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II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. STATEMENT OF ISSUES

1. The Trial Court erred in Finding of Fact IX in stating that Defendant South-N-Erectors, LLC (hereafter as “South-N-Erectors”) received proceeds from the sale of the property, and that the amount of such proceeds “consisted of the difference between the sale price of \$311,000.00 and the amount financed on the purchase of \$130,900.00,” when the Trial Court ignored the un rebutted evidence that: (a) the sale price exceeded \$130,900, (b) investors were also used to secure the purchase of the property; (c) the sale proceeds were also used to satisfy debts to both the “mortgage holder” and the investors; and (d) no sale proceeds remained after satisfaction of the debts to the “mortgage holder” and the investors?

2. The Trial Court erred in Finding of Fact X in stating that the proceeds from the sale of the property were used “to pay debts for which Mr. Hicks was personally liable, not debts owed by South-N-Erectors, LLC,” when the Trial Court ignored the un rebutted evidence that: (a) investments were used to secure the purchase of the property; (b) the investors were entitled to be repaid from the sale of the property; and

(c) there were no sale proceeds remaining to pay any debts of South-N-Erectors or Mr. Hicks, even if such debts existed.

3. The Trial Court erred in Conclusion of Law III in stating that Mr. Hicks used proceeds from the sale of the property to pay personal debts when the undisputed testimony was that there were no sale proceeds remaining after the debts related to the property were paid (the “mortgage holder” and the investors).

4. The Trial Court erred in Conclusion of Law III in stating that “South-N-Erectors, LLC made a distribution to its member, Roger Hicks while it was unable to pay its LLC obligations,” when: (a) there was no evidence that any distribution was made to Mr. Hicks; (b) the unrebutted testimony is that no sale proceeds remained; (c) there was no evidence that South-N-Erectors was unable to pay any of its obligations at the time the sale of the property closed.

5. The Trial Court erred in Conclusion of Law III in stating that the alleged distribution to Mr. Hicks in October 2006 “violated RCW 25.15.235,” when: (a) to implicate that statute, a distribution must either (i) render the LLC unable “to pay its debts as they become due in the usual course of business,” or (ii) cause the liabilities of the LLC to “exceed the fair value of the assets;” (b) there was no evidence to infer that the LLC could not pay its debts in October 2006 “as they became due in the usual

course of business;” (c) there was no evidence presented that the liabilities of South-N-Erectors exceeded “the fair value of the assets of” South-N-Erectors; and (d) South-N-Erectors continued to conduct business and pay its debts in the ordinary course for the two years following the sale of the property.

6. The Trial Court Erred in Conclusion of Law IV in stating that Roger Hicks “is liable to the LLC for the amount that was distributed to him in violation of RCW 25.15.235,” when: (a) neither South-N-Erectors nor any of its members asserted a claim against Mr. Hicks; and (b) even assuming such a claim, no evidence was presented to establish any liability of Mr. Hicks to South-N-Erectors, LLC.

7. The Trial Court erred in Conclusions of Law IV and V in stating that a member of a limited liability company (Mr. Hicks) not only can be but is liable to a third party creditor under RCW 25.15.235 when: (a) that statute plainly states that a member is liable to the limited liability company, not to a third party creditor; and (b) no claim was ever asserted by South-N-Erectors or any of its members against Mr. Hicks; and (c) the unrebutted evidence was that no distribution was made whatsoever, *a fortiori* there could be no wrongful distribution.

8. The Trial Court erred in Conclusion of Law V in stating that South-N-Erectors had a duty to “preserv[e] funds to pay contingent

claims against it,” and that by failing to preserve such funds South-N-Erectors “intentionally violated its duty to pay its obligations,” when: (a) South-N-Erectors was an ongoing company, denied the claim, and it asserted its own counterclaim; (b) there was no evidence presented that South-N-Erectors could not have paid Shinstine in the ordinary course following October 2006 (when the property was sold); and (c) had Shinstine pursued its claims diligently, there likely would have been funds to satisfy any of its potential, contingent claims against South-N-Erectors (assuming it prevailed on the merits instead of default).

9. The Trial Court erred in Conclusion of Law VI in stating that “it is necessary to pierce the ‘corporate veil’ of [South-N-Erectors] in order to prevent a loss to an injured party, Shinstine,” when: (a) Shinstine presented no evidence that it suffered the requisite “unjustified loss;” and (b) if there was any unjustified loss, it was caused by Shinstine’s inexcusable failure to diligently prosecute its action while South-N-Erectors was an ongoing concern.

10. For all of the preceding reasons state above, the Trial Court erred in Conclusion of Law VII in deciding to disregard the corporate form of South-N-Erectors so as to enter judgment, including an award of fees and costs, against Mr. Hicks personally.

B. STANDARD OF REVIEW

The facts underlying corporate disregard are reviewed for substantial evidence. *Truckweld Equip. Co. v. Olson*, 26 Wn.App. 638, 643, 618 P.2d 1017 (1980). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). However, legal conclusions that support corporate disregard are reviewed de novo. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 924, 982 P.2d 131 (1999).

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

South-N-Erectors was a small, minority owned construction subcontractor. CP 105 (¶2). Defendant and Appellant Roger Hicks was its sole member. RP 29:11 and RP 32:1-3. As a general contractor, Plaintiff Shinstine Assoc. LLC (hereafter as “Shinstine”) retained South-N-Erectors in April 2005 for a public works project. CP 117 (FF II-III); CP 12-13 (¶3.1-3.3); CP 95 (¶1.9); RP 32-7-34:17. The project was the construction of two fire stations for Pierce County Central Fire District, and South-N-Erectors would perform a small portion of labor, erection of certain steel materials. *Id.*

In August 2005, during the construction project involved, South-N-Erectors purchased a commercial building “from Tacoma.” CP 117 (FF VI); RP 37:14-16 and RP 39:3. To purchase the building, South-N-Erectors was required to put a percentage down, then financed the remaining balance. RP 38:3-39:5 and RP 45:7-9.

The down payment for the purchase was secured from money provided by investors. RP 45:10-12. The investors invested into the building, and acquired a portion along with South-N-Erectors. RP 45:14-23. Some, if not all, of the investors received “a mortgage or some security on the property” for their investment. RP 46:2-16. Thus, there were two groups of debts related to the property: (1) the investors who provided the down payment, and (2) the “mortgage holder” that financed the remaining purchase price.

In January 2006, prior to completion of the construction project, Shinstine wrongfully terminated South-N-Erectors; South-N-Erectors was “specifically told not to come back.” RP 35:18-21; CP 3 (¶4); and CP 106 (¶4-6). Since the termination was wrongful, South-N-Erectors had claims against Shinstine for the wrongful termination, as well as other contractual sums that had not been paid. RP 99:13:25; CP 97 (§III); and CP 106 (¶4-6).

A little over a year after purchasing the property, South-N-Erectors sold it, in October 2006. CP 118 (FF VIII); RP 48:24-25. All of the sale proceeds were used to satisfy both the debt to the investors and the debt to the lender who had financed the remaining purchase price:

Q: What happened to the money that you got when you sold the building?

A: Went back to the mortgage lender and the investors who invested in the building.

RP 47:1-4 (testimony of Mr. Hicks). Upon further questioning by Shinstine's counsel, Mr. Hicks again testified that all the sale proceeds were used to satisfy the debts to the investors and "the original mortgage holder":

Q: And as far as you know, the money [referring to the sale proceeds] was paid back to the original mortgage holder?

A: Yes. The money had to go to the original mortgage holder which— whoever was holding on the mortgage and then to the investors.

RP 47:23-48:2.

The un rebutted testimony at trial was that after the debts related to the property were satisfied, no sale proceeds remained:

Q: Okay. And how much profit did South-N-Erectors make on that building?

A: South-N-Erectors had no profit.

RP 46:23-25. As such, there were no funds remaining to pay any debts, or possible debts, of South-N-Erectors:

[Q] ...Did [you] use any of the funds to pay and LLC debts?

...

[A] No. Like I stated earlier, all my money was gone to investors and mortgage; South-N-Erectors had no money.

RP 53:21-54:2.

B. STATEMENT OF PROCEDURE

Despite an arbitration provision in the Shinstine-South-N-Erectors subcontract, Shinstine filed suit against both South-N-Erectors and Mr. Hicks on May 1, 2006. CP 1-3. Shinstine alleged that contractual amounts were owed by South-N-Erectors, and further sought to disregard the corporate form of South-N-Erectors so as to impose liability upon Mr. Hicks. CP 11-18 (Amended Complaint).

South-N-Erectors maintained its own counterclaims against Shinstine and continued to conduct business. CP 118 (FF XII); CP 97; and CP 106-108 (¶7-11). Such claims included that for wrongful termination and for amounts due and owing under the contract but which Shinstine had not paid to South-N-Erectors. RP 99:13-25; CP 97 (§ III); and CP 106 (¶4-6).

On August 31, 2006, the Trial Court entered a stipulated Order Granting a Stay of Proceedings so that the parties could comply with their contractual dispute resolution procedure of arbitration. CP 2-7.¹ The Court ordered the parties to “complete their arbitration on or before January 31, 2007,” four months later. CP 6. The Trial Court further ordered the parties to “submit a Joint Status Report on arbitration proceedings on or before October 31, 2007.” CP 6.

Shinstine failed to participate in the filing of the Court ordered Status Report. CP 8. Likewise, Shinstine failed to participate in any arbitration, and no arbitration was accomplished by January 31, 2007 s the Trial Court had ordered. CP 8-9.

Rather than participating in arbitration, Shinstine instead moved the Trial Court for leave to amend its Complaint to assert a claim against

¹ Although a stipulation, the Stipulation upon which the Trial Court entered its August 31, 2006 Order Granting a Stay contains inaccurate statements of facts, e.g. ¶1 stating Shinstine issued a bond to South-N-Erectors. However, the factual inaccuracies do not appear to be relevant to the issues on appeal.

the contractor registration bond South-N-Erectors acquired pursuant to the Contractor Registration Act, RCW 18.27, *et seq.* CP 9-10 and CP 11-18 (§7.1-7.9). The Trial Court granted Shinstine leave to add its claim against the bond, and extended the stay to allow arbitration “an additional 90 days or April 30, 2007.” CP 9-10.

Despite two stays, Shinstine still did not participate in arbitration, and the Court’s deadline of April 30, 2007 expired. CP 19-30. Approximately three months later, with Shinstine still failing to participate in the action, and failing to respond to discovery requests, all of the Defendants (South-N-Erectors, Mr. Hicks, and the surety) moved for an involuntary dismissal of Shinstine’s action. CP 19-91.

The Trial Court denied the motion for involuntary dismissal, but instead ordered Shinstine to participate in mediation and arbitration. CP 92.² This was the third time that the Trial Court ordered Shinstine to participate in arbitration.

In December 2008, 16 months after the Trial Court’s third order compelling Shinstine to participate in arbitration, South-N-Erectors ceased conducting business and closed its doors. RP 29:12-20 and RP 30:18-20.

² By its August 17, 2007 Order, the Trial Court essentially bifurcated Shinstine’s claims against South-N-Erectors and Mr. Hicks from Shinstine’s claims against the surety. The former claims were subject to the contractual dispute resolution procedures. The latter claims against the surety were to be decided by the Trial Court, and the Trial Court issued a case schedule for those claims setting trial for May 5, 2009. CP 92 and CP 101. The claims against the surety were resolved prior to trial, and are not at issue in this appeal.

Since South-N-Erectors closed, it lacked the financial ability to participate in arbitration, Shinstine ironically moved to compel arbitration. CP 109. The parties agreed to waive the contractual arbitration provision and agreed to have the Trial Court decide the claims against South-N-Erectors and Mr. Hicks. CP 109.

Trial was held on March 9 and 10, 2009. RP 1. Since South-N-Erectors had closed, it did not pursue its counterclaims against Shinstine, and likewise did not contest Shinstine's claims against South-N-Erectors. CP 7:4-8:11. Therefore, as the Trial Court stated, all that remained at trial was "the issue [] whether or not Mr. Hicks is personally liable..." CP 10:20-25.

IV. LEGAL AUTHORITY AND ARGUMENT

A. RCW 25.15.235 DOES NOT PROVIDE A BASIS TO DISREGARD THE CORPORATE FORM

RCW 25.15.235 addresses "wrongful distributions;" a distribution is "wrongful" if it violates either of the two scenarios in subsection (1) of the statute:

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business, or (b) all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is

limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability.

RCW 25.15.235(1).

If a distribution is made in violation of subsection (1) and the member who received the distribution “knew at the time of the distribution that the distribution violated subsection (1),” then the limited liability company has a cause of action against that member. RCW 25.15.235(2) states that the member receiving the “wrongful” distribution “shall be liable to a limited liability company for the amount of the distribution.” Thus, subsection (2) imposes a scienter element to liability, requiring that the member be aware at the time of the distribution that the distribution left the company in a financial state as described in subsection (1).

However, nothing in RCW 25.15.235 states or implies that if a distribution is made in violation of subsection (1), that *in addition to* being liable to the LLC, the member *is also liable* to a third party creditor. Statutes are to be accorded their plain meaning, and absent ambiguity the court’s inquiry ends because plain language does not require construction. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); and *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971).

Further, a court “is required to assume the Legislature meant exactly what it said and apply the statute as written.” *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

Applying the plain language of RCW 25.15.235, for a “wrongful” distribution (one that violates subsection (1), leaving the LLC essentially insolvent), then the member with the requisite knowledge “shall be liable” to the limited liability company for, and the limited liability company has a cause of action against the member to recover, the wrongful distribution.

Had the Legislature intended to provide a cause of action to a third party creditor for a violation of RCW 25.15.235(1), then the Legislature would have so stated. Likewise, had the Legislature intended that a violation of RCW 25.15.235(1) would serve as a basis for corporate disregard, it would have so stated.

Rather, the Legislature clearly expressed its intent as to when and in what circumstances the corporate form may be disregarded in favor of a third party creditor in RCW 25.15.060. That statute is captioned as “Piercing the Veil,” and states the corporate form may be disregarded “to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances,” and further stating that “the court may consider the factors and policies set forth in established case law with

regard to piercing the corporate veil” (excepting the failure to hold meetings or observe certain formalities). RCW 25.15.060.

The Legislature clearly expressed its intent to afford the same protections to members of a limited liability company as members of a corporation. A limited liability company is a hybrid between corporations and partnerships, *Chadwick Farms v. FHC, LLC*, 166 Wn.2d 178, 186-187, 207 P.3d 1251 (May 14, 2009), and the Legislature expressed its intent to protect members of a limited liability company the same as shareholders in a corporation. Indeed, in *Chadwick Farms*, the Supreme Court stated

A limited liability company is a statutory business structure that is like a corporation in that members of the company are generally not personally liable for the debts or obligations of the company...

Chadwick Farms, supra, 166 Wn.2d at 186-187.

Accordingly, RCW 25.15.235 provides neither a cause of action for third party creditors nor a basis to disregard the corporate form. The Trial Court erred in utilizing that statute as a means to disregard the corporate form of South-N-Erectors so as to make Mr. Hicks personally liable to Shinstine.

B. THE ELEMENTS OF CORPORATE DISREGARD WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Corporate disregard is an equitable doctrine applied “[i]n rare instances,” and “courts have been extremely reluctant to pierce the corporate veil in Washington.” Kelly Kunsch, 1B Wash. Prac., *Methods of Practice* § 66.91 (4th ed.) (collecting cases). To establish corporate disregard, two elements must be established:

First, the corporate form must be intentionally used to violate or evade a duty; second, disregard must be ‘necessary and required to prevent unjustified loss to the injured party.’

Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d 689, 692 (1982) (citation omitted).

The first element (intentional evasion) requires a finding of “an abuse of the corporate form,” which is typically established through “fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment.” *Meisel, supra*, 97 Wn.2d at 410 (“the court must find an abuse of the corporate form”).

For the second element, the alleged “wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary.” *Meisel, supra*, 97 Wn.2d at 410. Thus, the intentional evasion complained of must not only cause the harm, but be the cause of that harm. *Meisel*,

supra, 97 Wn.2d at 410-411 (“harm alone does not create corporate misconduct”).

1. No Abuse of the Corporate Form Because There is no Legal Duty for an Ongoing business to Preserve Funds for a Contingent Claim the Company Denies

In Conclusion of Law V, the Trial Court determined that the alleged duty that South-N-Erectors intentionally evaded was a duty to “preserv[e] funds to pay contingent claims against the LLC.” CP 120. No such duty existed, and even if there is such a duty it could not include requiring a company without funds to locate and segregate a contingent fund in case a contingent claim ultimately proves valid.

First, the Trial Court erroneously assumed that an ongoing limited liability company has some duty to preserve funds in the event that a disputed, contingent claim at some later unspecified date becomes valid. At trial, Shinstine offered no legal authority for that proposition, and the Trial Court identified none. Rather, the authority demonstrates that there is no such duty.

A well settled axiom is that “no plaintiff is entitled to a solvent defendant.” *Eagle Pacific Ins. Co. v. Christianson Motor Yacht Corp.*, 85 Wn.App. 695, 708, 934 P.2d 715 (1997), citing *Morgan v. Burks*, 93 Wn.2d 580, 589, 611 P.2d 751 (1980). In both *Eagle Pacific, supra*, and *Meisel, supra*, the courts refused “to work backwards” to create solvency

through the equitable doctrine of corporate disregard. *Meisel, supra*, 97 Wn.2d at 410-411; *Eagle Pacific, supra*, 85 Wn.App. at 708.

Likewise, “corporate entities should not be disregarded solely because one cannot meet its obligations.” *Meisel, supra*, 97 Wn.2d at 411. Further, deliberate undercapitalization is not an abuse of the corporate form, and “a corporation should not be disregarded solely because its assets are not sufficient to discharge its obligations.” *Norhawk Investments v. Subway Sandwich Shops*, 61 Wn.App. 395, 399-400, 811 P.2d 221 (1991).

The above authorities demonstrate that an ongoing corporation has no duty to “preserve funds” to pay a contingent claim that the company disputes, particularly when the date as to when the claim might eventually become valid is uncertain. Sound economic and public policy militate against such a duty as well. Holding that a corporation must set aside funds could very well handicap a corporation and its ability to pay valid and undisputed debts and obligations (e.g. rent, payroll, and the like). This would have devastating consequences to smaller corporations.

Further, imposing a duty upon a corporation to preserve the funds to pay a disputed, contingent debt comes perilously close to a court unnecessarily meddling in corporate affairs. “Courts are reluctant to interfere with the internal management of corporations and generally

refuse to substitute their judgment for that of the directors.” *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn.App. 489, 498, 535 P.2d 137 (1975) (discussing business judgment rule). If a company does not have funds to preserve, having a court impose a duty to preserve funds then forces the company’s managers onto the horns of a dilemma—use funds that would otherwise be used to pay basic needs and run the risk of breaching obligations to the company and its members, or preserve no funds and face a risk of personal liability.

Claims against a business are nothing new, and are part of business. As Mr. Hicks testified, people asking for payment “is nothing new in business.” RP 52:9-22. If a business was burdened with a legal duty to allocate funds for each and every claim, whether disputed or not, the effects would be deleterious and unnecessarily cross the line into the courts managing a company for its principals.

2. Lack of Substantial Evidence of Any Alleged Abuse Actually Causing Harm to Shinstine

Any alleged abuse of the corporate form by Mr. Hicks must also cause actual harm to Shinstine. *Meisel, supra*, 97 Wn.2d at 410 (“wrongful corporate activities **must actually harm** the party seeking relief” (emphasis added)). The Trial Court did not identify in its Findings and Conclusions what actual harm was caused to Shinstine by the alleged

abuse of corporate form. CP 116-121. The Trial Court simply stated that piercing the corporate veil of South-N-Erectors was necessary to prevent a loss, without identifying what that loss was or what precisely caused that loss as is required by *Meisel*. CP 120 (Conclusion of Law VI).

Most telling is the fact that the Trial Court expressly stated its disagreement with the Supreme Court's pronouncement in *Meisel*:

Defense counsel cites the—Meisel or Meesel (ph)—case that Washington courts have uniformly rejected the theory that undercapitalization of the inability to pay debts as they come due justifies disregard. Corporate entities should not be disregarded solely because one cannot meet its obligations. ***I don't believe that.***

RP 130:16-22 (emphasis added).

The only potential harm or loss to Shinstine was a solvent South-N-Erectors, however Washington law has been well settled that a creditor is not entitled to a solvent company, and that disregard cannot occur solely because a corporation is undercapitalized, lacks assets to pay creditors, or is unable to discharge its obligations. *Meisel, supra*, 97 Wn.2d at 410-411 and *Norhawk, supra*, 61 Wn.App. at 399-400.

Further, there was no evidence to establish the requisite causal link between the alleged abuse of the corporate form and the alleged harm or loss to Shinstine. Again, the only potential harm or loss to Shinstine was a solvent South-N-Erectors. However, any insolvency of South-N-Erectors

did not occur, and could not have occurred, because South-N-Erectors failed to preserve funds in case Shinstine prevailed. If anything, preserving funds would have hastened dissolution. Rather, any alleged insolvency occurred because it closed its doors and ceased conducting business, i.e. it dissolved. Dissolution occurred in December 2008, three months prior to trial, but over two and one-half years after Shinstine brought the instant action. CP 1 (lawsuit filed May 1, 2006); RP 29:14-20 and 30:18-20 (closing of South-N-Erectors in Dec. 2008).

Conspicuously absent from the Trial Court's Findings and Conclusions is any determination that Mr. Hicks precipitously or unnecessarily closed South-N-Erectors in order to avoid the potential liability to Shinstine, or that South-N-Erectors had any assets at the time it ceased conducting business. Indeed, the unrebutted testimony of Mr. Hicks was that in December 2008, when South-N-Erectors closed, "[n]o assets remained." RP 30:5-7.³

Therefore, there was no evidence to establish both an actual harm or loss to Shinstine, and that such harm or loss was caused by the alleged abuse of corporate form. Lacking substantial evidence to support its

³ Certainly, South-N-Erectors' counterclaim against Shinstine could qualify as an asset, however it was not an asset that could satisfy the contingent, potential liability to Shinstine. In theory, South-N-Erectors could have used its counterclaims to negotiate a settlement, however the parties' attempts at settlement were unsuccessful. CP 92 (ordering mediation) and CP 107-108 (§11 of Hicks Declaration stating mediation occurred in March 2008).

Findings and Conclusions, the Trial Court erred to the extent that it determined that the two requisite elements for corporate disregard were satisfied.

C. NO “DISTRIBUTION” WAS MADE, AND THE TRIAL COURT ERRED IN FINDING MR. HICKS TOOK A DISTRIBUTION FROM THE SALE OF THE PROPERTY

The Trial Court erred in Conclusion of Law IV in determining that Mr. Hicks “is liable to the LLC for the amount that was distributed to him in violation of RCW 25.15.235.” First, no distribution was made, therefore the substantial evidence does not support the Trial Court’s findings. Second, even assuming a distribution, there is no evidence that the distribution was “wrongful” in the sense that it violated RCW 25.15.235(1). Third, assuming a distribution, and further assuming that the distribution was wrongful, there was no claim by South-N-Erectors upon which the Trial Court could have imposed personal liability upon Mr. Hicks. Each of these are addressed in turn.

1. There Was Insufficient Evidence of A Distribution

One of the factual findings by the trial court upon which it premised the imposition of personal liability upon Mr. Hicks was its belief that a distribution was made to Mr. Hicks, specifically in utilizing proceeds from the sale of the property to satisfy the debt to the investors.

The Trial Court erred because satisfying the debt to the investors did not constitute a distribution.

The un rebutted evidence at trial demonstrated that South-N-Erectors purchased the property utilizing funds from two sources, (1) investors who supplied the down payment and (2) a loan to pay the balance remaining after the down payment was applied. RP 38:3-39:5 and RP 45:7-12; *see also* CP 117 (FF 6); RP 37:14-16 and RP 39:3. Both the investors and the lender received “some security on the property” in exchange for providing funds. RP 46:2-16.

By having received some security on the property, both the investors and the lender were repaid when the property was sold. By providing money for the down payment, the investors were acquiring an interest in the property. Mr. Hicks testified that the investors were “[f]rom different companies to purchase the building, and South-N-Erectors bought a portion too,” (RP 45:14-15), and that “[n]obody owns South-N-Erectors but me” (RP 45:19-20). Thus, the investors received “a mortgage or some security on the property” (RP 46:11-13).

The evidence therefore demonstrated that when a property was sold, the investors were entitled to be repaid their investment. In other words, satisfying the debt to the investors removed the “mortgage or some security” that the investors held related to the property so that clear title

could be passed. Satisfying the investors from the sale proceeds was done in the ordinary course, and was not, and could not have been, a distribution by the LLC to Mr. Hicks.

After the lender was also satisfied, no monies remained in order to make a distribution. Mr. Hicks twice made clear that South-N-Erectors received none of the sale proceeds. RP 46:25 (“South-N-Erectors had no profit”) and RP 47:23-48:2 (the sale proceeds went to “whoever was holding on the mortgage and then to the investors”). His testimony went un rebutted.

2. Even Assuming a Distribution, There is No Evidence to Support a Distribution in Violation of RCW 25.15.235

As set forth above, Section IV.A, *supra* at pgs. 14-15, RCW 25.15.235(1) sets forth two alternate bases in which a distribution violates the statute. No evidence was presented to the Trial Court to demonstrate that either of the two instances existed. No evidence was presented that after the assumed distribution to Mr. Hicks that either (a) South-N-Erectors was unable “to pay its debts as they became due in the usual course of business, or (b)” that the liabilities of South-N-Erectors exceeded the fair value of its assets (excluding those liabilities and assets set forth in the statute).

Rather, the substantial evidence demonstrated the opposite, that South-N-Erectors was a going concern able to pay its debts as they became due, at least until it ceased conducting business and closed its doors in December 2008. The timing of the assumed distribution was October 2006, when the property was sold. At that point, and for two years thereafter, South-N-Erectors maintained its own counterclaims against Shinstine, even mediating those claims unsuccessfully. CP 118 (FF XII); CP 97; CP 106-108 (§7-11); and CP 92 (compelling mediation).

Likewise, without evidence that the assumed distribution left South-N-Erectors in a financial position contrary to RCW 25.15.235(1), there was no evidence before the Trial Court to establish the scienter element required by subsection (2). No evidence was presented that Mr. Hicks had any knowledge that taking the assumed distribution either (a) left the company without the ability to pay its debts as they came due, or (b) that the value of the debts exceeded the value of the assets.

Accordingly, there is no evidence from which the Trial Court could reasonably find that a distribution was made in violation of RCW 25.15.235. In short, while there is some suggestion that South-N-Erectors may have had liabilities, it was unreasonable for the Trial Court to infer that South-N-Erectors was unable to pay those debts in a usual course. As Mr. Hicks testified, that just as in any business, people asking for

payments “is nothing new in the business...; that’s business.” RP 52:9-10 and 21-22.

3. Even Assuming a Distribution, and Further Assuming a Wrongful Distribution, Only the LLC Had a Claim Which it Never Asserted

By concluding that Mr. Hicks was liable to South-N-Erectors, the Trial Court erroneously assumed that South-N-Erectors, as a limited liability company, had asserted a claim against Mr. Hicks and was seeking to recover on it. South-N-Erectors asserted no such claim, and therefore liability could not be premised upon an unasserted claim. The Trial Court *sua sponte*, and erroneously, appointed itself as a *de facto* guardian or trustee of South-N-Erectors, asserting a claim on behalf of South-N-Erectors against Mr. Hicks pursuant to RCW 25.15.235.

Thus, not only was there no factual basis upon which to impose liability upon Mr. Hicks pursuant to RCW 25.15.235, but there was no legal basis to do so either.

D. REQUEST FOR STATUTORY ATTORNEY FEES

Pursuant to and in accordance with RAP 18.1(b), Mr. Hicks respectfully requests an award of attorney’s fees. If the Court of Appeals determines that Mr. Hicks has prevailed in its appeal, he would be entitled to an award of statutory attorney’s fees pursuant to RCW 4.84.010(6) and

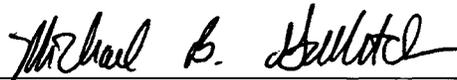
RCW 4.84.080. Likewise, Mr. Hicks would further be entitled to, and respectfully requests, an award of recoverable costs should he prevail.

V. CONCLUSION

For all of the preceding reasons, authority, and argument, Appellant Roger Hicks respectfully requests that the Court of Appeals reverse the Trial Court's April 24, 2009 Findings of Fact and Conclusions of Law in which the Trial Court imposed personal liability upon Mr. Hicks for the debt of South-N-Erectors to Shinstine. Mr. Hicks further respectfully requests that the Court of Appeals reverse the corresponding judgment entered in favor of Shinstine against Mr. Hicks personally on the same date. Lastly, Mr. Hicks respectfully requests and award of costs and attorney's fees pursuant to RAP 18.1 and RCW 4.84 *et seq.*

DATED this 24th day of September 2009.

GALLETCH & FULLINGTON, PLLC



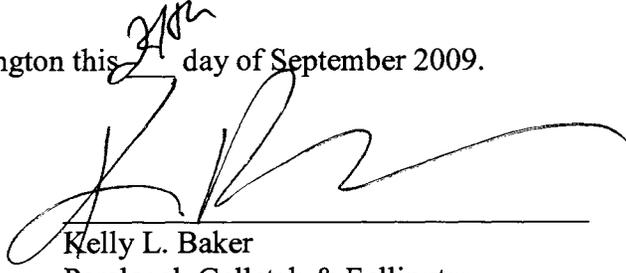
Michael B. Galletch, WSBA #29612
Attorneys for Appellant

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Antoni H. Froehling
122 East Stewart Ave.
Puyallup, WA 98372
Attorneys for Plaintiff

I declare under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this ^{21st} day of September 2009.



Kelly L. Baker
Paralegal, Galletch & Fullington