

**FILED**

**MAR 24 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By

**NO. 29575-3-III**

**Spokane County Cause No. 09-205401-5**

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III**

**PLESE-GRAHAM, LLC, et al**

**Respondents,**

**v.**

**ROBERT LOSHBAUGH, et ux.,**

**Appellants**

---

**RESPONDENTS' BRIEF**

---

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**Respondents,**

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**Appellants**

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**RESPONDENTS' BRIEF**

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## I. INTRODUCTION

This appeal involves the primary shareholder of a closely-held construction corporation seeking to use the corporate form to both incur a debt and evade a duty owed to a creditor. After Ed Loshbaugh and Sons, Inc. had ceased doing business, had lost its license, which had expired, Appellant Robert Loshbaugh ("Loshbaugh"), the primary shareholder of Ed Loshbaugh & Sons, Inc., ("the Corporation") orally entered into a contract with Respondent Plese-Graham, LLC ("Plese-Graham"). Several months later, after the Corporation was dissolved, Loshbaugh, via e-mail correspondence, sought to contract with the insolvent Corporation. The contract was intended to reimburse Plese-Graham for payment made to remove a lien on Plese-Graham's real property caused by the Corporation's previous failure to pay a subcontractor. However, when time to sign the promissory note arrived, Robert Loshbaugh did not sign the Note. More than a month after receiving the Note, Loshbaugh requested that the Note be redrafted so that Loshbaugh could sign on behalf of the Corporation. Rod Plese, member of Plese-Graham, was not aware that the Corporation had ceased doing business. He readily redrafted the Note and sent it to Loshbaugh. More than a month

passed and although Loshbaugh confirmed that the Note was "on its way," Loshbaugh never signed or returned the Note. Plese-Graham brought an action against the Corporation and Loshbaugh and his wife individually for breach of contract. Loshbaugh was found personally liable in Mandatory Arbitration, and sought relief in Superior Court. The trial court also found Loshbaugh personally liable for the contract with Plese-Graham and granted Plese-Graham's motion for summary judgment. Loshbaugh now appeals to this Court.

## **II. COUNTER-STATEMENT OF THE CASE**

### **A. FACTUAL HISTORY**

Ed Loshbaugh & Sons, Inc. ("the Corporation"), a construction company, was incorporated on June 2, 1971. (CP 12, 93). The Corporation ceased doing business and cancelled its surety bond on May 28, 2009. (CP 52). The corporation expired June 30, 2009 (CP 52, 93). The Corporation was administratively dissolved October 1, 2009 (CP 93). Until commencing this action, Plese-Graham, LLC, ("Plese-Graham") was not aware that the Corporation had ceased doing business, had cancelled its surety bond which had expired, and was subsequently dissolved. (CP 52).

Over several years, Plese-Graham engaged the Corporation in several matters of construction. (CP 52). During the subject engagement, Ed Loshbaugh & Sons, Inc. failed to pay a subcontractor for materials received. (CP 52). As a result, the subcontractor placed a lien on Plese-Graham's real property. (CP 52).

On June 24, 2009, Plese-Graham entered into an agreement with the subcontractor to remove the lien in exchange for \$16,265.12, a reduced amount owed to the subcontractor by the Corporation. (CP 52). In cooperation with that agreement, Robert Loshbaugh orally agreed to reimburse the amount to Plese-Graham and to sign a promissory note for the full amount. (CP 53, 91).

On June 30, 2009, Rod Plese, member of Plese-Graham, drafted a promissory note in the amount of \$16,265.12, to essentially reimburse Plese-Graham. (CP 53). Rod Plese then sent the Promissory Note to Robert Loshbaugh for his signature. (CP 53, 91). Robert Loshbaugh ("Loshbaugh") did not sign the Promissory Note, but on August 19, 2009, he requested that the Note be redrafted so that he could sign the Note on behalf of the Corporation. (CP 53).

In response to the request, Rod Plese redrafted the Promissory Note and sent it back to Loshbaugh for his signature. (CP 53, 91).

On two separate occasions, Loshbaugh stated in emails that he had signed and sent in the Note. (CP 53, 67-69). Those emails were sent to Rod Plese on October 5, 2009 and October 19, 2009 (CP 53, 69, 67). However, Loshbaugh never signed the Promissory Note even though on October 5, 2009, his e-mail stated "yes is on way". (CP 69).

The Corporation's \$12,000.00 contractor's bond was issued by Travelers Insurance and was entirely consumed by a previous creditor. (CP 96). Travelers Insurance was voluntarily dismissed by Plese-Graham. (CP 96).

## **B. PROCEDURAL HISTORY**

This matter was arbitrated under the Superior Court Mandatory Arbitration Rules on June 24, 2010. (CP 143-146). Plese-Graham was awarded judgment against the Corporation and Loshbaugh, individually, and the marital community, in the amount of \$16,265.12, plus interest at twelve percent (12%) per annum from June 24, 2009. (CP 143). In the Second Cause of Action, Plese-Graham was awarded \$1,308.00, plus twelve percent (12%)

interest from November 4, 2009, only against the Corporation. (CP 145). The Arbitrator also ruled that Plese-Graham's right to pursue collection of any unpaid claims it has against the Corporation shall not be diminished pursuant to Chapter 23B.14 RCW. (CP 146).

On July 28, 2010, Loshbaugh and wife appealed the Arbitrator's ruling to the Superior Court regarding only their individual liability and not the corporate liability. (CP 49). Both parties filed a motion for summary judgment (CP 104-105; CP 118-119). On October 15, 2010, the Trial Court granted Plese-Graham's motion for summary judgment and denied Loshbaugh's motion. (CP 158-162).

Loshbaugh now appeals the ruling as to the judgment against him individually. (CP 218-219). The Corporation did not appeal as there are no assets remaining. (CP 33).

### **III. RESPONSE TO APPELLANT'S ARGUMENT**

The trial court's decision should not be reversed because there is no genuine issue of material fact that Robert Loshbaugh and Jane Doe Loshbaugh are personally liable for the contract between Robert Loshbaugh and Plese-Graham, LLC and the contract between Ed Loshbaugh & Sons, Inc. and Plese-Graham.

**A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT.**

Respondent Plese-Graham, agrees with Appellant Loshbaugh's standard of review.

**B. APPELLANT LOSHBAUGH CONTENDS THAT HE IS NOT A PARTY TO ANY CONTRACT WITH PLESE-GRAHAM, LLC.**

Loshbaugh's contention that a contract does not exist between the parties is incorrect because there was both an oral offer and acceptance and an e-mail offer and acceptance. Furthermore, the contract does not violate the Statute of Frauds.

First, Loshbaugh argues that there has been no offer and acceptance and consequently there is no contract between himself and Plese-Graham. He contends that only the corporation is liable, which has no assets. (CP 33).

The Court in *Wilson's Court v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1988) stated: "Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party. (Citations omitted)."

Here, Loshbaugh contends that there was no acceptance of the agreement to execute a personal note. However, Loshbaugh orally accepted the new debt to Plese-Graham when Plese-

Graham agreed to pay the Corporation's debt to its prior subcontractor. (CP 53). Furthermore, although Loshbaugh subsequently requested that Rod Plese redraft the original Note so that Loshbaugh could sign it on behalf of the Corporation, Loshbaugh failed to sign the Note individually or on behalf of the corporation. (CP 53).

An email sent by Rod Plese to Loshbaugh, dated October 3, 2009, quoted in part states: "Did you sign and return the Note? Please advise. Rod." (CP 69). Loshbaugh replied by e-mail on October 5, 2009, as follows: "Yes, is on the way". (CP 69). In addition, Loshbaugh previously wrote on September 23, 2009, "Rod I am signing this contract (note) but would like to know about receivable that is still out there." (CP 71).

The e-mail response by Loshbaugh to Rod Plese's email dealt directly with the Promissory Note. Therefore, contrary to Loshbaugh's contention, there was an offer and acceptance both orally and by the October 5, 2009 email. (CP 69).

Second, Loshbaugh contends that if the Court finds acceptance, the personal note is wholly unsupported by consideration because Loshbaugh received no benefit from agreeing to its terms. It is true that the Promissory Note was never

signed; however, physical delivery of the executed Note is not essential for completed contract where the Court finds the parties have agreed that the contract is in effect. *Kupka v. Dicksons*, 72 Wn.2d 217, 432 P.2d 657 (1967).

Here, Loshbaugh verbally agreed and promised that he executed the Promissory Note and Plese-Graham agreed to accept the Note. (CP 69). Even though the Note was not delivered, there was a promise to do so and acceptance of the promise in a mutually binding contract. There is personal liability of a shareholder of a dissolved corporation under RCW 23B.02.040 as hereinafter argued.

Third, Loshbaugh contends that the contract violates the surety provisions of the Statute of Frauds, RCW 19.36.010(2). However, "the statute of frauds does not apply to void an oral contract which has been fully performed by one of the parties." *Rutcosky v. Tracy*, 89 Wn.2d 606, 611, 574 P.2d 382 (1978) (citing *Becker v. Lagerquist Bros., Inc.*, 55 Wn.2d 425, 434, 348 P.2d 432 (1960)). In *Rutcosky*, the court held that an oral contract between the plaintiff and the defendant did not violate the statute of frauds when the plaintiff had fully performed his part of the bargain. *Id.* In this case, the Statute of Frauds does not apply because

Plese-Graham fully performed its part of the bargain by paying off the lien.

In addition, "a party who promises implicitly or explicitly to make a memorandum of a contract in order to satisfy the statute of frauds, and then breaks his promise, is estopped to interpose the statute of frauds as a defense to enforcement of contract by another who relied on it to his detriment." *Klinke v. Famous*, 94 Wn.2d 255, 259-60, 616 P.2d 644, 647 (1980). Here, Loshbaugh orally agreed to sign the Promissory Note in return for Plese-Graham's payment to the Corporation's subcontractor. Furthermore, in two e-mails, Loshbaugh repeatedly stated that he had sent a signed-copy of the Promissory Note. (CP 69).

Lastly, Loshbaugh's contention that there is nothing in writing to satisfy the Statute of Frauds is unsupported because the emails are clearly written materials which indicate there was both a written offer and acceptance.

In summary, Loshbaugh's contention that there is no contract express or implied between Loshbaugh and Plese-Graham is not supported by the evidence, and the Court should affirm the judgment of the trial court.

**C. LOSHBAUGH CONTENDS THAT THE COMPANY NOTE DID NOT CREATE PERSONAL LIABILITY AGAINST LOSHBAUGH.**

Even if this Court finds that there are questions of material fact regarding the existence of a contract between Plese-Graham and Loshbaugh, Loshbaugh is still personally liable for the contract between Plese-Graham and the Corporation because the facts show that Loshbaugh used the Corporation to violate a duty owed. In his Appeal, Loshbaugh admits that the Promissory Note is enforceable against the Corporation. (Appellant's Brief, page 9).

**1. Loshbaugh Argues That Plese-Graham, LLC Is Precluded From Arguing That The Corporation Should Be "Set Aside" When The Corporate Form Is Used To Violate A Duty Owed.**

Loshbaugh argues that *Culinary Workers and Bartenders Union #596 v. Gateway Café, Inc.*, 91 Wn.2d 353, 588 P.2d 1334 (1997) is not applicable in the present case because the facts are not perfectly identical. However, the conduct by Loshbaugh in this case is analogous. The facts in this case specifically include Loshbaugh's entering into a contract on behalf of the Corporation with Plese-Graham when Loshbaugh, the primary shareholder of

the Corporation, knew that the Corporation had ceased doing business, had lost its license, was insolvent, and was dissolved.

*Culinary Workers* at page 366 states:

Similarly, the personal liability of corporate officers, directors, or stockholders, may result when the facts illustrate an overt intention to disregard the corporate entity by using it for an improper purpose such as violating or evading a duty owed. See, e.g., *Harrisons v. Puga*, 4 Wn.App. 52, 480 P.2d 247, 46 A.L.R. 3d 415 (1971).

The Court of Appeals in *Harrisons v. Puga, supra*, at Page 63, sets forth two phases of the Doctrine that permits the Court to disregard the corporate entity and proceed against the corporate shareholder. Enunciating the two phases of the doctrine would take up a considerable amount of this Brief and so for the purpose of justifying the Trial Court's ruling, the second phase of the doctrine set out on Page 63 applies here, namely:

When only the rights of Plaintiff and Defendant are to be determined, there being no innocent third party rights involved, then, notwithstanding that Plaintiff's rights are initially against a corporation, the corporate entity may likewise be disregarded as a matter of convenience, e.g., to avoid circuitous action.

Here, Loshbaugh clearly sought to evade a duty owed to Plese-Graham when Loshbaugh intended to enter a contract on behalf of the Corporation which had been dissolved or was at least insolvent and no longer conducting business. Furthermore, Plese-Graham's claim to disregard the corporate entity falls within the second phase of the doctrine as defined in *Harrisons v. Puga* at Page 63. There are no innocent third parties involved in the subject transaction and the corporate entity may be disregarded. Therefore, Loshbaugh is personally liable for the contract obligation owed to Plese-Graham.

**2. Loshbaugh Next Contends That The Facts Do Not Support Imposing Personal Liability For Post-Dissolution Transactions.**

Loshbaugh cites *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 135 Wn.2d 356, 950 P.2d 451 (1998), contending that knowledge of the dissolution was a question of fact. Here, it is undisputed that the corporation ceased doing business on May 28, 2009, expired June 30, 2009, and was administratively dissolved on October 1, 2009. (CP 93). The Corporation and its primary shareholder, Robert Loshbaugh, were certainly aware that other creditors of the Corporation had previously consumed the Corporation's Contractor's

Bond prior to Plese-Graham obtaining their judgment. (CP 107). In *Equipto v. Yarmouth*, the Supreme Court stated that RCW 23B.02.040 dealing with "liability for pre-incorporation transactions" also applied to post-dissolution liability. *Equipto v. Yarmouth*, 134 Wn.2d at 370, 950 P.2d 451. Yarmouth discovered the dissolution and he re-established his corporation and avoided personal liability. *Equipto v. Yarmouth*, 134 Wn.2d at 360, 950 P.2d at 453.

RCW 23B.02.040 states: "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this title, are jointly and severally liable for liabilities created while so acting except for any liability to any person who also knew that there was no incorporation."

Here, Loshbaugh could have followed suit by re-establishing the corporation, but he did not re-establish the Corporation and is consequently personally liable under RCW 23B.02.040.

Rod Plese, a member of Plese-Graham, stated in Paragraph 4 of his Affidavit on Page 2 that Loshbaugh did not disclose to Plese-Graham that the Corporation had ceased doing business and had expired on June 30, 2009. (CP 52). Loshbaugh could have avoided personal liability by re-establishing the Corporation. He elected not to do so and is therefore personally liable.

Loshbaugh argues that he agreed to the Promissory Note before the administrative dissolution. However, the facts do not bear this out. The corporation expired June 30, 2009. (CP 93). On August 19, 2009, Loshbaugh requested that Plese redraft the Promissory Note so that Loshbaugh could sign on behalf of the Corporation. (CP 53). The dissolution occurred October 1, 2009. (CP 93). The email sent by Rod Plese dated October 3, 2009, asked the question "Did you sign and return the Note?" Loshbaugh, on October 5, 2009, sent the following email to Rod Plese: "Yes, it's on its way". (CP 69). RCW 23B.02.040 imposes personal liability on Loshbaugh as Plese-Graham had no knowledge of the fact that the Corporation dissolved on October 1, 2009. (CP 52, 93).

**D. LOSHBAUGH CONTENDS THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLESE-GRAHAM.**

Plese-Graham was not named as the payee in the Promissory Note; Rod and Linda Plese were named as Payee. (CP 88, 89). Rod and Linda Plese were subsequently joined as Plaintiffs. (CP 163).

At the summary judgment hearing, Plese-Graham moved to join as Additional Plaintiffs Rod Plese and Linda Plese, husband and wife, pursuant to CR 17. (CP 136) (CP 156). CR 17 permits an amendment and joinder of the real parties in interest. Loshbaugh

cites *Kim v. Moffett*, 1 56 Wn.App. 689, 698, 234 P.3d 279 (2010). Plese-Graham, LLC, has no quarrel with the principles set out in that case because the real parties in interest were joined in these proceedings. Rod and Linda Plese were joined as additional Plaintiffs (CP 163, 164). Therefore, joinder was proper.

**E. LOSHBAUGH CONTENDS THAT PLESE-GRAHAM LLC'S JOINDER WAS IMPROPERLY GRANTED.**

Under CR 15(a) and (b), amendments are permitted to arrive at a just resolution of the action. *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165-166, 736 P.2d 249 (1987). Here, Plese-Graham filed a motion to join Rod and Linda Plese as Additional Plaintiffs. (CP 156, 157). The matter was duly noted and no objection was filed. (CP 165). The Trial Court's discretion will not be disturbed on appeal absent a manifest abuse of discretion. *Edmonds v. Scott Real Estate*, 87 Wn.App. 834, 852, 942 P.2d 1072 (1997). The purpose of CR 17(a) is to expedite litigation by not permitting technicalities or narrow constructions to interfere with the merits of the legitimate controversy. *Beal v. Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998). The Supreme Court in 2003 abolished the "honest or understandable mistake" test altogether making the *Beal* rule applicable to all changes under CR 17(a). Vol. 3A, Washington Practice, CR 17, page 374.

*Kommavongsa v. Haskell*, 149 Wn.2d 288, 67 P.3d 1068 (2003).

Plese-Graham's motion to join the additional plaintiffs is supported by the affidavit of Plese-Graham's attorney (CP 147, 148, 149). The affidavit is not controverted.

Loshbaugh misinterprets CR 17(a). Honest or understandable mistake applies only after the statutory limitation period has expired. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 734 P.2d 533 (1987). Here in these proceedings, the statutory limitation period had not expired before the time limitation on the action had run.

Loshbaugh also contends that he was prejudiced by the court's ruling. Loshbaugh cites *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). *Wilson* holds that decisions to grant leave to amend the pleadings are within the discretion of the trial court. The *Wilson* court went on to say when reviewing the court's decision to grant or deny leave to amend, the Court applies a manifest abuse of discretion test. *Id.* The trial court's decision will not be disturbed absent a clear showing of abuse of discretion.

In this case, Loshbaugh did not claim any prejudice at the hearing nor did he file any pleadings opposing the motion to amend. The motion to amend was noted for hearing and the order granting was entered without objection. The amendment changes nothing

except who will benefit from the action. Therefore, the amendment was proper.

**F. LOSHBAUGH CONTENDS THE COURT ERRED IN GRANTING PLESE-GRAHAM'S REQUEST FOR ATTORNEY'S FEES.**

The trial court awarded Plese-Graham's attorney's fees pursuant to RCW 7.06.060 which provides that the party who appeals a mandatory arbitration award and fails to improve his or her position on trial de novo may be assessed costs and reasonable attorney's fees. RCW 7.06.060. (CP 166, 168, 228, 229, 230).

Here, the arbitrator awarded Plese-Graham, LLC \$16,265.12 plus interest at 12 percent per annum from June 24, 2009, against Ed Loshbaugh & Sons, Inc., and Robert Loshbaugh, individually and the marital community of Robert Loshbaugh and Jane Doe Loshbaugh. (CP 143-146). In addition, the arbitrator awarded Plese-Graham an amount of \$1,308 plus interest at 12 percent per annum from November 4, 2009 against Ed Loshbaugh & Sons, Inc. (CP 145). All other claims were denied including Defendants' counterclaim and request for CR 11 sanctions. (CP 145).

The trial de novo involved only Robert Loshbaugh and Kathy Loshbaugh, husband and wife, as there was no appeal on the part of the judgment debtor Ed Loshbaugh & Sons, Inc., from a judgment

entered in the amount of \$1,308 plus interest. (CP 49).

The judgment entered under summary judgment was for the principal judgment amount of \$16,265.12 plus interest to the date of judgment summary of \$2,602.40 and that judgment was against Ed Loshbaugh & Sons, Inc., and Robert Loshbaugh and Kathy Loshbaugh, husband and wife, jointly and severally, and the community composed of and by them. (CP 158-162).

In effect, Loshbaugh did not better his position on appeal, and under the statute it is discretionary on the part of the trial court to award attorney's fees. *Christie-Lambert v. McLeod*, 39 Wn. App. 298, 693 P.2d 161 (1984).

Loshbaugh has not improved his position on appeal and an award of attorney's fees under RCW 7.06.060 and MAR 7.3 is proper. *Christie-Lambert v. McLeod, supra*. Therefore, the trial court's award of attorney's fees was proper and should be affirmed.

**G. LOSHBAUGH CONTENDS HE IS ENTITLED TO AN AWARD OF HIS ATTORNEY'S FEES.**

Loshbaugh bases his contention on the fact that there is an unsigned promissory note. In support of his contention, Loshbaugh cites *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). However, Loshbaugh is not the prevailing party and is

therefore not entitled to an award of attorney's fees. RCW 7.06.060.

Therefore, Loshbaugh should be denied attorney's fees.

#### IV. CONCLUSION

The court should affirm the trial court's decision and award reasonable attorney's fees to Plese-Graham, LLC on appeal.

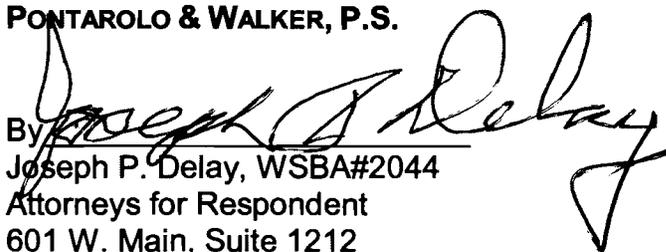
#### V. MOTION FOR ATTORNEY'S FEES ON APPEAL

Plese-Graham, LLC, and Rod and Linda Plese move the Court for attorney's fees on appeal pursuant to RAP 18.1; RCW 4.84.330; MAR 7.3 and RCW 7.06.060. *Dill v. Mickelson Realty Co.*, 152 Wn.App. 815, 822, 219 P.3d 726 (2009).

Dated this 23<sup>rd</sup> day of March, 2011.

Respectfully submitted,

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**AFFIDAVIT OF MAILING  
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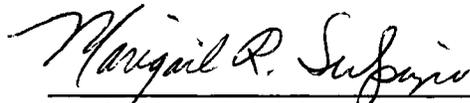
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STATE OF WASHINGTON        )  
  ) ss.  
COUNTY OF SPOKANE        )

The undersigned, being first duly sworn on oath, deposes  
and says:

I am competent to be a witness in the above-entitled matter;  
on the 23rd day of March, 2011, I mailed via first class mail, with  
postage prepaid thereon a copy of the Respondents' Brief  
addressed to the below-named as follows:

Richard D. Campbell  
Campbell & Bissell, PLLC  
7 South Howard Street, Suite 416  
Spokane, WA 99201

  
\_\_\_\_\_  
Marigail R. Sulpizio

SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of  
March, 2011.

  
\_\_\_\_\_  
NOTARY PUBLIC in and for the State of  
Washington, residing at Spokane  
My appointment expires:

