Supreme Court No. 97958-8
COA No. 78248-7-I (consolidated with No 78405-6 and 78340-8)

Supreme Court of the State of Washington

Vladen R. Milosavljevic,

Defendant/Appellant,

v.

Margaret L. Curtis, individually and as the Personal Representative of the Estate of Allen L. Curtis,

Plaintiff/Respondents.

Answer to Petition for Review and Cross-Petition for Review

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I. Identity of Cross-petitioner.

The trial court entered a money judgment in favor of Margaret Curtis but allowed offsets to the defendant, Vladan Milosavljevic, for value he gave to a limited liability company he formed and managed and of which Curtis was the sole member. The Court of Appeals disallowed the offsets because (1) the value was given to the LLC and not Curtis, and (2) Milosavljevic failed to establish grounds to pierce the corporate veil. The Court of Appeals' decision was correct and this court need not review it. But if the court accepts review, there are two additional issues for the court to consider.

II. Facts Relevant to Petitioner's Issues.

The facts relevant to petitioner's issues are stated in the following findings of fact.

"Hidden Creek II, LLC is a limited liability company that was formed under the laws of the State of Washington by Vladan R. Milosavljevic on March 12, 2013. Margaret L. Curtis and the Estate of Allen L. Curtis are the only members of Hidden Creek II, LLC. Vladan R. Milosavljevic is not now, and never has been, a member of Hidden Creek II, LLC. *Vladan R. Milosavljevic was the sole manager of Hidden Creek II, LLC from its formation until 2017."* FOF 3 (emphasis added).

"On March 14, 2013, Vladan and Lari-Anne Milosavljevic

conveyed to Hidden Creek II, LLC their fee interest in the Kenmore parcel.[1] The fair value of the Kenmore parcel at the time of the conveyance was $550,000." FOF 18.

"After the transfer, Milo continued to work on behalf of Hidden Creek, LLC as its manager to improve and maintain the Kenmore parcel. Vladan Milosavljevic advanced $434,526.96 in out -of-pocket expenses for the improvement of the Kenmore parcel …." FOF 19.

III. Reasons for Denying Review.

The Court of Appeals' decision in this case is consistent with the decisions of both the Supreme Court and the Court of Appeals. RAP 13.4 (b)(1) & (2), nor does the petition raise an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(4).

A. The court need not review the issue of whether to disregard the LLC form in the absence of a finding of abuse of that form.

The legislature and the courts have long recognized the importance to our commercial life of limited liability for corporate shareholders and limited liability company members. The rules for piercing the corporate veil are applied to both corporations and limited liability companies. RCW 25.15.061. As this court explained in *Grayson v. Nordic Const. Co., Inc*, "[a] corporation exists as an organization distinct from the personality of its

[1]The Kenmore parcel was an undeveloped 2½ acre parcel of land in Kenmore, Washington. FOF 12.

shareholders."[2] "[A] corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person."[3] .

This court has consistently held that to pierce the veil of a limited liability company so that liability can attach to a member, a plaintiff must show that the LLC form was intentionally used to violate or evade a duty and that the LLC form must be disregarded to prevent unjustified loss to the injured party.[4] "Intentional misconduct must be the cause of the harm that is avoided by disregard."[5] "[T]he court must find an abuse of the corporate form."[6]

And the separate existence of a corporation should not be disregarded solely because its assets are not sufficient to discharge its obligations.[7] As this court has explained:

Separate corporate entities should not be disregarded solely

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[2] *Grayson v. Nordic Const. Co., Inc.*, 92 Wn.2d 548, 552, 599 P.2d 1271 (1979).

[3] *Id. at* 553.

[4] Chadwick Farms Owners Ass'n v. FHC LLC, 166 Wn.2d 178, 201, 207 P.3d 1251 (2009); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 409-10, 645 P.2d 689 (1982).

[5] *Id.*

[6] *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 409-10, 645 P.2d 689 (1982).

[7] *Id.* at 411 (1982); *Norhawk Invest., Inc. v. Subway Sandwich Shops, Inc*., 61 Wn. App. 395, 399-400, 811 P.2d 221 (1991).

> because one cannot meet its obligations. … The absence of an adequate remedy alone does not establish corporate misconduct. The purpose of a corporation is to limit liability. Unless we are willing to say fulfilling that purpose is misconduct, Meisel is hard put to argue a theory of corporate disregard.[8]

The party seeking to pierce the veil must "demonstrate that the corporate form was used to violate or evade a duty."[9]

The trial court did not enter a finding of fact that an abuse of the LLC form occurred. In order to abuse the LLC form, one has to be in control of the LLC. The trial court found just the opposite. Curtis was not in control of the LLC.[10] FOF 3. Milosavljevic was the sole manager and therefore the only one in control of the LLC. RCW 25.15.154 *Id*. Milosavljevic quotes the trial court's oral ruling that Curtis, who was solely a member, was an agent of the LLC. This is contrary to RCW 25.15.154 (2)(b), which provides: "No member, acting solely in its capacity as a member, is an agent of the limited liability company."

The party alleging abuse of the LLC form bears the burden of proof.[11] It is well-established that the absence of a finding of fact in favor

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[8] *Meisel,* 97 Wn.2d at 411 (citations omitted).

[9] *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 503, 90 P.3d 42 (2004).

[10] "Vladan R. Milosavljevic was the sole manager of Hidden Creek II, LLC from its formation until 2017." FOF 3.

[11] *Jet Boats, Inc. v. Puget Sound Nat'l Bank*, 44 Wn. App. 32, 46, 721 P.2d 18 (1986).

of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue.[12] Milosavljevic asks the court to imply favorable findings of fact on an issue for which he had the burden of proof. He cites no evidence supporting a finding of abuse of the LLC form. R 52 requires written findings of fact. CR 52(a)(1). The presumption should be a negative finding.

B. The court need not consider the issue of whether to disregard the LLC form in every claim of unjust enrichment.

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it."[13] The elements of a "contract implied in law" are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment.[14] "In such situations a quasi contract is said to exist between the parties." Id. The law implies a debt as if it were upon a contract. Id.

Milosavljevic argues that he gave value for which he should, in justice, be fairly compensated. The Court of Appeals correctly decided that

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[12] *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001); *Smith v. King,* 106 Wash.2d 443, 451, 722 P.2d 796 (1986); *Golberg v. Sanglier,* 96 Wash.2d 874, 880, 639 P.2d 1347 (1982).

[13] *Young v. Young*, 164 Wn. 2d 477, ¶ 15, 191 P.3d 1258 (2008) (quoting *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc*., 61 Wn. App. 151, 160, 810 P.2d 12 (1991)).

[14] *Young v. Young*, 164 Wn. 2d 477, ¶ 16, 191 P.3d 1258 (2008).

his unjust enrichment claim is against Hidden Creek II, LLC, to which he conveyed the land and for which he provided his labor and materials. Since his claim is not against Curtis, it cannot be offset against a judgment in favor of Curtis. The court of appeals held that the findings of fact and evidence did not justify piercing the LLC veil to hold the LLC member liable for the LLC's debt.

Milosavljevic's argument is essentially that fulfilling the corporate purpose to limit liability is misconduct when a corporate entity is unjustly enriched. He argues in effect that a claim of unjust enrichment against a corporate entity *always* pierces the veil. The result would be a rule that shareholders or members are always personally liable for their entity's unjust enrichment.

At note 10, the court of appeals held that one "cannot use the theory of unjust enrichment to circumvent the protections of the LLC form," citing three federal cases in support.[15]

Milosavljevic relies heavily upon court of appeals' 1971 decision in *Harrison v. Puga*.[16] His reliance is misplaced. In that case, Harrison and

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[15] *McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc*., 339 F.3d 1087, 1093-1096 (9th Cir. 2003); *QVC, Inc. v. OurHouseWorks, LLC*, 649 Fed. Appx. 223, 228 (3d Cir. 2016); *North Am. Steel Connection, Inc. v. Watson Metal Prods, Corp*., 515 Fed. Appx. 176, 179-181 (3d Cir. 2013).

[16] *Harrison v. Puga*, 4 Wn. App. 52, 480 P.2d 247 (1971).

Puga formed a corporation to which Harrison contributed funds and Puga contributed assets. Puga controlled the corporation, and he used corporate funds to purchase assets in his own name. Harrison sued both the corporation and Puga, seeking the return of his contributed funds on the basis of unjust enrichment. The court of appeals allowed Harrison's claim against Puga because Puga engaged in wrongdoing. In a later case, this court explained the *Harrison* court's reasoning: "the liable corporation has been "gutted" and left without funds by those controlling it in order to avoid actual or potential liability."[17]

Harrison contributed money to the corporation and brought an unjust enrichment claim against both the corporation and Puga personally to recover his contribution. Petitioner likens his position with Hidden Creek to that of Harrison and the position of Curtis to that of Puga. But in terms of control, the parties' positions in the present case are the reverse of those in *Harrison v. Puga*. Unlike Harrison, Milosavljevic controlled the company. Unlike Puga, Curtis had no control over the company. And unlike Puga, there is no evidence or finding that Curtis engaged in intentional wrongdoing. Because of this crucial factual difference, *Curtis* is consistent with *Harrison* and *Morgan*. Therefore this case does not merit review by the supreme court under RAP 13.4 (b)(1) & (2).

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[17] *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980).

C. The court need not consider whether to disregard the LLC form just because it has a single member.

Milosavljevic asks the court to consider whether the LLC form should always be disregarded if the LLC has only one member. His reason is that a single member is benefitted by the enrichment of the LLC. This is of course true, whether the enrichment is just or unjust. And it is true regardless of the number of LLC members. Those who own an artificial entity are enriched whenever the entity is enriched. So the logical extension of Milosavljevic's argument is that whenever an LLC is unjustly enriched, all LLC members are personally liable.

What Milosavljevic proposes would radically depart from existing corporate disregard doctrine because it would not require intentional wrongdoing by the personally liable member. And it would require this court to overrule its holding in *Grayson v. Nordic Const. Co., Inc.*[18] that "a corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person." See RCW 25.15.061 (applying corporate disregard rules to LLCs). And, since unjust enrichment is an action on an implied contract, the rule advocated by Milosavljevic would logically mean that the LLC form should be disregarded when the action is on an express contract. The rule is limited liability for LLC members. Milosavljevic asks the court to consider an exception that would logically consume the rule. The court should leave its corporate disregard doctrine intact.

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[18] *Grayson v. Nordic Const. Co., Inc*, 92 Wn.2d at 553.

D. Milosavljevic had an adequate remedy.

Milosavljevic could have joined a claim against Hidden Creek II, LLC in this case. Early in this action, Hidden Creek II, LLC was a defendant. CP 1. It was dismissed by stipulation on July 12, 2017. CP 24-28. The stipulation provided in part:

> 9. The dismissal of Hidden Creek and order quieting title is without prejudice with respect to claims or possible claims that the Defendants have or may have for reimbursement or credit for monies expended, and/or their services, if any, related to the platting and improvement of the property described above, including but not limited to reimbursement and/or credit from the Plaintiffs for monies paid for permits, bonds, surveying, engineering, development fees, development, investigation reports, and site improvements, including above and underground utilities, connection or hookup fees. This is a disputed matter. All claims related to this matter are reserved notwithstanding the order quieting title of dismissal.

CP 25. Milosavljevic never joined a third party claim against Hidden Creek II, LLC.[19] He could have done so. That was his remedy.

IV. Additional Issues for Review.

1. Milosavljevic conveyed the Kenmore parcel to Hidden Creek II, LLC, and advanced labor and expenses developing that parcel. Did this constitute payment of a pre-October 2011 debt owed to Curtis?

    a. When a debtor owing multiple debts to a creditor makes an unallocated payment, is the payment applied to the oldest debt even if enforcing that debt is legally barred by a discharge in bankruptcy?

[19] In July 2017, Hidden Creek II, LLC still owned the Kenmore parcel, which it sold for $1,450,000 in January 2018. Ex. 38.

b. When an order of discharge is entered in an individual chapter 11 bankruptcy, does it just discharge pre-confirmation debts or does it also discharge the debtor's obligations under the confirmed reorganization plan?

V. Argument for Review of Additional Issues

A. Facts Relevant to Additional Issues.

Curtis loaned Milosavljevic $2,059,615.59 and he signed a note promising to repay the loan at 12 % interest on June 19, 2005. Ex. 22, p. 7. When Milosavljevic filed bankruptcy in 2010, Curtis filed a claim for $3,259,615.59. FOF 8. Under his chapter 11 plan, Milosavljevic paid Curtis $1,401,155.14 and he agreed to give Curtis a deed of trust on the Kenmore parcel to secure the $1.8 million unpaid balance. FOF 10. Milosavljevic represented the Kenmore parcel to be worth $2.2 million. Ex. 25, p. 13. The property was actually worth only $550,000 and Milosavljevic never granted the deed of trust. FOF 11, 18.

Under the chapter 11 plan, Milosavljevic would have granted the deed of trust and worked to develop the property. Instead, he formed Hidden Creek II, LLC, conveyed the Kenmore parcel to it, and, as the manager of the LLC, worked to develop the property. He named Allen and Margaret Curtis as the sole members of the LLC.

B. Under Washington law, is a payment allocable to an older debt even if enforcement of that debt is barred by a discharge in bankruptcy?

It is Curtis' contention that the creation of Hidden Creek II, LLC, the conveyance of the Kenmore parcel to it, and Milosavljevic's advancement of labor and expenses, are all allocable to payment of his debt to Curtis under the chapter 11 plan.

> It is well established that if, at the time of payment, a debtor owing several accounts to his creditor provides no specific direction as to how the payment is to be applied or allocated among those accounts, the right belongs to the creditor until the account is settled or suit is brought. If a debtor gives no direction and the creditor makes no timely application to any particular account, the law will apply any payments to the oldest accounts.[20]

Even if the older debt is barred, the payment is still allocated to the older debt if the debtor gives no direction as to how the payment is to be applied and the creditor makes no timely application to any particular account.[21] The *Knight* court adopted the Restatement of Contracts § 387, Illustration 8 (1932), which provides:

> 8. A owes B two debts, one of which is barred by the Statute of Limitations. A makes a payment without manifesting any

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[20] *Yancovich v. Cavanaugh Lumber Co., Inc.*, 20 Wn. App. 347, 349–50, 581 P.2d 1057 (1978), citing *Bellingham Sec. Syndicate, Inc. v. Bellingham Coal Mines, Inc*., 13 Wn.2d 370, 125 P.2d 668 (1942); *Whiting v. Rubinstein*, 10 Wn.2d 5, 116 P.2d 305 (1941); *Diettrich Bros., Inc. v. Anderson*, 183 Wn. 574, 48 P.2d 921 (1935); and *Sturtevant Co. v. Fidelity & Deposit Co*., 92 Wn. 52, 158 P. 740 (1916).

[21] *Knight v. Freimuth*, 13 Wn. App. 112, 115–16, 533 P.2d 423 (1975).

> intent that it shall be applied to one rather than the other. The payment is insufficient fully to satisfy either debt. B can apply the payment in whole or in part to the barred debt; But if the debt is not fully paid thereby, the bar of the Statute is not removed as to the remainder.[22]

A debt is not extinguished by the expiration of the statute of limitations on its remedy for enforcement of the contract, but merely made unenforceable in court."[23]

A debt discharged in bankruptcy is likewise not extinguished. "A debtor may voluntarily repay a discharged debt.[24] A discharge in bankruptcy only operates as an injunction against the collection of a debt as a personal liability of the debtor.[25] "[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam".*[26]

C. Under federal bankruptcy law, does a discharge in a chapter 11 bankruptcy case only discharge debts incurred before confirmation of the chapter 11 plan?

This court has held that it has the power to construe a bankruptcy

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[22] *Id*.

[23] *CHD v. Boyles*, 138 Wn. App. 131, 138, 157 P.3d 415 (2007); *Jordan v. Bergsma*, 63 Wn. App. 825, 828-29, 822 P.2d 319 (1992).

[24] 11 U.S.C. § 524(f). *In re Lopez*, 274 B.R. 854, 860 (B.A.P. 9th Cir. 2002).

[25] 11 U.S.C. § 524(a).

[26] *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 2154, 115 L. Ed. 2d 66 (1991).

discharge and determine whether a particular debt is or is not within the discharge.[27]

The relevant bankruptcy provision is 11 U.S.C. § 1141(d), which states in part:

> (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title,
>
> …
>
> (5) In a case in which the debtor is an individual—
>
> (A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan; ….

In a corporate chapter 11 case, confirmation of the plan discharges any debts that arose before the date of confirmation. 11 U.S.C. § 1141 (d)(1)(A). Before 2005, the same result occurred when the chapter 11 debtor was an individual, i.e. confirmation of the chapter 11 plan discharged any debts that arose before the date of confirmation.[28]

In 2005, Congress amended §1141 to provide that, when the debtor is an individual rather than a corporation or other business entity,

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[27] *Herring v. Texaco, Inc.,* 161 Wn.2d 189, ¶ 9, 165 P.3d 4 (2007).

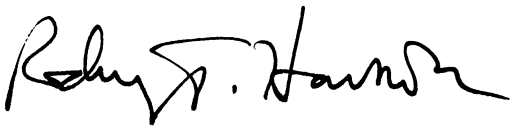
[28] 11 U.S.C. § 1141 (d)(1)(A); *Kirkpatrick v. Cheff*, 118 Wn. App. 772, 775, 76 P.3d 1211 (2003).

"confirmation of the plan does not discharge any debt provided for in the plan *until* the court grants a discharge on completion of all payments under the plan." 11 U.S.C. § 1141(d)(5)(A).[29] In a chapter 11 case, whether the debtor is an individual or an entity, there is no question that a bankruptcy court's discharge order discharges all debts incurred prior to confirmation of the chapter 11 plan. But where the debtor is an individual, does the discharge order also discharge the debtor's post-confirmation obligations under the chapter 11 plan? No court, state of federal, has yet considered this issue.

VI. Conclusion.

The Court should deny Milosavljevic's petition for review. But if the Court grants his petition, Curtis respectfully requests that the Court review the additional issues raised in this answer.

Respectfully submitted this 12th day of December, 2019



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[29] The 2005 amendments were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 95–96 and are commonly referred to as BAPCPA.

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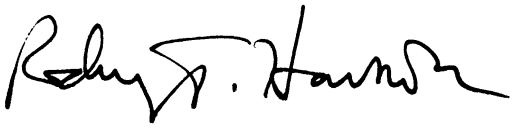

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