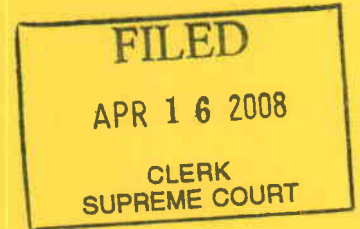


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000017-MR



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

APPELLANTS

V. APPEAL FROM ORIGINAL ACTION IN COURT OF APPEALS
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

REPLY BRIEF FOR APPELLANTS

Respectfully submitted,


A handwritten signature in black ink, appearing to read "Trevor W. Wells". The signature is written in a cursive, flowing style.

TREVOR W. WELLS
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COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellants and the accompanying Motion for Leave to File same was served by mailing same by First-Class U.S. Mail postage prepaid, on this the 15th day of April, 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).



COUNSEL FOR APPELLANTS

I. **STATEMENT OF PURPOSE OF REPLY BRIEF**

Appellants submit this Reply Brief exclusively to address the allegation of mootness raised in the Brief filed by Appellee/Real Party in Interest Charlene Dudee (“Real Party Charlene Dudee”), which rests that allegation upon developments subsequent to Appellants’ filing of their original Brief.

II. **ARGUMENT**

Appellants respectfully disagree with Real Party Charlene Dudee’s suggestion that the issues presented in this appeal have been rendered moot by an Order entered March 6, 2008 that discharged the Receiver and relieved “him of all responsibilities with respect to Medical Vision Group, PSC and Schatzie, LLC” except as otherwise specified. To be clear, Appellants do not dispute the fact that the Court entered the Order attached to Appellee Charlene Dudee’s Brief. Instead, they ask the Court to closely scrutinize Appellee Charlene Dudee’s mootness claim because “it is not every change in circumstances which renders a case moot so as to require a dismissal of appeal[.]” Brown v. Baumer, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (Ky. 1945). Appellants have no dispute with the legal principle that an appellate court should dismiss an appeal “where the reversal would not accomplish *any result*, or where an affirmance *would benefit no one* [or] where pending on appeal an event occurs which of necessity renders any judgment that might be pronounced *ineffectual for any purpose.*” Id., 301 Ky. at 322, 191 S.W.2d at 238 (emphasis added). From Appellants’ perspective, however, those principles are wholly inapplicable to the appeal presently before the Court because in the Original Action below, the Court of

Appeals made a finding of fact, i.e., that Appellants are Real Party Jitander Dudee's alter-egos, that carries the potential to continue to produce negative consequences for Appellants – not only within the context of the related marital-dissolution proceeding, but also externally if third parties are able to make offensive use of that finding through the doctrine of collateral estoppel or otherwise. Simply stated, because this Court can reverse the decision of the Court of Appeals and set aside as clearly erroneous the factual finding made by it, this Court retains the ability to grant meaningful relief on this appeal, and this appeal is not one in which it would be “impossible for this Court to grant actual or practical relief.” Commonwealth v. Hughes, 873 S.W.2d 828, 830 (Ky. 1994). Because a fully-justiciable controversy remains, this appeal is far from moot.

Furthermore, the Court should note that Appellants foreshadowed the possibility of review-ducking intervening orders from Appellee Judge Philpot when they framed their request for relief in their Original Action. Appellants did not seek relief from a particular Order, but rather asked the Court of Appeals to prohibit 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.” The fact that Appellee Judge Philpot has now at least temporarily suspended the imposition of the previous judicially-imposed external control does not deprive this Court of the jurisdiction to decide the

question of whether Appellee Judge Philpot has the authority to take such action in this case.

As this Court is well-aware, “a well-known exception to the mootness doctrine occurs when an issue is ‘capable of repetition, yet evading review.’” Fletcher v. Commonwealth, 163 S.W.3d 852, 859 (Ky. 2005). And, “[a] two-part test governs the application of this exception: ‘(1) is the ‘challenged action too short in duration to be fully litigated prior to its cessation or expiration and (2) [is there] a reasonable expectation that the same complaining party would be subject to the same action again.’” Id.

Taking those two questions in reverse order, it is beyond any serious dispute that Appellee Judge Philpot’s discharging of the Receiver stemmed from *the Receiver’s request to withdraw*, and cannot in any way be reasonably interpreted as Appellee Judge Philpot’s abdication of authority to impose Receiverships upon Appellants in the future. In fact, in a separate Order entered the same day as the Order attached to Real Party Charlene Dudee’s Brief, and of which Real Party Charlene Dudee rightfully should have made this Court aware, the Court unequivocally stated that it “shall not dismiss the Receiver, but neither shall it Order the Receiver to remain in the case. The Receiver shall notify the court if he intends to withdraw.” See Order of March 6, 2008 (attached as Exhibit A to this Reply Brief). The subsequent Order’s recitations state that “the Receiver having informed the Court of his request to withdraw,” and in its rightful context can only reasonably be interpreted as the Court’s decision to respect the wishes of the individual Receiver. In addition, the second May 6, 2008 Order left

little doubt as to the Court's thinking with regard to the availability of *Appellants'* *assets* for satisfaction of the judgment it entered against Real Party Jitander Dudee. Paragraph 2 of that Order not only authorized but actually mandated that on his way out the door, the Receiver was to write a check to Real Party Charlene Dudee that included \$26,000.00 in interest payments on "the Judgment." Although the former Receiver apparently understandably no longer wished to fulfill his appointed role, the entire record of Orders in this case reflects a clear and present danger that Appellee Judge Philpot will reimpose external controls upon Appellants if he chooses to do so notwithstanding the fact that he lacks the jurisdiction to do so.

Appellee Judge Philpot entered the Order appointing the Receiver *more than a year ago*.¹ Between ultimately vain attempts to reason with Judge Philpot regarding his lack of jurisdiction over Appellants and litigation of the Original Action before the Court of Appeals, *a full eight months* passed before Appellants had a final Order in the Original Action from which it could appeal to this Court. Briefing before this Court took longer than usual because of Real Party Charlene Dudee's Motion for Extension, to which Appellants did not object. Frankly, the mootness exception for those matters that are "capable of repetition, but evading

¹ Although Real Party Charlene Dudee's Brief contains extensive "citations" to matters not within the record of this Original Action, see Real Party Charlene Dudee's Brief at 2, which is unquestionably improper, see Baker v. Jones, 199 S.W.3d 749 (Ky. App. 2006) ("On appeal, our review is confined to matters properly made part of the record below. . . . [T]he presentation of extraneous material in briefs is improper[.]"), rather than adding further unnecessary delay by moving to strike her brief, Appellants will simply ask the Court to take note of Appellee Judge Philpot's written Order [attached at Tab 4 of Appellant's Documentary Appendix], which is a part of this appellate record, unequivocally states that he appointed the Receiver in response to *Petitioner's* Motion.

review” seems a perfect fit to permit meaningful appellate review in situations where circuit court judges take extra-jurisdictional actions and then enter Orders suspending or withdrawing those actions immediately before the appeal becomes ripe for a decision in this Court. Cf. Commonwealth v. DeWeese, 141 S.W.3d 372, 375 (Ky. App. 2003) (applying “capable of repetition, yet evading review” exception to mootness doctrine in appeal from denial of writ of prohibition where subsequent developments in trial court removed immediacy of issue).

III. CONCLUSION

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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COUNSEL FOR APPELLANTS

COMMONWEALTH OF KENTUCKY
FAYETTE FAMILY CIRCUIT COURT
FIRST DIVISION

MAR 06 2008

IN RE THE MARRIAGE OF:

CHARLENE THERESA DUDEE

AND

ORDER

CASE NO. 03-CI-442

JITANDER SINGH DUDEE

** ** * ** * ** * **

This matter having come before the Court on the Receiver's Emergency Motions regarding payments priorities on March 4, 2008; the Receiver being present, the Respondent being present and proceeding pro se, counsel for Petitioner being present; the Court having heard an oral report from the receiver, argument from counsel and Respondent; the Court having reviewed the record and otherwise being sufficiently advised; IT IS HEREBY ADJUDGED AND ORDERED that;

- 1) The Court was informed that Dr. Dudee is taking psychiatric medical leave from his practice for the next 6-8 weeks.
- 2) The Court shall not dismiss the Receiver, but neither shall it Order the Receiver to remain in the case. The Receiver shall notify the court if he intends to withdraw;
- 3) Should the Receiver remain in place, he shall make the following payments while the practice is being held in abeyance or winding down:
 - a) Court Ordered Child Support to Petitioner
 - b) Property division of \$3,000 per week to Petitioner;
 - c) Salaries for skeletal staff needed to assist Dr. Dudee in holding the



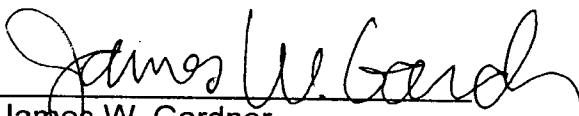
- practice in abeyance or winding down;
- d) Health Insurance as previously provided for current employees.
- 4) Dr. Dudee remains the sole person regarding all decision-making for patient care and medical duties for Medical Vision Group, PSC;
- 5) Should the Receiver remain in place, he shall contact Dr. Reddy to determine the reasonableness of payments for services provided he may provide to Medical Vision Group's patients while Dr. Dudee is on medical leave;
- 6) Dr. Dudee is to provide all information and proof of any and all disability insurance policies he holds either through the practice or individually, at the next review; and
- 7) This matter shall be reviewed on March 7, 2008 at 10:15 a.m.

MAR 06 2008
Dated this _____ day of March, 2008.

/S/TIMOTHY N. PHILPOT
A TRUE COPY
ATTEST: WILMA R. LYNCH, CLERK
FAYETTE CIRCUIT COURT
BY Belinda W. 2 **DEPUTY**

TIMOTHY N. PHILPOT
JUDGE, FAYETTE CIRCUIT COURT

PREPARED BY:


James W. Gardner
Receiver

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has this 6th day of March, 2008 been mailed to the following:

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Hilma J. Lynch
BY: Edward
CLERK, FAYETTE CIRCUIT COURT