

### **Wal-Mart v. Shank Background:**

In 1999, Mrs. Shank took a job stocking shelves with the Wal-Mart Store in Cape Girardeau, Missouri. She qualified for medical benefits with the Wal-Mart plan in February 2000.

In May 2000, Mrs. Shank was severely injured in a car accident while touring local yard sales in the area. A Semi ploughed into the driver's side of her mini-van causing her severe brain damage and only minor injuries to her girlfriend. Wal-Mart paid medical expenses of \$469,216 for her accident related injuries

On or about August 8, 2002, the Shanks sued driver David Shivers and G.E.M. Transportation Inc. who owned the semi which struck her car. G.E.M. had only \$1 million in liability coverage. They agreed to a settlement of \$900,000 with the Shanks that were allocated as follows: \$700,000.00 to Deborah Shank and \$200,000.00 to James Shank:

\$200,000.00 to Mr. Shank less fee & expenses netted him \$119,000.00  
Fees and expenses of 40.5% paid to attorney (\$81,000.00)

\$700,000 to Mrs. Shank less fee & expenses netted her \$417,477  
Fees and expenses of 40.4% (\$282,523.00)

Total Fees and expenses paid of \$ 363,523 or 40.5% of settlement went to attorneys' fees and expenses.

In August 2005, the Administrative Committee of the Wal-Mart Store Inc. Associates Health and Welfare Plan sued James A. Shank as Trustee of the Trust of money. A temporary restraining order was granted on the trust funds as of June 9, 2006. As part of this temporary restraining order, funds of the trust were allowed to be used for some medical needs and care of Mrs. Shank.

The District Court granted summary judgment for the plan on August 31, 2006. The Shanks appealed the decision to the 8<sup>th</sup> Circuit Court of Appeals and the Court issued a ruling on August 31, 2007, affirming that the plan had a right to recover from the funds held in the trust. In its ruling, the 8<sup>th</sup> Circuit noted as follows:

“The written Plan in this case confers benefits on both parties. Shanks contributed premium payments, plus a promise to reimburse the Committee for medical expenses in the event she was injury and received a judgment or settlement from third parties. In exchange, she received the certainty that the Committee would pay her medical bills immediately if she was injured. “

The 8<sup>th</sup> Circuit went on to find that the reimbursement was necessary to protect the interest of all plan beneficiaries. The Court of Appeals held that:

“ERISA’s purpose of upholding the integrity of written plans and protecting the interest and expectations of all participants and beneficiaries are best served by enforcing the Committee’s contractual right of reimbursement. We hold that such relief is “appropriate” under section 502(2)(3).”

### **Media Reaction to the Case:**

Despite other articles in various media outlets, the current media firestorm began nationally when the Wall Street Journal published its front-page story on Nov. 20, 2007. NASP and the American Association for Justice both penned letters to the Editor that were published in part on Nov. 29, 2007. As of December 2007, the Shank case was out in the media but had dropped off the front page. The Shanks sought an appeal to the U.S. Supreme Court.

The U.S. Supreme Court denied the petition for certiorari by the Shanks on March 17, 2008. Based upon the denial, the 8<sup>th</sup> Circuit court ruling became final and the amount due to the Plan was set.

On March 26, 2008, Anderson Cooper of CNN aired a story on his 360 show detailing the Wal-Mart case with interviews with Mr. & Mrs. Shank. MSNBC picked up the story as well with Keith Olbermann calling Wal-Mart the worst person on his news show. In its coverage of the case, MSNBC actually used a criminal defense attorney to explain that subrogation was rarely enforced in the legal community.

On April 1, 2008, CNN and other media outlets reported that Wal-Mart had agreed to allow them to keep the money and would be revamping its plan to allow it more discretion in the subrogation rights of its plan. The Wall Street Journal also picked up the letter as well as the Associated Press. The media is now reporting speculation that federal lawmakers may want to re-examine ERISA subrogation rights after the 2008 election.