

IN THE SUPREME COURT OF MISSISSIPPI

AND

THE MISSISSIPPI COURT OF APPEALS

No. 2010-CA-01266

**CHARLES R. PHILLIPS
AND RJK INVESTMENTS, LLC**

APPELLANTS

VS.

**JOEY P. KELLEY, KEITH D. TEMPLET,
PIKE COUNTY NATIONAL BANK
AND SAMUEL C. HALL**

APPELLEES

**APPEAL FROM THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI**

**REPLY BRIEF FOR APPELLANTS
CHARLES R. PHILLIPS AND RJK INVESTMENTS, LLC**

ORAL ARGUMENT REQUESTED

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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.

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Trial Court Judge:

The Honorable Michael M. Taylor
Circuit Court Judge of Pike County, Mississippi
Post Office Drawer 1350
Brookhaven, Mississippi 39602-1350

SO CERTIFIED, this the 6th day of June, 2011.

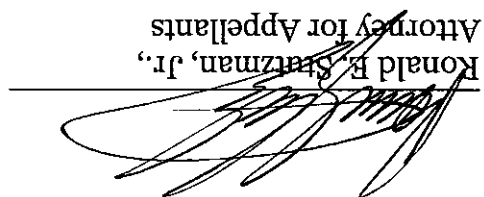

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**REPLY BRIEF OF APPELLANTS CHARLES R. PHILLIPS
AND RJK INVESTMENTS, LLC**

Charles R. Phillips and RJK Investments, LLC showed in their opening brief that the Bankruptcy Trustee acted beyond his authority by dismissing RJK's claims against the Appellees. By dismissing RJK's claims, the Bankruptcy Trustee assumed possession of the assets of RJK, a separate corporate entity, with disregard to the division between equitable and legal title. The actions undertaken produced results which are contrary to Mississippi's Limited Liability Company Act.

Appellants further demonstrated in their opening brief that the Order of Dismissal entered is void for misrepresentations. Additionally, Appellants initial brief showed that the actions undertaken by the Bankruptcy Trustee completely disregarded the separate corporate status of RJK effectively unilaterally piercing the corporate veil. Finally, Appellants opening brief addressed the fact that RJK's counsel was not provided notice of the Bankruptcy Trustee's intention to settle and dismiss its claims.

Appellees have failed to rebut these claims and contend that the claims are procedurally barred and that this Court lacks jurisdiction to entertain this appeal. This Court has previously entertained these arguments. This Court has previously determined that jurisdiction is properly before it. Although Appellees' procedural bar argument has been previously presented to this Court, this submitted Reply Brief makes it clear that Appellees' position is without merit.

For the reasons set forth in Appellants' initial brief and herein, the Order of Dismissal with prejudice should be vacated and this matter remanded to the trial court so that RJK may proceed with its claims on the merits.

LEGAL ARGUMENT

I. Jurisdiction is Proper and Appellants' Arguments Asserted are not Procedurally Barred.

Appellees have argued at great length in their brief that this Court does not have jurisdiction over this matter and that Appellants' claims are procedurally barred. This Court has previously decided this issue in Appellants' favor. In its January 26, 2011 Order addressing Appellees' Motion to Dismiss, this Court specifically found that "After due consideration the panel finds that this Court has jurisdiction to consider the appeal, and the Motion to Dismiss Appeal should be denied." *See* January 26, 2011 Order. In their brief, Appellees have rehashed the same arguments which have previously been presented to this Court and which have been denied.

Because Appellees have also previously presented their argument that Appellants' claims are procedurally barred, and this Court has already made its ruling, Appellants will not brief this issue *ad nauseum*. Rather, Appellants offer the following concise point on this topic. As shown by the docket in this matter, the Order of Dismissal was entered on July 6, 2010. R. 1, R.E., Tab 1. As was discussed in Appellants' initial brief, notice was not provided to RJK's counsel of these actions.¹ *See* Brief of Appellants at 14. It wasn't until over two weeks later that RJK's counsel discovered that the Order of Dismissal had been entered. In response, Appellants' counsel took immediate action in the case. R. 1-2, R.E. Tab 1.

Appellees argue that the Appellants are procedurally barred from raising this appeal. The crux of Appellees' argument is that Appellants have failed to comply with

¹ In their initial brief, Appellants have briefed the issue that they did not receive notice of the Bankruptcy Trustee's intention to dismiss RJK's claims. Although Appellees initially raised this issue in their Motion to Dismiss, this issue was not addressed in their Response. Because they have either conceded Appellants' position or, alternatively, waived the issue, Appellants will not revisit this issue in their Reply.

Rules 59 and 60 of the Mississippi Rules of Civil Procedure. Turning first to Appellees' Rule 59 argument, the docket in this matter demonstrates that counsel for RJK was without knowledge of the actions being taken against its interests. As reflected by the docket, fifteen days had passed between the entry of the Order of Dismissal and actions being taken to correct this error. As demonstrated in Appellants' opening brief and herein, this fifteen day lapse in time was due to RJK's counsel not being provided with notice. By the time RJK's counsel discovered that the Order of Dismissal had been entered, the ten day timeframe set forth in Rule 59(b) of the Mississippi Rules of Civil Procedure had expired. M.R.C.P. 59(b).

Appellees argue that the issues on appeal should have been presented to the trial court for consideration. Because more than ten days had passed before it was discovered that the Order of Dismissal had been entered, RJK could not utilize a Rule 59 motion to seek relief from the Order. Appellees' contentions that Rule 59 serves as a procedural bar to Appellants' claims are without merit.

As this Court is aware, a Rule 60 motion, is the avenue used to set aside a Judgment or an Order. Rule 60(b) specifically provides that "A motion under this subdivision does not affect the finality of a judgment or suspend its operation." M.R.C.P. 60(b). Rule 4(a) of the Mississippi Rules of Appellate Procedure states that "the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." M.R.A.P. 4(a). Faced with the prospect of "rolling the dice" on a Rule 60 motion (which if denied, the thirty days appellate time would have lapsed) or to take immediate appeal from a final order dismissing the case, appeal to this Court was taken.

Stated simply, Rule 59 relief was no longer available to RJK due to the delay in its counsel receiving the Order of Dismissal. Secondly, a Rule 60 motion is not a prerequisite to the filing of this appeal. Pursuant to this Court's January 26, 2011 Order, and the Rules of Civil and Appellate Procedure, this Court has jurisdiction over this appeal and the issues presented herein are not procedurally barred.

II. The Bankruptcy Trustee Acted Beyond His Authority.

In their initial brief, Appellants demonstrated that the Order upon which the Bankruptcy Trustee relied to dismiss the claims on behalf of RJK did not grant him this authority. Charles R. Phillips filed individual bankruptcy. RJK did not file for bankruptcy protection. Phillips' bankruptcy was a voluntary individual Chapter 7 proceeding. The Order of the Bankruptcy Court states that the Debtor's (Charles R. Phillips') claims, were the property of the bankruptcy estate. R. 30 - 32, R.E., Tab 3. The Order does not address RJK's claims in this lawsuit. However, using this Order of the Bankruptcy Court as a springboard for the actions undertaken, RJK's suit was dismissed.

Appellees contend that because Phillips is the sole member of RJK, that any assets owned by the limited liability company should be incorporated into his personal bankruptcy estate. This position is directly contrary to Mississippi's Revised Limited Liability Act which specifically sets forth that "A member has no interest in specific limited liability company property." Miss. Code Ann. § 79-29-701 (Amended 2010).

In their brief, Appellees cite cases from Colorado, Pennsylvania and Maryland for the proposition that the assets of a limited liability company become property of the member's bankruptcy estate. The statutes from these states are contrary to Mississippi's. Colorado's Limited Liability Company Act provides that "The interest of

each member in a limited liability company constitutes the personal property of the member and may be assigned or transferred.” Colo. Rev. Stat. § 7-80-702. Pennsylvania’s Limited Liability Company Act provides that “The interest of a member in a limited liability company constitutes the personal estate of the member and may be transferred or assigned as provided in writing in the operating agreement.” 13 Pa. Cons. Stat. § 8924. Maryland’s Limited Liability Company Act states that “The interest of a member in a limited liability company is personal property.” Md. Code, Corp. and Assn., § 4A-602. None of these statutes contain the same limiting language as is found in Mississippi’s: “**A member has no interest in specific limited liability company property.**” Miss. Code Ann. § 79-29-701 (emphasis added).

Incorporating RJK’s assets (this lawsuit) into Phillips’ personal bankruptcy estate is in direct conflict with the express language of § 79-29-701. As stated in Appellants’ initial brief, the question presented in the case *sub judice* has yet to be decided in Mississippi. In light of the specific limiting language of § 79-29-701, Appellants respectfully suggest that this Court should find that the assets of the LLC are separate property that may not be incorporated into a member’s personal bankruptcy estate.

III. The Order of Dismissal is Void for Misrepresentations.

In their Response, Appellees contend that Appellants have alleged fraud on the court. This mischaracterizes Appellants’ arguments on this issue. Throughout the course of litigation, Phillips maintained that he was the sole member of RJK. Appellees, Joey Kelley and Keith Templet, never illustrated any ownership in RJK. The brief submitted on behalf of Kelley and Templet offers no additional argument or insight

related to this matter.² Phillips, nor his counsel, were involved in drafting the Order of Dismissal with Prejudice. However, knowing that this was directly contrary to Phillips, RJK and their counsel's position, Kelley and Templet entered into the Order of Dismissal making this representation without representation in place to safeguard RJK's interests.

Kelley and Templet may genuinely believe that they are members of RJK. It makes no difference because pursuant to *McGee v. Clark*, the Order is void whether the misrepresentation was entered into knowingly or based upon a mistaken belief. *McGee v. Clark*, 343 So. 2d 486, 488 – 489 (Miss. 1977).

IV. The Order Effectively Pierced the Corporate Veil.

In their initial brief, as a manner of illustrating the stringent findings required in order to disregard an LLC's separate corporate status, Appellants set forth the findings required in order to pierce the corporate veil in Mississippi. As this Court is well aware, these necessary findings are very strict and the separate status of corporate entities is not a status that is easily disregarded. As demonstrated in Appellants' initial brief, the actions undertaken by the Bankruptcy Trustee had the same effect as piercing the corporate veil. A finding which pierces the corporate veil, or a Bankruptcy Trustee which ignores the separate legal status of such an entity, has the same effect – the corporate status is stripped and the assets become the property of the individual.

² In their brief, Kelley and Templet adopt the brief of Pike County National Bank and Samuel C. Hall *in toto*. Because Kelley and Templet's brief seeks an award of attorneys' fees, the undersigned feels compelled to address this issue. Attorneys' fees are not considered costs of appeal pursuant to M.R.A.P. 36(c). The undersigned does not intend for this statement to be taken in a flippant manner, however, in the event that attorneys' fees are assessed against Appellants, counsel for Kelley and Templet clearly expended more time, effort and explanation seeking extensions of the deadlines in which to submit their brief than was spent in the preparation of their brief. It is asked that this be taken into consideration in the event that attorneys' fees are assessed.

In support of their position, Appellees contend that the Bankruptcy Court's Order gave Mr. Henderson the authority to do so. Appellees contend that Henderson was given the implicit authority to undertake such action. See Brief of Appellees, page 16. However, the Bankruptcy Court's Order contains very plain language. As shown in Appellants' initial brief, the explicit language contained in the subject Order pertains solely to the Debtor – Charles R. Phillips, not RJK Investments, LLC. R. 30 – 38. R.E., Tab 4. In fact, not a single Order of the Bankruptcy Court, other than referring to the caption of this case, addresses RJK.

It is by this assumption of authority through “implicit” language that the Bankruptcy Trustee disregarded this separate corporate entity and dismissed its claims in this matter. These actions have the same result as a determination that the corporate veil should be pierced which is contrary to the well-established law in this State.

CONCLUSION

In summary, this Court clearly has jurisdiction to entertain an appeal from the dismissal of an action which occurred without authority in one of its circuit courts. Jurisdiction has previously been determined to be proper before this Court. Additionally, Appellees' assertion that Appellants are procedurally barred from presenting this issues on appeal are without merit.

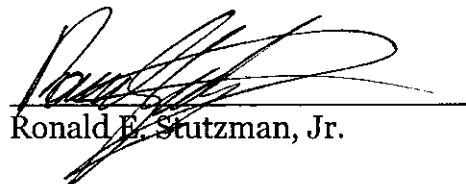
The Order of Dismissal with prejudice which settled claims on behalf of RJK went beyond the authority conferred upon the Bankruptcy Trustee. Mississippi's law provides that a member of an LLC does not own the assets of the limited liability company. This creates a division of legal and equitable title between the corporate entity and the member. Mississippi law is equally clear that lawsuits are assets. RJK's claims in this matter are one of its assets, an asset that was beyond the reach of the

Bankruptcy Trustee. Because the Bankruptcy Trustee exceeded his authority in dismissing RJK's claims in this matter, the Order of Dismissal with prejudice entered must be vacated and the case be remanded to the trial court for further proceedings on the merits.

The Order of Dismissal is additionally void as it contains misrepresentations. Furthermore, the actions undertaken by the Bankruptcy Trustee effectively pierced the corporate veil. Under well-established law in this State, the separate status of a corporate entity is to be respected except in the most extreme of circumstances based upon specific findings. The actions of the Bankruptcy Trustee completely disregarded the separate status of RJK and impinged upon its separate rights. Finally, RJK's legal counsel was without notice of the actions being undertaken and was, therefore, unable to prevent the Order of Dismissal from being entered.

For the foregoing reasons, the Order of Dismissal with prejudice should be vacated and this matter remanded to the trial court so that RJK may proceed with its claims on the merits.

Respectfully submitted, this the 6th day of June, 2011.


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CERTIFICATE OF SERVICE

I, Ronald E. Stutzman, Jr., attorney for Appellants, do hereby certify that I have hand delivered an original and three (3) copies of the Reply Brief of Appellants and an electronic diskette containing same to the Clerk of the Mississippi Supreme Court and Mississippi Court of Appeals and have also forwarded via First Class United States Mail, postage prepaid, one (1) copy of the above and foregoing Reply Brief of the Appellants to the following:

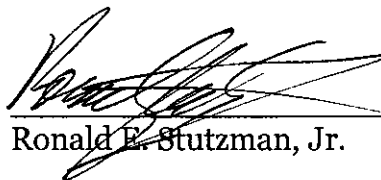
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So certified, this the 6th day of June, 2011.



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