

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

**NO. 2008-TS-00832**

**J. CRISS BUILDER, INC. AND  
JANIE CRISS, INDIVIDUALLY**

**APPELLANTS**

**VS.**

**WILLIAM P. WHITE AND  
PATRICIA L. WHITE**

**APPELLEES**

Appeal from the Circuit Court of Madison County, Mississippi

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**BRIEF OF APPELLANT**

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**ORAL ARGUMENT NOT REQUESTED**

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**ATTORNEY FOR APPELLANTS**

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**VS.**

**WILLIAM P. WHITE AND  
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**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 or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. J. Criss Builder, Inc., Appellant
2. Janie Criss, Individually, Appellant
3. William P. White, Appellee
4. Patricia L. White, Appellee
5. Honorable Samac S. Richardson
6. Paul E. Rogers, Esquire
7. John W. Christopher, Esquire

Respectfully Submitted,



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### **STATEMENT OF ISSUES**

- I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THIS CAUSE BASED UPON MISSISSIPPI CODE ANNOTATED § 15-1-41.
- II. THE TRIAL COURT ERRED IN ITS REFUSAL TO DISMISS JANIE CRISS, INDIVIDUALLY, FROM THIS LAWSUIT.
- III. THE TRIAL COURT ERRED IN GRANTING AN ADDITUR.

## **STATEMENT OF THE CASE**

### **COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

On February 12, 2003, Appellees filed their Complaint against Appellants and Bailey Engineering & Land Surveying, LLC alleging breach of warranties, negligence, failure to disclose and negligence of Bailey Engineering & Land Surveying, LLC. (R. 6). Appellants filed their Answer and Defenses to the complaint on March 27, 2003. (R. 12). Thereafter, Bailey Engineering & Land Surveying, LLC filed its Affirmative Defenses, Answer and Cross-Claim on April 25, 2003. (R. 22).

Appellants filed their Motion for Summary Judgment on October 11, 2004. (R. 54). Bailey Engineering & Land Surveying, LLC filed its Motion for Summary Judgment on November 8, 2004. (R. 90). Thereafter, Appellees filed their response to the Motion for Summary Judgment filed by Appellants on November 16, 2004. (R. 127). On January 24, 2005, Judgment Dismissing Bailey Engineering & Land Surveying, LLC was entered. (R. 145). The trial court denied Appellants Motion for Summary Judgment by Order Denying Motion for Summary Judgment on June 21, 2007. (R. 275, RE. 7-8).

Appellees filed their First Amended Complaint on April 24, 2007. (R. 265). Thereafter, Appellants filed their Answer to Plaintiffs' First Amended Complaint on May 1, 2007. (R. 271). Trial of this case was concluded on February 28, 2008. (R. 469). The jury rendered a verdict in favor of Appellees in the amount of \$30,000.00. (R. 467). The Court entered its judgment upon the jury's verdict herein on March 24, 2008. (R. 328, RE. 15).

On March 26, 2008, Appellants filed their Motion for Entry of Judgment Non Obstante Veredicto. (R. 330). On May 5, 2008, the trial court entered its Order which denied Appellants' Motion for Entry of Judgment Non Obstante Veredicto. (R. 340, RE. 18).

On April 1, 2008, Appellees filed Plaintiffs' Motion for Additur or in the Alternative a New Trial on Damages. (R. 334). Appellants filed their response to Appellees' Motion for an Additur or in the Alternative a New Trial on Damages on April 10, 2008. (R. 337). Thereafter, on April 22, 2008, without a hearing thereon, the trial court entered its Order Granting Additur and thereby granted Appellees an additur in the amount of \$103,701.82. (R. 339, RE. 17).

### **STATEMENT OF FACTS**

On or about July 30, 1996, J. Criss Builder, Inc. purchased Lot 37, Whisper Lake Estates of Annandale, Part 4 (R. 240-42, RE. 19-44) from Annandale Properties, LP and shortly thereafter applied for and received a building permit thereon. (R. 249, RE. 19-44). On or about November 23, 1996, J. Criss Builder, Inc. requested and received a final inspection of the residence constructed on Lot 37, Whisper Lake Estates of Annandale, Part 4 by the Madison County Building Inspector. (R. 258, RE. 19-44).

On November 21, 1996, J. Criss Builder, Inc. conveyed Lot 37, Whisper Lake Estates of Annandale, Part 4 to Janie Criss in her individual capacity by Warranty Deed. (R. 250, RE. 19-44). Commencing on November 23, 1996, Janie Criss occupied the residence at issue herein as her personal residence (Transcript 366-67) and applied for homestead exemption with the Madison County Tax Assessor for the year 1997. (R. 261, RE. 19-44).

On or about February 17, 1997, Janie Criss conveyed Lot 37, Whisper Lake Estates of Annandale, Part 4 and improvements situated thereon to Appellees. (R. 259-60, RE. 19-44).

Thereafter, on February 12, 2003, Appellees filed their Complaint against Appellants and Bailey Engineering & Land Surveying, LLC seeking compensation for damages to the structure on Lot 37, Whisper Lake Estates of Annandale, Part 4. (R. 6-11).

### **STANDARD OF REVIEW**

This Court reviews issues of law *de novo*. *Cook v. Children's Med. Group, P.A.*, 756 So.2d 734, 739 (Miss. 1999). The standard of review for the denial of a motion for judgment notwithstanding the verdict and a motion for directed verdict are identical. *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1083 (Miss. 2000). "This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence." *General Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 268 (Miss. 1999). If the facts are so overwhelmingly in favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, this Court must reverse and render. *Id.* On the other hand, if substantial evidence exists in support of the verdict, that is, "evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions," then this Court must affirm. *Id.*

This Court reviews a trial court's ruling on a motion for additur for abuse of discretion. *Teasley v. Buford*, 876 So.2d 1070, 1075 (Miss.Ct.App. 2004). Because damage awards are within the traditional domain of the jury, the appeals court will affirm an additur only with great caution and only when the jury award is "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rogers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945 (Miss. 1992).



## ARGUMENT

### **I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THIS CASE BASED UPON MISSISSIPPI CODE ANNOTATED § 15-1-41.**

The trial court erred by failing to dismiss this case based upon the applicable statute of repose being Mississippi Code Annotated § 15-1-41. Most of the facts which support this conclusion are set forth in the Parties' Stipulation of Facts and Documents. (R. 236-61, RE. 19-44). The remaining facts which support this conclusion are in the record and were not disputed nor contested by Appellees. On or about November 21, 1996, J. Criss Builder, Inc. conveyed Lot 37, Wisper Lake Estates of Annandale, Part 4 to Janie Criss in her individual capacity. (R. 250-251, RE. 19-44). On or about November 23, 1996, Janie Criss moved into the residence on Lot 37, Wisper Lake Estates of Annandale, Part 4 and began occupying said residence as her personal home. (Transcript 366-67). Janie Criss filed for homestead exemption with the Madison County Tax Assessor on Lot 37, Whisper Lakes Estates of Annandale, Part 4 for the year 1997. (R. 261, RE. 19-44). It is undisputed in the record, that Janie Criss began occupying the residence on November 23, 1996.

Mississippi Code Annotated § 15-1-41 states, in pertinent part that:

No action may be brought to recover damages for injury to property, real or personal, or for an injury to the person, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, . . . against any person, firm or corporation performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever occurs first, of such improvement by the owner thereof.

All evidence submitted at trial proves that Janie Criss began to occupy the subject residence on or about November 23, 1996; at that time was "the owner thereof"; was occupying said residence as her personal residence with no intent to sell said residence; and on which Janie Criss filed for

homestead exemption for the year of 1997. Suit was not commenced until February 12, 2003, which was outside the six year period of repose provided by Mississippi Code Annotated § 15-1-41. Accordingly, Appellants' Motion for Summary Judgment, Motion for Directed Verdict and subsequent Motion for Entry of Judgment Non Obstante Veredicto were erroneously denied by the trial court.

At trial, Appellees *presented no evidence* to contradict Janie Criss' testimony or other evidence which proves Janie Criss was living in the house as her residence and was the owner thereof *more than six (6) years* before suit was filed. There is no law construing Mississippi Code Annotated § 15-1-41 which provides a contrary result. Accordingly, this Court should reverse and render the decisions of the trial court denying Appellants' Motion for Summary Judgment, Motion for Directed Verdict and subsequent Motion for Entry of Judgment Non Obstante Veredicto.

**II. THE TRIAL COURT ERRED IN ITS REFUSAL TO DISMISS JANIE CRISS, INDIVIDUALLY, FROM THIS LAWSUIT.**

The trial court erred by failing to dismiss Janie Criss, individually, from the lawsuit herein. On or about July 30, 1996, Annandale Properties, LP conveyed Lot 37, Whisper Lake Estates of Annandale, Part 4 to J. Criss Builder, Inc. (R. 240-42, RE. 19-44). On or about July 30, 1996, J. Criss Builder, Inc. executed a Construction Deed of Trust for the benefit of Union Planters Bank of Central Mississippi whereby J. Criss Builder, Inc. obtained a construction loan secured by Lot 37, Whisper Lake Estates of Annandale, Part 4 for the purpose of construction of a residential dwelling thereon. (R. 243-48, RE. 19-44). On or about August 12, 1996, J. Criss Builder, Inc. was granted a building permit by Madison County, Mississippi which granted J. Criss Builder, Inc. authority to erect a residence on Lot 37, Whisper Lake Estates of Annandale, Part 4. (R. 249, RE. 19-44).

Nothing was entered into evidence at the trial of this matter whereby Janie Criss may be held individually liable for the alleged faulty construction of the residence at issue. In fact, there was sufficient testimony along with reasonable inferences to be drawn therefrom to support a finding that Janie Criss could not be held personally liable for the alleged faulty construction, pursuant to the authority of *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044 (Miss. 1989). Appellees did not even attempt to offer evidence to pierce the corporate veil and hold Janie Criss liable in her individual capacity.

The Mississippi Supreme Court has stated: “to cause a court to disregard the corporate entity and justify shareholder liability, the complaining party must demonstrate: (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. *Id.* at 1047.

Appellees failed to submit any evidence that would allow Janie Criss as a shareholder of J. Criss Builder, Inc. to be held liable for the actions of J. Criss Builder, Inc. Appellees were on constructive, if not actual notice, of the builder of the subject home herein and at no time presented evidence that J. Criss Builder, Inc. was not the builder of the home, thereby frustrating appellees’ contractual expectations regarding the party to whom they looked to for performance. No evidence was submitted whereby Janie Criss, as sole shareholder of J. Criss Builder, Inc., engaged in flagrant disregard of corporate formalities. Furthermore, no evidence was submitted which demonstrated a fraud or other equivalent misfeasance on the part of Janie Criss.

To present a jury issue on a demand that the corporate veil be pierced, a party must present some credible evidence on each of the three points enumerated in *Gray v. Edgewater Landing, Inc.*,

541 So. 2d 1044, 1047 (Miss. 1989). Applying these requirements to this case, Appellees failed to offer proof sufficient to create a jury issue on any of these three requisites. First, Appellees could have taken any number of available steps to become aware, if they were not previously, that the home in question was built by J. Criss Builder, Inc., not Janie Criss in her personal capacity. Second, Appellees offered no proof that corporate formalities were not followed by J. Criss Builder, Inc. Indeed, the evidence suggest the contrary, that formalities were at all times adhered to. Third, Appellees put forth no proof that Janie Criss as shareholder of J. Criss Builder, Inc. perpetrated any fraud upon them.

In 2007, the Mississippi Supreme Court again considered the actions that would be required to allow one to pierce the corporate veil in a residential construction context and reiterated the *Gray v. Edgewater Landing, Inc.* requirements. *Rosson v. McFarland*, 962 So.2d 1279, 1285 (Miss. 2007) mirrors the case at bar in that a builder was the sole shareholder and employee in a corporate entity which constructed residential dwellings. The Mississippi Supreme Court stated: “sole ownership of a corporation by one person or another corporation is not a factor, and neither is the fact that the sole owner uses and controls it to promote his ends.” *Id.* at 1286. There is no applicable Mississippi law which would compel this Court to allow the judgment of the trial court to stand as to Janie Criss, individually.

### **III. THE TRIAL COURT ERRED IN GRANTING AN ADDITUR.**

Statutory authority exists for the granting of an additur. Mississippi Code Annotated § 11-1-55 provides as follows:

The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the

damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

Appellants filed their Response to Appellees' Motion for an Additur or in the Alternative a New Trial on Damages within which they prayed said motion be denied. (R. 338). The trial court granted Appellees an additur in the amount of \$103,701.82 without a hearing thereon or any findings as required pursuant to Mississippi Code Annotated § 11-1-55. (R. 339, RE. 17). The order granting additur makes no finding that the verdict was influenced by bias, prejudice or passion, or that the verdict was contrary to the overwhelming weight of the credible evidence, or that damages were excessive or inadequate.

Numerous cases have been decided which interpret and construe the requirements for an additur. Because damage awards are within the traditional domain of the jury, an additur will only be ordered with great caution, when the jury award is "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945 (Miss. 1992). The trial court did not enter its additur in this matter in accordance with Mississippi Code Annotated § 11-1-55, the jury award was not unreasonable in amount nor outrageous and the trial court did not exercise caution in granting Appellees' additur. Accordingly, granting of said additur was in error and it should be reversed and the original verdict reinstated.

## CONCLUSION

The trial court erred by not properly applying the applicable statute of repose being Mississippi Code Annotated § 15-1-41. All evidence submitted at trial reflects that Janie Criss began to occupy the subject residence on or about November 23, 1996, at that time was “the owner thereof”, was occupying said residence as her personal residence with no intent to sell said residence and on which Janie Criss filed for homestead exemption for the year of 1997. It is undisputed in the record that Janie Criss began occupying the residence on November 23, 1996. Suit was not commenced until February 12, 2003, which was outside the six year period of repose provided by Mississippi Code Annotated § 15-1-41. Accordingly, Appellants’ Motion for Summary Judgment, Motion for Directed Verdict and Motion for Entry of Judgment Non-Obstante Veredicto were erroneously denied by the trial court.

The principal commonly referred to as “piercing the corporate veil” was utilized by the trial court to award damages from Janie Criss, personally, when evidence was not presented upon the requirements enumerated by the Supreme Court of Mississippi for such relief. This issue has been adequately and consistently addressed by the Supreme Court of Mississippi, most recently in *Rosson v. McFarland*, 962 So.2d 1279, 1285 (Miss. 2007).

The latest ruling on piercing the corporate veil reiterates standards followed since 1989 in which evidence must be presented on three separate issues. First, Some frustration of contractual expectations regarding the party to whom he looked for performance must be presented. Second, flagrant disregard of corporate formalities by the defendant corporation and its principals must be

presented. Third, a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder must be presented to the court.

Nothing was entered into evidence at the trial of this matter on any of the three requirements to allow the corporate veil to be pierced. As early as 1933, the Mississippi Supreme Court stated, "A corporation is [an] entity separate and distinct from its stockholders." *Ill. Cent. RR. v. Miss. Cotton Seed Prod.*, 148 So. 371, 372 (Miss. 1933). Appellants' Motion for Summary Judgment, Motion for Directed Verdict and Motion for Entry of Judgment Non-Obstante Veredicto were erroneously denied by the trial court as to dismissing Janie Criss in her personal capacity from this action.

The trial court further erred by taking the award of damages out of the domain of the jury without caution or findings consistent with Mississippi Code Annotated § 11-1-55. The trial court entered its additur without a hearing thereon. The \$103,701.82 additur granted by the trial court was not granted in accordance with Mississippi Code Annotated § 11-1-55 and therefor was granted in error.

Upon review of the lower court's findings and record, this Court should reverse the ruling of the Madison County Circuit Court and render a decision for Appellants, dismissing this case. Alternatively, the judgment of the trial court should be reversed and judgment should be entered against only J. Criss Builder, Inc. in the amount of \$30,000.00.

Respectfully submitted,

**J. CRISS BUILDER, INC. AND  
JANIE CRISS, INDIVIDUALLY**

BY:

  
**PAUL E. ROGERS**

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**ATTORNEY FOR APPELLANTS**

**CERTIFICATE OF SERVICE**

I, Paul E. Rogers, do hereby certify that I have this day caused to be served via U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing to the following:

Honorable Samac S. Richardson  
Madison County Circuit Judge  
P. O. Box 1885  
Brandon, Mississippi 39043

John W. Christopher, Esquire  
P.O. Box 982  
Ridgeland, Mississippi 39158-0982

Mississippi Supreme Court Clerk  
P. O. Box 249  
Jackson, MS 39205-0249

THIS, the 10<sup>th</sup> day of October, 2008.

  
**PAUL E. ROGERS**