

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2008-SA-000017-MR

FILED  
APR 16 2008  
CLERK  
SUPREME COURT

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

APPELLANTS

V.  
APPEAL FROM ORIGINAL ACTION  
IN THE COURT OF APPEALS  
ACTION NO. 07-CA-00159-OA

HON. TIMOTHY N. PHILPOT, JUDGE  
FAYETTE CIRCUIT COURT,  
FAMILY BRANCH, FIRST DIVISION

APPELLEE

AND

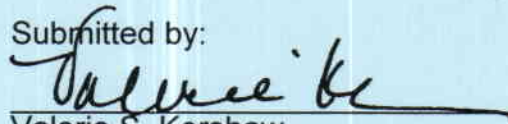
CHARLENE THERESA DUDEE  
JITANDER SINGH DUDEE, AND  
JAMES W. GARDNER, ESQ. in his capacity as Receiver  
(REAL PARTIES IN INTEREST)

APPELLEES

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BRIEF UPON BEHALF OF APPELLEE AND REAL PARTY IN INTEREST  
CHARLENE THERESA DUDEE

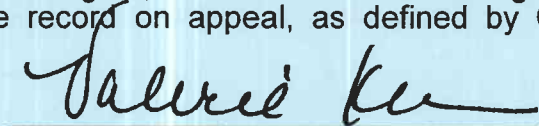
Submitted by:



Valerie S. Kershaw  
Suzanne Baumgardner  
Dawahare & Kershaw, LLP  
333 West Vine Street, Suite 1201  
Lexington, KY 40507  
(859)381-1145 (phone)  
(859)381-1165 (fax)

CERTIFICATE

The undersigned hereby states that a copy of this document was served by U.S. Postal Service, first class postage paid, on this the 9<sup>th</sup> day of April, 2008 upon Hon. Timothy Philpot, Fayette Circuit Court, First Division, 120 N. Limestone, Lexington, Kentucky 40507; James W. Gardner, Henry Watz Gardner Sellars & Gardner, PLLC, 401 West Main Street, Suite 314, Lexington, KY 40507; Trevor W. Wells, Miller & Wells, 300 East Main Street, Suite 3600, Lexington, KY 40504; Thomas D. Bullock, 234 N. Limestone, Lexington, KY 40507. The undersigned certifies that she did not withdraw the record on appeal, as defined by CR 76.36(5)&(7)(j).



Valerie S. Kershaw

## INTRODUCTION

This is an appeal from an Order of the Kentucky Court of Appeals denying Appellant's Petition for a Writ of Prohibition stemming from an underlying divorce action. Appellee, Dr. Jitander Dudee, has failed to make payments due under the Decree of Dissolution to Appellee, Ms. Charlene Dudee. Dr. Dudee is the sole owner, officer, and shareholder of Medical Vision Group, P.S.C. Upon oral motion of Dr. Dudee and written motion of Ms. Dudee, the trial court appointed a receiver for Medical Vision Group on April 3, 2007. Subsequently, Dr. Dudee hired counsel on behalf of Medical Vision Group, P.S.C. to file a Petition with the Court of Appeals to Prohibit the Trial Court from subjecting Medical Vision Group, P.S.C. to a receiver. The Court of Appeals did not error in denying the Writ of Prohibition. Further, the receiver has now been discharged and this appeal should be dismissed for lack of jurisdiction.

**STATEMENT CONCERNING ORAL ARGUMENT**

This divorce action has been highly litigated at both the trial and appellate level. As Dr. Dudee has refused to post a bond or pay the amounts due to Ms. Dudee under the decree, it is now being litigated as an enforcement action. The trial court has held several hearings regarding the enforcement of its Decree. The legal issues presented before this Court are not issues of first impressions nor are they complex. The record and briefs submitted are sufficient for this Court to render an opinion in this matter. The Appellee does not believe oral argument would assist the Supreme Court in this matter.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

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### **COUNTERSTATEMENT OF THE CASE:**

Dr. Dudee and Ms. Dudee were divorced on February 13, 2006 pursuant to a Decree of Dissolution entered by Hon. Timothy Philpot, Judge of the First Division of Fayette Circuit Court. In that Decree, the trial court allocated the majority of the marital assets to Dr. Dudee and awarded Ms. Dudee a cash payment. The assets awarded to Dr. Dudee include Schatzie, L.L.C. (the holding company of the parties' commercial real estate of which Dr. Dudee and Ms. Dudee were the only shareholders) and Dr. Dudee's ophthalmic medical practice, which is wholly owned and operated by Dr. Dudee under the name "Medical Vision Group, Professional Service Corporation." Dr. Dudee is the sole owner, officer, and shareholder of Medical Vision Group, P.S.C. The entirety of these entities were found by the trial court to be 100% marital property.

These assets were, and continue to be, under the subject matter jurisdiction of the trial court; they were valued, characterized, and allocated by the trial court. In exchange for Dr. Dudee being awarded the hard assets, per his request at trial, Ms. Dudee was awarded a cash payment to equalize the division of the marital estate pursuant to KRS 403.190. Dr. Dudee remains in possession of the hard assets awarded to him; however, he refused, and continues to refuse, to pay to Ms. Dudee any of the money awarded to her under the trial court's Order to make an equitable division of the marital estate. Until such time as Dr. Dudee complies with the terms of the Decree and pays to Ms. Dudee the sums due to her in exchange for receiving the hard marital assets, those hard assets awarded to Dr. Dudee remain under the jurisdiction of the trial court.

Dr. Dudee appealed the trial court's Findings of Fact, Conclusions of Law and Decree, but he chose not to post a bond.<sup>1</sup> As no bond was posted, Ms. Dudee availed herself to all avenues available to her under the law to enforce the Decree of Dissolution. Dr. Dudee has not voluntarily paid one cent toward the sums due for property division pursuant to the Decree. Prior to the appointment of the receiver, the only payments Ms. Dudee has received has been through forced sale of Dr. Dudee's property.

It was Dr. Dudee's suggestion for the trial court to hire a receiver. At a contempt hearing on February 19, 2007, Dr. Dudee argued that he did not have the funds to pay Ms. Dudee the amounts due her under the Decree, and if the Court wanted proof of that, the trial court should appoint a receiver for his businesses. [02/19/2007 22/01/06/CD/VCR/11 10:27:54-10:28:16]. The trial court took this suggestion under consideration after that hearing.

A few weeks later, when Dr. Dudee stopped paying his maintenance obligation, Ms. Dudee requested that the trial court sustain Dr. Dudee's oral motion and appoint a receiver for Medical Vision Group, P.S.C., and Schatzie, LLC. At a hearing on March 23, 2007, Dr. Dudee reiterated that he wanted the trial court to appoint a receiver for his businesses even though he then stated that he believed the trial court did not have jurisdiction to do so. [03/23/2007 22/01/06/CD/VCR/20 10:03:00-10:03:09]. Dr. Dudee's counsel further states that, "We'll agree to the receiver with respect to all of it, every bit of it." (Referring to Medical Vision Group and Schatzie, LLC). [03/23/2007 22/01/06/CD/VCR/20 10:17:59].

The trial court sustained Dr. Dudee's Oral Motion and Ms. Dudee's written motion and appointed a receiver in an Order entered April 3, 2007. (Appellant's

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Action Nos. 05-CA-2218-MR & 06-CA-775-MR. The Court of Appeals affirmed the trial court's Findings of Fact, Conclusions of Law, and Decree. Dr. Dudee has filed a motion for discretionary review which is pending before the Supreme Court of Kentucky.

Appendix #4). This Order was not appealed by Dr. Dudee. However, on August 30, 2008, Medical Vision Group, P.S.C., on behalf of the sole owner and sole shareholder Dr. Dudee, filed a Writ of Prohibition against the trial court in an attempt to dismiss the receiver. That Writ was denied by the Court of Appeals.

Since the initial appointment of the receiver, the trial court has held numerous hearings, monitoring and reviewing the role of the receiver, the latest of these hearings occurred March 1, 2008. At that hearing, Dr. Dudee informed the trial court he was taking psychiatric medical leave and he was either winding down or holding the practice in abeyance. Based on the news that Dr. Dudee was holding the practice in abeyance, the receiver has withdrawn, and the Court has dismissed the services of the receiver.

## ARGUMENT

### I. THE ISSUE IS MOOT BY SUBSEQUENT ACTS AND PROCEEDINGS AND THE APPEAL SHOULD BE DISMISSED.

Dr. Dudee informed the Court on March 4, 2008 that he was leaving his practice for at least eight weeks and did not know if he would return. The receiver has withdrawn. By Order entered March 5, 2008, the trial court dismissed the receiver and Dr. Dudee is in sole control of the income and expenses of Medical Vision Group, P.S.C. (Exhibit A)

For a court to address the merits of a complaint, there must be an actual and justiciable controversy. Associated Industries of Kentucky v. Commonwealth, 912 S.W.2d 947, 950 (Ky.1995). If a case has facts which make a court's ruling for the complaining party meaningless, the case is rendered moot because there is no grievance to resolve. Commonwealth v. Hughes, 873 S.W.2d 828, 830 (Ky.1994). As the receiver has been dismissed and Medical Vision Group, P.S.C., is in the sole control of Dr. Dudee, the issue of the appointment of the receiver and his duties is moot and this matter should be dismissed for lack of jurisdiction.

### II. THE COURT OF APPEALS MADE A FINDING AS A COURT OF ORIGINAL JURISDICTION, AND THOSE FINDINGS WERE AMPLY SUPPORTED BY THE RECORD.

The Court of Appeals, as the court of original jurisdiction, made an appropriate finding that Dr. Dudee is the alter ego of Medical Vision Group, P.S.C. Medical Vision Group, P.S.C., attached, among other documents, to its Petition for a Writ of Prohibition, the trial court's entire Findings of Facts, Conclusions of Law, and Decree of Dissolution. The Findings of Fact entered by the trial court contained sufficient Findings for the Court of Appeals to base its conclusion that Dr. Dudee is, in fact, the alter ego of Medical Vision Group, P.S.C.

Dr. Dudee does not deny that he is the sole physician in his professional service corporation doing business under the name of Medical Vision Group, P.S.C.



He is the sole owner, officer, and shareholder. Dr. Dudee admitted at trial that he used business credit cards and bank accounts to pay personal expenses. He testified at trial that money flowed back and forth between himself and the business. It was acknowledged by all accountant experts involved in the case that the "books" of the business with regard to "notes payable" and "notes receivable" between Dr. Dudee, Medical Vision Group, P.S.C., and Schatzie, LLC, were not wholly accurate. The trial court made a specific finding that the notes receivable between the two business entities and Dr. Dudee were "loosely" accounted for. (Findings of Fact, Paragraph 12, Page 15: Appellant's Appendix #2)

The entities lost their status as separate due to Dr. Dudee's actions. Dr. Dudee admitted he did not deposit some cash assets of the business into any business account. He failed to disclose assets during the proceedings, including in the signing of mandatory disclosure forms and discovery answers under oath. (Findings of Fact, paragraph 16, pages 20-21; Conclusions of Law, paragraph 16, page 37: Appellant's Appendix #2). Dr. Dudee admitted as sole equity holder he used the business credit card as a personal credit card. Neither accounting expert, nor the deposed accountant for the business, could testify that in reclassifying such expenses from expenses of the business to equity draws, that all such transactions were appropriately adjusted; the transactions were too numerous for certainty. Dr. Dudee's own expert made an adjustment in his valuation of the practice in an effort to account for business expenses that had not been appropriately reclassified. (Findings of Fact, paragraph 5, pages 4-7: Appellant's Appendix #2).

The books and records of Medical Vision Group, P.S.C., were scrutinized by counsel and accountant experts for both sides. Both experts testified at trial and were subject to extensive cross-examination. The experts relied upon the company books and the depositions of the company's accountants. Dr. Dudee's admissions are included in the trial court's Findings of Fact and Conclusions of Law.

By treating the business credit cards and bank accounts as his own

accounts—paying personal expenses through same—Dr. Dudee “pierced” his own corporate veil. His actions are consistent with the finding from the Court of Appeals that the corporation is his alter ego.

There is substantial evidence in the record to support the Finding of the Court of Appeals that the business, Medical Vision Group, P.S.C., is the alter ego of Dr. Dudee. Thus the Finding of the Court of Appeals is supported by the weight of evidence in the record and should not be set aside by this Court as abuse.

**III. A MOTION FOR A MORE SPECIFIC FINDING WAS NOT FILED WITH THE COURT OF APPEALS, THEREBY FAILING TO PROPERLY PRESERVE THIS FOR REVIEW.**

If Medical Vision Group, P.S.C. believed that a more specific finding were needed from the Court of Appeals as to how it arrived at its conclusion that Medical Vision Group, P.S.C. was the alter ego of Dr. Dudee, it was required to bring a written motion, or a motion to make additional findings pursuant to Rule 62.02. See, Eiland v. Ferrell, 937 S.W.2d 713 (Ky. 1997) (court must render findings of fact based on evidence, but no claim will be heard on appeal unless trial court has been requested to make unambiguous findings of all essential issues). Failure to make a request for a specific finding constitutes a waiver and precludes appellate review. Abuzant v. Shelter Ins. Co., 977 S.W.2d 259 (Ky. App. 1998).

If Medical Vision Group, P.S.C., believed the Court of Appeals failed to make a clear factual finding or that such a finding was made without sufficient evidence, it should have moved the Court for a more specific finding. Medical Vision Group, P.S.C., did not request more specific findings pursuant to Civil Rule 52.04. This issue was not properly preserved for review. Angel v. Angel, 562 S.W.2d 661 (Ky. App. 1978).

## CONCLUSION

The trial court was well within its jurisdiction to appoint a receiver and pay Ms. Dudee judgment amounts due from the marital asset, Medical Vision Group, P.S.C. Dr. Dudee requested that the trial court appoint a receiver. The Court of Appeals was correct when it stated Medical Vision Group was the alter ego of Dr. Dudee and that finding was supported by the record available to the Court of Appeals and no abuse of discretion has occurred. Further, the receiver has now been discharged and the issue is moot. For all the reasons set forth herein, Appellee, Charlene Dudee, requests that the Court of Appeals Order not be disturbed.

Respectfully submitted,  
VALERIE S. KERSHAW  
SUZANNE BAUMGARDNER  
DAWAHARE & KERSHAW, LLP  
333 West Vine Street, Suite 1201  
Lexington, KY 40507  
859-381-1145

  
ATTORNEYS FOR APPELLEE