hereinafter referred to as "Mrs. Winter") asserts that Appellants Wal-Mart SuperCenter and American Home Assurance Co. (hereinafter collectively referred to as "Wal-Mart") reliance upon *Shelton v. State*, 984 So. 2d 320 (Miss. Ct. App. 2007), as to the applicable standard of review is misplaced because *Shelton* involved a criminal matter in which the defendant appeared pro se and was "obviously well outside of his time to file a Motion to Reopen." The fact that *Shelton* involved a criminal matter in which the Appellant was appearing *pro se* is completely irrelevant. Rather, the Court in *Shelton* addressed one issue only, which was whether the circuit court properly denied the defendant's out-of-time appeal. *Id.* at 322. The issue in this case is whether Mrs. Winter's Motion to Reopen time for appeal should have been granted, which is an issue of law. The *Shelton* Court indicated that *de novo* review is the standard used for deciding issues of law. The issues addressed in *Shelton* are clearly the issues present before the Court in this case, thus, reliance upon *Shelton* is completely appropriate.

II. THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING MRS. WINTER'S MOTION TO REOPEN TIME FOR APPEAL BECAUSE MRS. WINTER FAILED TO MEET THE REQUISITE BURDEN OF PROOF.

Mrs. Winters asserts that reliance upon the case of *In Re A.M.A.*, 986 So. 2d 999 (Miss. Ct. App., 2007), is not appropriate, as that case was eventually rendered based on other issues. However, Mrs. Winters cannot contest the fact that *AMA* clearly interprets Mississippi Rules of Appellate Procedure Rule 4(h) as requiring that an appellee, when filing a motion to reopen time for an appeal, **must** file that motion within seven (7) days of receipt of the notice of appeal. *Id.* at 1008. (Emphasis added)

Mrs. Winters has **never** established that she filed her Motion to Reopen Time for Appeal within seven (7) days of her receipt of the notice of entry of the Circuit Court's Opinion and Order. She did not address the date upon which she received this Opinion and Order in her affidavit, nor in her Motion to Reopen Time for Appeal. (See Appellee RE 3, 4) In addition, she has never addressed the date she received this Opinion and Order in any of her filings before this Court.

Accordingly, Mrs. Winters has wholly failed to establish that her motion to Reopen Time for Appeal was filed within the required seven (7) days of her receipt of the Circuit Court Opinion and Order, as required by M.R.A.P. 4(h). Her failure to meet this required burden precluded the Circuit Court Judge from being able to grant the Motion to Reopen her time for appeal. As such, the Circuit Court Judge's granting of her Motion to Reopen Time for Appeal without proof of the required elements was an abuse of discretion. It is for these reasons that the Union County Circuit Court's Opinion and Order granting Mrs. Winters' Motion to Reopen Time for appeal must be reversed, and her corresponding appeal dismissed.

III. WAL-MART IS PREJUDICED BY MRS. WINTER'S CONTINUED DISREGARD OF THE REQUIREMENTS SET FORTH BY THE MISSISSIPPI RULES OF APPELLATE PROCEDURE.

In addition to Mrs. Winter's failure to meet the required element to reopen time for appeal, which requires dismissal of this case, her appeal must also be dismissed based on the grounds of prejudice. Mrs. Winters erroneously states in her brief that Wal-Mart has not been prejudiced and has not even claimed to be prejudiced, by this ongoing appeal. These assertions are completely untrue. Wal-Mart has been, and continues to be prejudiced by Mrs. Winter's failure to timely file her appeal.

Mrs. Winters has repeatedly failed to timely serve and file notices, documentation, and briefs within the rules set forth by the Mississippi Rules of Appellate Procedure, throughout the pendency

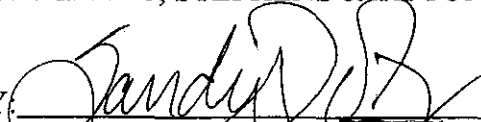
of this litigation. There has been no justification for Mrs. Winter's continued disregard for the procedural rules that all parties are required to adhere to. To allow Mrs. Winters to continue to disregard these rules, and permit her to pursue her appeal, results in severe prejudice to Wal-Mart. Mrs. Winters attempts to assert that no such indication of prejudice has been made. To the contrary, Wal-Mart has continually asserted that it is being prejudiced by her complete disregard for the procedural rules. (Appellant RE 31). Mrs. Winter's complete disregard for the requirements set forth to pursue litigation and appeals requires Wal-Mart to continually put forth time, effort and expenses in preparing objections to untimely filed pleadings, motions and appeals. Accordingly, to allow Mrs. Winters to, once again, disregard the requirements of the Mississippi Rules of Appellate Procedure, and allow her to pursue an admittedly untimely appeal with the Mississippi Supreme Court, would result in severe prejudice to Wal-Mart.

CONCLUSION

Accordingly, the Appellants herein, Wal-Mart Supercenter and American Home Assurance Company, ask this Court to reverse the Opinion and Order of the lower court granting Claimant's Motion to Reopen Time for Appeal and denying Employer-Carrier's Objection to Claimant's Designation of the Record and Motion to Dismiss Appeal on February 12, 2008; and to dismiss Mrs. Winter's appeal of the cases assigned Circuit Court number U2006-018-5218 and U2006-017-5216, assigned Supreme Court number 2007-WC-01717-COA.

WAL-MART STORES, INC., Employer, and AMERICAN
HOME ASSURANCE COMPANY, Carrier

BY: WILKINS, STEPHENS & TIPTON, P.A.

BY: 
ROXANNE P. CASE (REDACTED)
SANDRA T. DOTY (REDACTED)

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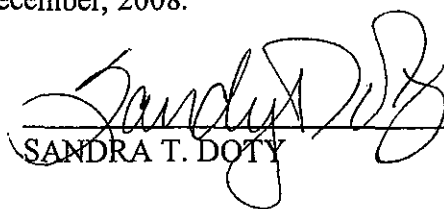
CERTIFICATE OF SERVICE

I, SANDRA T. DOTY, attorney for the Employer and Carrier, do hereby certify that I have
this day served via U.S. Mail, a true and correct copy of the above and foregoing **REPLY BRIEF**,
to:

Honorable Andrew K. Howorth
Circuit Court Judge
Circuit Court of Union County, Mississippi
1 Courthouse Square, Suite 201
Oxford, MS 38655

John P. Fox, Esquire
Fox Law Firm
P. O. Box 167
Houston, Mississippi 38851

THIS the 23rd day of December, 2008.



SANDRA T. DOTY