IN THE COURT OF APPEALS
STATE OF MISSISSIPPI

NO. 2011-CA-00108-COA

LLOYD WAYNE CUEVAS AND
CHARLOTTE ANGELL CUEVAS — APPELLANTS

V.

ANGELA K. LADNER AND
KELLY C. SMITH — APPELLEES

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT OF HARRISON COUNTY, MISSISSIPPI

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V.

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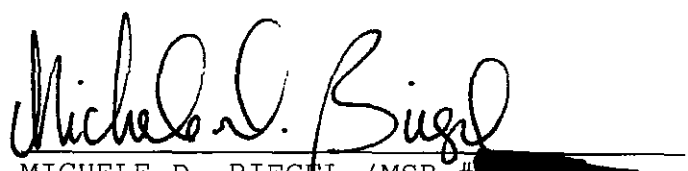
CERTIFICATE OF INTERESTED PERSONS

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. Lloyd Wayne Cuevas and Charlotte Angell Cuevas, Appellants.
2. Angela K. Ladner and Kelly C. Smith, Appellees.
3. Honorable Eugene L. Fair, Jr., Chancellor.
4. Michele D. Biegel, Attorney for Appellants.
5. B. Ruth Johnson, Attorney for Appellants.
6. James C. Simpson, Jr., Attorney for Appellees.



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The Brief of Appellees contains numerous statements not supported by the record and is tantamount to gross violation of *MRAP* 28(a)(6). The following statements are just a few of the statements contained in the Appellees' "Statement of the Case" and not supported by the record:

- Wayne conveyed all but his life estate in the property to his daughters. (Brief of Appellees 5, 6).

- Prior to Charlotte and Wayne's second marriage, Charlotte insisted Lloyd execute a deed on the land, "notwithstanding that the previous deed had been executed and delivered to his daughters." (Brief of Appellees 5, 6).

- Wayne alleged there was a "nefarious plot" that was "devised and carried out in concert among his daughters, the lawyer who prepared the first Quitclaim deed and the notary who signed the acknowledgment on the instrument, and possibly other persons unknown who might have actually affixed his signature to the document." (Brief of Appellees 6).

- The lawyer and the notary public denied any wrongdoing and stated repeatedly under oath that Lloyd Wayne Cuevas did in fact execute the Quitclaim deed to his daughter. (Brief of Appellees 6).

- Sixteen days after entry of the Courts Order and mailing of same by the Clerk of Court to counsel for all parties, Plaintiffs then chose to substitute their counsel on appeal in the place and stead of their trial counsel, Mr. Nixon. (Brief of

Appellee 7).

Also, not supported by the record, is the Appellees' explanation that the "4c" found on page two of the November 1, 2010 *Order* means that the Clerk mailed the *Order* to four counsel of record. (Brief of Appellee 7). The Appellees failed to offer proof via affidavits or otherwise from the Chancery Clerk's office showing that notice was in fact sent and/or received. The Appellees' contention that the "Court's records plainly indicate that the Order was sent to counsel" is clearly not supported by the record. (Brief of Appellee 7).

The Appellees claim that the trial court declined to accept the single affidavit of only counsel on appeal as sufficient proof that neither the Plaintiffs nor any of their other counsel of record were aware of the ruling, however, this claim is not supported by the record. (Brief of Appellee 8). There are no findings of fact or conclusions of law in either the trial court's *Order* or the record reflecting the trial court's reason for denying the Cuevases' motion to reopen time to appeal. (R. 50).

The opening paragraph of Ladner's and Smith's "Argument" discusses at great length the Chancellor's opportunity to hear the testimony of all witnesses and to observe their demeanor and credibility (Brief of Appellee 8), but the Chancellor did not allow the Cuevases a hearing on their motion to reopen time for appeal which is the subject of this appeal. Despite the fact that Cuevases' *Motion to Reopen Time for Appeal* was set for hearing on

January 14, 2011 (R. 47), the trial court entered an *Order* on January 5, 2011 denying said motion (R. 50).

Throughout the Brief of the Appellees, Walter L. Nixon, Jr. ("Nixon") is referenced as the "lead" counsel for the Cuevases, and the majority of the Appellees' argument is based upon their contention that Nixon was the "lead" counsel for the Cuevases (Brief of Appellees 7, 10). However, the record, including the *Defendants' Kelly C. Smith and Angela K. Ladner's Opposition to Plaintiff's Motion to Reopen Time for Appeal* (R. 44), does not support the Appellees' argument that Nixon or any other counsel was the "lead" counsel for the Cuevases.

In an attempt to further their argument that Nixon was the "lead" counsel, the Appellees made the following statements which are not supported by the record:

- "Mr. Nixon conducted all discovery in the case; he attended all depositions....."
- "....there was no substitution of counsel until November 16, 2001 (sic), sixteen days after the entry of the court's ruling and after mailing of same to counsel of record, presumably lead counsel, Mr. Nixon."
- "Lead counsel of record at the time the Order signed (sic) by the Court, at the time it was entered by the Clerk, at the time it was mailed by the Court Clerk, and at the time it would have been received by mail remained Mr. Nixon, the lead counsel throughout the prosecution and trial of Plaintiff's case."

(Brief of Appellees 10).

Because the record does not support the Appellees' contention that Nixon was "lead" counsel for the Cuevases, the Appellant Court should disregard all of the Appellees' arguments and/or contentions related to Walter L. Nixon, Jr. The Appellees were aware that Michele D. Biegel ("Biegel") filed all post-trial motions and were fully aware that Biegel was handling the post-trial proceedings as clearly reflected in the December 6, 2010 electronic mail from Biegel to counsel for the Appellees. (R. 18, 43).

The Appellees' argument that Nixon was allegedly the "lead" counsel for the Cuevases and, therefore, he would have received notice of the trial court's *Order* from the Clerk is in total disregard of *MRAP* 28(a)(6) and its requirement to cite to the record. The Appellee's failed to offer proof via affidavits or otherwise from the Chancery Clerk's office showing that notice was sent must less which counsel "would have received notice of the trial court's *Order.*"

In reversing the trial court's denial of Pre-Paid's timely filed motion to reopen time for appeal, the Supreme Court in *Prepaid Legal Services, Inc. v. Taylor* noted that "Taylor did not offer proof via affidavits or otherwise from the Chancery Clerk's office showing that notice was in fact sent and/or received." *Taylor*, 904 So.2d at 1061 (¶10, 11).

In the Appellees' summary of their argument and conclusion, they state that the Cuevases failed to meet their burden because

they failed to prove and/or satisfy the trial court that neither the Cuevases or their counsel of record received notice of the Court's *Order* entered on November 1, 2010 and more specifically, the Appellees argue that the Cueavases failed to meet their burden under *MRAP* 4(h) because they did not personally provide an affidavit specifically denying notice of the Court's ruling, nor did they provide an affidavit by Nixon. (Brief of Appellee 8, 10, 12). The Appellees contradict their arguments when they later admit that a specific factual denial of receipt of notice by a party seeking relief rebuts and terminates the presumption that mailed notice was received. (Brief of Appellee 10).

As admitted by the Appellees, *MRAP* 4(h) does not require the Cuevases to prove that they did not receive **actual** notice. A party's specific factual denial of receipt is sufficient to conclusively overcome any subjective reasoning by a trial judge or ambiguity in a record as to whether notice was actually received. *Mississippi Public Employees' Retirement System v. Lee*, 23 So.3d 528, 531 (¶7) (Miss.App. 2009) citing *Anderson*, 873 So.2d at 1009 (¶¶6-7).

In the Cuevases' *Motion to Reopen Time for Appeal*, they specifically denied receipt of notice from the clerk or any party within 21 days of its entry, and they also attached to their motion an affidavit of their counsel of record, Michele D. Biegel, specifically denying that she received the Order. (R. 38).

The Appellees argue that Biegel had a duty to be diligent to

properly secure all pleadings from her co-counsel and to check the court's docket. (Brief of Appellees 11). In essence, the Appellees are artfully arguing that Biegel was inexcusably neglectful, but *MRAP* 4(h) does not require a showing of excusable neglect. *Winter v. Wal-Mart Supercenter*, 26 So.3d 1086, 1089 (¶9) (Miss.App. 2009); *MRAP* 4(h) cmt. (2010). Assuming *arguendo* that the Cuevases must show excusable neglect, the Cuevases' reliance upon Biegel for notice of the Order is excusable neglect as is Biegel's reliance upon *MRCP* 77(d) that she would receive a copy of the Order from the Clerk.

The Appellees allege that granting the Cuevases time to reopen appeal will re-write *MRAP* 4(h) by allowing one or more of their attorneys "affirm ignorance" regardless of actual notice by the party and one or more of their attorneys (Brief of Appellees 11), however, there is no evidence that the Cuevases or any of their attorneys received **actual** notice of the Order. Not only did the Appellees fail to provide any evidence that the Cuevases or their counsel received **actual** notice, they failed to present any evidence that the Order was, in fact, mailed by the Clerk as required by *MRCP* 77(d).

Lastly, the Appellees argue that the trial court was within its discretion to deny the Cuevases leave for an out-of-time appeal in reliance upon *Mississippi Public Employees' Retirement System v. Lee*, 23 So.3d 528 (Miss.App. 2009); (Brief of Appellees 9, 11). The Appellees, as did the dissent in *Mississippi Public Employees'*

Retirement System, argue that the trial court was well within its discretion to deny an out-of-time appeal, however, the majority of the Appellate Court found that the "a party's specific factual denial of receipt is sufficient to conclusively overcome any subjective reasoning by a trial judge or ambiguity in a record as to whether notice was actually received." *Mississippi Public Employees' Retirement System* at 531 (¶7) citing *Anderson*, 873 So.2d at 1009 (¶¶ 6-7). The Appellees' reliance upon *Mississippi Public Employees' Retirement System* is unfounded and misguided. As the Mississippi Public Employees' Retirement System did, the Cuevases, through their attorney, specifically denied receipt of the Court's *Order* entered on November 1, 2010. (R. 38).

The Brief of Appellees is fraught with statements unsupported by the record and most, if not all, of the Appellees' contentions and arguments regarding Walter L. Nixon, Jr. are in direct violation of *MRAP* 28(a)(6). This Court should not consider any of the Appellees' statements, contentions and arguments not supported by the record. *Jordan v. State* 995 So.2d 94, 110 (¶51) (Miss. 2008).

The Cuevases met their burden of the first prong of *MRAP* 4(h) by timely filing their motion to reopen which included a specific denial of receipt of notice of the *Order* and rebutted and terminated the presumption that mailed notice was received. The Cuevases also met their burden of the second prong of *MRAP* 4(h); the undisputed evidence is that the Appellees will not be

prejudiced if the time for appeal is reopened.

RESPECTFULLY SUBMITTED this the 20th day of July, 2011.

LLOYD WAYNE CUEVAS AND
CHARLOTTE ANGELL CUEVAS, Appellants

By: _____
MICHELE D. BIEGEL, Attorney for Appellants

CERTIFICATE OF SERVICE

I, Michele D. Biegel, certify that I have this date served a copy of the above and foregoing **Reply Brief of Appellants** by placing a copy of same in the United States mail, postage prepaid, addressed to the regular business mailing addresses of:

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THIS the 20th day of July, 2011.

Michele D. Biegel

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