IN THE SUPREME COURT OF MISSISSIPPI

2008-CA-00620 E

VENNIT B. MATHIS, II — PLAINTIFF-APPELLANT

V.

ERA FRANCHISE SYSTEMS, INC., JACKIE R. HILL, PAMELA HILL, H. STUART IRBY, MARK WARREN, REAL ESTATE PROFESSIONALS OF CENTRAL MISSISSIPPI, LLC, AND REAL ESTATE PROFESSIONALS OF THE PINE BELT, LLC — DEFENDANTS-APPELLEES

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 resusal.

Real Estate Professionals, LLC ("REP") - This limited liability company was the springboard for other real estate companies involved in this derivative action and is the one entity for which any derivative action could be maintained; however, REP is not a party to this action. It has never been named as either a plaintiff or defendant in this litigation.

Vennit B. Mathis, II, appellant, is the plaintiff below, the alleged investor in and/or LLC member of REP who attempts to bring this derivative action as a direct action for personal gain.

Sam S. Thomas and Eddie J. Abdeen are attorneys for appellant Mr. Mathis.

ERA Franchise Systems, Inc., appellee, a defendant below, has engaged in franchises to each of the real estate companies involved in this action.

Cendant Corporation, Cendant Finance Holding Company, LLC, and Cendant Real Estate Services Group, LLC, are the ascendant corporate parents of ERA Franchise Systems, Inc.

Christophe A. Shapley, Robert L. Gibbs, Steven J. Allen and Joseph Anthony Sclafani, are attorneys for ERA Franchise Systems, Inc., appellee.

Mark Warren, appellee, defendant below, is a real estate agent and registered agent for Real Estate Professionals of Central Mississippi, LLC, appellee.

Real Estate Professionals of Central Mississippi, LLC, appellee, defendant below, was formed after Real Estate Professionals, LLC.

Rick Pratt is attorney for Mark Warren and Real Estate Professionals of Central Mississippi, LLC.

H. Stuart Irby, appellee, defendant below, is a realtor and registered agent for Real Estate Professionals of the Pine Belt, LLC, and, as set out in the complaint, a fifty percent member of Real Estate Professionals, LLC.

Real Estate Professionals of the Pine Belt, LLC, appellee, defendant below, is a real estate company formed after REP.

Dennis L. Horn, Shirley Payne, of Horn & Payne, PLLC, and Erik M. Lowery are attorneys for H. Stuart Irby and Real Estate Professionals of the Pine Belt, LLC.

Jackie R. ("Chip") Hill, appellee, defendant below, is a former member of REP currently in bankruptcy.

Pamela Hill, appellee, defendant below, is a former minority member of REP currently in bankruptcy.

Mr. and Mrs. Hill appear *pro se*.

Honorable Robert Evans, Covington County Circuit Court Judge, entered the judgment of dismissal below for lack of standing.

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STATEMENT OF THE ISSUES

1. Whether the Circuit Court was correct in concluding that Mathis lacks standing to pursue, in a direct action solely for his own benefit, and to the express exclusion of the LLC and its other members, claims that are derivative in nature and this are assets of the LLC?

2. Whether all of the claims against H. Stuart Irby and Real Estate Professionals of the Pine Belt, LLC, are derivative in nature?

3. Whether H. Stuart Irby and Real Estate Professionals of the Pine Belt, LLC, or any of the Defendants waived their objection to the standing of the plaintiff Mathis, or whether standing can be waived?

4. Whether Mathis waived his objections to the Defendants' arguments by failing to raise those objections below and by failing to support those arguments with cited authority on appeal?

5. Whether Mathis failed to comport his action to the substantive and procedural pre-suit notice and other requirements of the Limited Liability Company Act, established by that statute and in accordance with settled precedent from this Court?

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V.

ERA FRANCHISE SYSTEMS, INC.,
H. STUART IRBY, MARK WARREN,
REAL ESTATE PROFESSIONALS OF
CENTRAL MISSISSIPPI, LLC, AND
REAL ESTATE PROFESSIONALS OF
THE PINE BELT, LLC — DEFENDANTS-APPELLEES

APPEAL FROM THE CIRCUIT COURT OF COVINGTON COUNTY

BRIEF OF APPELLEES H. STUART IRBY AND REAL ESTATE PROFESSIONALS OF THE PINE BELT, LLC

STATEMENT OF THE CASE

NATURE OF THE CASE

This is an action applying the Limited Liability Company Act, § 79-29-1101, et seq., Miss. Code Ann.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This derivative action was filed without satisfaction of the pre-suit notice requirements of the Limited Liability Company Act,§ 79-29-1101, et seq., particularly Miss. Code Ann., §79-29-1102 Miss. Code Ann. (Supp. 1994). This fact is established. Brief of Appellant p. 13.

Necessary, court-ordered, delays have slowed the progress of this action, through no fault

of the parties. There was no waiver of the issue by any of the defendants. From the time the case was filed on May 8, 2003, until the motion to dismiss was filed on July 31, 2007, the case was stayed, appealed, transferred, and resumed. There was no trial and the case was not yet ready for trial. R. Vol. 8, p. 15 - 16. There was no trial by consent of the individual's claims under the derivative action. First, the case was stayed by a bankruptcy filing by the defendants Chip Hill and his wife. The other claims were removed to federal court. The case remained there until the bankruptcy court lifted its stay and the federal district court remanded the case to the Chancery Court of Covington County on April 23, 2004. R. Vol. 4, p.437 - 438; R. Vol. 3, p. 417. Then an issue was raised concerning transfer to circuit court, R. Vol. 3, p.419 - 428; R. Vol. 4, p. 429 - 430; R. Vol. 4, p. 519-520 (order denying transfer) which resulted in an interlocutory appeal to this Court, R. Vol. 4, p. 554. The interlocutory appeal was decided on July 14, 2006. R. Vol. 5, p. 601 - 621. On remand and transfer to circuit court, discovery ensued. Then the Defendant ERA filed its motion to dismiss for lack of standing on July 31, 2007. R. Vol. 6, p. 119 and the Defendant Appellee H. Stuart Irby and Real Estate Professionals of the Pine Belt joined in the motion to dismiss for lack of standing on August 23, 2007. RE of Irby and Pine Belt at 1, R.892-893. The Partial Judgment of Dismissal and Certification Pursuant to Rule 54(B) was entered on March 14, 2008. R. Vol. 7. P. 956 - 957. Notice of Appeal was filed on April10, 2008. R. Vol. 7, p. 960. No waiver is involved.

The Court below held that the Plaintiff lacked standing to pursue "any claims against any Defendant that are in the nature of derivative claims belonging to Real Estate Professional, LLC..." R. 956. "The Court further finds that the Court's ruling regarding Plaintiff's lack of standing fully disposes of all claims Plaintiff has asserted against any Defendant that are in the

nature of derivative claims..." Id. Finally, although designated as a Rule 54 (b) appeal, the Court further ordered, "that this is a Final Judgment of Dismissal as to any claims asserted by Plaintiff against all Defendant that are derivative in nature..." Id., at 957.

FACTS

Venit B. Mathis, II, joined in various financial exchanges orchestrated by Jackie "Chip" Hill, including loans, guaranties, and an investment of $68,000 in a partnership with Hill in Real Estate Professionals, LLC ("REP"), R. Vol. 6, p.807. Mathis claims these dealings give him not only claims against Hill, but also ownership in the real estate brokerage firm REP and equity interests against its successors, and employees or directors of those entities. Mathis asserts rights of the original limited liability company, Real Estate Professionals, LLC against the defendants, including H. Stuart Irby ("Irby") and Real Estate Professionals of the Pine Belt ("Pine Belt").

Section 79-29-1102 Miss. Code Ann. (Supp. 1994) requires that an individual member of a limited liability company such as REP must make a demand for the LLC to pursue the action on its own behalf before an individual member such as the Plaintiff Mathis could pursue these claims for himself. Mathis, Plaintiff-appellant, did not make any pre-suit demand as required by statute. This fact is not in dispute. See brief of Plaintiff-appellant at p. 13. Without satisfying this procedural prerequisite, the individual has no standing to proceed.

H. Stuart Irby was drawn into this litigation as a subsequent co-owner of Real Estate Professionals along with the Plaintiff, Vennit Mathis. The parties all admit that Irby was a member of REP. R. Vol. 6, p.725. H. Stuart Irby shares in any professed losses suffered by the LLC that are currently claimed by Mathis.

At the time Irby invested $200,000 to secure his share of Real Estate Professionals,

Mathis did not know him or did not know that Irby was involved. R. Vol. 6, p. 815 (p.238). There is no allegation that Irby had engaged in any wrongdoing with regard to Mathis or REP in gaining his interest in the LLC. Chip Hill had told Mathis that "he had a doctor interested in buying the company and that's why he was going to be able to come up with all the money [i.e., the $200,000]." Id. Meanwhile, Irby believed that his $200,000 had bought out Mathis's interest in REP. As he explained in his response to requests for admissions, "Irby's payment of $200,000, which was received by Mathis, bought-out Mathis's interest in REP, which occurred prior to Pinebelt's formation." R. Vol. 6, p. 725. Mathis admitted simultaneously that he did receive a check for $200,000. R. Vol. 6, p. 815 (p. 239).

Taking Mathis's allegations in his complaint as true, which allegations are otherwise disputed, Mathis and Irby were at all times 50% co-owners of Real Estate Professionals, LLC. Irby's connection to Mathis, unlike Hill's connections to Mathis, arise from his being a co-owner of the LLC. Any wrongs allegedly done to Mathis by Irby were within that co-owner relationship and are therefore actually harms to the LLC. Such harms, if proven to be true, were harms to the LLC and not personal to Mathis. As the statute itself reads, "A member has no interest in specific limited liability company property." §79-29-701 Miss. Code Ann. (Supp. 1994). The property rights involved belong to the LLC and not to Mathis.

All claims against H. Stuart Irby and Real Estate Professionals of the Pine Belt are derivative in nature. Only two (2) of the fourteen (14) counts pleaded in the complaint attempt to name Stuart Irby and/or Real Estate Professionals of the Pine Belt as active participants in any wrongdoing. Those two claims are, first, that Irby owed a fiduciary duty to Mathis as a member in REP, a closely held company. The second claim is that Irby, along with Hill, improperly

induced Mathis to pledge a $100,000 certificate of deposit as collateral for a loan. In all other respects Irby and REP of the Pine Belt are in the same position as the defendant appellee ERA. Irby therefor adopts[1] the brief of ERA in its entirety.[2]

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[1] "[U]nconnected parties, having a common interest centering in the point in issue in the cause, may unite in the same bill." *Comstock v. Rayford,* 9 Miss. 423, 438 (Miss. 1843). To the extent that ERA asserts that joinder in its motion below did not reach all issues in the complaint not addressed to it, Irby and Pine Belt would reply that joinder did raise all issues in the complaint as to all parties who joined. ERA's motion was put forward as a motion to dismiss for failure to state a claim. The motion did not segregate out any portions of the complaint. In Mathis's brief on this appeal the motion is called a motion to dismiss for failure to state a claim. The joinder of Irby and Pine Belt preserves all issues relevant to their position. The appellant Mathis did not assign as error the lower court's dismissal of Irby/Pine Belt's particular derivative claims because of the nature of Irby/Pine Belt's joinder. Mathis has not raised joinder as a procedural issue.

[2] Examining the complaint shows the claims are the following:

Count I - Declaratory Judgment

REP Pine Belt is alleged to be a corporate opportunity of REP. This claim is derivative of REP's cause of action.

Count II - Breach of Fiduciary Duties

The fiduciary duties claimed are alleged to belong to "Mathis and REP," ¶ 23 Complaint, and, as such, belong first to REP.

Count III - Joining in Breach of Fiduciary Duties

Same as above. The fiduciary duties claimed are alleged to belong to "Mathis and REP," ¶ 23 Complaint, and, as such, belong first to REP.

Count IV - Violation of Duty of Care, Duty of Loyalty, Duty of Fair Dealing and Usurpation of Corporate Opportunity.

The injuries alleged inure to REP, first, not Mathis. Those include the claimed damages from "Default on the contractual obligations of REP, including ones on which REP and Mathis were makers or guarantors, respectively, the lease obligations of REP,...Converting substantially all of the corporate assets of REP, Converting funds of REP, inducing real estate agents of REP to leave and work for others, loss of Mathis's loans and investment in REP, destruction of REP's business and the investment of Mathis in REP. These damages are all derivative in nature.

Count V - Tortious Interference with Contract

The interference is alleged to have occurred with the contractual relations of Mathis and/or REP. Again, these claims inure first to REP and are therefore derivative in nature.

Count VI - Interference with Prospective Business Advantage

The Defendants are alleged to have committed gross, reckless and/or intentional interference with the prospective business advantage of Mathis and/or REP. Again, no

Count XIV - Breach of Contract - Chip Hill and H. Stuart Irby

Count XIV is the only claim which names H. Stuart Irby as an active participant. It is alleged that Irby and Chip Hill induced Mathis to obtain loans for working capital for REP. As Mathis explained in an earlier brief filed by him, "...Mathis has also asserted claims for breach of contract against Defendant Chip Hill and Irby in relation to loans Mathis made to Hill and/or as a result of Mathis pledging a $100K CD as collateral for a loan that Hill and Irby represented the proceeds of which would be used as working capital for REP. (Count XIII and XIV - Record Excerpt 2/R.22-23.)." R.877. That is, the underlying debt for which Mathis pledged his certificate of deposit was a debt of the LLC, Real Estate Professionals. This claim is derivative of REP and Mathis cannot pursue it individually.

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direct benefit was secured to Mathis. This claim is derivative.

Count VII - Civil Conspiracy and/or Aiding and Abetting

This claim depends on there being other valid claims which Defendants could have conspired to commit. Inasmuch as the other claims are derivative, this claim also must be derivative.

Count VIII - Accounting

Mathis pleads that he is entitled to an accounting. Any accounting is due based upon the limited liability company act and is a right derivative of the limited liability company, here, REP.

Count IX - Constructive Trust

This claim is dependent on the claims of conspiracy or breach of fiduciary duty. A constructive trust is a remedy for such violations, and, as such, is an asset of the limited liability company, REP, not Mathis personally.

Count X - Breach of Contract to Convey Real Estate

This claim lies solely against the Defendant Chip Hill and does not involve either H. Stuart Irby or REP of the Pine Belt.

Count XI - Equitable Conversion

This claim is alleged against Chip Hill only.

Count XII - Breach of Contract - ERA

This claim is against ERA and not against H. Stuart Irby or REP of the Pine Belt.

Count XIII - Breach of Contract - Chip Hill

This claim is against Chip Hill and not against H. Stuart Irby or REP of the Pine Belt.

In short, the only claims which are, possibly, alleged to be independent of REP are the claims of Count XIII that Chip Hill obtained personal loans from Mathis, outside the operations of REP. These claims do not involve H. Stuart Irby or REP of the Pine Belt. All other claims are properly dismissed by the judgment below. The only claims that are not derivative are against the defendants Chip Hill and his wife. As Mathis argued below, "...without question, Your Honor. Mr. Mathis is seeking a personal recovery on claims that would otherwise belong to Real Estate Professionals. There's no question about that. We concede that point." R. Vol. 8, p. 7. There are no claims against H. Stuart Irby or Real Estate Professionals of the Pine Belt which are not derivative. The dismissal entered below deals with all remaining issues except those against the Hills. Therefore, the dismissal below finally dismisses all claims against H. Stuart Irby and Real Estate Professionals of the Pine Belt.

STANDARD OF REVIEW

The standard of review on whether a party has legal standing to sue is de novo. *Brown v. Mississippi Department of Human Services*, 806 S.2d 1004 (Miss. 2000); *The City of Picayune v. Southern Regional Corp.*, 916 So.2d 510 (Miss. 2005)(applying *Brown* to a claim for constructive trust). Equally, a motion granted under Rule 12(b)(6) is reviewed de novo. *Heartsouth, PLLC v. Boyd*, 865 So.2d 1095 (Miss. 2003).

SUMMARY OF ARGUMENT

The decision of the Circuit Court is correct that an individual is without standing to raise the claims belonging to the limited liability company of which he is a member when he has failed to satisfy the pre-suit notice requirements set out by statute, under the Limited Liability Company Act, § 79-29-1101, et seq., Miss. Code Ann.

ARGUMENT

1. THE DECISION OF THE CIRCUIT COURT CORRECTLY APPLIES SETTLED LAW UNDER THE LIMITED LIABILITY COMPANY ACT.

The decision of the circuit court below correctly applies settled law on standing to sue under The Limited Liability Company Act and should be affirmed. The Limited Liability Company Act prevents an individual member of a limited liability company from suing for personal gain when the obligations he seeks to enforce belong to the LLC as a separate legal entity. In such a situation, as in this case on appeal, the action is a derivative action. The injury was suffered by REP when, allegedly, all of its assets were transferred to the Defendants, including Irby and REP of the Pine Belt. Plaintiff Mathis's purported right to receive payments from these defendants was not an obligation owed independently to him by defendants, but instead was entirely contingent upon their receipt of the limited liability company's assets. Similarly, the injury inflicted when the defendants failed to make payments was not felt by Mathis alone but was shared by the LLC, which allegedly lost all its assets without receiving anything in return. Mathis in his individual capacity is not entitled to receive damages for lost profits on the company's behalf. *Griffith v. Griffith*, 2008 Miss. App. LEXIS 715, * 11 (Miss. Ct. App. Dec. 2, 2008)

2. MATHIS DOES NOT HAVE STANDING TO PURSUE THIS ACTION.

This case is before the Court on appeal from dismissal for lack of standing for the Plaintiff, Vennit Mathis, to pursue a derivative action without satisfying the procedural

prerequisites set out in the Limited Liability Company Act. Against this decision, the Plaintiff appeals on essentially two grounds. First, he says the appellees have waived their argument on standing by not having presented it earlier in the litigation. This argument runs against the settled law that standing is a jurisdictional issue that may be raised at any time, (even by the court on its own motion when a case is on appeal). The history of this litigation also demonstrates that there can be no waiver here. Second, the Plaintiff tries to reprieve his argument that the procedural requirements of the LLC Act should be disregarded under the present facts. This Court has previously reviewed, and rejected this argument.

Previous decisions from this Court hold there is no standing for Mathis to bring this action. *Longanecker v. Diamondhead Country Club,* 760 So.2d 764 (Miss. 2000) and *Speetjens v. Malaco, Inc.* 929 So.2d 303 (Miss. 2006) held there was no standing for individuals to pursue a derivative action. *Blanton v. Prins,* 938 So.2d 847 (Miss. Ct. App. 2005) held that a plaintiff did not have standing because of his failure to give notice to the LLC. The prior decision on the interlocutory appeal in the instant action held that the action had to be transferred to circuit court because it was essentially derivative in nature. *Era Franchise Systems, Inc. v. Vennit B. Mathis, II,* 931 So. 2d 1278 (Miss. 2006). All theses decisions require affirmance on this appeal.

Cases from other jurisdictions require dismissal for lack of standing of individual LLC members, *Feldman v. Cutaia,* 951 A.2d 727 (Del. 2008)(no standing where claims solely derivative in nature); and see, *Domino's Pizza, Inc. v. McDonald,* 546 U.S. 470 (2006)(owner lacked standing in a 42 U.S.C. §1981 federal of contract claim where there were no injuries to him distinct from the injuries to the business).

3. THERE IS NO STANDING FOR AN INDIVIDUAL TO ASSERT THE CLAIMS OF THE COMPANY.

"The doctrine of standing provides that a suit to enforce corporate rights or to redress or prevent injury to a corporation, whether arising from contract or tort, ordinarily must be brought in the name of the corporation and not that of a stockholder, officer, or employee." *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 474, 666 N.W.2d 271 (2003). Mathis is seeking to assert claims arising under contract and tort that belong to REP. Under these circumstances, "any injury the Plaintiff may have suffered as a consequence of the damage done to his corporation[] is derivative," and does not give rise to an individual cause of action. *B. & V. Distributing Co., Inc. v. Dottore Companies, LLC*, 278 Fed. Appx. 480, 2008 U.S. App. LEXIS 10725 (6th Cir. 2008), citing *Malouf v. BT Commercial,* 261 Fed. Appx. 887, 2008 U.S. App. LEXIS2376, 2008 WL244552, at 83 (6th Cir. 2008); see also *Adair v. Wozniak,* 492 N.E. 2d 426, at 428 (S.Ct. Ohio 1986)(distinguishing between an injury independently suffered by an individual shareholder and "an injury which indirectly affects the shareholders or affects them as a whole"); *Canderm Pharmacal v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 603 (6th Cir. 1988)(explaining that the "corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, ...has a right to recover[]" for injuries to its business or property, "even though in an economic sense real harm may well be sustained" by such individuals in the form of reduced earnings, lower salaries [or] bonuses, injury to general business reputation, or diminution in the value of ownership" *B. & V., supra* at **16 - 17.

For the Plaintiff's claims for breach of fiduciary duty, declaratory judgment, and constructive trust, any recovery would inure in the first instance to the benefit of the limited

liability company, not the Plaintiff Mathis. *Polak v. Kobayashi*, 2008 U.S.Dist. LEXIS 92254 (D.Del. Nov. 13, 2008). A claim for a breach of fiduciary duty or breach of duty of fair dealing is a duty owed to the company, and only derivatively owed to a shareholder. *Hall v. Dillard*, 739 So.2d 383, 386, P12 (Ct.App. Miss. 1999). A derivative action is an asset of a corporation that the corporation deals with as any other corporate asset. Id. A derivative action may be brought for the benefit of a shareholder where the defendant officer or director used his position improperly to obtain a benefit for himself as a shareholder to the exclusion or other shareholders similarly situated. Id. The *Hall v. Dillard* case cited *Derouen*[3], but ruled that the requirements for a derivative action must be met, even if a director or officer had engaged in alleged misconduct. Even if the alleged wrongdoer continued to act for the company and would at the same time stand to recover through the company on the derivative claim against himself the procedural .[4] Therefore, where the claims are derivative, as all are involving Irby, the requirements of pre-suit notice set out in the limited liability company act must be met and the position of a director as a member of the LLC is not an exception to this statutory requirement.

In *The Guides, Ltd, a Colorado limited liability company d/b/a The Africa House and Foote, individually v. The Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002), the court dismissed the plaintiff's claims for lack of standing on two claims of injury to herself. The Plaintiff claimed she suffered emotional distress to herself and losses as a guarantor, both as a result of the defendant's actions. She was held to have standing on neither

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[3] *Derouen v. Murray*, 604 So.2d 1086 (Miss. 1992).

[4] *Hall v. Dillard, supra*, at 836, P13, suggests that the court must then construct the appropriate procedure under the authority vested in it under Rule 16.

claim. As to the emotional distress, the court held: "However, this distress arose from the failure of the defendants to contract with or lease to Africa House and was a product of the economic damages which were suffered by the corporation. [The plaintiff] Foote suffered no violation of her contract rights or right to lease that was in any way different from the violations claimed by Africa House. Her claim is derivative of that of Africa House and she does not have standing to sue on her own behalf." *Id.*, at 1072-1073. As to the losses suffered as guarantor, the court held: "...we reject the premise that a stockholder's status as a guarantor gives the stockholder status to assert an individual claim against a third party where that harm is derivative of that suffered by the corporation. [Cites omitted.] Foote's status as a guarantor of the previous lease is of no significance to her claim that the defendants refused to contract or lease to her corporation." Id., at 1073. Mathis is also making claims as a guarantor and claims for personal losses which are all derivative and must therefore be dismissed.

4. STANDING MAY BE CHALLENGED AT ANY TIME AND THAT ARGUMENT HAS NOT BEEN WAIVED.

The court must analyze standing first because it is the threshold issue, and a matter of jurisdiction. *Spain v. EMC Mortgage Co.*, 2008 U.S.Dist. LEXIS 21436 (D. Az. March 18, 2008). As briefed by ERA, standing may be raised at any time. "Standing is a jurisdictional issue which may be raised by any party or the court at any time, 'even by the appellate courts for the first time on appeal.'" *Kirk v. Pope*, 973 So.2d 981, 988, P22 (Miss. 2007). It is not subject to waiver. Even if standing were brought into the realm of affirmative defenses that may be waived, Mathis has not made a showing of waiver on this procedurally complex record. There

was no unnecessary delay functioning as a waiver of the standing issue. Irby and Pine Belt adopt the arguments advanced by ERA.

Not only can standing can be raised at any time, it was raised by the answers filed below and it was raised by motion joined by all defendants. Again, there is no waiver. Irby pleaded failure to state a claim upon which relief could be granted R.80, and joined in the motion to dismiss for lack of standing. R. 892 - 893, RE for Irby and Pine Belt, 1. *Tooley v. Donaldson, Lufkin, & Jenrette, Inc., et al.*, 845 A.2d 1031 (Del. 2004)(dismissal with prejudice for failure to state a claim, action was solely derivative). Further, Mathis waived his appeal on the standing argument by not asserting that argument below. On this issue as well, Irby and Pine Belt adopt the arguments put forward by ERA.

Additionally, appellant Mathis, citing no authority, merely points out that Irby/Pine Belt did not mention "standing" in their 12(b)(6) defense. Brief of Appellant, p. 3. The nature of the pleading is not addressed as error. Citing no authority does not preserve an issue for appeal. *Ferrell v. River City Roofing*, 912 So.2d 448, 456, P24 (Miss. 2005).

When this case was previously before this Court on an interlocutory appeal, the Court held that Mathis had pleaded a direct, personal action, rather than a derivative action, See, *Griffith v. Griffith*, 2008 Miss. App. LEXIS 715 (Miss. Ct. App. Dec. 2, 2008)(duty owed to the corporation, action is derivative, distinguishing *ERA Franchise Sys. v. Mathis, supra*, based on lack of prejudice to other interested parties). In its earlier consideration of the present case by this Court, its opinion held: "Mathis is asserting his own personal claims, in addition to the derivative claims of REP, in a direct action that may benefit him alone, to the exclusion of the other equity owner in REP. Based on these facts, we must conclude that, as to the derivative

claims through which Mathis seeks compensatory and punitive damages, he is pursuing a direct legal action rather than a true shareholder's derivative action."[5] *Era Franchise Systems, Inc. v. Vennit B. Mathis, II, supra*, at 1282, P11 (Miss. 2006). This holding is law of the case and controls in the present analysis on the questions, numbered 2, 3, and 4, of this appeal. *Holcomb v. McClure*, 217 Miss. 617, 64 So.2d 689 (Miss. 1953).

Basically, in the present appeal, Mathis concedes, in issues 2, 3 and 4, and throughout his brief, that many of his causes of action are derivative in nature. He re-argues his position that he is entitled to pursue a derivative action as a direct action without satisfying the procedural prerequisites set out by statute, that he may enjoy purely personal gain from such an action, and that not all of his claims are derivative of the claims of Real Estate Professionals LLC ("REP).

Mathis himself is procedurally barred from raising his waiver arguments for the first time

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The reasoning behind this Court's earlier ruling was explained, "P10. ERA challenges Mathis's assertion that this is a derivative action. ERA notes that Mathis has made no attempt to comply with prerequisites for bringing a derivative action in Mississippi; n3 he has brought REP's derivative claims as a direct action; and he seeks an individual recovery on REP's claims. ERA argues that because Mathis is seeking only an individual recovery in this action, he is clearly not asserting these claims for the benefit of REP, the business entity. ERA further argues that even if *Derouen* can be read as allowing a shareholder to bring derivative claims in a direct action, it should not be read as allowing a shareholder in a closely-held corporation to bring a direct action, solely for his own benefit, and maintain the suit under the guise of being a shareholder's derivative suit. We note that in the *Derouen* case, Derouen was merely seeking to recover from Murray, as a dividend, his fifty-percent interest in proceeds that should have gone to the business rather than Murray himself, *Id. at 1089-90*, yet Mathis seeks to exclude Irby, the other equity member of REP, from sharing in any recovery." *Id.*, at 1281-1282.

----------Footnotes----------

n3 The prerequisites for bringing a derivative action under the Mississippi Limited Liability Company Act are found in *Miss. Code Ann. §§ 79-29-1101 to -1104.*

on this appeal. Irby/Pine Belt adopts the arguments briefed by ERA at pp. 12 - 14 of its brief.

5. THE PREREQUISITES TO A DERIVATIVE ACTION ARE NOT MET.

Mississippi Code Section 79-29-920 (Supp. 2001) provides: "A member or an employee of a domestic or foreign professional limited liability company is not liable, however, for the conduct of other members or employees of the limited liability company, except a person under his direct supervision and control.... " Therefore, the plaintiff in a case against an individual member of an professional LLC has the duty to show that the defendant either personally participated in a negligent or wrongful act or directly supervised someone who committed wrongful conduct. *Keszenheimer v. Boyd*, 897 So.2d 190, 193 (Miss. Ct. App. 2004). There has been no pleading or showing of any nature that H. Stuart Irby has any such personal liability. This test reiterates the test that there be some independent duty owed the plaintiff other than a duty owed to the LLC as a whole. The only actions stated against Irby and Pine Belt are not independent of REP, are derivative in nature only, and cannot give rise to liability owed directly to Mathis.

6. THE STATUTE REQUIRES NOTICE CONDITIONS PRECEDENT BE SATISFIED.

Section 79-29-1102 Miss. Code Ann. (Supp. 1994) requires notice. Mathis admits this notice requirement has not been satisfied. §79-29-1102 states: "No member may commence a derivative proceeding until: (a) A written demand has been made upon the limited liability company to take suitable action; and (b) Ninety (90) days have expired from the date the demand was made..."

Longanecker v. Diamondhead Country Club, 760 So.2d 764 (Miss. 2000) affirmed the decision of the court below which had dismissed the action for failure to satisfy the pre-suit notice requirements of the statute. Similarly, *Blanton v. Prins,* 938 So.2d 847 (Miss. 2005) held that the notice requirement could not be waived or otherwise satisfied

Section 79-29-1101 Miss. Code Ann. (1994) plainly requires that "A member may not commence or maintain a derivative proceeding unless the member: ...(b) fairly and adequately represents the interests of the limited liability company in enforcing the rights of the limited liability company."

Other jurisdictions also require strict compliance. E.g., *Law v. Harvey*, 2007 U.S.Dist. LEXIS 78398 (N.D.Ca. Oct. 11, 2007) the court dismissed the plaintiff's claims that were actually derivative for failure to comply with the procedural requirements of bringing a derivative action. Specifically, the plaintiff in *Law v. Harvey* had claimed, among other things, unfair competition, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing, conversion and negligence, all of which were held by the court to be derivative claims. The same smorgasbord of claims was put forth by Mathis, and all his claims are also derivative in nature. The plaintiff, Law, had also asserted that the claims were not derivative because the injury was either personal to him or because he alleges alternate theories of ownership. These claims were rejected by the court. Its reasoning was,

> "A cause of action is individual, not derivative, only where it appears that the injury resulted from the violation of some special duty owed the stockholder by the wrongdoer and having its origins in circumstances independent of the plaintiff's status as a shareholder. (Cite omitted.)"

Id., at * 18 - 19, and *Feldman v. Cutaia*, 951 A.2d 727, 732 (S.Ct. Del. 2008)(claimed direct

injury must be independent of any alleged injury to the company). Mathis does not allege that there was a special duty owed him by Irby or Pine Belt independent of his status as a member of the LLC.

The court in *Law v.Harvey* also rejected the plaintiff's arguments that he was entitled to recovery for breach of fiduciary duty. That duty also belonged to the corporate entity. These same claims are the ones Mathis alleges against Irby individually. Mathis's claims against Irby and Pine Belt are also entirely derivative.

In *Spain v. EMC Mortgage Co.*, 2008 U.S.Dist. LEXIS 21436 (D. Az. March 18, 2008) the court also held that the plaintiff had no standing because he had alleged injury to a corporation or LLC only and not "either ... an injury distinct from injuries to other shareholders, or a special duty between [the plaintiff] and the defendant[s]. Since the plaintiff had failed to allege injury in fact, or any causal connection between the plaintiff's claimed injury and the defendant[s'] conduct," his claims were dismissed.

Interestingly, two sets of defendants in *Spain v. EMC Mortgage Co.* had omitted to move for dismissal based on lack of standing. Nevertheless, the court dismissed the claims against them on the same grounds because, it held, "this court has 'both the power and the duty to raise the adequacy of [a plaintiff's standing] sua sponte,' it will do so regardless of the fact that the Ruyle defendants and Mr. Huston are not asserting lack of standing." Id., at * 23. There is therefore no legal basis to Mathis's argument of the defendants' waiver of the standing issue. Irby and Pine Belt fully adopt the brief of ERA on these issues.

7. *DEROUEN* OR THE "CLOSELY-HELD CORPORATION DIRECT ACTION

DOCTRINE," DOES NOT APPLY HERE.

This Court has already distinguished the present case from *Derouen.* In the decision on interlocutory appeal, the Court stated, " However, unlike the plaintiff in *Derouen*, who merely sought his fair share of the proceeds owed to the corporation, Mathis is asserting his own personal claims, in addition to the derivative claims of REP, in a direct action that may benefit him alone, to the exclusion of the other equity owner in REP." *Mathis v. ERA, supra*, at P 11. That other equity owner is the present defendant-appellee, Stuart Irby. Because Irby is a member of REP, his presence makes it impossible for Mathis to meet the three requisites set forth in the footnote to Derouen. Those three are: "In the case of a closely held corporation. . ., the [chancery] court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (I) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons." *Derouen* at 1091, n. 2.

As appellee ERA points out, Mathis has failed to meet his burden to show there is not a risk of multiplicity of actions and has failed to show that the interests of creditors would not be prejudiced. Mathis explicitly denies his obligation to make a fair distribution of recovery between himself and Irby, even where he has not framed his pleadings to seek only his 50% interest, contrary to the remedy sought in Derouen where only the plaintiff's proportionate share was sought.

Derouen was a case where the individual action had been tried by implied consent.

Holloway v. Dane, 316 B.R. 876, 881 (S.D. Miss. 2004) citing *Derouen* at 1090. It does not apply to the present situation where all defendants have joined in the objection to Mathis's individual standing.

8. REP IS A NECESSARY PARTY UNDER RULE 19.

Real Estate Professionals, LLC, is not a named party to this litigation. It is not mentioned as either a plaintiff or a defendant in the complaint. At the very least REP is a necessary and indispensable party. *Bartfield v. Murphy*, 578 F.Supp.2d 638 (S.D.N.Y. 2008). Without joinder of this necessary party, this case cannot proceed and must, also, be dismissed under Rule 19 of the Mississippi Rules of Civil Procedure. Failure to join necessary parties may be raised on appeal and by the appellate court sua sponte. *Board of Education v. Warner*, 853 So.2d 1159 (Miss. 2003).

The Plaintiff addressed this issue below at oral argument before the Circuit Court. "Mr. Mathis, for example, has not named Real Estate Professionals as a nominal defendant like you would do if we were pursuing a derivative action. You know, we haven't purported to file a derivative action and then say that the statutory requirements ought to be waived..." R. Vol. 8, p. 8. As the Circuit Court correctly pointed out, the fact that some of the parties being sued might benefit from the judgment was not an exception to the requirements for a derivative action being met. Id., p. 8 - 9. This fact, established by Mathis himself in the proceedings below, also mandates dismissal of his claims.

9. THIS COURT HAS NOT EXTENDED THE LIMITED LIABILITY COMPANY ACT

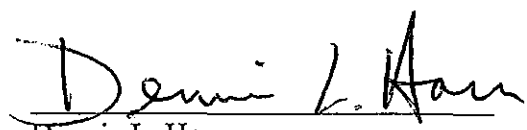
BEYOND ITS TERMS TO ALLOW DIRECT ACTIONS BY LLC MEMBERS WITHOUT STATUTORY AUTHORITY.

The Mississippi Supreme Court has not been willing to extend the limited liability company act beyond its express terms without authorization from the Legislature. For example, in *Champluvier v. State*, 942 So.2d 145, 153 (Miss. 2006), the Court refused to extend criminal accountability for embezzlement to an LLC because such a business was neither an "incorporated company" nor a "private person" under the embezzlement statute, even though limited liability companies are "artificial persons." Even if Mississippi had adopted the closely held corporation direct action doctrine, which it has not, the language of the footnote in *Derouen v. Murray*, 604 So.2d 1086, 1091, n.2 (Miss. 1992) applies expressly to closely held corporations, not to LLC's. Therefore, the court should not extrapolate from direct actions by shareholders of corporations to direct actions against LLC's, without statutory authority.

CONCLUSION

The decision of the Circuit Court of Covington County below must be affirmed and this action dismissed in its entirety against H. Stuart Irby and Real Estate Professionals of the Pine Belt, LLC.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis L. Horn, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellees H. Stuart Irby and Real Estate Professionals of the Pine Belt, LLC, via United States Mail, postage pre-paid, to the following:

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