

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

2010-WC-00238-COA

MOLD PRO, INC.

APPELLANT

VERSUS

PEGGY A. ALFORD

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Peggy A. Alford, Appellee;
2. Mold Pro, Inc., Appellant;
3. Michael W. Darby, Jr., Esq., Attorney for the Appellee;
4. Jessie L. Evans, Esq., Attorney for the Appellant.

This the 2nd day of July, 2010.



MICHAEL W. DARBY, JR., ESQ.
MS BAR # [REDACTED]

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MOLD PRO, INC.

VERSUS

CAUSE NO. 2010-WC-00238-COA

PEGGY A. ALFORD

Statement of the Case

The instant case arises from a worker's compensation injury sustained by the Appellee, Peggy A. Alford, hereinafter referred to as "Alford", on November 12, 2004. The hearing was before the Administrative Law Judge, wherein an Order was entered on July 18, 2008, finding that Alford did indeed sustain a work-related injury on November 12, 2004.

The Appellant, hereinafter referred to as "Mold Pro", requested a review on August 1, 2008, before the Full Commission. The Commission issued its ruling on January 30, 2009, modifying the Order of the Administrative Judge, but for purposes herein the Commission did affirm that Alford sustained a work-related injury on November 12, 2004.

Feeling aggrieved once again, Mold Pro appealed the Order of the Full Commission on February 21, 2009, and Alford cross-appealed on February 27, 2009.

Thereafter, the Madison Circuit Court Judge, Samac Richardson affirmed the Commission Order on May 5, 2009. (Document No. 3, P. 5)

On June 19, 2009, Alford's counsel provided notice of the Madison County Circuit Court's decision to counsel for Mold Pro. (Exhibit 1 to Document No. 5, P. 2)

Thereafter on July 16, 2009, Mold Pro filed a Motion to Reopen Time for Appeal, which Alford responded to on July 23, 2009, to Appellant's Motion. The Motion to Reopen was set for

hearing before the Honorable Samac Richardson, who he recused himself and assigned the case to the Honorable Willie E. Chapman.

Judge Chapman, following a telephone conference, entered an Order on January 29, 2010, dismissing the instant case based upon Mold Pro's failure to timely file their appeal pursuant to Rule 4(a) and (h) of the Mississippi Rules of Appellate Procedure. (Document No. 8, P. 31)

Summary of the Argument

The Circuit Court properly denied the Appellant's out of time Appeal and was correct in dismissing said case. The time line in this case is not in dispute and the Appellate Rules of Procedure are abundantly clear on this issue. The only result that could occur in this case was an Order of Dismissal as ordered by Judge Chapman. It is further clear that Judge Chapman did not abuse his discretion in reaching said conclusion as it is the only logical result when looking at the applicable Appellate Rules of Procedure.

Argument

"We review the decision of the trial court to grant or deny a motion pursuant to Rule 4(h) for abuse of discretion." Winter v. Wal-Mart SuperCenter, 26 So. 3rd 1086, 1088, citing Pre-Paid Legal Services, Inc. v. Anderson, 873 So. 2d 1008, 1009.

The appeal before this Court is based on purely procedural grounds. Mold Pro failed to comply with the Mississippi Rules of Appellate Procedure. 77(d) of the Mississippi Rules of Civil Procedure, states in pertinent part:

"Lack of notice of the entry by the clerk does not affect the time to appeal, nor relieve, nor authorize the Court to relieve, a party for failure to appeal within the

time allowed, except as permitted by the Mississippi Rules of Appellate Procedure.”

Rule 4(h) of the Rules of Appellate Procedure states as follows:

“Reopening time for appeal. The trial court, if it finds (a.) that a party entitled to notice of the entry of a judgment or order did not received such notice from the clerk, or any party within twenty-one (21) days of its entry, and (b.) that no party would be prejudice, may, upon motion file within 180 days of entry of the judgment or order or within seven (7) days of receipt of such notice, which ever is earlier, reopen the time for appeal for a period of fourteen (14) days from the date of entry of the order reopening the time for appeal.”

As stated in the statement of the case, there is no real dispute concerning the time line in the instant case. Mold Pro received notice on June 19, 2009, that the Circuit Court Order had been entered. Thereupon Mold Pro had a seven (7) day period for which Mold Pro to file a Motion tp Reopen Time for Appeal. The comment to Rule 4(h) states in pertinent part:

“Reopening may be ordered only upon a motion filed within 180 days of the entry of judgment or order, or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal and enables any winning party to shorten the 180 day period by sending, (and establishing proof of receipt of), its own notice of entry of judgment or order as authorized by Miss. R. Civ. P. 77(d). Winning parties are encouraged to send their own notices in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both, the clerk and the winning party. Receipt of a winning party’s notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.”

(emphasis ours) Mold Pro does not deny they received Notice of Entry of Judgment on June 19, 2009. Their defense is based primarily on, 1.) they did not receive notice from the clerk; 2.) they did not receive a copy of the Order in said June 19, 2009 correspondence. However, Rule 49h) and its comment are explicit that a winning party may shorten said time period by providing notice that entry has been made. The rule does not indicate the need for providing the actual order, only notice of same.

Conclusion

In conclusion, the Circuit Court did not abuse its discretion in issuing its Order of Dismissal. In fact, it reached the only decision possible under the Mississippi Rules of Civil Procedure and Appellate Procedure. Accordingly, the Order of the Madison County Circuit Court should be affirmed and this case should be dismissed.

RESPECTFULLY submitted, this the 2nd day of July, 2010.

PEGGY A. ALFORD, Appellee

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CERTIFICATE OF SERVICE

I, **MICHAEL W. DARBY, JR.**, Attorney for the Appellee herein, do hereby certify that I have this day mailed, proper postage prepaid, a true and correct copy of the above and foregoing

Brief of the Appellee to:

Honorable William E. Chapman, III
Circuit Court Judge
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Canton, MS 39046

Honorable Jessie L. Evans
Evans Law Firm
P. O. Box 528
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Attorney for the Appellants

THIS, the 2nd day of July, 2010.

A handwritten signature in black ink, appearing to read 'Michael W. Darby, Jr.', written over a horizontal line.

MICHAEL W. DARBY, JR.