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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

HARLEY KANE

CASE NO.: 23-1637
L.T. NO: 502017CA013497XXXXMB

Appellant,

v.

STEWART TILGHMAN FOX & BIANCHI, P.A., et al.,

Appellees.

_____________________________/

Appeal from the Circuit Court of Palm Beach County

INITIAL BRIEF

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Preface

- “Kane Lawyers, PLLC”- Kane Lawyers
- “Florida’s Uniform Fraudulent Transfer Act”- FUFTA
- “R. __” - Record on Appeal, which this Court received on November 21, 2023.

I. Statement of the Case and Facts

Appellees are judgment creditors pursuing collection under Florida Statute §56.29. (R. 437). Appellees' judgment is held against Charles Kane and Appellant Harley Kane jointly and severally with defunct law firm Kane & Kane. The judgment was obtained in 2008. (R. 438).

In 2014 Harley Kane, a former attorney, formed a partnership with his then wife, Michelle Kane. (R. 111-112). The partnership, Michelle and Harley Kane as T.B.E., P.A., was one half owner of a law firm known as Kane Lawyers. (R. 111-112). The other owner of the firm was the Flanagan Firm, P.A., which was solely owned by another attorney named Thomas Flanagan. (R.111-112).

Appellees contend Michelle and Harley Kane as T.B.E., P.A. was the alter ego of Appellant. In 2015 Kane Lawyers paid just over $2m to Michelle and Harley Kane as T.B.E., P.A. (T. 188, lines 1-6). These monies were initially sent to the partnership's account and thereafter deposited in the joint bank account of Michelle and Harley Kane. (T. 324-325, lines 18-18). No evidence exists showing who issued the document or bank transfer of those funds, i.e., who "caused" the corporation to issue payment to the Kanes. Appellees brought two counts to trial claiming fraudulent transfers

under Florida Statute §726.105(1)(a) and/or §726.105(1)(b). (R. 1063-1064).

Appellees, unable to obtain a second judgment against Appellant, sought judgment against "Michelle J. Kane and Harley N. Kane, as tenants by the entireties". (R. 1063-1064). In the months prior to trial, Appellant sought to dismiss the actions on the basis that tenants by the entireties is a legal fiction form of ownership, not an entity against which a judgment could be entered. (R. 634). That motion was denied. (R. 1221).

Trial took place over three days, including three witnesses: Harley Kane, Michelle Kane, and Thomas Flanagan. The jury found for Appellees. (R. 1249-1250). The trial court denied Appellant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial on June 20, 2023, prompting this appeal. (R. 1339-1341).

II. Summary of Argument

The trial court erred in failing to grant Appellant's motion for summary judgment. Appellees failed to put forth any record evidence of the requisite elements for piercing the corporate veil. To do so requires a finding that (1) Harley Kane dominated and controlled the entity; (2) the entity was formed or used for an improper purpose; and (3) that Appellees were harmed by this improper purpose.

Appellees put forth no evidence whatsoever to contradict the documentary and testimonial evidence that Harley and Michelle Kane jointly owned and operated the entity.

As to the trial itself, the lower court erred on three principal issues: (1) tenants by the entireties is a legal form of ownership, not a distinct entity against which judgment may be entered; (2) the trial court failed to give the standard jury instruction regarding piercing the corporate veil; and (3) in order for Appellees to prevail, the jury was required to find that Michelle Kane had no interest in the funds transferred- yet the trial court failed to instruct the jury of this requirement.

(1) tenants by the entireties is a legal form of ownership, not a distinct entity against which judgment may be entered

All of Appellant's non-exempt assets were liquidated in bankruptcy to partially satisfy Appellees' judgment against him. In order to attach assets jointly owned by Appellant and Michelle Kane, however, Appellees needed a judgment against Michelle <u>and</u> Harley Kane. Under Florida law, though, Appellees could not obtain a second money judgment against Harley Kane for the purported transfer. Accordingly, Appellees sought a "work around" by obtaining a judgment against Harley Kane and Michelle Kane as tenants by the entireties. There is no basis to sue or be sued as "tenants by the entireties" under Florida law. The judgment is therefore in error.

(2) the trial court failed to give the standard jury instruction regarding piercing the corporate veil

The trial court failed to provide the standard jury instruction on piercing the corporate veil. The instruction given blurred the lines between separate elements required to pierce the corporate veil. Instead of requiring a finding of an alter ego/instrumentality **and** improper conduct, the instruction given by the trial court provides one list of factors that **may** be considered in order to disregard the corporate entity. Among the factors which "may" be considered, according to the court's instruction, was whether there existed fraud, wrongdoing, or injustice to third parties. The element of fraud or improper purpose is not a factor which may be considered but a required finding to pierce the corporate veil. Because the trial court's instruction indicated this element of fraud was optional, the jury could disregard the corporate entity without a finding of improper conduct.

(3) the trial court failed to require a finding that no portion of the funds transferred belonged to Michelle Kane

The trial court erroneously assumed that if the jury found Michelle and Harley Kane as T.B.E., P.A. was the alter ego of Harley Kane, it would be implicitly finding that the distribution paid by Kane Lawyers was meant only for Harley Kane. Accordingly, the trial court did not require a finding on the issue.

The trial court correctly instructed the jury that it should not consider the allocation of the distribution between Harley and Michelle Kane in determining whether to disregard the corporate entity. Once, however, the jury determined that the entity was Harley Kane's alter ego, it was required to determine what portion of the funds paid to the entity belonged to Michelle Kane. The trial court's failure to do so resulted in a miscarriage of justice.

III. Argument

A. The trial court erred in failing to grant Appellant's motion for summary judgment

Record Evidence for Motion For Summary Judgement:

Michelle and Harley Kane as T.B.E., P.A. was formed in 2014 to be a 50% owner of Kane Lawyers. (R. 111-112). The entity filed its requisite articles of organization (R. 1627-1628) and annual reports regularly. (R. 1629; 1684-1686). Kane Lawyers thereafter took over cases from the Greenspan Law Firm. (T. 326-327, lines 25-12). The other owner of Kane Lawyers was an entity known as the Flanagan Firm, P.A.- owned solely by Thomas Flanagan. (R.1228, ¶ 13).

A transfer of Kane Lawyer monies (distribution) was made to Michelle and Harley Kane as T.B.E., P.A. (R. 1229, ¶15) and a separate transfer (distribution) was made to the Flanagan Firm, P.A. in 2015. (T. 453, lines 7-

10). Michelle and Harley Kane as T.B.E., P.A. transferred the monies to a joint bank account of Harley and Michelle Kane. (R. 1229, ¶15). Harley and Michelle paid income taxes on the monies. (R.1630-1683).

Plaintiffs' Failure to Establish or Point to Record Evidence:

Pursuant to Florida Rule of Civil Procedure 1.510, a nonmoving party who bears the burden of proof must demonstrate a record tending to show genuine material record conflict on all essential elements of their case.

It was Plaintiffs' burden to point to sufficient record evidence of each and every element of their case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The basic inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). "[T] the court's function is to determine whether a dispute about a material fact is genuine, that is, whether a reasonable jury could return a verdict for the nonmoving party based on the evidence." Quick v. Donaldson Company, Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996).

Appellees failed to put forth any record evidence of the requisite elements for piercing the corporate veil. To do so requires a finding that (1) Harley Kane dominated and controlled the entity; (2) the entity was formed

or used for an improper purpose; and (3) that Appellees were harmed by this improper purpose.

Appellees put forth no evidence whatsoever to contradict the documentary and testimonial evidence that Harley and Michelle Kane jointly owned and operated the entity.

Undercapitalization alone does not establish an improper use of a corporation. Segal v. Forastero, Inc., 322 So.3d 159, 164 (Fla. 3rd DCA 2021). Appellees put forth no evidence to show unlawful conduct by or use of Michelle and Harley Kane as T.B.E., P.A. by anyone as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate. Riley v. Fatt, 47 So.2d 769, 773 (Fla. 1950). The funds distributed by Kane Lawyers to Michelle and Harley Kane as T.B.E., P.A., who thereafter distributed same to its shareholders are corporate transactions, not personal as to Harley Kane.

Likewise, the absence of a shareholders' agreement, lack of physical shares issued, and lack of meeting records are insufficient alone to pierce the corporate veil. Eagle v. Benefield-Chappell, Inc., 476 So.2d 716 (Fla. 4th DCA 1985). ("A failure to follow corporate formalities (*i.e.,* properly issuing stock or keeping records) is not, by itself, a sufficient ground upon which to base individual shareholder liability. This is because a loss is

normally not caused by the failure to follow corporate formalities.") (parenthetical original) (citations omitted). Appellees put forth no evidence regarding unlawful formation or how a lack of formalities caused harm.

Appellees correctly argue a trial court cannot make credibility determinations at summary judgment (R. 172-173). It was nevertheless Appellees' burden to counter the Appellant's record evidence by pointing to record evidence of each and every essential element of their case. Credibility of witnesses is not one of those elements. Traveler's Express Company v. Crosby, 524 So. 1168, 1169 (Fla. 5th DCA 1988) (reversing where there was, as here, a one-side record, no conflicting evidence for a jury to resolve); Gormady v. State, 185 So.3d 547 (Fla. 2d DCA 2016) (reversed on other grounds). A jury's function is to judge credibility of testimony on conflicting evidence of the essential elements. White v. Acker, 155 So.2d 176, 178 (Fla. 1st DCA 1963). Credibility is a tool used to test witness statements, not in itself an essential element of a case. State v. Smith, 573 So.2d 306, 313 (Fla. 1991). It was the Appellees' burden, not the Appellant's, that the trial court overlooked, shifting the burden without conflicting evidence.

Accordingly, the trial court erred in denying Appellant's motion for summary judgment.

B. Tenancy by the entireties is a legal form of ownership, not a distinct entity against which judgment may be entered

Prior to the proceeding supplemental at bar, Appellees had a judgment against Harley Kane, not Michelle Kane. All of Appellant's non-exempt assets had been liquidated in bankruptcy to partially satisfy Appellees' judgment. (T. 232, lines 5-12). In order to attach assets jointly owned by Appellant and Michelle Kane, however, Appellees needed a judgment against Michelle and Harley Kane.

Accordingly, Appellees sought a judgment against Harley Kane and Michelle Kane as tenants by the entireties- a form of ownership. As detailed below, there is no basis to sue or be sued as "tenants by the entireties" under Florida law, Accordingly, the judgment is in error.

i. **Second Judgment Rule**

Florida's Uniform Fraudulent Transfer Act

FUFTA provides remedies to creditors for certain transfers of assets deemed to be fraudulent. Florida Statute §726.108 specifically identifies the remedies available to creditors where a debtor has fraudulently transferred an asset. The statute provides for: (a) avoidance of the transfer; (b) attachment of the asset or other property of the **transferee**; or (c) an **injunction against further disposition**; the **appointment of a receiver**; or "[a]ny other relief the circumstances may require.".

FUFTA further provides, in § 726.109, that creditors can obtain judgments against: the first transferee or subsequent transferees "other than a good faith transferee[s]" Fla. Stat. § 726.109. This remedy is available when the transfer is voidable under § 726.108(1)(a).

Proceedings Supplementary

"Proceedings supplementary are post-judgment proceedings conducted within the original proceeding." Uoweit, LLC v. Fleming, 300 So. 3d 1201, 1203 (Fla. 4th DCA 2020). Florida Statute § 56.29 is a collection mechanism, wherein a "court may entertain claims concerning the judgment debtor's assets brought under chapter 726 and enter any order or judgment, including **a money judgment against any initial or subsequent transferee**, in connection therewith, irrespective of whether the transferee has retained the property." Fla. Stat.§ 56.29(9) (emphasis added).

Caselaw

While some Florida caselaw has expanded the language of FUFTA to allow for a money judgment against a transferor, this Court has expressly held "[t]here is nothing in section 726.108 which provides that a creditor such as [Appellee], that has a judgment against a debtor such as [Appellant], can obtain an *additional* judgment against the same debtor, because the debtor fraudulently transferred funds to avoid his creditors."

Yusem v. S. Florida Water Mgmt. Dist., 770 So. 2d 746, 749 (Fla. 4th DCA 2000) (emphasis original)[1]; but see McCalla v. E.C. Kenyon Const. Co., Inc., 183 So. 3d 1192 (Fla. 1st DCA 2016) (allowing a judgment against a debtor in an action under §726- and not brought under §56.29- without considering the issue of a second judgment).

Consistent with this Court, however, federal courts considering the issue have likewise determined that a second judgment could not be issued under §726 or §56.29. See SE Prop. Holdings, LLC v. Welch, 65 F.4th 1335, 1344 (11th Cir. 2023) ("[W]e conclude that the plain language of the statute and the relevant Florida case law on FUFTA amount to a 'strong indication' that the Florida Supreme Court would not find an award of money damages *against the transferor* permissible under section 726.108, including its catch-all provision."); Pasternack v. Klein, 8:16-CV-482-T-33CPT, 2019 WL 330593 (M.D. Fla. Jan. 25, 2019) ("[A] creditor that has a judgment against a debtor cannot obtain an additional money

[1] Notably, in deciding whether a party had a right to a jury trial, this Court held "a plaintiff may recover money damages against the transferor under the so-called catchall provision ...". Hansard Const. Corp. v. Rite Aid of Florida, Inc., 783 So. 2d 307, 309 (Fla. 4th DCA 2001) (citation omitted). The only reconcilable view of the two cases is that a creditor can recover a judgment against a debtor for a fraudulent transfer, unless the creditor already holds a judgment against the debtor. Any other reading puts these cases in direct conflict.

judgment against the same debtor simply because that debtor fraudulently transferred assets to avoid the creditor.”).

Importantly, none of the cases which rely on the ‘catch all’ provision to create the right to a ‘money judgment’ are brought under proceeding supplementary. Like the express language of FUFTA, Florida Statute § 56.29, proceedings supplementary, provides only “[t]he court may … enter any order or judgment, including **a money judgment against any initial or subsequent transferee**...” with regard to claims concerning chapter 726. Fla. Stat.§ 56.29 (emphasis added).

Neither FUFTA nor Florida Statute §56.29 expressly authorizes money judgments against transferors. This Court has expressly held that “[t]here is nothing in section 726.108 which provides that a creditor such as [Appellee], that has a judgment against a debtor such as [Appellant], can obtain an *additional* judgment against [Appellant], because [Appellant] fraudulently transferred funds to avoid his creditors.” Yusem, 770 So. 2d at 749 (emphasis original).

Accordingly, any new judgment against Harley Kane is void. Appellees try to sidestep Florida law on this issue by seeking (and obtaining) a judgment against Harley Kane and Michelle Kane as tenants by the entireties.

ii. **Tenancy by the Entireties**:

Tenancy by the entireties is a form of ownership. Beal Bank, SSB v. Almand & Associates, 780 So. 2d 45, 53–54 (Fla. 2001) ("[T]his Court has continued to adhere to its holding that a tenancy by the entireties in personal property constitutes a legally recognized form of ownership.") (citations omitted); Storey Mountain, LLC v. George, 357 So. 3d 709, 712 (Fla. 4th DCA 2023) ("a joint spousal bank account would be presumed a tenancy by the entireties so long as the account was established in accordance with the six 'unities' required at common law **for this form of joint property ownership**.") (citing Beal Bank, SSB 780 so. 2d at 58) (emphasis added); see also In re Willoughby, 212 B.R. 1011, 1015 (Bankr. M.D. Fla. 1997) ("In this **form of ownership**, each spouse owns the 'entirety' or the whole of the estate.") (citing Quick v. Leatherman, 96 So.2d 136 (Fla.1957)) (emphasis added).

Unlike forms of ownership, business entities, trusts, and individuals are each granted the specific right to access Florida courts. A Florida corporation has the power "[t]o sue and be sued, complain, and defend in its corporate name." Fla. Stat.§ 607.0302. Likewise, a Florida limited liability company can "[s]ue, be sued, and defend in its name". Fla. Stat. § 605.0109. The same express grants of power are made to partnerships

and trustees of trusts. See Fla. Stat § 620.8307 and Fla. Stat. § 736.0811. Finally, the Florida Constitution provides individuals access to courts. See Art. I, § 21, Fla. Const. ("courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay"). No such grants of power to sue and be sued exist for property held as joint tenants by the entirety.

Because individuals and entities can sue and be sued, there is no need for 'forms of ownership' to be misconstrued as a type of entity. Florida law has a well-developed body of caselaw that determines how creditors can reach assets held by individuals- whether as tenants by the entirety, joint tenants with a right of survivorship, or otherwise.

In the case where assets are held in a tenancy by the entireties, only creditors holding a single judgment against both spouses can reach the assets. See Miller v. Washington Mut. Bank, 184 So. 3d 558, 559 (Fla. 4th DCA 2016) ("Property that is owned by husband and wife as tenants by the entirety cannot satisfy the debt of one tenant alone."); Williams v. M & R Constr. of N. Florida, Inc., 305 So. 3d 353, 354 (Fla. 1st DCA 2020) ("[T]he entireties property cannot be attached to satisfy an individual spouse's debt."). See also Fla. Stat. §726.102 (defining assets to expressly exclude property held in tenancy by the entireties "to the extent it is not subject to

process by a creditor holding a claim against only one tenant."). "This is so because the '[p]roperty held by a married couple as tenants by the entireties belongs to neither spouse individually.'" M & R Constr. of N. Florida, Inc. 305 So. 3d at 354 (quoting *In re Hinton*, 378 B.R. 371, 377 (Bankr. M.D. Fla. 2007)).

Instead, under Florida law:

> When a married couple holds property as a tenancy by the entireties, each spouse is said to hold it "per tout," meaning that each spouse holds the "whole or the entirety, and not a share, moiety, or divisible part." Bailey v. Smith, 89 Fla. 303, 103 So. 833, 834 (1925). Thus, property held by husband and wife as tenants by the entireties belongs to neither spouse individually, but each spouse is seized of the whole. See Hector Supply Co., 254 So.2d at 780; Wilson v. Florida Nat'l Bank & Trust Co., 64 So.2d 309, 313 (Fla.1953).
>
> Beal Bank, SSB, 780 So. 2d at 53 (citations original).

Public policy[2] has increasingly favored finding such tenancies. Id. (creating presumption of a tenancy by the entireties in bank account);

[2] Florida courts have explained that the public policy behind similar exemptions from levy, such as homestead protections, are for the protection of the family.

> "No matter the form, the goal of homestead has remained stable: to protect the family." See Chames v. DeMayo, 972 So.2d 850, 856 (Fla.2007). Homestead " 'promote[s] the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune.' " McKean v.

George, 357 So. 3d at 713 ("[S]everal years after Beal Bank was issued, the Legislature added the last sentence to section 655.79(1), …, thereby codifying in Florida's statutory law the presumption in favor of joint spousal bank accounts being tenancy by the entireties property."); see Fla. Stat. § 655.79 ("Any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing."

Conclusion as to Tenancy by the Entireties

Florida law prohibits Appellees from obtaining a second judgment against Harley Kane for a fraudulent transfer to avoid creditors. Suing Harley Kane and Michelle Kane as tenants by the entireties is not a suitable against a separate entity, but merely a suit against the individuals. Any such judgment against Harley Kane violates this Court's jurisprudence.

C. The trial court failed to give the standard jury instruction regarding piercing the corporate veil

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Warburton, 919 So.2d 341, 344 (Fla.2005) (quoting Pub. Health & Trust v. Lopez, 531 So.2d 946, 948 (Fla.1988)).

Kelly v. Spain, 160 So. 3d 78, 82 (Fla. 4th DCA 2015) (quotations original).

The public policy of protecting families is furthered by tenancy by the entireties. Per the Florida Supreme Court, "the legitimate expectations of the parties regarding an account jointly held by them as a married couple should be no different than a home jointly owned by them as a married couple." Beal Bank, SSB, 780 So. 2d at 58.

Facts and Law

In order to pierce the corporate veil, Florida requires a showing of improper conduct. Dania Jai–Alai Palace, Inc. v. Sykes, 450 So. 2d 1114 (Fla. 1984). "Under this standard, it must be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them." Seminole Boatyard, Inc. v. Christoph, 715 So. 2d 987, 990 (Fla. 4th DCA 1998) (citing Sykes at 1121).

Accordingly, this Court has required three findings to pierce the corporate veil:

> (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;
>
> (2) the corporate form must have been used fraudulently or for an improper purpose; and
>
> (3) the fraudulent or improper use of the corporate form caused injury to the claimant.

Christoph, 715 at 990 (quoting In re Hillsborough Holdings Corp., 166 B.R. 461, 468 (Bankr. M.D. Fla. 1994)). As this Court stated, "in order to pierce the corporate veil, a plaintiff is required to prove both that the corporation is a mere instrumentality or alter ego of the defendant and that the defendant engaged in improper conduct." Priskie v. Missry, 958 So. 2d 613, 614–15 (Fla. 4th DCA 2007) (quotations and citations omitted). These requisite

findings are accurately reflected in Florida Supreme Court standard jury instruction 416.43, which provides:

> **In order to pierce the corporate veil and hold** (owner) **liable for obligations of** (form of business entity)**,** (claimant) **must show that:**
>
> **1.** (Owner) **dominated and controlled** (form of business entity) **such that:**
>
> > **a.** (form of business entity)**'s separate identity was not sufficiently maintained, and**
> >
> > **b.** (form of business entity) **lacked an existence independent from** (owner)**; and**
>
> **2. The corporate form of** (business entity) **was [formed] [used] for a fraudulent or improper purpose; and**
>
> **3.** (Claimant) **was harmed by the fraudulent or improper [formation] [use] of the corporate form of** (business entity)**.**

In re Standard Jury Instructions in Contract & Bus. Cases-2018 Report, 260 So. 3d 87 (Fla. 2018) (emphasis original). Notwithstanding this standard instruction, the trial court, gave the following instruction:

> Under Florida law, a finding that a corporation is the alter ego of an individual will not be made absent a showing of improper conduct. The mere fact that Michelle and Harley Kane own and control the stock structure of a corporation does not lead inevitably to the conclusion that the corporate entity is a fraud and is necessarily the alter ego of Harley Kane. Nor does the fact that the corporation's business affairs have been poorly handled, without more, justify treating the corporation as an alter ego.
> In determining whether to disregard the corporate entity known as Michelle and Harley Kane, TBE, P.A. [sic], and determine that

it was the alter ego of Harley Kane, you may consider the following factors, among others:

(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like[3];

(2) inadequate capitalization[4];

(3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes;

(4) common office space, address and telephone numbers of corporate entities;

(5) existence of fraud, wrongdoing or injustice to third parties.

(R.1252-1253).

The "trial court is required to instruct the jury regarding the law applicable to the facts in evidence and the law of the case." Lynch v. McGovern, 270 So. 2d 770, 771 (Fla. 4th DCA 1972) quoted in Wransky v. Dalfo, 801 So. 2d 239, 243 (Fla. 4th DCA 2001). This Court has stated that "[t]he standard jury instructions should be used when applicable, but '[i]f

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[3] "A failure to follow corporate formalities (*i.e.,* properly issuing stock or keeping records) is not, by itself, a sufficient ground upon which to base individual shareholder liability. This is because a loss is normally not caused by the failure to follow corporate formalities." Solomon v. Betras Plastics, Inc., 550 So. 2d 1182, 1185 (Fla. 5th DCA 1989) (citing Riley v. Fatt, 47 So.2d 769 (Fla.1950); Eagle v. Benefield-Chappell, Inc., 476 So.2d 716 (Fla. 4th DCA 1985)).

[4] Undercapitalization alone does not establish an improper use of a corporation. Segal v. Forastero, Inc., 322 So.3d 159, 164 (Fla. 3rd DCA 2021).

they are erroneous or inadequate the trial judge may amend them or give some other instruction which adequately instructs the jury in the circumstances of the case.'" Wransky, 801 So. 2d at 243 (quoting McGovern, 270 So. 2d at 771). In that case, the Florida Rules of General Practice and Judicial Administration provide:

> [i]f the trial judge modifies a standard jury instruction or gives another instruction, upon timely objection to the instruction, the trial judge shall state on the record or in a separate order the respect in which the judge finds the standard instruction erroneous or inadequate or confusing and the legal basis for varying from the standard instruction.

FL ST GEN PRAC AND J ADMIN Rule 2.580.

Error and Argument

Harley Kane requested the standard instruction on piercing the corporate veil. (R. 1208-1209). Notwithstanding rule 2.580, the record contains no specific statement as to why the standard instruction would be inadequate or confusing.

More problematic, however, is the instruction the trial court gave. While the trial court acknowledged the required finding of improper conduct, the instruction blurs the lines between this required finding and the alter ego component.

Instead of requiring a finding of an alter ego/instrumentality **and** improper conduct, the jury instruction provides one list of factors that **may**

be considered to disregard the corporate entity. Among the factors which "may" be considered, according to the court's instruction, was whether there existed fraud, wrongdoing, or injustice to third parties. The element of fraud or improper purpose is not a factor which may be considered but a required finding to pierce the corporate veil. Because the trial court's instruction indicated this element was optional, the jury could find the existence of an alter ego entity without a finding improper conduct. The instruction therefore misstates Florida law on the issue.

D. The trial court failed to require a finding that no portion of the funds transferred belonged to Michelle Kane

Appellees' theory of the case was that all funds transferred to Michelle and Harley Kane as T.B.E., P.A. were the exclusive monies of Harley Kane. (T. 470-471, lines 25-4). Instead of having to prove this theory, however, the trial court required only a finding that Michelle and Harley Kane as T.B.E., P.A. was the alter ego of Harley Kane.[5] The jury was never asked whose monies were transferred[6] and Appellees put forth

[5] This finding alone is inadequate even to pierce the corporate veil. See discussion supra Section C, page 17-21.

[6] A question of fundamental importance because a fraudulent transfer cannot exist where the asset transferred was owned as tenants by the entireties. Fla. Stat. §726.102(2)(c).

no direct[7] evidence as to whether the monies were exclusively Harley Kane's.

Evidence:

Kane Lawyers was owned by two separate entities, the Flanagan Firm and Michelle and Harley Kane as T.B.E., P.A. (T. 434-435, lines 21-3). The Flanagan Firm received over $1m in distributions in 2015 (T. 453, lines 7-10), while Michelle and Harley Kane as T.B.E., P.A. received over $2m in distributions. Thomas Flanagan, as the sole owner of the Flanagan Firm, received a third of the total funds distributed that year. According to Mr. Flanagan, the remaining two-thirds[8] were sent to Michelle and Harley Kane as T.B.E., P.A.

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[7] In an effort to insinuate that the funds belonged only to Harley Kane, Appellees elicited testimony on two points: (1) Harley Kane was instrumental in obtaining the settlement funds which made up a large portion of the distributions to both owner entities (T. 326, lines 14-18; T. 327-329, lines 13-21); and (2) Harley Kane was far more experienced than Michelle Kane. (T. 222-224, lines 22-3).

Both arguments ignore the fact that Thomas Flanagan received one-third of the distributions- despite the fact that Thomas Flanagan had been a law school classmate of Michelle Kane. (T. 444, lines 16-20). Thus, Thomas Flanagan was equally inexperienced. Moreover, to the extent the large settlement was the result of Harley Kane's efforts, Thomas Flanagan benefited to the same extent Michelle Kane did.

[8] The parties stipulated that Kane Lawyers made a $2m profit distribution to Michelle and Harley Kane as T.B.E., P.A. Thomas Flanagan testified that

At trial, Appellees' counsel asserted that Michelle and Harley Kane as T.B.E., P.A. received two-thirds of the distributions because Harley Kane had been instrumental in negotiating a large settlement for Kane Lawyers:

> Counsel for Appellees: "Harley's contribution specifically was the reason for that – the larger distribution to their company; isn't that right?"
>
> Thomas Flanagan: "Well, I mean, it was -- well, the distribution went to the both -- like, their company was -- it was Michelle and Harley. It wasn't just Harley."

(T. 455, lines 1-7).

Jury instruction:

On Appellees' claim as to alter ego, the trial court instructed the jury:

> Allocation
>
> Whether the $2,037,500 distribution from Kane Lawyers, PLLC was earned solely by Harley Kane should not be considered in the factual determination whether Michelle and Harley Kane TBE PA [sic] is the alter ego of Harley Kane.

(R. 1253).

Argument:

When considering whether Michelle and Harley Kane as T.B.E. P.A. was the alter ego of Harley Kane, it was proper for the jury to ignore the proportionate interest in the monies owned by or transferred to the entity. The ownership of the funds distributed by Kane Lawyers is not changed by

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his entity received over $1m in distributions. The testimony is unambiguous that these were the only owners of Kane Lawyers. (T. 453).

which of the spouses earned it, any more than a shareholder dividend is changed by which employee produced the most.

Once the jury discarded the corporate entity, however, it was required to determine which, if any, funds actually belonged to Michelle Kane. This conflict was discussed at length at trial. (E.g., T. 511-513).

This requisite finding is not only intuitive, it's necessary in order to determine whether a "transfer" occurred within the meaning of FUFTA. Transfer means the "disposing of or parting with an asset or an interest in an asset…". Fla. Stat. § 726.102 (14). FUFTA expressly defines assets to mean "property of a debtor" not including an "… interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant." Fla. Stat. § 726.102 (2).

The verdict form asked only whether the funds were received by the entity as Harley Kane's alter ego. The jury answered affirmatively, apparently believing the entity was Harley Kane's alter ego. While the trial court instructed the jury as to what a tenancy by the entireties is, the instruction was for naught. The jury was never asked to determine whether the monies were jointly owed to Harley and Michelle- as tenants by the entireties or otherwise. Instead, the sole inquiry was whether the entity was Harley's alter ego.

As to the possibility that the entity was Harley Kane's alter ego **and** that Kane Lawyers nonetheless paid funds to Michelle and Harley through that entity; the trial court presumably thought it an impossible outcome.

According to the trial court's conflated inquiry, if the jury finds that Michelle and Harley Kane as T.B.E., P.A. was the alter ego of Harley Kane, then any monies transferred to the entity were monies solely owed to Harley Kane. A simple review of the elements for piercing the corporate veil reveals the flaw in this theory. No part of the instruction on piercing the veil requires a finding as to ownership. Piercing the corporate veil destroys the limited liability protection of the corporate form, it doesn't destroy ownership interests in company assets.

To reach the outcome advocated for by Appellees required an initial multiprong finding to pierce the corporate veil. Upon piercing the corporate veil, the jury was required to find that a transfer took place of Harley Kane's asset- which could not have occurred if the monies were owned as tenants by the entireties. If the jury found that the funds were not owned as tenants by the entireties, a transfer could have occurred. In the event the jury found the remaining elements for a fraudulent transfer, it then needed to determine the amount of the fraudulent transfer. In other words, only the transfer of Harley Kane's monies, not Michelle's, could be fraudulent. The

judgment amount, if any, could not include funds which the firm paid to Michelle Kane. The inquiry, therefore, is not how the funds were received, but why they were sent.

The central theory of Appellees' case was that the funds transferred to Michelle and Harley Kane as T.B.E., P.A. were funds belonging solely to Harley Kane. Yet that question was never asked of the jury. Accordingly, the jury made no such determination. The trial court failed to require this finding, thereby relieving Appellees of their burden of proof, in error.

IV. Conclusion

For the foregoing reasons, the judgment entered April 21, 2023, should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was e-filed, and provided to Charles W. Throckmorton, Esq., Kozyak, Tropin & Throckmorton LLP, 2525 Ponce de Leon, 9th Floor, Coral Gables, FL 33134 at cwt@kttlaw.com, Michelle J. Kane, michelle@mjkanepa.com, John B. Agnetti, Esq. Hoffman, Larin & Agnetti, P.A., 909 North Miami Beach Blvd, Suite 201, North Miami Beach, Florida 33162 at john@hlalaw.com and pleadings@hlalaw.com on this 7th day of December 2023.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this Notice of Appearance complies with the font and wordcount requirements of Fla. R. App. P. 9.045.

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