COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000017-MR

THE MEDICAL VISION GROUP, P.S.C., AND
SCHATZIE, LLC — APPELLANTS

APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
V. 07-CA-00159-OA

HON. TIMOTHY N. PHILPOT, JUDGE
FAYETTE CIRCUIT COURT — APPELLEE

AND

CHARLENE THERESA DUDEE,
JITANDER SINGH DUDEE, AND
JAMES W. GARDNER, ESQ., in his
capacity as Receiver
(REAL PARTIES IN INTEREST) — APPELLEES

APPELLANT'S BRIEF

Respectfully submitted,

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I. INTRODUCTION

Appellants appeal as a matter of right from an Order from the Kentucky Court of Appeals Denying their Petition for a Writ of Prohibition. Appellants, separate business entities solely owned by a party to an underlying Fayette Circuit Court dissolution proceeding, sought extraordinary relief in response to Appellee's imposition of a Receivership upon them. Appellants contend that Appellee has acted outside his jurisdiction – and, for that matter, without any defensible basis in fact or law – by appointing a Receiver for non-party, wholly-owned business entities in order to facilitate a Decree-of-Dissolution Judgment creditor's attempt to execute upon their *corporate and company assets* in order to satisfy an *individual* judgment previously against a party to the dissolution action. Because the Court of Appeals abused its discretion, improperly distinguished on-point authority from this Court, and made factual findings that lack substantial support in the record before it, Appellants seek appellate review in this Court.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellants respectfully request the opportunity to develop their arguments at an Oral Argument before the Court. Although Appellants recognize that matter-of-right appeals from Original Actions infrequently warrant Oral Argument, the disregard of this Court's decision in Lewis LP Gas, Inc. v. Lambert, 113 S.W.3d 171 (Ky. 2003) both by Appellee and by the Court of Appeals suggests a need for reaffirmation and re-emphasis of the principles contained therein. Perhaps more significantly, however, the approach taken by Appellee and tacitly accepted by the Court of Appeals represents endorsement of what commentators in other jurisdictions have described as "Outside Reverse Veil Piercing" ("ORVP"). From Appellants' perspective, Kentucky's highest Court should give its counseled consideration to the appropriateness of ORVP before it becomes accepted practice in Kentucky, and oral argument would assist the Court in doing so.

III. STATEMENT OF POINTS AND AUTHORITIES

IV. STATEMENT OF THE CASE

To describe Dudee v. Dudee as having a long and tortured history could well be construed as understatement of Hemmingway-esque proportions. Fortunately, for the purposes of this appeal, the relevant procedural history begins with Appellee Judge Philpot's February 13, 2006 entry of the forty (40)-plus-page Findings of Fact Conclusions of Law And Decree (Exhibit 2 in the Appendix to this Brief) that, among many other things, but most notably for purposes of this action, (1) distributed – as marital property – The Medical Vision Group, P.S.C. ("MVG") and Schatzie, LLC ("Schatzie) to Appellee/Real Party in Interest Jitander Singh Dudee ("Real Party Jitander Dudee);[1] and (2) required *Real Party Jitander Dudee* to pay Appellee/Real Party in Interest Charlene Theresa Dudee ("Real Party Charlene Dudee") $3,600 a month in child support, $50,000 in attorneys' fees and litigation costs, and a lump-sum equalization payment of $1,299,038.00 On or about March 28, 2006, Appellee Judge Philpot entered a supplemental Findings of Fact Conclusions of Law and Amended Decree that additionally required *Real Party Jitander Dudee* to pay an additional amount as maintenance.

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[1] Evidencing Appellee Judge Philpot's long-standing misconception of the nature of MVG as a separate entity, the Fayette Circuit Court's Conclusions of Law regarding the MVG property repeatedly referred to it as an "LLC" rather than the professional service corporation that it actually is, and purported to distribute not the stock in MVG (or even a membership interest, given Respondent's confusion as to the nature of the entity), but rather the practice entity itself, i.e., "Dr. Dudee is allocated Medical Vision Group, LLC [sic] at a value of $1,006,000." Compare McGinnis v. McGinnis, 920 S.W.2d 68 (Ky. App. 1995) (affirming trial court's award of equitable, undivided interest *in vested stock* in closely-held corporation).

To make a long story as short as possible, Real Party Jitander Dudee has not paid Real Party Charlene Dudee all of the amounts that the Decrees require him to pay her. As would likely be predictable to virtually anyone who has ever set foot in a Family Court, Real Parties Dudee have sharply different explanations for Real Party Jitander Dudee's failure to pay. Real Party Charlene Dudee ascribes the failure to malice and a mere refusal to pay. Real Party Jitander Dudee maintains that he is simply unable to pay the amounts ordered in the Decree(s), which he has appealed in Jitander Singh Dudee v. Charlene Theresa Dudee, Court of Appeals Case No. 2006-CA-0775, as of the date of this filing, currently pending before this Court on a Motion for Discretionary Review, 2007-SC-0727-D.

In any event, however, the previous Original Action and this appeal stem from the fact that Real Party Jitander Dudee was apparently financially unable to post a supersedeas bond to prevent Real Party Charlene Dudee from executing as a judgment creditor during the pendency of his appeal. Specifically, various post-Decree proceedings before Appellee Judge Philpot have taken place to address Real Party Charlene Dudee's efforts to liquidate her judgment against her ex-husband. Appellants brought this Original Action in response to Appellee Judge Philpot's rulings in support of Real Party Charlene Dudee's claim to *MVG's corporate and Schatzie's company assets* as partial satisfaction of her *individual judgment* against her ex-husband.

On or about March 21, 2007, Real Party Charlene Dudee filed a Motion for Receiver (Appendix Exhibit 3) in which she asked Appellee Judge Philpot "to

appoint a receiver to run Medical Vision Group and Schatzie, LLC and any and all other business entities under the control of [Real Party Jitander Dudee]." She cited as substantive grounds for her Motion an assertion of equitable entitlement to the businesses' assets as collateral for the property judgment in the Decree and a claim that those assets were in danger of dissipation:

> . . . Respondent has been remanded to the Fayette County Jail for Contempt of Court. It appears that the Respondent is refusing work release and has abandoned his businesses. Should the businesses not be properly maintained, they shall fall to waste. When property is in danger of being lost or materially injured, the Court may appoint a receiver to take charge of the property. KRS 425.600. Ms. Dudee has an equitable interest in Dr. Dudee's businesses as those businesses are the property he received in the divorce action in exchange for Ms. Dudee receiving a money judgment. Ms. Dudee has not been paid her money judgment and the businesses are securing her judgment. Should the businesses be allowed to fail, she will have no recourse from which to collect her judgment. (Emphasis added).

Accordingly, Real Party Charlene Dudee asked Appellee Judge Philpot to "appoint a receiver to take charge of the business operations, including collection of all receipts and payment of all liabilities of the businesses until further Orders of this Court."

Although Real Party Jitander Dudee, in his individual capacity, had, during the course of the proceedings proposed and/or consented to the appointment of a "Receiver" exclusively for the purposes of performing a third-party forensic audit of the businesses in order to put an end to Real Party Charlene Dudee's nearly-weekly unevidenced assertions that her ex-husband had engaged in fraudulent and/or criminal activity to shield piles of hidden assets, it was in

response to Real Party Charlene Dudee's Motion that the Court ultimately appointed a Receiver in this case. On or about April 3, 2007, Appellee Judge Philpot entered an Order (Appendix Exhibit 4) "sustain[ing]" Real Party Charlene Dudee's Motion and appointing Lexington attorney James W. Gardner as Receiver for Real Party Jitander Dudee's businesses. The Order authorized the Receiver to "hire any persons necessary to fulfill his duties as a Receiver" and required the parties to cooperate with the Receiver, but was otherwise agnostic as to exactly what authorities and duties the Receiver would have in that the Order directed the parties "to immediately meet with Mr. Gardner to try to reach an agreement on the parameters of the receivership."

Ultimately, it appears that the Real Parties were unable to compromise on the scope of the Receiver's authority because on May 29, 2007, Real Party Charlene Dudee filed a Motion to Define Duties of the Receiver (Appendix Exhibit 5). In her Motion, she requested "that the receiver, Jim Gardner, take over all aspects of Medial [sic] Vision Group and Schatzie, LLC[,]" that "the receiver perform his duties in the traditional role of a receiver, taking over all daily operations of the business including but not limited to gathering all receipts and paying all necessary bills[,]" and that Appellee Judge Philpot grant the Receiver "full control of the assets and liabilities of Dr. Dudee's business entities."

On June 4, 2007, Appellee Judge Philpot entered an Order Regarding Receiver Duties (Appendix Exhibit 6) that assigned the Receiver only certain specified and limited authority, i.e., (1) "to employ the services of Dean Dorton & Ford to include David C. Bundy and Pamela Hicks to first review and examine

the cash inflows, including such matters as collections, patient volume, and billing practices of the medical practice known as Medical Vision Group," and (2) "to pay Ms. Dudee child support, maintenance, and judgment amounts as previous Order [sic] by this Court," and responsibilities, i.e. (1) "to investigate the expenditure side of Medical Vision Group" following Dean Dorton & Ford's investigation, (2) "to hire and retain Doug Gibson of the Gibson Company to examine the real estate owned by Schatzie, LLC, to make an analysis and any recommendation regarding the maintenance of the properties, the rent amounts for the properties, and whether such properties should be sold[.]" and (3) to "report to the parties via email on a weekly basis regarding the status and conclusions, if any, of his investigation." The last line of the Order provided that "[s]ubsequent orders shall be entered as the duties of the Receiver shall likely change after his initial duties are completed."

On June 21, 2007, Real Party Charlene Dudee filed a Motion to Compel Immediate Payment of Maintenance, Day Care Cost, Payment of Receiver, and Awarded Attorneys Fees, and Motion for Attorney's Fees (Appendix Exhibit 7) that identified a number of different sums that Real Party Jitander Dudee had not paid his ex-wife and asked the Court to Order him "or, in the alternative, the Receiver" to pay each expense. Because the Receiver had not yet received the $12,500 retainer that the Court had previously ordered Real Party Jitander Dudee to pay, the Motion asked Appellee Judge Philpot to order the Receiver "to take over operations of both businesses forthwith and to pay himself from the accounts and/or assets of the businesses."

On June 29, 2007, Appellee Judge Philpot entered an Order (Appendix Exhibit 8) "sustain[ing]" the Motion to Compel Immediate Payment of Maintenance, etc.:

> The Petitioner's Motion to allow the Receiver to take over operations of both businesses forthwith and to pay himself the previously Ordered retainer of $12,500 from the accounts and/or assets of the businesses is Sustained. The Receiver shall begin his duties immediately and has the authority to pay himself from the accounts and/or assets of the businesses[.]

In addition, the Order authorized the Receiver to utilize Appellants' business assets to pay preschool expenses, maintenance arrearages, and attorneys' fees owed by Real Party Jitander Dudee.

Despite Appellee Judge Philpot's expansion of the Receiver's authority in its June 29th Order, on July 10, 2007, Real Party Jitander Dudee was forced to file an Emergency Motion to Allow Medical Vision Group to Pay Its Necessary and Ordinary Expenses (Appendix Exhibit 9) following his counsel's receipt of correspondence from the Receiver stating that the Receiver interpreted the Court's Orders as granting him the authority to pay only expenses owed to Real Party Charlene Dudee and her attorneys. The Motion referenced the immediate concern that MVG's employees were scheduled to receive their paychecks the following day, but would be unable to be paid unless the Court authorized the Receiver or permitted MVG's management personnel to remit the necessary funds to the outsourced payroll company. The Motion aptly described MVG's plight as a result of the limbo in which it found itself:

> If the necessary and ordinary expenses of Medical Vision Group are not paid, the practice will soon cease to exist. Therefore, it is crucial to the well-being of the practice, the parties and their minor children, as well as the employees of Medical Vision Group, that the aforementioned expenses are paid, and that some person has this Court's permission to pay these expenses on a regular basis. After all, if Medical Vision Group closes its doors, the parties will have no source of income, and at least thirteen employees will be unemployed.

Although Appellee Judge Philpot conducted a telephonic hearing on the Emergency Motion, he did not grant the relief requested. Instead, he effectively passed the Motion to Friday, July 13, 2007 – which was, of course, three days after "pay day" – to consider the matter in connection with the Court's scheduled review of the case.

Real Party Jitander Dudee, realizing that MVG required separate counsel because his interests as a currently-incarcerated individual judgment debtor may not be co-extensive with his interests and duties in his capacity as President of MVG, arranged for separate counsel to be present on behalf of MVG at the Friday, July 13, 2007 hearing. Accordingly, on or about July 12, 2007, undersigned appellate counsel filed a Notice of Entry of Special and Limited Appearance (Appendix Exhibit 10) on behalf of MVG in the underlying dissolution action, which flagged MVG's concern for the Court – as well as the supporting authority – that Appellee Judge Philpot lacked the jurisdiction "to subject its corporate assets to receivership or other execution[.]" Contemporaneously, the Receiver filed a Preliminary Report (Appendix Exhibit 11), which, in addition to noting that the Receiver had utilized MVG and Schatzie assets to pay himself

and Real Party Charlene Dudee "to reduce obligations owed to her by Dr. Dudee pursuant to the Court's Orders[,]" incorporated an *initial* report from the accountants he had retained.[2]

At the hearing, counsel for MVG addressed Appellee Judge Philpot with regard to the ongoing siphoning of corporate assets to satisfy the individual judgment against Real Party Jitander Dudee, and articulated MVG's basic position, i.e., that both the Receivership and the raiding of its corporate assets represented ultra vires actions for which Appellee Judge Philpot lacked jurisdiction. At the conclusion of the hearing, however, Appellee Judge Philpot, not only elected to leave the Receivership in place, but actually directed the Receiver to utilize MVG's assets to pay Real Party Charlene Dudee $9,200 a month as a first priority and only then to pay the "[n]ecessary and reasonable expenses of the MVG as determined in the Receiver's discretion." Elsewhere in the Court's Order of July 19, 2007 (Appendix Exhibit 12), Appellee Judge Philpot authorized the Receiver "to reduce expenses of MVG to include but not be limited to reducing payroll and reducing salaries of employees[.]" Although steadfastly convinced that Appellee Judge Philpot's actions lacked any legal foundation, MVG elected initially to attempt to continue its operations within the stifling confines of the Court's Orders.

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[2] Of the eight "bullet-points" contained in the accountants' *initial* report, more than half were qualified with observations such as that the accountants "did not have enough time to determine" certain facts and "did not have enough time to investigate the detail" and that "[f]urther analysis would need to be undertaken in order to determine" other facts and that "the detail of these transactions would need further investigations" in addition to other language of equivocation.

Ultimately, however, after subsequent developments detailed in affidavits and other documents filed with the Court of Appeals as part of Appellants' Petition, it became clear to Appellants that the Receivership represented an anaconda that was squeezing the life out of the businesses. In a nutshell, the businesses' profit margin was so thin that they did not generate enough revenue to pay both Real Party Charlene Dudee and their actual creditors – even after the Receiver trimmed payroll expenses by no longer paying Real Party Jitander Dudee for his services and similarly effectively discharging Real Party Jitander Dudee's brother, who wore a number of hats at MVG, most significantly that of being the only trained operator of the laser used in the vision-correction surgeries that had historically represented the lion's share of MVG's profits. Appellants ultimately sought extraordinary relief from the Court of Appeals because of what they perceived to be a clear and present danger to MVG's business viability stemming from Appellee Judge Philpot's imposition of the Receivership and directions to privilege or preference the payment of Real Party Jitander Dudee's *individual* debts over MVG's own *corporate* debts, which put MVG in a zero-sum dilemma, i.e., that every dollar paid to the MVG's President's ex-wife represented a dollar that was unavailable to pay MVG's actual creditors.

On or about August 30, 2007, Appellants filed their Petition for a Writ of Prohibition with the Kentucky Court of Appeals. Simultaneously, they filed a Motion for Intermediate/Emergency Relief in which they emphasized the entities' present financial plight. On September 6, 2007, Chief Judge Combs entered an Order that denied the Motion for Intermediate/Emergency Relief on the grounds

> demonstrate that the respondent judge is acting outside his jurisdiction or erroneously within his jurisdiction to their irreparable detriment. *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004). The authority upon which petitioners rely, *Lewis LP Gas, Inc. v. Lambert*, 113 S.W.3d 171 (Ky. 2003) (overruled on other grounds by *Hoskins, supra*) is distinguishable. *Lewis* involved a corporation which was not solely owned; in this case it is clear that petitioners fall under the "alter ego" rule as explained by the Court in *Lewis*.

Appellants bring their matter-of-right appeal from this Order.

V. ARGUMENT

THE COURT OF APPEALS IMPROPERLY DISTINGUISHED CONTROLLING AUTHORITY, COMMITTED CLEAR ERROR WITH RESPECT TO ITS "ALTER-EGO" FACTUAL FINDING, AND OTHERWISE ABUSED ITS DISCRETION IN DENYING APPELLANT'S PETITION FOR A WRIT OF PROHIBITION.

PROCEDURE / PRESERVATION: Pursuant to Kentucky Rule of Civil Procedure ("CR") 76.12(4)(c)(v), Appellants state that they properly preserved this matter for appellate review by virtue of their Petition and the Order denying it.

MERITS OF ALLEGATION OF ERROR:

Ostensibly, "[i]t is well settled in this jurisdiction that a corporation is a legal entity and exists separate and distinct from its stockholders and officers and irrespective of the individuals who own its stock[.]" May v. Sullivan, 300 Ky. 321, 188 .W.2d 469, 470 (Ky. 1945); see also Lowry Watkins Mortgage Co. v. Turley-Burlington Mortgage Co., 248 Ky. 285, 58 S.W.2d 591, 592 (Ky. 1933). Stated otherwise:

> A basic axiom of corporate law is that a corporation will be treated as a separate entity unless sufficient reason appears to disregard the corporate form. As a separate entity, the personal assets of an individual stockholder may not normally be reached to satisfy

> A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Id. at 10.

Appellants contend that the Court of Appeals abused its discretion in denying extraordinary relief in this Original Action, the facts of which compelled entry of such a writ under either basis articulated in Hoskins because Appellee Judge Philpot acted without jurisdiction and neither post-hoc nor even interlocutory appellate review could possibly avoid great injustice and irreparable injury in the form of functionally irreversible diversion of corporate and company funds and assets.

D. THE COURT OF APPEALS FAILED TO FOLLOW LEWIS LP GAS, INC. v. LAMBERT

Medical Vision Group, **PSC** and Schatzie, **LLC** are, respectively, a professional service corporation and a limited liability company. They are separate and distinct legal entities from each other, and, more significantly, from Real Party Jitander Dudee. Although Appellee Judge Philpot concluded that the parties' ownership interests in the two entities constitute marital property to be divided by the Court, neither *separate legal entity* was or is a party to the underlying action, and neither *separate legal entity's* assets is subject to attachment simply because there is an ownership connection between it and the judgment debtor. See Penn v. Penn, 655 S.W.2d 631, 632 (Mo. Ct. App. 1983)

("[T]he decree purports to operate on the property of the corporation – an entity not a party to the litigation nor otherwise subject to the jurisdiction of the court. A shareholder – even one who holds all the shares – does not have legal ownership of the corporation property. The title remains in the corporation." (emphasis added)).

As such, in subjecting MVG and Schatzie to receivership, Appellee Judge Philpot acted without jurisdiction. "In simple terms, jurisdiction is '[a] court's power to decide a case or issue a decree.'" Clements v. Harris, 89 S.W.3d 403, 406 (Ky. 2002) (Keller, J., dissenting) (quoting Black's Law Dictionary 857 (7th ed. 1999)). Here, the problem is "jurisdiction over the person," 20 Am.Jur.2d *Courts* § 54 (1995) or "personal jurisdiction," i.e., "[a] court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights[.]" Black's Law Dictionary 857 (7th ed. 1999). In Lewis LP Gas, Inc. v. Lambert, 113 S.W.3d 171 (Ky. 2003), abrogated on other grounds by Hoskins, supra the Kentucky Supreme Court directed the Court of Appeals to grant a writ on startlingly similar facts where a Family Court Judge presiding over a marital dissolution action enjoined a non-party, closely-held corporation from transferring any assets during the pendency of the dissolution action. Rejecting a similarly unwarranted assertion that the "alter-ego" doctrine was sufficient to confer jurisdiction, the Kentucky Supreme Court, after concluding "that the trial court was without jurisdiction to enjoin Lewis LP Gas," id at 178, remanded the case to the Court of Appeals for entry of a writ of prohibition against the trial court." Id.

In a just and fair world, the result in this Original Action would have been identical – without, however, the need for and expense of an appeal to the Kentucky Supreme Court to obtain relief plainly warranted. Although Appellee Judge Philpot likely had the jurisdiction, i.e., subject-matter or particular-case jurisdiction, to distribute Real Party Jitander Dudee's *interest* in MVG and Schatzie as part of the marital estate, he had no jurisdiction over MVG and Schatzie themselves, which no party to the underlying action has ever sought to bring into the action – choosing instead a decidedly more "thud and blunder" approach of seeking the appointment of a Receiver for a non-party. Compare Monin v. Monin, 156 S.W.3d 309 (Ky. App. 2004) ("Through a counterclaim and third-party complaint . . . the cross-appellants requested, *inter alia*, the dissolution of Monin, Inc., and the appointment of a receiver.").

In fact, the receivership ordered by Judge Philpot is considerably more onerous than the "status quo Order" at issue in Lewis LP Gas; Appellee Judge Philpot's Order wrests control of the entities from their sole owner, permits the Receiver to take their reins, and, most troubling, authorizes the Receiver to transfer the *separate legal entities'* assets to Real Party Charlene Dudee in order to satisfy the stockholder/member's individual judgment debt. Given that Appellee Judge Philpot has acted completely without jurisdiction in so doing, the Court of Appeals should simply have applied Lewis LP Gas and issued the requested writ.

B. NO EVIDENCE – SUBSTANTIAL OR OTHERWISE – SUPPORTS THE ASSERTION THAT APPELLANTS ARE ANYONE'S ALTER-EGOS.

Instead, however, the Court of Appeals concluded that Lewis LP Gas was inapplicable precedent – apparently because of its *finding* that Appellants constitute Real Party Jitander Dudee's alter-ego. To be perfectly clear, the "alter-ego" finding is the Court of Appeals's and the Court of Appeals's alone. Appellee Judge Philpot did not make such a finding before dividing the parties' property and then unleashing the series of Orders subjecting Appellants to judicially-imposed Receivership. To be entirely clear, Appellants do not dispute that, as a matter of law, *if Appellants were in fact Real Party Jitander Dudee's alter-egos*, then Appellee Judge Philpot could presumably exercise jurisdiction over them to the same extent that he exercised jurisdiction over Real Party Jitander Dudee. Appellants however, vehemently dispute any assertion that they are anyone's alter egos, and take great umbrage with the fact that this alter-ego theory has been deployed as an afterthought, or a post-hoc rationalization, to justify actions taken by Appellee Judge Philpot, who never uttered the words "alter-ego" or conducted any evidentiary hearing as to that question and thus, at a very minimum, put the proverbial cart before the horse.

In any event, however, the Court of Appeals's *factual finding* is subject to appellate review in this Court for clear error. See Commonwealth v. Harrelson, 14 S.W.3d 541, 549 (Ky. 2000). "Clearly erroneous" review considers whether the factual findings are supported by substantial evidence, i.e., "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and

evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted). Stated as plainly and civilly as possible, it is evident from a review of the Order and the record below that the Court of Appeals's "alter-ego" finding lacks support in anything resembling substantial evidence in the record before it.

The typically-terse Order from the Court of Appeals offers little in the way of reasoning to support its *finding* that "petitioners fall under the 'alter ego' rule as explained by the Court in *Lewis*." In fact, other than a gratuitous observation that that finding was "clear" and the observation in the same sentence that unlike the situation in Lewis LP Gas, Real Party Jitander Dudee is the sole owner of both Appellants,[3] the Order does not further elucidate the panel's reasoning. Given that the only factual matter even referenced in the Order is the extent of ownership, Appellants must begin by emphasizing the fact that Real Party Jitander Dudee's sole ownership of the stock and membership interest in MVG

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[3] Fearful that a misrepresentation found in the responsive memorandum Real Party Charlene Dudee filed below might lead to the type of confused result exhibited in the Order denying relief, Appellants utilized a portion of the footnote in their Renewed Motion for Intermediate/Emergency Relief to address this red herring:

> Real Party Charlene Dudee's attempt to distinguish Lewis LP Gas, Inc. v. Lambert, 113 S.W.3d 171 (Ky. 2003) is similarly deficient. Initially, her assertion that "Lewis LP Gas concerned itself with a closely held corporation with several shareholders," see Response at 5 (erroneous emphasis in original) is indefensibly incorrect. There were two shareholders, and the Opinion is crystal-clear as to that fact. See Lewis LP Gas, Inc., 1113 S.W.3d at 173 (Lewis LP Gas is a family corporation in which Randy Lewis is the majority stockholder and Aileen B. Lewis ("Aileen Lewis"), Randy Lewis's mother, is the minority stockholder." (emphasis added)).

and Schatzie respectively is *undebatably insufficient to support an alter-ego finding*. See White v. Winchester Land Development Corp., 584 S.W.2d 56, 61 (Ky. App. 1979) (""In this case it cannot be doubted that the Whites exercised a great deal of control over the corporation insofar as they were the sole shareholders. However, mere ownership and control of a corporation by the persons sought to be held liable is not alone a sufficient basis for denial of entity treatment."); see also Kline v. Kline, 305 N.W.2d 297 (Mich. Ct. App. 1981); Zisblatt v. Zisblatt, 693 S.W.2d 944, 950 (Tex. Ct. App. 1995) ("[D]omination of corporate affairs by a sole stock holder will not in itself justify imposition of personal liability."); ("Generally, the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all of the corporation's stock." (emphasis added)).[4]

Moreover, the alter-ego determination is an individualized one that turns on the specific facts of each case. Kline, 305 N.W.2d at 299 (Mich. Ct. App. 1981) ("Each case involving disregard of the corporate entity rests on its own special facts."); Zisblatt, 693 S.W.2d at 950 (Tex. Ct. App. 1985). Returning to first principles, the so-called "alter-ego rule" is long-standing common-law legal doctrine under which Courts will disregard the legal separateness of a corporation in specific, unusual circumstances where necessary to address the

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[4] To hold otherwise, of course, would render entirely moot the entire concept of a single-owner professional service corporation, which the authorizing statutes expressly contemplate. KRS 274.015(1) ("One or more individuals . . . may incorporate and form a professional services corporation[.]" (emphasis added)). If a sole stockholder could never enjoy the limitations on individual liability which are the primary motivation for incorporation, no individual professional would have any incentive to incorporate.

"evil or bogus or dummy corporations organized and controlled for the sole purpose of evading penalties of the law or contractual or other obligations which would otherwise attach." Lowry Watkins Mortgage Co., 58 S.W.2d at 592 (emphasis added).

As in the case now before the Court, the active Appellee/Real Party in Lewis LP Gas relied upon an 11th-hour assertion that "alter-ego" principles justified a Family Court Judge's improper actions. Unlike the Court of Appeals below in this action, however, the Lewis LP Gas Court found the post-hoc, alter-ego rationalization entirely unpersuasive:

> Appellee responds that the trial court has jurisdiction over Lewis LP Gas because the corporation is Randy's "alter-ego." Thus, Appellee asserts that the trial court could pierce the corporate veil to obtain jurisdiction over Lewis LP Gas. Although we agree that the alter-ego rule may confer jurisdiction over a corporation under certain circumstances, we disagree that it is applicable here. The alter-ego doctrine is reserved for situations in which incorporation is accomplished to invoke fraudulent protection against personal liability. "[T]he elements thereof have been defined as follows: (1) that the corporation is not only influenced by the owners, but also that there is such unity of ownership and interest that their separateness has ceased; and (2) that the facts are such that an adherence to the normal attributes, viz[.] treatment as a separate entity, of separate corporate existence, would sanction a fraud or promote injustice." In sum, under the alter-ego theory, assets "owned" by the corporation are inseparable from those controlled by its owner. That is not the case here. Lewis LP Gas was incorporated as a family business and continues as such. Although the nature of its business has changed, with Randy Lewis and his mother at the helm, it continues as a separate business from its owners. Its major holding, Ferrellgas stock, is an independent asset of the corporation. Although Randy Lewis owns the

> majority of the Lewis LP Gas's stock, he does not own all of its stock and the corporation's separateness still exists. Thus, the alter-ego doctrine is inapplicable in the present case and may not be used as a jurisdictional hook for the trial court to exert control over Lewis LP Gas.

Lewis LP Gas, 113 S.W.3d at 176.

The Lewis LP Gas Court utilized the articulation of the "elements" of alter-ego proof found in White, supra, where the Court also observed that "the courts have been more willing to 'pierce the corporate veil' when the defendant is a corporation that owns some subsidiary, rather than an individual, controlling shareholder." Id., 584 S.W.2d at 61 n.6. In any event, however, the alter-ego/piercing-the-corporate-veil analysis hinges to a great extent upon "the innumerable equities of each case":

> While these two formulations are helpful as an analytical framework, issues of "alter ego" do not lend themselves to strict rules and prima facie cases: whether the corporate veil should be pierced depends upon the innumerable equities of each case. Because this issue depends not only upon close-connectedness (which is inevitable in all closely held businesses) but also upon such actions as would indicate unfair dealings, an examination of those other factors is mandated.
>
> Generally speaking, the corporate veil should only be pierced "reluctantly and cautiously" and then only in the presence of a combination of the following factors: (1) undercapitalization; (2) a failure to observe the formalities of corporate existence; (3) nonpayment or overpayment of dividends; (4) a siphoning off of funds by the dominant shareholder(s); and (5) the majority shareholders having guaranteed corporate liabilities in their individual capacities.

Id. at 62 (emphasis added).

See also Medlock v. Medlock, 642 N.W.2d 113, 124 (Neb. 2002) (applying similar considerations to an alter-ego claim in a domestic relations case, although reconceptualizing "uncapitalization" in that context as relating "to the insolvency of the individual and the extent to which the individual's ostensible poverty is supported by corporate assets.").

Viewed through that lens, the Lewis LP Gas Court's consideration was considerably more nuanced than counting the number of stockholders. In recognizing the business's history and present character, the Court necessarily looked for well-recognized badges of "sham" companies. See American Collectors Exchange, inc. v. Kentucky State Democratic Central Executive Committee, 566 S.W.2d 759, 762 (Ky. App. 1978) (holding that a lack of assets, employees, and stationary were indicative of an "alter-ego" corporation). Courts in other jurisdictions examining different factual situations have taken these same types of considerations into account. In Saeks v. Saeks, 493 N.E.2d 280 (Ohio Ct. App. 1985), for example, the Court found the "alter-ego" doctrine applicable to a situation where breadcrumbs of fraud were plainly evident in that a party, post-dissolution incorporated his insurance business as a solely-held corporation for the sole purpose of manipulating his individual income in order to minimize an alimony obligation calculated pursuant to a settlement agreement as a percentage of his income. And in Standage, supra the Court affirmed an alter-ego finding where the record demonstrated that the husband had failed to file corporate income tax returns for the six years preceding the property-division trial, had not filed reports with the Arizona Corporation Commission for several

years, had failed to "maintain appropriate books and records," had otherwise "failed to observe corporate formalities," and had operated the business without any consultation with his wife, the equal shareholder, regarding business decisions and affairs. Id., 711 P.2d at 615.

Some courts have articulated an "alter-ego" analysis individualized to the dissolution context, and in so doing, have recognized that perhaps the primary relevant factor is *the extent, if any, to which any wrongdoing with respect to the corporation adversely affected the marital estate*:

> Thus to properly pierce in a divorce case, the trial court must find something more than mere dominance of the corporation by the spouse. At the least, a finding of alter ego sufficient to justify piercing in the divorce context requires the trial court to find: (1) unity between the separate property corporation and the spouse such that the separateness of the corporation has ceased to exist; and (2) the spouse's improper use of the corporation damaged the community estate beyond that which might be remedied by a claim for reimbursement.

Lifshutz v. Lifshutz, 61 S.W.3d 511, 517 (Tex. Ct. App. 2001).

And, given the substantial equitable nature of the veil-piercing remedy, the results reached by courts evaluating such "alter-ego" claims have predictably turned on the extent to which actions through the corporate form affected the marital estate. Compare Medlock, 642 N.W.2d at 125 (Neb. 2002) (finding, upon de novo review, that a corporation represented an alter ego of a party to the marriage in large part "because all the property that would ordinarily have been acquired over the course of a 28-year marriage was instead acquired in the name of [the corporation.]) with Lifshutz v. Lifshutz, 61 S.W.3d 511, 518 (Tex. Ct.

App. 2001) (concluding that the trial court's alter-ego finding was clearly erroneous because "[t]here is no evidence James's alleged dominance and misuse of the corporate businesses resulted in a transfer of community property to the separate property corporations. The evidence does not reflect the egregious circumstances that have led other courts to pierce the corporate veil and characterize separate property corporate assets as community property.")

Finally, a court's determination of whether giving recognition to the corporate form in a particular case will sanction fraud and/or promote injustice requires more than a balancing of the equities of the parties before the court; the rights of third-parties must be taken into account as well. Kline, 305 N.W.2d at 299 (remanding because the trial court "failed to hear evidence concerning employees and other third-party creditors of the professional corporation" and reasoning that "[i]f the court finds that ignoring the corporate entity will work a fraud or injustice on third parties, it may decide to respect the corporate entity if the interests of justice so demand.").

The record before the Court of Appeals simply does not contain any evidence that could possibly justify imposition of a Receivership and execution of an individual judgment against *separate legal entities* MVG and Schatzie. Despite empty *rhetoric*,[5] there is no *evidence* that would support the assertion

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[5] For example, in the Memorandum she filed in the Court of Appeals, Real Party Charlene Dudee asserted that "Dr. Dudee is the alter ego of Medical Vision Group" and "[h]e runs personal expenses through that entity." The citation accompanying that assertion, however, is a factual finding in Appellee Judge Philpot's Decree [Appendix Exhibit 1] wherein the Court merely summarized the parties' expert witnesses' testimony in stating: "Both Mr. Anderson and Mr. Cranfill testified that the most difficult element in valuing the practice was normalizing the personal expenditures that Dr. and Mrs. Dudee

that Real Party Jitander Dudee utilized Appellants' corporate forms to defaud his ex-wife in any way. Cf. White, 584 S.W.2d at 61 (describing "the essential elements of fraud" as "material misrepresentation, falsity, scienter, reliance, deception, and injury."). MVG is unquestionably, for lack of a better word, a "real business." It existed well before the filing of the dissolution action – a fact which would make it exceedingly difficult for anyone to find that Real Party Jitander Dudee formed it for the purpose of avoiding payment of his ex-wife. MVG *treats patients*, advertises, employs around a dozen people in addition to cleaning services, etc, for its multiple physical locations, and generates revenues from its business operations. Significantly, there is no evidence in the record to suggest that MVG was in any way undercapitalized or that Real Party Jitander Dudee disregarded any of the corporate formalities. Wholly absent from the record is any evidence that would support a finding that to recognize Appellants' corporate status would in some way "sanction a fraud or promote injustice." Not even Appellee Judge Philpot has made an "alter-ego" finding on these facts. And it appears the Court of Appeals's finding — to the extent that it is based upon anything other than a misconception about the primacy of mathematical ownership percentages, which would be purely speculative – withers when one realizes that, although the "alter-ego" label may constitute a convenient label that might justify Appellee Judge Philpot's rulings, it is a label with very real and very severe consequences. After all there are two sides to the coin; if MVG is Real

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paid from the practice." Even if a fact-finder were to interpret this statement as an indication that some garden-variety financial irregularities occurred with respect to personal v. corporate funds during the marriage, such would be a far cry from the type of egregious self-dealing *to the specific detriment of Real Party Charlene Dudee* that could support an alter-ego finding.

Party Jitander Dudee's alter ego, then *all of MVG's creditors* – from the laser-supply company to the electric company – could presumably look to Real Party Jitander Dudee for payment of *corporate debts*. Appellants fail to see any evidence in the record that could possibly support such a result; as such, the Court of Appeals's "alter-ego" finding is clearly erroneous. Accordingly, Appellee Judge Philpot has simply "shot from the hip," and in the process has effected and facilitated a complete disregard of the corporate form and, most significantly, has exceeded the scope of his jurisdiction. As such, the Court of Appeals abused its discretion when it denied Appellants' Petition for a Writ of Prohibition. See Lewis LP Gas, 113 S.W.3d at 178.

C. THE COURT OF APPEALS FAILED TO ADDRESS APPELLANTS' *INDEPENDENT CONTENTION* THAT APPELLEE JUDGE PHILPOT ACTED ERRONEOUSLY BY SANCTIONING OUTSIDE REVERSE VEIL PIERCING ("ORVP") GIVEN THE UNDISPUTED INTERFERENCE IT WOULD CAUSE WITH OTHER CREDITORS' CLAIMS.

Independently, in sanctioning Appellee Judge Philpot's rulings and thus Real Party Charlene Dudee's plans to effectuate the individual judgment against Real Party Jitander Dudee by executing that judgment upon the assets of MVG and Schatzie, the Court of Appeals has at least implicitly authorized what commentators have described as "Outside Reverse Veil Piercing" ("ORVP"). Appellants recognize that nearly thirty years ago in Culver v. Culver, 572 S.W.2d 617 (Ky. App. 1978), a relatively new Court of Appeals, in four sentences that provide no substantial elucidation as to the underlying factual record, affirmed a trial judge's decision to place a lien upon to "alter ego" corporations "in order to secure the payment of the sum awarded to Mrs. Culver as a division of the

marital property." Id. at 622. It is readily apparent from a review of the existing precedents, however, that neither the Court of Appeals nor this Court has ever addressed the issue in the context of a case that devoted substantial attention and legal analysis to the appropriateness of ORVP. Notably, a number of jurisdictions have flat-out rejected ORVP, see, e.g., Floyd v. IRS, 151 F.3d 1295 (10th Cir. 1998) (identifying the "many problems presented by the 'reverse-pierce' theory"). And the majority of the jurisdictions that have expressly recognized ORVP have done so with qualifications of a type that would prevent its application to Appellants because allowing Real Party Charlene Dudee to seize Appellants' assets to satisfy the judgment in her favor would adversely affect the corporation's creditors. See Acree v. McMahan, 585 S.E.2d 873 (Ga. 2003) (rejecting ORVP in Georgia, and observing that the jurisdictions that do permit such claims "place strict limits on its application such as requiring the plaintiff to prove that no innocent third-party creditor or shareholder would suffer harm or prejudice as a consequence of reverse veil-piercing and that there is no other available remedy, such as the usual judgment collection procedures.").

As such, even in the hopelessly hypothetical and imaginary world where substantial evidence existed to support the factual finding that Appellants were alter-egos for Real Party Jitander Dudee, *Appellants would still be entitled to the writ they seek* because Receivership and ORVP are indefensible given the inevitable zero-sum tradeoff that occurs if Appellants' assets and profits are distributed to Real Party Charlene Dudee instead of Appellants' employees or vendors or equipment providers, etc. Stated otherwise, even if an alter-ego

theory provided a jurisdictional "hook" upon which Appellee Judge Philpot could enter orders directly affecting Appellants, he acted erroneously within that jurisdiction, and in a manner that, based on the record before the Court of Appeals, undoubtedly caused immediate and irreparable harm to Appellants. In light of the fact that the Court of Appeals's Order gives no indication that it gave any consideration whatsoever to Appellants' stand-alone argument concerning the unavailability of ORVP in this factual context, it has plainly abused its discretion.

VI. CONCLUSION

For the above reasons, Appellants respectfully ask the Court to reverse the December 3, 2007 Order Denying Petition for a Writ of Prohibition and remand the case to the Kentucky Court of Appeals for entry of a writ prohibiting Appellee Judge Philpot from subjecting them to further imposition of receivership or equivalent form of judicially-imposed external control in connection with a dissolution action between two of the Appellees/Real Parties in Interest styled Charlene Theresa Dudee v. Jitander Singh Dudee, Fayette Circuit Court Civil Action No. 03-CI-442.

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant, was served by mailing same, postage prepaid, on this the 25TH day of January, 2008 to (1) Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; (2) Hon. Timothy N. Philpot, Fayette Circuit Courthouse, Room 534, 120 N. Limestone Street, Lexington, Kentucky 40507; (3) Ms. Valerie Kershaw, Esq., Dawhare & Kershaw, LLP, 333 West Vine Street, Suite 1201, Lexington, Kentucky 40507; (4) Mr. Thomas D. Bullock, Esq., Mr. Ross Stinetorf, Esq., and Mr. Harold L. Kirtley, Esq., Bullock & Coffman, LLP, 234 N. Limestone St., Lexington, Kentucky 40508; and (5) Mr. James W. Gardner, Esq., Henry, Watz, Gardner, Sellars, & Gardner, PLLC, 401 West Main Street, Suite 314, Lexington, Kentucky 40507. The undersigned certifies that he did not withdraw the record on appeal, as defined by CR 76.36(5)&(7)(j).

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