IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2006-CA-01849-COA

THOMAS GRIFFITH — APPELLANT/CROSS-APPELLEE

VS.

HARRY GRIFFITH — APPELLEE/CROSS-APPELLANT

APPEAL FROM THE CHANCERY COURT
OF MARION COUNTY, MISSISSIPPI

CROSS-APPELLANT'S REPLY BRIEF

T. Jackson Lyons
T. JACKSON LYONS & ASSOCIATES, P.A.
120 North Congress Street, Suite 620
Jackson, Mississippi 39201
Tel. (601) 969-0731
Fax (601) 969-0732
MSB # [redacted]
Counsel of Record to Harry Griffith

ARGUMENT IN REPLY

I. Neither Tom Griffith, nor the Chancellor, should be permitted to use Rule 15(b) to subvert the purposes of Rule 15(a).

Preliminarily, Harry believes that only two points should be emphasized on Reply: the trial judge's permitting a complaint to be amended at trial, and the question of whether a corporate opportunity was usurped.

To Tom's credit, he does not argue that he ever requested, under Rule 15(a), to be allowed to amend his complaint to include the claim that Harry had improperly taken advantage of a business opportunity that should have been presented to the Ray Griffith Company. Less creditworthy, Tom appears to throw himself on the mercy of the Court by arguing that his procedural default should be overlooked because there has been no prejudice to either party. (Cross-Appellee's Brief at 18) This assertion does not bear up under scrutiny. "Prejudice" is a term of legal art that covers a considerable territory.

Tom's argument seems to be that there was no "trial by ambush" on the corporate opportunity doctrine issue and therefore no "prejudice." This misses the point. There should have been no trial on the issue by ambush or otherwise absent a proper complaint stating the issue. It is hard to see how leave to amend a complaint can be freely given when there has been no request. Forced to defend against a complaint that was never validly filed is a good example of legal prejudice.

There is of course a difference between "prejudice" in a practical sense – for

example the admissibility of unfavorable facts – and prejudice in a legal sense. Legal prejudice generally refers to a party's encountering a disadvantage that has no basis in the evolved law that determines what is legally "fair." For example, Rule 402, Miss.R.Evid., generally defines the kind of evidence that is fair to present to the fact-finder as only that evidence that is "relevant." Rule 401 in turn identifies relevant evidence as any evidence tending to make a fact that is material to the case more likely or less likely than the fact would be absent such evidence. However even relevant evidence may be refused if its probative value is outweighed by the risk of legal prejudice.

In a recent case regarding the Rule 403 balancing test of probativeness vs. prejudice, the Supreme Court reviewed the testimony of an expert who spoke in a general manner about the relationship between regulators and the regulated. *E. I. DuPont De Nemours & Co. v. Strong*, No. 2006-CA-01005-SCT (Miss. October 18, 2007)(*en banc*). Interesting and relevant as such background information might be, the Court held that the evidence was more prejudicial than probative. *Id.* at ¶ 21. "Prejudice" was found in the use of the hypothetical generalization that large corporate entities can and do bring to bear a variety of influences on regulators who are almost always less well healed than the regulated entity. There was no evidence that DuPont had, in that particular case or in general, committed any such influence peddling. "There exists a real danger that the testimony would unfairly prejudice DuPont and mislead the jury with the accusations of *hypothetical* regulatory violations by DuPont." *Id.*

In this case, Rule 15(a) requires a party to request leave of the court to amend a complaint once an answer has been filed. The legal prejudice here is that Harry has been compelled to defend against a claim that was never properly authorized to be presented. Rule 15 requires seeking leave to present additional claims but it raises no significant barrier. Rather, if performs the function of a check and balance: the complainant need not present a "mini-trial" in order to show cause for the amendment, but the defending party is also offered the opportunity to bring to the court's attention any aspects of the proffered amendment that might prejudice the defending party.

Certainly there may be grounds in a proper case to overlook a procedural default such as the one present here. Waiver and estoppel come to mind. However, Harry objected in an amended answer to the filing of the amended complaint (V. 1: C.P. 119), and repeatedly objected during the hearing on the basis of their being no legitimate claim based on the corporate opportunity doctrine. (V. 3: T. 106, 109, *et seq.*) There has been no waiver of the issue here.

The Court should reverse the trial court's belated and unrequested allowance of the amended complaint.

II. The Ray Griffith Company, under the control of Tom Griffith, rejected the offered corporate opportunity of importing pecan picking devices because Tom had determined that the Ray Griffith Company was a manufacturer, not an importer.

Tom asserts that Harry began importing pecan pickers while Harry was still acting as an officer and director of the Ray Griffith Company ("RGC"). (Cross-

Appellee's brief at 19-20) This is not factually correct. On July 3, 2002, a temporary order was entered empowering the trustees of the two family trusts to hold an emergency meeting to replace Harry as President of RGC. (V. 1: C.P. 31) That meeting was held a few days later and Tom replaced Harry as President. (V. 1: C.P. 35-36) At the same meeting, new directors were elected, Steve Gray and John Harvey, the trustees of Ray's and Tom's trusts respectively. Harry remained a shareholder only after this date.

Harry did not undertake importing pecan gathering devices from China until after the lawsuit was filed. (V. 4: T. 193) Tom's assertion that Harry usurped a corporate opportunity while Harry was an officer and director – and the chancellor's similar finding – are not factually correct. Tom correctly points out, however, that it is the nature of most closely held businesses to be functionally partnerships. For this reason, shareholders of a enterprise like RGC are also in a confidential relationship. (Cross-Appellee's brief at 20, *citing Fought v. Morris*, 543 So.2d 167 (Miss. 1989))

Tom does not contest that he and Harry disagreed over importing pecan pickers. While Tom's and Harry's trusts hold the majority of shares in RGC, Harry and Tom were in practical control of RGC until Harry was forced out as an officer and director in July, 2002. Harry and Tom were deadlocked on the question of whether RGC should manufacture, import, or shift the company's primary focus to another business such as the powder coating operation. Harry advocated the latter two options, while Tom believed RGC should continue manufacturing.

Prior to Harry's ouster in mid-2002, he and Tom had become aware of the competition based on the "China price." RGC lost a large order two years before and they then learned details about a Mississippi-based importer. The opportunity to engage in importation was known to both Harry and Tom then. In his brief, Tom does not deny that he opposed joining the competition and transforming RGC from a manufacturer to a marketing company. Instead, Tom argues that there are no corporate minutes of RGC's having rejected the opportunity.

However, both brothers agree that they met frequently over the years to talk about RGC and its operations. That neither of them kept corporate records or insisted that they be kept is, between these insiders, an irregularity that can be waived. As is typical of close corporations, Harry and Tom held board meetings every time they met over coffee in the morning to talk about RGC. *See, Sire Plan, Inc. v. Mintzer*, 237 NYS 2d 123, 127 (New York Supreme Court 1963), *citing* 5 Fletcher, Cyclopedia of Corporations § 1999.

Historically, where corporate deadlock has occurred, for practical reasons the presidents of close corporations are generally held to have implied powers to continue the operations of the company. *See, Conlee Const. Co. v. Cay Const. Co.*, 221 So.2d 792, 796 (Fla.App. 4th Dist. 1969). However, following Harry's ouster and replacement on the board of directors, there was no deadlock. And Tom has remained steadfast in opposing importation as a means to salvage RGC.

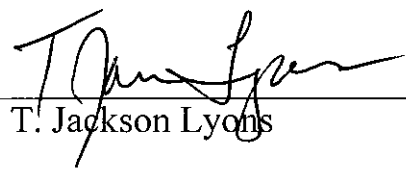
On one hand, Tom cannot deny that he has rejected the opportunity as not being in line with RGC's manufacturing business, and on the other he insists that

Harry cannot take up the opportunity Tom rejected on RGC's behalf. Tom should only be allowed to have it one way, not both.

The Court should reverse the judgments of the trial court.

Respectfully submitted

HARRY C. GRIFFITH

By: 
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Jackson, Mississippi 39201
Tel. (601) 969-0731
Fax (601) 969-0732
MSB [redacted]

CERTIFICATE OF SERVICE AND FILING

The undersigned counsel of record to Harry Griffith hereby certifies that the original and three copies of the above and foregoing Cross-Appellant's Reply Brief have been personally deposited by the undersigned into the United States mail, priority postage prepaid, to the Clerk of the Court, and that a true and correct copies have been deposited into the United States mail, first class postage prepaid, to the following addressees:

Hon. James H.C. Thomas
District 10 Chancellor
P.O. Box 807
Hattiesburg, Mississippi 39403-0807

Ms. Renee McBride Porter
Porter Law Firm
P O Box 982
Columbia, Mississippi 39429-0982

SO CERTIFIED, this the 27th day of February, 2007.