90388-3

No. 71061-3-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

NORTHWEST CASCADE, INC.

Appellant/Cross-Respondent,

v.

UNIQUE CONSTRUCTION, INC.; TEMPORAL FUNDING, LLC; WILLIAM REHE; JANE DOE REHE; WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC,

Respondent/Cross-Appellant.

PETITION FOR REVIEW

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June 6, 2014

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No. 71061-3-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NORTHWEST CASCADE, INC., a Washington corporation, Appellant/Cross Respondent, v. UNIQUE CONSTRUCTION, INC., a Washington corporation; Respondent/Cross Appellant, TEMPORAL FUNDING, LLC, a Washington Limited Liability Company; Defendant, WILLIAM REHE; JANE DOE REHE; and the WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC, Respondents/Cross Appellants.	)	PETITION FOR REVIEW TO SUPREME COURT (RAP 13.3, 13.4)

I. IDENTITY OF PETITIONER

The petitioners are William and Suzanne Rehe and Unique Construction, Inc.

II. CITATION TO COURT OF APPEALS DECISION

Nw. Cascade, Inc. v. Unique Const., Inc., 71061-3-I, 2014 WL 1289586 (Wash. Ct. App. Mar. 31, 2014) ("Decision"). Reconsideration denied on April 30, 2014. A motion to publish was denied on May 7, 2014.

III. ISSUES PRESENTED FOR REVIEW

a. Did the appellate court err and deviate from existing Supreme Court and Appellate Court precedent in substituting its factual determination for that of the trial court when substantial evidence supported the trial court determination not to pierce the corporate veil?

b. Did the appellate court err and deviate from existing Supreme Court and Appellate Court precedent in applying the applicable law regarding the standard of review?

c. Did the appellate court err in reversing as opposed to remanding?

d. Did the appellate court err in not allowing the Motion to Supplement evidence?

e. Did the appellate court err in not ruling that the attorney fees of Northwest Cascade, Inc (NWC) were unreasonable?

f. Should the court award the petitioners' attorney fees and costs?

IV. STATEMENT OF THE CASE

a. Background Facts.

Unique contracted with NWC on March 27, 2006 for the infrastructure of a 34-lot plat in East Tacoma. Ex. 4; CP 11; RP 3/20/12 p. 18-19. Despite the Contract being for $583,812.50, NWC ended up billing $951,203.18. Exhibit 4, Exhibit 14 third page. RP 3/20/12 p. 32 As the plat was completed, as the real estate market imploded, the lots lost value to the point it became a complete loss and was foreclosed and lost at great loss to Unique and its sole shareholders, the Rehes. Of relevance is that in 2009, Unique transferred two properties, the 89th Street Property and the 38th Street Property. (Ex 87, 88) The transfer of the 89th Street Property was avoided in this lawsuit.

b. Unique was a small S-Corp.

Unique Construction was originally a sole proprietorship formed about 40 years ago. RP 3/26/12 p. 22. It was incorporated in 1984. RP 3/26/12 p. 22. William ("Bill") and Suzanne Rehe have been the sole shareholders. RP 3/14/12 p. 32. Bill always did the books. RP 3/26/12 p. 22. He also did the tax returns for Unique and described it as a "flow through" S-Corporation RP 3/26/12 p. 35. His method of accounting on each project was to keep "a box" where he would keep all of the expenses and paperwork related to each project. RP 3/26/12 p. 22-23. At intervals, he would go through the box and update his computer records. RP 3/26/12. p. 24; RP 3/22/12 p. 30-31; Finding 9 CP 1021. This informal accounting system predated any involvement with NWC. RP 3/26/12 p. 22; Finding 10 CP 1021.

c. Rehes personal use of corporate funds was diminimus in light of overall transactions, amounts personally contributed, and Bill Rehe not taking any wages or salary.

Bill Rehe believed, that given that Unique was an S-Corporation and was a "flow through" entity, that distinctions related to personal and business expenses were not overly important as it would all flow out to his personal tax return anyways. RP 3/26/12 p. 35, 40-41. For instance, Bill Rehe would charge large construction related expenses on his personal credit card to get credit for airline miles from the credit card company. RP 3/26/12 p. 27. Bill Rehe would then go through the credit card statement and allocate which portion of the statement would go to which project. RP 3/26/12 p. 26-28. The unallocated portions of personal expenses were not attributed to the business ventures and put in the "personal box." RP 3/26/12 p. 26-27. Again, this practice predated any activity with NWC. RP 3/26/12 p. 22, 37.

Reference was made by Division 1 to checks for "cash" from Unique to the Rehes. NWC'S own expert, Paul Peterson, acknowledged that such 16 "cash" checks that occurred long before Unique became insolvent. RP 3/22/12 p. 12. The "cash" checks totaled $33,298.80 from July 2005 to the expert's trial testimony on March 15, 2012. RP 3/15/12 p. 261. Unique never paid the Rehes any salary. RP 3/15/12 p. 259. NWC's expert testified that Unique could have properly disbursed funds to the Rehes in the form of wages or distributions to owners. RP 3/22/12 p. 10-11. Mr. Peterson acknowledged "Unique was out of cash in 2006 and most this stuff [cash distributions] occurred way before that

timeframe." RP 3/15/12 p. 261. Mr. Rehe testified that much of the cash was used for business related expenses. RP 3/26/12 p. 28-29.

NWC's expert did not dispute that the money for the 89th St. Property came from the Rehes' personal funds. RP 3/15/12 p. 216, 255, 256. Unique never paid any interest back to the Rehes – even NWC's expert so agreed. RP 3/15/12 p. 256 The 89th Street Property got tied up in unrelated litigation in which Unique prevailed. RP 3/15/12 p. 171-72. Still, by then, the Rehes needed a place to live and having funded the 89th Street project and taken nothing back, moved into the home. RP 3/26/12 p. 36.

At trial, NWC's expert was only able to identify $175,000-180,000 in claimed personal expenses over a four month period. RP 3/15/12 p. 247-8. Of such amount, a portion was for medical insurance and expenses which Mr. Peterson acknowledged could have been run through the company properly. RP 3/15/12 p. 262. $96,000 was a noncash "rental benefit" estimated by the non-appraiser, inactive CPA, Mr. Peterson. CP 3/15/12 p. 244-46. $33,298.80 were checks to "cash" that Mr. Rehe testified were used for business. Supra. Mr. Peterson testified the date of Unique's insolvency was July 29, 2009, when the 89th Street Property was transferred. RP 3/22/12 p. 3. The commingling, NWC's expert testified to, was from 2005 to 2008. RP 3/22/12 p. 15. When asked if he was testifying if the commingling caused Unique to be unable to pay NWC, Mr. Peterson answered:

> I don't know why they didn't pay them. I know that when they transferred the house they could not pay them. These types of transactions make it more difficult for them to pay, but I believe, absent the transfer of the house, there was enough assets left to pay Northwest had they elected to do so.

RP 3/22/12 p. 15.

The trial court wisely picked up on this in finding "[w]hile Mr. Rehe's accounting practice are substandard, they were not designed to intentionally evade a duty to a creditor." Finding 35, CP 1025

NWC's expert testified the other questionable expenses on the credit card which were under $20,000 over five years. RP 3/15/12. p. 257. During such time hundreds of thousands of dollars ran through the credit card. RP 3/15/12. p. 258. Mr. Peterson, when asked if it was material in "the big scheme" of things, said "not when you add it up according to the total volume of transactional activity...." RP 3/15/12. at 259. The trial court found the questionable expenses to be "diminimus in the overall view of Unique's activities, predated the NW Cascade, Inc.'s contract, and did not cause the inability of Unique to pay its creditors." Finding 34, CP 1025. The record further reflected that Bill Rehe was never paid a salary or took any salary during the many years relevant to this litigation. RP 3/15/12 p. 259-60

d. Northwest Cascade did not protect itself.

The record further reflected that NWC failed to take any steps to protect itself. The contract allowed for NWC to run a credit check on Unique. Ex. 4. NWC never ran such a check. RP 3/26/12 p. 32. NWC never

sought a personal guaranty. RP 3/26/12 p. 33. NWC never sought to look at Unique's financial statements. RP 3/26/12.p. 32. The trial court made findings at CP 1025-6 that:

> 38. The assets that Northwest Cascade is trying to reach were never a consideration of Northwest Cascade when entering into he contract. The attempts to pierce the corporate veil is an attempt by Northwest Cascade to create a fund against which to collect a judgment.
>
> 39. Prior to entering into the contract, Northwest Cascade did not ask to see he books or financial records of Unique or the Rehes. Therefore, the abuse of corporate form by commingling and the Rehe's personal use of the corporate assets did not mislead Northwest Cascade.

e. During the appeal, Northwest Cascade had the transfer of the 38th Street property avoided that was relevant to the appeal before Division 1.

As set forth in the Motion to Supplement Evidence filed in Division 1 by the Petitioners, there was new evidence that should have been considered by the Division 1: A January 17, 2014 Finding of Fact and Conclusion of Law and a January 17, 2014 Judgment in Pierce County Superior Case No. 12-2-15410-0 wherein on January 6, 2012, NWC filed another action in Pierce County Superior Case No. 12-2-15410-0. In such case NWC similarly sought to have the 38th Street Property transfer avoided as a fraudulent transfer. The trial court agreed and on January 17, 2014, it did so by entering the afore-referenced Findings of Fact and Conclusions of Law as well as a Judgment.

V. ARGUMENT

a. The appellate court erred and deviated from existing Supreme Court and Appellate Court precedent in substituting its factual determination for that of the trial court when substantial evidence supported the trial court determination not to pierce the corporate veil.

This is the first case the undersigned could find wherein an appellate court reversed a trial court's determination not to invoke the equitable remedy of piercing the corporate veil. The Washington Supreme Court and the appellate court have made clear that "We review the facts underlying corporate disregard for substantial evidence." (citation omitted). Rogerson Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 924, 982 P.2d 131, 134 (1999). It is not this court's role to retry factual issues. (citation omitted) Reynolds Metals Co. v. Elec. Smith Const. & Equip. Co., 4 Wn. App. 695, 698, 483 P.2d 880, 882 (1971). Such case went on to explain: "However, our examination of the record goes no further than to determine whether there is substantial evidence to sustain the trial court's findings. Stutz v. Moody, 3 Wash.App. 457, 476 P.2d 548 (1970). As an appellate court, we cannot weigh conflicting evidence. McGarvey v. Seattle, 62 Wash.2d 524, 384 P.2d 127 (1963)." Reynolds at 698-99. See, Grayson v. Nordic Const. Co., Inc., 92 Wn.2d 548, 553, 599 P.2d 1271, 1274 (1979).

Further, "[t]he doctrine of disregarding the corporate entity or piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege." (citation omitted) Truckweld Equip. Co., Inc. v. Olson, 26 Wn. App. 638, 643, 618 P.2d 1017, 1021 (1980) Equitable proceedings are "addressed to the sound discretion of the trial

court, to be exercised according to the circumstances of each case." Standing Rock Homeowners Ass'n v. Misch, 106 Wash.App. 231, 240, 23 P.3d 520 (2001)(quoting Steury v. Johnson, 90 Wash.App. 401, 405, 957 P.2d 772 (1998)). Many cases involving the granting of equitable relief deal with injunctions. "A trial court has broad discretion to fashion an injunction that is appropriate to the facts, circumstances, and equities before it, and the reviewing court will give great weight to the trial court's exercise of discretion." Sunnyside Valley Irr. Dist. v. Dickie, 111 Wn. App. 209, 219-20, 43 P.3d 1277, 1283 (2002), affirmed 49 Wn.2d 873, 73 P.3d 369 (2003).

"In matters of equity, 'trial courts have broad discretionary power to fashion equitable remedies.' In re Foreclosure of Liens, 123 Wash.2d 197, 204, 867 P.2d 605 (1994). The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. Blair v. Wash. State Univ., 108 Wash.2d 558, 564, 740 P.2d 1379 (1987)." Sorenson v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172, 1176 (2006). "An abuse of discretion exists only when no reasonable man would take the position adopted by the trial court. State v. Batten, 16 Wash.App. 313, 556 P.2d 551 (1976)." Morgan v. Burks, 17 Wn. App. 193, 198, 563 P.2d 1260, 1262 (1977), reversed on other grounds, 93 Wn.2d 580, (1980).

In the present case, there was substantial evidence regarding reasons not to pierce the corporate veil. The trial court went through findings as to Bill Rehe's accounting system and found that the cash

distributions later focused on by Division 1 were diminimus. The factual basis in the record is set forth in the fact section but is summarized as the cash distributions being small in comparison to the amount of money being run through the account, that many of the expenses could have been properly labeled business expenses and the fact that Bill Rehe never took a salary or a wage. This is legally important as the commingling has to cause the harm to NWC. However, even NWC's own expert admitted that Unique was out of cash by 2006. The third amended complaint shows problems began to brew in early 2007 (CP 11-13) and this present lawsuit was not filed until 2008.

Further the court noted how Bill Rehe's accounting system long predated the March 2006 contract and was based on a misunderstanding of how "flow through" entities work. (Finding 33, 35 CP 1025). The court found that the accounting practices "were not designed to intentionally evade a duty to a creditor." (Finding 35 CP 1025). This is legally important as the entire notion of disregarding the corporate form requires "a plaintiff must prove the LLC form 'was used to violate or evade a duty and that the LLC form must be disregarded to prevent loss to an innocent party.' Chadwick Farms [Owners Ass'n v. FHC, LLC], 166 Wash.2d [178] at 200, 207 P.3d 1251 [(2009)]. Establishing the first element requires the plaintiff to show 'an abuse of the corporate form.' Meisel v. M & N Modern Hydraulic Press Co., 97 Wash.2d 403, 410, 645 P.2d 689 (1982)." Landstar Inway Inc. v. Samrow, 43894-1-II, 2014 WL 1847001 (Wash. Ct. App. May 6, 2014). Unique Construction existed decades

before its contract with NWC and there is no proof any of the cash issues, the accounting issues, the bookkeeping issues were designed to evade a duty.

There was also substantial evidence that NWC took no efforts to get a credit report, review Unique's financial books or get any form of security or personal guaranty. In fact, this was undisputed. This is legally important as "[t]he law provides adequate safeguards with which Truckweld could have protected its interests in light of what it knew about Aztec and Olson. Yet, Truckweld made no effort to obtain Olson's personal guarantee prior to extending credit nor did it file timely chattel liens when Aztec's payment became questionable. It was Truckweld's failure to utilize these safeguards which contributed to its loss, not any misconduct or abuse of the corporate form by Olson." Truckweld at 646. NWC doing nothing to protect itself is a factor a trial court can consider in fashioning (or not fashioning) an equitable remedy.

Further, the trial court, after considering that the main assets owned by the Rehes was an inherited stock account that had never been in Unique, found that the "attempt to pierce the corporate veil is an attempt by NWC to create a fund against which to collect a judgment." (Finding 39 CP 1025-6). Legally, such attempt is inappropriate as a "plaintiff is not entitled to a solvent defendant" and that disregard is not to be used to create a solvent defendant. Truckweld at 646. In the present case, this trial court (and the later trial court regarding 38th) put the two assets that were removed from Unique back in Unique but refused to pierce and provide

access to assets that NWC never saw or contemplated in contracting. It is hard to call this an unreasonable use of discretion in forming a remedy.

The Division 1 Decision simply ignores all the legal reasons, supported by substantial evidence, which the trial court declined to pierce the corporate veil. Division 1 did not have the benefit of sitting through days and days of trial and listening to the witnesses and hearing how each piece of evidence fit together. By doing so, Division 1 erred in deviating from long existing precedent.

b. The appellate court erred and deviated from existing Supreme Court and Appellate Court precedent in applying the applicable law regarding the standard of review.

Similar to the prior argument, Division 1 erred in how it latched on to a bit of colloquy in arguing if there should or should not be a finding that there was no consideration for the 38th Street Property. Recall, that 38th was not the property that NWC was seeking to avoid the transfer in this case. Space prohibit its full replication of the colloquy but it can be found at RP 7/27/12 p. 7-13. The discussion was if there should be a finding that the 38th Street Property transfer out of Unique was without consideration. The undersigned had objected as 38th was not before the court to avoid. The court said *"I am not saying the evidence [related to 38th] was not presented. I said the question was never asked for [the jury] to decide."* Opposing counsel then explained how the 38th Street property was relevant to the intent to defraud and being evidence of the second prong of the fraudulent transfer act. The trial court concluded: *"All that*

we are talking about here is Mr. Burns' objection to one sentence in the Findings. I believe he is right and I am instruction you to delete it."

For this, NWC said the judge did not consider the evidence. Division 1 said she was confused. However, this is not what the record reflects. In the same colloquy the trial court rebuffed opposing counsel who suggested the evidence was not presented, "*That isn't what I said. What I just said was that the question of whether or not the 38th Street property had consideration was never given to the jury and if you look at the jury verdict form...it does not include anything about the 38th. I didn't say the evidence wasn't presented. I said the question was never asked for them to decide.*" At trial the quitclaim deed transferring the 38th Street Property out of Unique was admitted. (Ex. 87). The corresponding real estate excise tax affidavit was admitted. (Ex. 121). NWC's expert testified to the transfer of the 38th Avenue Property numerous times on direct. RP 190-197, 208-209. On cross, NWC's expert acknowledged such deeding to be in the public record and not hidden. RP 209-211. When asked where the money for 38th Avenue came from, the NWC's expert referenced (and did not dispute) Bill Rehe's testimony that it came from the Rehes' personal funds. RP 216. Mr. Rehe testified to the circumstances leading up the deeding of the 89th Street Property and the 38th Avenue Property at length during examination by both NWC and Mr. Rehe's counsel. 3/14/12 RP 56-62; 3/20/12 RP 97-105; 3/20/12 RP 167-168; and 3/26/12 RP 43. NWC's expert testified that ultimately it was the 89th Street transfer that caused the insolvency and inability to pay.

RP 3/22/12 p.3, 15-16. The point being, there was substantial evidence and testimony admitted before the court as to the 38th Avenue Property. Instead of looking at all the matters that the trial court considered regarding 38th Street, Division 1 simply applied a heretofore unknown standard of review: The trial judge was "apparently confused". This was error. Moreover, the trial judge was right. The issue was if there needed to be a separate finding for the issue of lack of consideration regarding the 38th Street Property transfer (which transfer was not before the court to avoid). In discussing the requirements of the findings after a bench trial, the appellate courts have been consistent: "This rule does not require the trial court to make findings in regard to every item of evidence introduced in a case. Harbican v. Chamberlin, 82 Wash. 556, 114 P. 717; Dillabough v. Okanogan County, 105 Wash. 609, 178 P. 802; Walters v. Munson, 176 Wash. 469, 30 P.2d 224; Shorrock v. Shorrock, 185 Wash. 623, 56 P.2d 674; Taylor v. Lubetich, 2 Wash.2d 6, 97 P.2d 142; Williamson v. United, etc., of Carpenters, 12 Wash.2d 171, 120 P.2d 833." Bowman v. Webster, 42 Wn.2d 129, 134, 253 P.2d 934, 937 (1953).

Division 1 stated, "NWC contends that the trial court erred by failing to consider the transfer of the 38th Street Property as evidence of corporate 'gutting,' which establishes manipulation of the corporation to the stockholder's benefit and a creditor's detriment. We agree." Nw. Cascade, Inc. v. Unique Const., Inc., 71061-3-I, 2014 WL 1289586 (Wash. Ct. App. Mar. 31, 2014). Division 1 then went on to discuss haw post-tort must be considered – but ignores the admission of evidence on

the topic. The trial court's acknowledgement of the purpose of the evidence which can be found at RP 3/15/2012 p. 183-4 where the trial court overruled the undersigned's objection to the admission of evidence about the 38th Street Property when opposing counsel said, *"It goes to intent as to one of the badges of fraud, patterns and practices. The jury instructions, under the uniform fraudulent transfer act, it's a pattern of conduct. It does to the question of intent."* Prior to that opposing counsel had said *"I don't understand that objection. We spent quite a bit of time talking about the 38th Street transfer without objection so far. The 38th Street property is relevant to the intent question because it shows a pattern of moving those assets at a critical point in time, so."* To which the trial court said, *"Well, Exhibit 87, I believe, came in without objection. It was the quitclaim deed on the 38th Street Property."* The record reflects that there was considerable discussion of 38th Street – some of it over objection – for the exact purpose for which Division 1 said the trial court needed to consider it. Division 1 did not necessarily get the law wrong that post-tort activities can be considered – it applied the law wrong in this case by ignoring portions of the record that showed the trial court properly considered the issue. In short, Division 1 retried the issue that the trial judge had already tried. This was error. This violates precedent as to reviewing for substantial evidence.

c. The appellate court erred in reversing and not remanding, assuming the trial court failed to consider certain evidence.

Assuming, arguendo, that the trial court did not properly consider the effect of the 38th Street Property, the proper remedy would have been remand to the court trial court for consideration of the effect of the 38th Street transfer in conjunction with all of the other facts and legal reasons why, or why not, the trial court should invoke equity to pierce the corporate veil. There are all sorts of other reasons the trial court could refuse to pierce such as that NWC did not protect itself, it never relied on the accounting records, it was trying to impermissibly create a fund to collect from....As cited above, fashioning an equitable remedy is the province of the trial court. In re Foreclosure of Liens, at 204; Sorenson at 531. Remember, this entire issue arose over the deletion of one sentence in a finding. Findings are made by trial courts – not appellate court. What makes this case "unique" is that in all the cases reviewed by the undersigned, no Washington appellate court has ever reversed a trial courts decision **not to pierce the corporate veil**. Plenty of cases have reversed piercing. None have mandated piercing. This is only logical as piercing is inherently factual. "The question whether the corporate form should be disregarded is a question of fact." Truckweld at 643. In Morgan v. Burks, 93 Wn.2d 580, 611 P.2d 751 (1980) the trial court refused to pierce, the court of appeals reversed and remanded (**to consider evidence claimed to be ignored by the trial court)** – and the Supreme Court reversed and reinstated the trial court decision. While the Morgan facts and remand are different, this court should reverse Division 1

entirely or, at the very least, remand for consideration of the effect of the 38h Street transfer.

d. The appellate court erred in not allowing the Motion to Supplement Evidence.

As previously referenced, a later superior court judgment avoided the transfer of the 38th Street Property claimed to be fraudulently transferred. Such decision was not available to this trial court and occurred after the appellate review had commenced. The reason the requested supplemental material is important is that it is legally inappropriate to have both the disregard of the corporate entity and the avoidance of the fraudulent conveyances as they are alternate remedies seeking to redress the same wrong.

> The sufficiency of avoidance of fraudulent conveyances as an alternative to disregard of the corporate entity in cases such as this was acknowledged by the federal courts in a case quoted by the plaintiff:
>
> > The payment of these (illegal) dividends should be avoided and set aside, as to appellee, as a fraud upon his rights. Equity has full power to grant relief. Ignoring the corporate entity, the court below went to the heart of the matter and did justice by granting a decree against the (otherwise not-liable defendant) . . . . Preserving the fiction of separate legal entities, it might have accomplished the same thing by setting aside the fraudulent transfer of assets . . . . As the same result and the right result was reached in the district method followed by the court below, no one may complain . . . .
>
> Texas Co. v. Roos, 93 F.2d 380, 383 (5th Cir. 1937). (Italics ours). Thus the result sought by the plaintiff in this case was already accomplished by the bankruptcy trustee's avoidance of the post-tort transfers.

Morgan at 588-89. Such additional material was necessary to fairly resolve the case under RAP 9.11(a)(1) as it should change the court's decision. RAP 9.11(a)(2); The Rehes should be excused for not presenting such evidence to the trial court under RAP 9.11(a)(3) as it was not then in existence; There was no need to incur the cost and delay of post-trial motions as the additional evidence implicates a purely legal issue appropriate for this court to decide under RAP 9.11(a)(4) and (5); and it was inequitable under RAP 9.11(a)(6) to not consider the additional evidence as it unfairly adds the unneeded remedy of piercing to obtain relief that another court has provided. As such, the Court of Appeals abused its discretion in not allowing and considering the additional evidence that could not have been presented at the time of trial. The court failed to apply the purpose behind the rules of appellate procedure: "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)." RAP 1.2.

e. The appellate court erred in not ruling that the attorney fees of Northwest Cascade were unreasonable.

The Petitioner had requested the Appellate court review the awarding of $295,817.27 in attorney fees and costs. (CP 1028-31). NWC, at the time of the request, had $377,658.00 in attorney fees and costs (CP 594) while all of the other defendants had $135,417.20 (CP 467). The

amount in dispute was $139,075.74 (CP 594). Division 1, in reversing the piercing claim, did not in any way address whether or not the attorney fees claimed and previously awarded by the trial court were appropriate. At a minimum, Division 1 should have noted that the fees were grossly disproportionate to the amount in controversy and instructed the trial court to reduce the award. In Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993), the amount in controversy was $19,000.00. The defendant prevailed on a Long-arm Statute and requested fees of $180,914.00. The trial court awarded $116,788.00. On the first remand, the trial court lowered the fee award to $72,746.38. On the second appeal, the Supreme Court had enough and set the fee amount without remand at $22,454.28. Id. at 143-44. Even though the appellant provided "extensive documentation of their efforts in this case," such documentation "is not dispositive on the issue of the reasonableness of the hours." Id. at 151. The Supreme Court noted the hours added up to "three months of uninterrupted legal work by one attorney" and was "patently unreasonable." Id. This is similar to the present case. In the November 2011 billings, NWC – when the trial was bumped – there were 454.42 hours billed. CP 706-713. This is 18.93 straight, 24-hour days. NWC sought $153,848.73 in its various complaints and received verdict for $139,075.75. CP 10-11, 1036-1039. Even if the Division 1 decision were to stand, the fees would still be unreasonable.

f. Request for Fees.

In the event this court accepts the petition and reinstates the trial court decision, fees should be awarded to Rehe as NWC is trying to pierce the corporate veil to make the Rehes responsible for fees under RCW 4.84.330. Such fees should be set by subsequent application.

VI. CONCLUSION

For the reasons set forth above, the Supreme Court should grant review and reverse the Division 1 decision.

Dated: June 6, 2014.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 6th day of June, 2014, I caused a true and correct copy of this Petition for Review to be served on the following via U.S. Mail and email to:

Michael J. Murph **Electronic Mail, Facsimile & Legal Messenger**
Daniel C. Carmalt
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DATED this 6th day of June, 2014, at Tacoma, Washington.

McFERRAN & BURNS, P.S.

By _____
Sheila Gerlach
Paralegal

O:\CLIENTS\27000\27845 Rehe (NW Cascade)\Appeals\Appeal 71061-3-I (old 43852-6-II case)\Pldgs\Petition for Review\Petition for Review2.doc

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NORTHWEST CASCADE, INC., a Washington corporation, Appellant/Cross Respondent, v. UNIQUE CONSTRUCTION, INC., a Washington corporation, Respondent/Cross Appellant, TEMPORAL FUNDING, LLC, a Washington Limited Liability Company, Defendant, WILLIAM REHE; JANE DOE REHE; the WILLIAM K. AND MARION L., LLLP; and SAHARA ENTERPRISES, LLC, Respondents/Cross Appellants.	)	No. 71061-3-I DIVISION ONE UNPUBLISHED OPINION FILED: March 31, 2014

GROSSE, J. — Abuse of the corporate form is established by evidence that property owned by a corporation was transferred to its shareholders after a lawsuit was filed against the corporation and that shareholders commingled personal and corporate funds such that substantial funds were diverted from the corporation during a time when the corporation was indebted to the creditor. When, as here, such diversion of funds results in an unjustified loss to the corporation's creditors, piercing the corporate veil is warranted. Accordingly, we reverse.

FACTS

Unique Construction, Inc. (Unique) is a Washington corporation owned by William (Bill) Rehe and his wife Suzanne Rehe. Bill Rehe is its president and he and his wife are the sole shareholders. Unique was incorporated in the 1980s and remained incorporated throughout this litigation.

In 2004 and 2005, Unique began acquiring lots for the development of a 34-lot residential real estate project in Tacoma. In 2005, Unique transferred the property to a single purpose limited liability company, Temporal Funding LLC, wholly owned by the Rehes. Unique acted as the general contractor for the project.

On March 27, 2006, Unique entered into a subcontract with Northwest Cascade, Inc. (NWC) to build the infrastructure for the plat. In August 2007, Unique stopped paying NWC's invoices. On July 7, 2008, NWC sued Unique for breach of contract and unjust enrichment.

In January 2009, Unique quitclaimed one its properties, the "38th Street Property," to Black Point Management LLC (Black Point), a Nevada limited liability company. Black Point then transferred the 38th Street Property to Winnemucca Enterprises LLC (Winnemucca). Winnemucca was another Nevada limited liability company controlled by the Rehes and by the William K. and Marion L. LLLP, which was formed at the direction of the Rehes. No consideration was paid for the transfers.

On July 29, 2009, Unique recorded a quitclaim deed to Black Point for one of its other properties, a house built by Unique known as the "89th Street

Property." The Rehes moved into the 89th Street Property in 2006 and paid no rent to Unique. They continued to reside there through this litigation except for an 18-month period when they temporarily moved out. On December 16, 2010, Black Point transferred the 89th Street Property by quitclaim deed to Sahara Enterprises LLC, a Nevada limited liability company ultimately controlled by the William K. and Marion L. LLLP. The transfers were identified as tax exempt and no consideration was paid for them. The transfer of this property left Unique insolvent.

On October 30, 2009, NWC amended its complaint, adding the Rehes and Temporal Funding LLC as defendants. The complaint also added a claim seeking to pierce the corporate veil and hold the Rehes personally liable and a claim under the Uniform Fraudulent Transfer Act (UFTA), chapter 19.40 RCW, for fraudulent conveyance of the 89th Street Property. The amended complaint did not include a cause of action that Unique's transfer of the 38th Street Property was a fraudulent conveyance nor was Winnemucca named as a defendant. In April and August of 2011, NWC filed additional amended complaints, adding the William K. and Marion L. LLLP and Sahara Enterprises LLC as defendants.

The case proceeded to trial in March 2012. On the morning of trial, NWC moved for a voluntary dismissal of defendant Temporal Funding LLC, and the court granted the dismissal. The breach of contract and UFTA claims were tried to a jury and the parties agreed to a bench trial on the equitable claim of corporate veil piercing.

NWC presented evidence showing a consistent disregard of corporate accounting principles by Bill Rehe on behalf of Unique, including cashing of corporate checks made out to "Cash" by Bill Rehe with no record of how the cash was used and no records indicating that such cash payments were accounted for as income to the Rehes; payment of the Rehes' medical premiums and deductible expenses, personal utility bills, and other personal expenses without properly accounting for them on the Rehes' personal tax returns as income; inadequate tax reporting; use of personal expenses and not allocating those to income; and use of the 89th Street Property for several years without payment of rent to Unique. NWC's expert testified that the substantial majority of such questionable expenses occurred before 2008.

According to Bill Rehe, he treated his corporate and personal assets as one and the same and comingled the assets because, in his mind, all of the assets belonged to him. Bill Rehe, an attorney, claimed he viewed the S-Corporation as a "flow through" entity and understood that such distributions, whether they were wages, owner's distributions, or profits, would eventually flow out to his personal tax return where it would be treated as ordinary income. Thus, the exact characterization of the distributions was, in his mind, immaterial.

Bill Rehe also testified that the funds to build the 89th Street house and purchase the 38th Street Property came solely from the Rehes' personal funds. The Rehes claimed that such funds constituted shareholder loans to Unique and that transfers of the properties were in repayment of shareholder loans. But there was no evidence of records of any shareholder loans to Unique and such

loans were not reflected on the Rehes' tax returns.

The jury returned a verdict in favor of NWC on the breach of contract and UFTA claims. The jury made a specific finding that Unique transferred the 89th Street Property with the actual intent to hinder, delay, or defraud creditors. The court entered judgment against Unique for $512,322.73. The court also voided the transfer of the 89th Street Property and quieted title to Unique, leaving Unique with a single asset. On the veil piercing claim, the trial court found in favor of the Rehes, concluding that "[p]iercing of the corporate veil is not necessary to prevent an unjustifiable loss to NW[C]."

The court awarded attorney fees to NWC in the amount of $237,924.54 on the breach of contract claim and $32,730.36 on the UFTA claim. The court also awarded attorney fees to the Rehes in the amount of $85,000.00 on the veil piercing claim. NWC appeals the dismissal of the veil piercing claim and the fee award to the Rehes. Unique cross appeals the fee award to NWC.

ANALYSIS

NWC contends that the trial court erred by refusing to pierce the corporate veil and hold the Rehes personally liable. NWC argues that the evidence established as a matter of law that the Rehes manipulated Unique to their benefit and to the detriment of Unique's creditors, resulting in an unjustifiable loss to NWC. We agree.

The doctrine of "veil piercing," or "corporate disregard" allows the court to disregard a corporate entity and assess liability against individual shareholders when (1) they have used the corporation to intentionally violate or evade a duty

owed to another, and (2) the shareholder's conduct resulted in a unjustified loss to a creditor.[1] To establish the first element, the court must find an abuse of the corporate form, which typically involves fraud, misrepresentation, or some form of manipulation of the corporate form to the stockholder's benefit and the creditor's detriment.[2] To establish the second element, the wrongful corporate activities must harm the party seeking relief so that disregard is necessary.[3]

Whether a corporate form should be disregarded is a question of fact.[4] Thus, the trial court's ruling must be supported by substantial evidence.[5] Piercing the corporate veil is an equitable remedy that should only be used in "exceptional circumstances."[6]

Here, the trial court ruled that piercing the corporate veil was not warranted because NWC failed to show that the Rehes' commingling of personal and corporate funds and poor accounting practices were intended to defraud, manipulate, or misrepresent the corporate status of Unique or resulted in NWC's loss. The trial court did not make a finding that the 38th Street Property transfer was fraudulent or otherwise relevant to the veil piercing claim, noting that NWC did not plead a claim of fraudulent conveyance relating to that property. NWC contends that the trial court erred by failing to consider the transfer of the 38th Street Property as evidence of corporate "gutting," which establishes

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[1] Morgan v. Burks, 93 Wn.2d 580, 585, 611 P.2d 751 (1980).
[2] Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d 689 (1982) (quoting Truckweld Equip. Co. v. Olson, 26 Wn. App. 638, 645, 618 P.2d 1017 (1980)).
[3] Meisel, 97 Wn.2d at 410.
[4] Truckweld, 26 Wn. App. at 643.
[5] Truckweld, 26 Wn. App. at 643.
[6] Truckweld, 26 Wn. App. at 643-44.

manipulation of the corporation to the stockholder's benefit and a creditor's detriment. We agree.

As the court recognized in Morgan v. Burks, an intentional use of the corporation to evade a duty owed to another is established when "the liable corporation has been 'gutted' and left without funds by those controlling it in order to avoid actual or potential liability."[7] In such cases, "post-tort activities must be considered, and often will *independently support* disregard of the corporate entity, because it is only *after* the tort that the impetus to 'gut' the corporation arises."[8] Here, there was undisputed evidence showing that after the lawsuit was filed against Unique, the 38th Street Property was transferred to an entity controlled by the Rehes for no consideration. Thus, the trial court was required to consider the post-lawsuit transfer of the 38th Street Property as an independent basis for disregard of the corporate form and its failure to do so was error.

NWC argued to the trial court that this questionable transfer of Unique's assets was a basis for piercing the corporate veil because it gutted corporate assets after the filing of the lawsuit. The trial court determined that the 38th Street Property transfer was not before it on the veil piercing claim because it was not pleaded to the jury as a UFTA claim:

> [COUNSEL FOR NWC]: . . . [T]he 38th Street property was clearly taken out for no consideration. Now, the jury wasn't asked to address that because that was not a fraudulent conveyance claim, but it was an asset stripped out of the company that's worth 200 and some thousand dollars that has -- that was taken for no value,

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[7] 93 Wn.2d 580, 585, 611 P.2d 751 (1980).
[8] Morgan, 93 Wn.2d at 585 (emphasis added).

by Mr. Rehe's own admission . . . .

That again deprives [NWC] of an asset that should have been in the corporation to pay what the final judgment is in this case . . . .

. . . .

THE COURT: But the 89th Street property we have a jury verdict determining that was a fraudulent conveyance. We do not have a determination that the transfer of the 38th Street property was.

. . . .

[COUNSEL FOR NWC]: That's something -- you have to decide that on the piercing question.

[COUNSEL FOR THE REHES]: No. They didn't even name Winnemuca as a party.

[COUNSEL FOR NWC]: We did not assert that as a fraudulent transfer claim.

. . . .

THE COURT: . . . No one ever previously communicated to this Court that this Court was going to be asked to determine that the 38th Street conveyance was a fraudulent conveyance.

I was asked to consider the issue of piercing the corporate veil.

The trial court was apparently confused about the evidence it was to consider on the veil piercing claim and mistakenly decided it could not consider the 38th Street Property transfer because it was not pleaded as a UFTA claim or found by the jury to be fraudulent. While the jury was not asked to make a specific finding that the 38th Street Property transfer was a fraudulent conveyance under the UFTA, evidence of that transfer was presented and the court was not precluded from considering it as evidence to support the separate claim of veil piercing. Indeed, the very fact that the transfer of the 38th Street

Property was not pleaded as a UFTA claim made it all the more necessary for NWC to pursue the equitable remedy of corporate veil piercing to prevent unjustified loss resulting from that transfer.

As the court recognized in Morgan, the doctrine of corporate disregard applies "only when, at the time the doctrine is invoked, it is necessary to prevent violation of a duty owed."[9] In Morgan, the court did not apply the doctrine of corporate disregard when post-tort fraudulent conveyances were avoided by a bankruptcy trustee and ultimately left the liable corporation intact. As the court acknowledged, "the result sought by the plaintiff in this case was already accomplished by the bankruptcy trustee's avoidance of the post-tort transfers."[10] Thus, in such cases avoidance of fraudulent conveyances was a sufficient alternative to disregarding the corporate entity. But here, there was no avoidance of the post-lawsuit transfer of the 38th Street Property precisely because it was not brought as a UFTA claim. Thus, Unique was not left intact and the 38th Street Property transfer effectively "gutted" the corporation of those assets.[11]

Nor was a finding of intent to defraud required to establish abuse of the corporate form, as the trial court seemed to suggest. Rather, the evidence need only show "some form of manipulation of the corporat[e form]" to the

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[9] 93 Wn.2d at 586.
[10] 93 Wn.2d at 588-89.
[11] As the trial court correctly noted, this was not the case of the 89th Street Property transfer, which was avoided based on the jury's finding that it was fraudulent. As a result, those assets were returned to the corporation and the transfer did not result in a loss to the corporation.

stockholder's benefit and the creditor's detriment, which was established here.[12] The undisputed evidence showed the 38th Street Property was transferred to an entity controlled by the Rehes after the lawsuit was filed for no consideration. This property was a substantial asset of Unique valued at approximately $250,000.00 at the time of transfer, and its transfer gutted Unique of assets such that it was unable to pay its creditor NWC. Piercing of the corporate veil was therefore warranted. The trial court's conclusions to the contrary were error.

NWC also contends that the trial court further erred by concluding that the evidence of the commingling of personal and corporate funds was not sufficient to justify veil piercing. We agree.

As our courts have recognized, the corporate veil will be pierced and courts will impose personal liability "where the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist."[13] In McCombs, the court held that veil piercing was warranted when the evidence established that the principal owner of a corporation "commingled his personal affairs with those of the corporation such as to warrant imposition of personal liability."[14] There, the principal owner of a corporation directed a contractor to remodel a house he rented and to send the bill to the corporation.[15] The contractor claimed a lien against the corporation for unpaid work.[16] The

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[12] Miesel, 97 Wn.2d at 410.
[13] McCombs Constr., Inc. v. Barnes, 32 Wn. App. 70, 76, 645 P.2d 1131 (1982).
[14] 32 Wn. App. at 77.
[15] McCombs, 32 Wn. App. at 72.
[16] McCombs, 32 Wn. App. at 72.

principal owner then filed for bankruptcy and the corporation was dissolved. The contractor then sought personal judgment against the principal owner and the court awarded a judgment against the owner personally.[17] On appeal, the court affirmed, based on evidence showing commingling of personal and corporate affairs:

> Here, the evidence established that after the major construction was completed by the McCombs, Scott Barnes moved into the improved house with the intent of keeping it as his personal residence. Payment for the work was made with checks drawn upon the corporation's bank account and a boat manufactured by the corporation. The checks were not signed by Scott in a representative capacity on behalf of the corporation.[18]

In a recent case, a federal district court held that under Washington law, veil piercing was warranted by evidence showing use of corporate assets to pay for obviously personal expenses.[19] The court concluded that "such dissipation of the corporate assets harmed [the] Plaintiffs in that those corporate funds were not then available to pay [the] Plaintiffs' royalties."[20]

Similarly here, the dissipation of corporate assets harmed NWC because those funds were not available to pay NWC's invoices and we agree with NWC that the trial court's finding that the amount of personal expenses was "de minimus" is not supported by substantial evidence. NWC entered into the contract with Unique in March 2006 and performed work through December 2007, submitting its final invoice in April 2008. Unique stopped paying NWC's

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[17] McCombs, 32 Wn. App. at 72-73.
[18] McCombs, 32 Wn. App. at 76-77.
[19] Curtis v. Illumination Arts, Inc., No. C12-0991JRL, 2013 WL 6173799, *9 (W.D. Wash. Nov. 21, 2013).
[20] Curtis, 2013 WL 6173799 at *9.

invoices in August 2007. The evidence showed that from July 2005 through October 2007, there were "hundreds of thousands" of credit card charges paid by Unique, $27,000.00 of which were identifiable as personal expenses and there were checks drawn on Unique's account for the Rehes' personal expenses, including medical and utility bills. Between 2006 and 2007, there were also checks drawn on Unique's account made out to "Cash" totaling approximately $33,000.00. And from 2005 through 2009, Unique was foregoing $96,000.00 in rent for the Rehes' personal use of the 89th Street house. In all, at least $177,000.00 of corporate funds were diverted by the Rehes for personal expenses during the time Unique was indebted to NWC, depriving Unique of its ability to honor its obligations to NWC.

The evidence establishes as a matter of law that the Rehes' post-lawsuit transfer of the 38th Street Property owned by Unique and their commingling of personal and corporate assets amounted to manipulation of the corporate form to the Rehes' benefit and to the detriment of NWC as Unique's creditor, and that NWC suffered an unjustifiable loss as a result. Thus, piercing the corporate veil was warranted. Accordingly, we reverse the trial court's ruling in favor of the Rehes on the corporate veil piercing claim.

Both parties challenge the trial court's award of attorney fees to the opposing party. Because we reverse on the veil piercing claim, we remand to the trial court for entry of judgment consistent with this opinion and a determination of appropriate fees to the prevailing party, NWC. We also award attorney fees on appeal, the amount to be determined by the trial court on remand.

We reverse and remand.

WE CONCUR: