Rel: September 03, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1190525

Paul Childs and Granger Construction Company, LLC

v.

Harry J. Pommer and Brenda S. Pommer

1190580

Harry J. Pommer and Brenda S. Pommer

v.

Melissa T. Granger, as administratrix of the Estate of Daniel D. Granger, deceased

Appeals from Baldwin Circuit Court
(CV-16-900017)

WISE, Justice.

In case number 1190525, two of the defendants below, Paul Childs and Granger Construction Company, LLC ("Granger Construction"), appeal from a judgment the Baldwin Circuit Court entered in favor of the plaintiffs below, Harry J. Pommer ("Bud") and Brenda S. Pommer. In their cross-appeal, case number 1190580, the Pommers appeal from the trial court's judgment entered in favor of another of the defendants below, Melissa T. Granger ("Melissa"), as the administratrix of the estate of Daniel D. Granger ("Granger"), deceased.

Facts and Procedural History

In 2014, the Pommers decided to build a garage on property that they owned in Fairhope. Bud testified that he initially contacted a contractor he knew about building the garage, that that contractor did not do that type of work, and that that contractor recommended Childs to

him. Bud testified that he telephoned Childs, that he told Childs that he and Brenda wanted to build a garage in front of their house, that he asked Childs if he was interested in doing the job and if he could do it, and that Childs said that he could.

The Pommers subsequently met with Childs at their house. Bud testified that his initial concern was whether they could build a garage in front of the house. Bud testified that Childs said that he would contact the proper authorities with the City of Fairhope ("the City") to find out and then get back with them. Bud testified that, after that initial meeting, Childs did some work for them regarding the design of the garage. Initially, after checking with the City, Childs told the Pommers that the garage could be built in front of their house. Childs worked on some sketches and ultimately came up with a computer generated-drawing of the garage. Childs gave the Pommers invoices dated July 2014 and September 29, 2014. Childs's name was on the top of both invoices. The first invoice was for "Preliminary Design Work for Garage Addition," and the second invoice was for "Secondary Design Work for Garage

Addition." The Pommers paid both invoices by checks made payable to Childs.

Childs subsequently gave the Pommers an estimate dated October 14, 2014, for constructing a garage in front of their house. Evidence was presented indicating that Childs took some sketches of the garage to the City for approval. However, the City informed Childs that a garage could not be built in front of the Pommers' house unless it was attached to the house. Because the Pommers were using their existing garage for other purposes, they still needed another garage. Therefore, they continued to work with Childs to come up with a new location and a new design for the garage.

Evidence was presented indicating that Childs subsequently prepared a set of plans for a garage to be built behind the Pommers' house with a breezeway connecting the garage to the house. That set of plans was marked as plaintiffs' exhibit 5 ("the original plans"). Evidence was presented indicating that the original plans included a brick ledge for the exterior bricks of the garage to be placed upon. Childs submitted plans for

the garage to John Peterson, an engineer, because the City required that the plans have an engineer's stamp approving the plans. Childs testified that he chose Peterson as the engineer. The plans stamped by Peterson, which were plaintiffs' exhibit 6, were submitted to and approved by the City ("the approved plans"). The approved plans did not include a brick ledge.

The Pommers met with Childs again on December 10, 2014, after the plans were approved. The Pommers testified that only the three of them were present at that meeting, that Childs presented them with an estimate for building the garage, that the estimate indicated that the total cost for the project was $65,874, and that the estimated time for completion of the project was four to five weeks. The estimate further stated that 20% of the total cost would be required to start work and that payments would be based on a draw schedule. However, the Pommers never received a draw schedule. Bud testified that he told Childs that the Pommers wanted to move forward with the project and that they arranged a meeting for the following day to sign a contract with Childs.

The Pommers testified that Childs brought Granger with him to the meeting on December 11, 2014. The Pommers testified that they had never met or heard of Granger before that meeting and that they were surprised when he showed up at that meeting. The Pommers presented evidence indicating that, during that meeting, Childs told them that he did not have a contractor's license and that he needed Granger because he was a licensed contractor. The Pommers testified that, during that meeting, they were given a "cost plus" contract for the construction of the garage and breezeway ("the contract"). Granger Construction was listed as the contractor, and the Pommers were listed as the owners. The description of the work included the following:

> "Contractor will furnish all labor, equipment, and material to construct and complete in a good workmanlike and substantial manner, the following work of improvement:
>
> > "Garage as shown in the attached plans. Covered walk as detailed in plans
> >
> > "Estimated price of project is $65,874.00
> >
> > "This is a good faith estimate based upon market pricing and bids by subs/suppliers. This figure does include 10% profit and 5% overhead."

The contract was executed during that meeting on December 11, 2014. It was signed by Brenda as an owner. The signature line for the contractor listed Granger Construction, and it was signed by Granger. At that time, the Pommers gave Granger Construction a $13,000 check for the first draw.

Construction started on the project around the middle of December 2014. Evidence was presented indicating that, during the construction process, the Pommers were presented with five invoices from Granger Construction: one for a $10,000 draw on December 30, 2014; one for a $10,000 draw on January 9, 2015; one for a $10,000 draw on January 26, 2015; one for a $10,000 draw on February 11, 2015; and one for a $13,000 draw on March 10, 2015. The Pommers testified that Childs and Granger were present when the invoices were presented to them and that Childs predominantly did most of the talking and explaining regarding the draws. The Pommers paid each of those invoices with checks made payable to Granger Construction. Between December 11, 2014, and

March 10, 2015, the Pommers paid Granger Construction a total of $66,000.

The evidence presented at trial indicated that the project experienced significant delays. Evidence was presented indicating that some of the delays were caused by the weather and because subcontractors for the project were backed up. Evidence was also presented indicating that the Pommers requested some changes to the project, which contributed to some of the delays. Evidence was presented indicating that Granger and Childs performed some of the physical labor on the project, including digging the footings and putting up framing for the slab for the garage. Bud testified that, as the project dragged on, he began to wonder why Granger and Childs were doing the work at the speed they were doing it instead of hiring subcontractors who could have done the work faster. He further testified that he saw work done by Childs and Granger that had to been redone. Evidence was presented about issues that had arisen with the concrete for the breezeway, about

the Pommers' dissatisfaction with the finish of the concrete, and about Childs's own dissatisfaction with the finish of the concrete.

Bud testified that, at the time the March 10, 2015, invoice was presented to the Pommers, he and Brenda told the Childs and Granger that they did not want to give them another check based on how things had been going and because they wanted to be sure the job would be finished. Bud testified that he and Brenda went out of town around the first or second week of March and that they expected that the work would be complete when they got back. Bud testified that, when they returned, he observed that light fixtures were attached to the garage, but the wiring was hanging down; that gates on the breezeway had been started, but were not completed; that the work on the driveway and turn around had not progressed; that painting had been started on the doors to the garage, but were not completed; and that the hardware had not been installed on the doors. He further testified that it appeared that a lot of work had been started, but not finished.

When asked if he or Brenda raised these issues with Childs or Granger, Bud testified that Childs and Granger were not very talkative and that Childs subsequently told him that they needed to have a meeting. The Pommers met with Granger and Childs at their kitchen table. During the meeting, Childs and Granger told the Pommers that they needed an additional draw and that they could not do any additional work without more money. The evidence established that the meeting became heated. At one point, Granger made the statement to Brenda: "[M]y daughter rolls her eyes like that, and it pisses me off when she does it too." The Pommers testified that, at one point, Childs turned his chair around, was leaning over Brenda, and was screaming and yelling in her face. Bud testified that Childs appeared to be angry, that Childs's "eyes were different," that Brenda was back in her chair and not saying anything at that time, that he felt like the confrontation was starting to become dangerous, and that he was afraid for his wife and of the situation. Brenda also testified that she was afraid and did not know what to do. Bud testified that he stood up, said that things had gone far enough, and

told Granger and Childs to leave. Bud testified that Childs telephoned him later that night, that Childs apologized, and that Childs asked if the Pommers would give him and Granger a second chance to finish the job.

The Pommers met with the Childs and Granger again the following day. The Pommers testified that, during that meeting, Childs and Granger gave them paperwork they had not seen before, including time sheets for the labor of Granger and Childs, a change-order document indicating a total cost of $11,728.57 for the changes to the project, and a punch list of items required to finish the job. Evidence was presented indicating that Granger told the Pommers that the total cost to complete the garage would be over $95,000 but that he would settle for $83,015.11. Bud testified that, at the end of the meeting, the status of the project was that Granger Construction and Childs would not do any more work until the Pommers paid them more money. Bud testified that he did not feel like any agreement had been reached at the end of the meeting and that he told Childs and Granger that he would get back to them. Bud testified that, because he did not want a replication of the previous heated

meeting, he and Brenda contacted an attorney about the situation. Counsel hired by the Pommers then sent Granger Construction and Childs a letter dated March 31, 2015. That letter stated:

> "Please be advised that the undersigned represents [the Pommers] regarding the construction work you have been performing at their home. Granger Construction Company, LLC entered into a contract with my clients on December 11, 2014. The estimated time of completion passed long ago. The 'good faith estimate' of $65,874 has been paid by client paying $66,000. In a recent conversation, my clients were told that the estimated job cost would exceed $95,000.
>
> "Although there was a change order, the amount far exceeds the 'good faith estimate.'
>
> "Reviewing time records, you have charged 'skilled carpenter' hourly rates of $37.50 for the simplest of labor work. There are many discrepancies in the contract versus the actual amount claimed to be due.
>
> "I am aware that you offered to take away all of your profit which you claimed is $12,450 and therefore bringing the total job cost to $83,000. That offer is unacceptable to my client.
>
> "The rude and unacceptable behavior of Mr. Paul Childs on March 24 of screaming at Mrs. Pommer requires the undersigned to be involved. You are to have no further communications with Mr. or Mrs. Pommer.

> "If you would like to attempt to resolve this matter short of litigation, please call to arrange a convenient time to meet Mr. Pommer and myself at my office.
>
> "If I do not hear from you by Friday, April 3, I will assume you do not care to resolve this matter amicably and my client will proceed accordingly."

There is no evidence indicating that either Childs or Granger ever contacted the Pommers' counsel after receiving that letter. There was no further contact between the Pommers and Childs and Granger, but Childs and Granger did return to the Pommers' house to retrieve their tools.

After Childs and Granger left the project site, Bud requested that the City perform a final inspection of the garage. Bud testified that the inspection took place on April 21, 2015, and that the garage did not pass inspection at that time. Evidence was presented indicating that one issue noted by the City's inspector was the fact that there were exposed rafter tails that were untreated lumber and that that did not comply with the applicable building code. The Pommers subsequently hired another contractor and other companies to repair work done by Granger Construction and to complete unfinished work on the project. The

Pommers paid $16,572.61 to complete the project. Thus, the Pommers spent a total of $82,572.61 to complete the project.

Subsequently, cracks developed in the bricks on the garage. Bud contacted James Martin Pitts, a structural engineer, to come look at the garage. Pitts testified that the cracks indicated a foundational issue. After some excavation was done, Pitts observed that there was no brick ledge to support the bricks, which was an error. Childs also testified that a brick ledge was important and critical.

Pitts further testified that he observed that there was a drainage issue with the garage, i.e., that water was draining toward the garage; that building codes require that water be turned away from a structure on all four sides; that the garage was built too low, so water was directed toward the garage rather than away from it; that that was a fatal error, which means that it is virtually impossible or impossible to fix; and that, although it can be corrected in some situations, it can be very difficult to correct. He further testified that there were drainage issues with the breezeway that could be corrected by removing the breezeway and

building it again. Pitts testified that, considering the combined issues caused by the lack of the brick ledge and the lack of proper drainage, he would recommend removal of the garage and breezeway.

On January 7, 2016, the Pommers filed a complaint against Childs and Granger Construction, which they subsequently amended. In their amended complaint, the Pommers alleged that Childs and Granger Construction had breached the contract in numerous ways, had breached the express warranty to perform their work in a workmanlike manner, had breached various implied warranties, and had made fraudulent representations to them. They also included a count alleging the tort of outrage.

On February 29, 2016, Childs and Granger Construction filed their answer to the amended complaint and a counterclaim. In the counterclaim, Granger Construction asserted a claim of breach of contract/unjust enrichment against the Pommers. The Pommers subsequently filed their answer to the counterclaim.

On October 19, 2017, the Pommers filed a motion for leave to file a second amended complaint to include a request to pierce the corporate veil with regard to Granger Construction and to add Granger, in his individual capacity, as an additional defendant. The Pommers further asserted that Granger had died and that they intended to file a suggestion of death and a motion to substitute an appropriate party for Granger. The trial court granted the motion, and the Pommers filed their second amended complaint. On October 20, 2017, the Pommers filed a suggestion of death stating that Granger had died on August 17, 2017. The Pommers subsequently filed a motion to substitute Melissa, as the administratrix of Granger's estate, for Granger. The trial court granted that motion.

The trial court subsequently conducted a bench trial. After the bench trial, the Pommers filed a motion to amend the pleadings to conform to the evidence. The trial court granted that motion but stated that it did not intend to allow the Pommers to raise new claims or causes of action not raised or pleaded in the complaint and amended complaints.

On September 14, 2018, the trial court entered an order. In that order, it stated:

> "This matter came before the Court on the Second Amended Complaint filed by Harry J. Pommer and Brenda S. Pommer, Plaintiffs, against Granger Construction Company, L.L.C., Paul D. Childs, and Daniel Granger, by and through Melissa T. Granger, as Administratrix of the Estate of Daniel D. Granger, Defendants; and on the Counterclaim filed by Granger Construction Company, L.L.C. against the Plaintiffs. Trial of this matter was held on May 1, 2018 through May 3, 2018. The Court, having received evidence and testimony ore tenus from the parties and having considered the same, does find as follows:
>
> > "1. Judgment is entered in favor of Plaintiffs Harry J. Pommer and Brenda S. Pommer and against Defendants Granger Construction and Paul D. Childs, jointly and severally, in the amount of Eighty Two Thousand Five Hundred Seventy Two Dollars and 61/l00ths ($82,572.61) for compensatory damages plus reasonable attorney's fees in the amount of $50,062.50 plus the cost of court.
> >
> > "2. Plaintiffs Harry J. Pommer and Brenda S. Pommer stated in their pleadings that they intend to pierce the corporate veil of Granger Construction as to Daniel [D.] Granger, its sole owner. The Court reserves jurisdiction to make a final determination on the issue of piercing the corporate veil in the event that Plaintiff pursues such course of action postjudgment.

> "3. All claims against Melissa Granger as Administratrix of the Estate of Daniel Granger are hereby denied.
>
> "4. Judgment is entered in favor of the Counterclaim Defendants and against the Counterclaim Plaintiffs.
>
> "[5]. Any and all relief requested by the parties that is not specifically addressed herein is denied."

Granger Construction and Childs originally filed a notice of appeal from the trial court's September 14, 2018, order. On June 10, 2019, this Court, by order, dismissed that appeal as arising from a nonfinal judgment.

On July 29, 2019, Melissa, as administratrix of Granger's estate, filed an answer to the Pommers' second amended complaint, addressing the Pommers' request to pierce the corporate veil. The trial court subsequently conducted a bench trial as to the Pommers' request to pierce the corporate veil of Granger Construction. On March 12, 2020, the trial court ruled in favor of Melissa, as the administratrix of Granger's estate, as to the Pommers' request to pierce the corporate veil of Granger Construction, thus rendering a final judgment.

Granger Construction and Childs appealed the judgment the trial court entered in favor of the Pommers to this Court. The Pommers' cross-appealed the trial court's judgment denying their request to pierce the corporate veil of Granger Construction.

Standard of Review

> " 'Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. " 'When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.' " Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).
>
> " ' "...."
>
> " '... However, "that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts." Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994).'

"Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010)."

Mitchell v. K & B Fabricators, Inc., 274 So. 3d 251, 260 (Ala. 2018).

I. Case Number 1190525

A.

Childs argues that he is not liable under a breach-of-contract theory because he was not a party to the contract.

> " ' "The elements of a breach-of-contract claim under Alabama law are (1) a valid contract binding the parties; (2) the plaintiffs' performance under the contract; (3) the defendant's nonperformance; and (4) resulting damages." ' Shaffer v. Regions Fin. Corp., 29 So. 3d 872, 880 (Ala. 2009) (quoting Reynolds Metals Co. v. Hill, 825 So. 2d 100, 105 (Ala. 2002))."

Dupree v. PeoplesSouth Bank, 308 So. 3d 484, 490 (Ala. 2020).

The contract stated that it was between Granger Construction and the Pommers, and the contact was signed by Granger and Brenda. It is undisputed that Childs was not a signatory on the contract, that Childs was not named in the contract, and that Childs was not an owner or a member of Granger Construction.

In their brief to this Court, the Pommers assert:

> "Granger LLC and CHILDS agree that Granger LLC had a contract with the POMMERS. CHILDS, however, argues that he was not a party to the contract; therefore, he is not liable for breach of contract. CHILDS is wrong.

> "CHILDS testified that he was a subcontractor of Granger LLC for the Pommer job. According to the contract, which was prepared by MR. GRANGER, 'all work performed by subcontractors shall be subject to all applicable terms and conditions of the Contract Documents.' (C. 589). CHILDS performed work at the POMMERS' house on generally a full time basis. He was obligated to perform that work pursuant to the terms of the contract. As discussed, CHILDS and Granger LLC failed to perform the terms of the contract. Accordingly, CHILDS and Granger LLC are both liable to the POMMERS for breach of contract."

(Pommers' brief at p. 33 (capitalization in original).) Paragraph 21 of the contract, which deals with subcontractors, provides as follows:

> "Contractor shall have the right to subcontract any portion of the work hereunder, and all work performed by subcontractors shall be subject to all applicable terms and conditions of the Contract Documents. Contracts between Contractor and Subcontractors shall (1) require each subcontractor, to the extent of the work to be performed by the subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by Contract Documents, assumes toward the Owner and Architect, and (2) allow the Subcontractor the benefit of all rights, remedies, and redress afforded to the Contractor by these Contract Documents."

(Emphasis added.) When read in its entirety, it is clear that this paragraph does not provide that a subcontractor owes any contractual

duties toward the owners of the property. Rather, it provides that the work performed by subcontractors will be subject to the provisions of the contract. However, it goes on to provide that contracts between the contractor and subcontractors will include provisions binding the subcontractor to the contractor and provisions by which the subcontractor will assume duties and obligations toward the contractor. Thus, the Pommers' argument in this regard is without merit and would not support a finding that Childs was liable to them based upon the a breach-of-contract theory. Based on the foregoing, we reverse the trial court's judgment as to Childs and render a judgment in his favor.[1]

B.

[1]In the trial court, the Pommers argued that Childs was equitably estopped from arguing that he was not liable for breach of contract because, they asserted, he was a de facto contractor for the project. The Pommers also asserted claims of fraud and the tort of outrage. Because the trial court did not state the basis for its judgment against him, Childs addressed the de facto-contractor argument and the Pommers' additional claims on appeal. However, in their brief to this Court, the Pommers have not presented any argument that the de facto-contractor argument and their additional claims actually supported the trial court's judgment against Childs.

Granger Construction argues that the evidence was insufficient for the Pommers to prevail on any breach-of-contract claim because the Pommers allegedly repudiated the contract without performing their obligation to pay Granger Construction.

> "In New Properties, L.L.C. [v. Stewart, 905 So. 2d 797 (Ala. 2004)], supra, this Court addressed the manner in which a party preserves a challenge to the sufficiency of the evidence when, in a bench trial, a trial court issues its ruling without issuing findings of fact. In that case, this Court stated:
>
> > " 'Although Rule 52(b)[, Ala. R. Civ. P.,] speaks to those situations in which a trial court makes findings of fact, the rule does not indicate what is to occur when the trial court makes no such findings. As Justice Lyons has noted:
> >
> > > " ' "If a court makes findings of fact in a nonjury case, Rule 52(b), Ala. R. Civ. P., excuses the losing party from objecting to the findings or moving to amend them or moving for a judgment or a new trial as a predicate for an appellate attack on the sufficiency of the evidence. By negative implication, such steps are required when the court makes no findings of fact." '
>
> "905 So. 2d at 800 (quoting Ex parte James, 764 So. 2d 557, 561 (Ala.1999) (plurality opinion) (Lyons, J., concurring in the result)) (emphasis in New Properties). After reviewing

conflicting caselaw on the subject, the Court in New Properties stated:

> " '[W]e hold that, in a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review. See Rule 52(b), Ala. R. Civ. P. ...'
>
> "905 So. 2d at 801-02."

Weeks. v. Herlong, 951 So. 2d 670, 676-77 (Ala. 2006). In this case, Granger Construction and Childs filed a motion for a judgment as a matter of law at the close of all the evidence. In that motion, they did not present any argument that the Pommers had repudiated the contract and that, therefore, they could not prevail on any breach-of-contract claim. Additionally, after the trial court entered its judgment, Granger Construction and Childs did not file any postjudgment motions raising an argument that the evidence established that the Pommers had repudiated the contract. Therefore, because this issue is not properly preserved for appellate review, we will not reverse the trial court's judgment on this basis.

C.

Granger Construction also argues that the trial court's compensatory-damages award is clearly erroneous because the Pommers allegedly did not adequately prove their damages at trial. Although Granger Construction and Childs filed a motion for a judgment as a matter of law at the close of all the evidence, they did not raise any argument that the Pommers had failed to prove their compensatory damages. Additionally, after the trial court entered its judgment, Granger Construction and Childs did not file any postjudgment motions in which they challenged the amount of damages awarded by the trial court or argued that the Pommers had not presented evidence to establish their damages in this case. Accordingly, this issue is not properly preserved for our review and will not support a reversal of the compensatory-damages award. See Weeks, supra.

D.

Granger Construction and Childs further argue that the trial court erred in awarding the Pommers attorneys' fees.

1.

First, Childs argues that the trial court erred in assessing attorneys' fees against him because he was not a party to the contract. We agree. As we held in Part I.A. of this opinion, Childs was not a party to the contract and could not be held liable for breaching the contract. Therefore, we reverse the trial court's judgment assessing attorneys' fees against Childs.

2.

Granger Construction also argues that the trial court erred in awarding the Pommers attorneys' fees because, it asserts, there was no admissible evidence to support the award of attorneys' fees. Before the trial court entered its judgment, it conducted a hearing discussing the parties' positions regarding whether attorneys' fees should be included in a judgment for the prevailing parties. During that hearing, the following took place:

> "[THE COURT:] And how much time do you-all need to submit your requested attorneys' fees?

"[DEFENSE COUNSEL]: I just need a couple of days for my bookkeeper to put the invoices together.

"[PLAINTIFFS' COUNSEL]: Yeah. I think a few days is fine, Your Honor.

"THE COURT: If y'all can get me those. I literally -- I have got an order I'm about to enter pretty quick, but I can do that rather quickly. What I'm going to ask you-all -- and I don't know -- I mean I have got some idea what I'm going to do, but if we are dealing with attorneys' fees, if y'all could have me that by the end of next week. Is that okay?

"[DEFENSE COUNSEL]: Sure.

"[PLAINTIFFS' COUNSEL]: That will be fine.

"THE COURT: And to each other by, say, next Friday. How long would y'all need to review each others in the event that you did need to file an objection?

"[DEFENSE COUNSEL]: Judge, perhaps -- I'll just make a suggestion to the Court? If Your Honor wants to enter a ruling based upon attorneys' fees, we can come back on a post-trial motion and deal with attorneys' fees at that time.

"Would that be an appropriate way to do it and just schedule another hearing?

"THE COURT: Is that okay with you, [plaintiffs' counsel]?

"[PLAINTIFFS' COUNSEL]: Yes, sir.

"THE COURT: Or you want to do --

"[PLAINTIFFS' COUNSEL]: Either way is fine.

"THE COURT: How do you want to do it? Because we specifically agreed and I recall that we were going to deal with the attorneys' fees after the fact, and so -- all right. Then what I'll do is whatever I do. And if I were to include -- if I were to include reasonable attorneys' fees, then I'll include plus reasonable attorneys' fees to be established.

"And then y'all can get with Ellen [the trial court's judicial assistant] and we can find a date to have a hearing or submit what you need to then.

"[DEFENSE COUNSEL]: So do we email our invoices to Ellen in PDF format and then carbon copy the other attorneys?

"THE COURT: That's probably the easiest way. And then if there was an objection, then we can deal with that.

"....

"[THE COURT:] Then, if y'all will get me those, then I will go ahead and get you-all a ruling. And if we needed to have an additional date, if y'all just file something and request a hearing date with Ellen, and make sure we can get it set within the time prescribed.

"We probably can handle it almost -- if we go that route, [defense counsel], just whoever files any motions to alter, amend or vacate, if there are any filed, which I assume that the non-prevailing party would file. But if they are filed, maybe we can deal with it through that as well.

> "And when I do set that when -- assuming they get filed and assuming that I'm going to set them, we can deal with them at that stage, provided we get them set. And you know I will get them set within the time limits that we'll be dealing with.
>
> "[DEFENSE COUNSEL]: Okay.
>
> "[PLAINTIFFS' COUNSEL]: All right."

Subsequently, the parties emailed their fee invoices to the trial court's judicial assistant. However, counsel for Granger Construction and Childs did not file any objection to the information Pommers' counsel provided to the trial court regarding attorneys' fees. In its judgment, the trial court ordered Granger Construction and Childs to pay attorneys' fees to the Pommers. However, counsel for Granger Construction and Childs did not file a postjudgment motion challenging the award of attorneys' fees. Therefore, this issue is not properly preserved for our review and will not support a reversal of the attorney-fee award against Granger Construction. See Nichols v. Pate, 54 So. 3d 398 (Ala. Civ. App. 2010); Jones v. Sherrell, 52 So. 3d 527 (Ala. Civ. App. 2010).

E.

Finally, Granger Construction asserts that the trial court erroneously denied its counterclaim seeking compensation for labor, materials, profit, and overhead that it alleges was due under the contract. Granger Construction and Childs did not raise any argument in their motion for a judgment as a matter of law regarding Granger Construction's counterclaim. In its judgment, the trial court did not make any findings of fact as to Granger Construction's counterclaim. Rather, it merely entered a judgment in favor of the Pommers and against Granger Construction as to the counterclaim. Granger Construction did not file any postjudgment motions in which it argued that it had presented sufficient evidence to support its counterclaim. Therefore, Granger Construction has not preserved this issue for appellate review See Weeks, supra.

Based on the foregoing, in case number 1190525, we reverse the trial court's judgment against Childs, including the attorney-fee award against Childs, and render a judgment in his favor. However, we affirm the trial court's judgment as to Granger Construction.

II. Case Number 1190580

In their cross-appeal, the Pommers argue that the trial court erroneously denied their request to pierce the corporate veil of Granger Construction.

> "Piercing the corporate veil is not a power that is lightly exercised. The concept that a corporation is a legal entity existing separate and apart from its shareholders is well settled in this state. Co-Ex Plastics, Inc. v. AlaPak, Inc., 536 So. 2d 37 (Ala.1988). Alorna Coat Corp. v. Behr, 408 So. 2d 496 (Ala.1981). The mere fact that a party owns all or a majority of the stock of a corporation does not, of itself, destroy the separate corporate identity. Messick v. Moring, 514 So. 2d 892 (Ala. 1987); Forester & Jerue, Inc. v. Daniels, 409 So. 2d 830 (Ala. 1982). The fact that a corporation is under-capitalized is not alone sufficient to establish personal liability. Co-Ex Plastics, Inc. v. Alapak, Inc., supra; East End Memorial Association v. Egerman, 514 So. 2d 38 (Ala. 1987). To pierce the corporate veil, a plaintiff must show fraud in asserting the corporate existence or must show that recognition of the corporate existence will result in injustice or inequitable consequences. Washburn v. Rabun, 487 So. 2d 1361 (Ala.1986); Cohen v. Williams, 294 Ala. 417, 318 So. 2d 279 (1975).
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> "....
>
> "... Where the law recognizes one-man corporations, it is obvious that the law accepts the fact of domination by one person. See ... Co-Ex Plastics, Inc. v. Alapak, Inc., supra. Therefore, mere domination cannot be enough for piercing the

> corporate veil. There must be the added elements of misuse of control and harm or loss resulting from it. Messick v. Moring, supra; Washburn v. Rabun, supra.
>
> > "The corporate veil may be pierced where a corporation is set up as a subterfuge, where shareholders do not observe the corporate form, where the legal requirements of corporate law are not complied with, where the corporation maintains no corporate records, where the corporation maintains no corporate bank account, where the corporation has no employees, where corporate and personal funds are intermingled and corporate funds are used for personal purposes, or where an individual drains funds from the corporation. See, e.g., Forester & Jerue, Inc. v. Daniels, supra; Hamrick v. First National Bank of Stevenson, [518 So. 2d 1242 (Ala. 1987)]; Deupree v. Ruffino, 505 So. 2d 1218 (Ala.1987); Messick v. Moring, supra; East End Memorial Association v. Egerman, supra."

Simmons v. Clark Equip. Credit Corp., 554 So. 2d 398, 400-01 (Ala. 1989).

In Co-Ex Plastics, Inc. v. AlaPak, Inc., 536 So. 2d 37 (Ala. 1988), AlaPak, Inc., was a corporation and Gregg Gantt was the sole stockholder and director and the principal officer of Alapak. This Court included the following facts about the formation of AlaPak:

> > "Gantt began a packaging and supply business in 1980, using the name Alabama Packaging and Supply, and he operated that business as a sole proprietorship until 1984, when he incorporated this business as AlaPak, Inc. Upon incorporation, Gantt transferred all assets and liabilities of

> 'Alabama Packaging and Supply,' sole proprietorship, to AlaPak, the corporation. As a result of this transfer, AlaPak assumed total assets of $591,894.55 and total liabilities of $580,054.48. The capital stock of the corporation was $1,000.00 and there existed $10,839.87 in paid-in capital. Soon after incorporation, AlaPak entered a financing arrangement with National Acceptance Corporation ('NAC') and entered loan transactions with First Montgomery Bank."

536 So. 2d at 38.

In July 1985, AlaPak and Co-Ex Plastics, Inc. ("Co-Ex"), entered into an open-account supplier-purchaser relationship. During the relationship, Co-Ex sold over $127,000 worth of goods to AlaPak. However, in January 1986, the account was overdue. Subsequently, Co-Ex sued AlaPak and Gantt to collect the overdue amount. The trial court conducted a bench trial. This Court set forth the following summary of the evidence that was presented at trial:

> "Evidence was presented at trial indicating that Gantt, the sole stockholder and director and the principal officer of AlaPak:
>
> "1) could not produce a stock certificate;
>
> "2) had retained the 'Alabama Packaging and Supply Company' bank account as AlaPak's bank account; and

> "3) had continued to use the 'Alabama Packaging and Supply Company' checks because, he stated, he lost the AlaPak checks.
>
> "It was further shown that Gantt had not signed checks in a representative capacity and that Gantt also varied the manner in which he referred to the corporation, i.e., 'AlaPak,' 'Alabama Packaging and Supply Co.,' and 'Alabama Packaging and Supply, Inc.'
>
> "AlaPak closed its doors in August 1986, after NAC withdrew its line of credit. A bankruptcy petition was prepared thereafter, but was not filed, which disclosed a total of $391,500.30 owed to unsecured creditors and $110,000.00 in accounts receivable subject to a security interest in favor of NAC and inventory of $72,000.00 existing."

Co-Ex Plastics, 536 So. 2d at 38. The trial court entered a judgment in favor of Co-Ex and against AlaPak. However, it refused to pierce the corporate veil and entered a judgment in favor of Gantt. Co-Ex filed postjudgment motions, but the trial court again denied Co-Ex's request for relief against Gantt. On appeal, Co-Ex argued that Gantt had operated AlaPak in such a manner that the corporate veil should have been pierced and Gantt should have been held individually liable for the debts of the corporation.

"The concept that a corporation is a legal entity existing separate and apart from those who compose it is a well-settled rule in the State of Alabama. Cohen v. Williams, 294 Ala. 417, 420, 318 So. 2d 279, 280 (1975) (quoting 18 Am. Jur. 2d Corporations § 14 at 559 (1965)). It is also a well-settled rule in this State that the corporate form can be set aside, and the individual or individuals owning all of its stock and assets can be treated as the business entity, even in the absence of fraud, as a means of preventing injustice or inequitable consequences. Cohen, 294 Ala. at 421, 318 So. 2d at 281. This Court has also held:

> " 'A separate corporate existence will not be recognized when a corporation is so organized and controlled and its business so conducted as to make it a mere instrumentality of another or the alter ego of the person owning and controlling it.'

"Woods v. Commercial Contractors, Inc., 384 So. 2d 1076, 1079 (Ala. 1980).

"Co-Ex first contends that AlaPak was merely an instrumentality of Gantt, and that this was shown by Gantt's failure to follow corporate formalities in the course of its business, i.e., the failure of Gantt to produce a stock certificate; the retention of the Alabama Packaging and Supply Company bank account, and the continued use of the Alabama Packaging and Supply Company checks, which were never shown to have been signed in a representative capacity. Gantt, on the other hand, argues that Co-Ex knew or should have known that AlaPak was a corporation and acknowledged, AlaPak, as such, and therefore, that no fraud can be inferred from AlaPak's neglect of corporate formalities. We find [Gantt's] argument persuasive on this issue. We have held

that in the absence of fraud or inequity, the sole shareholder in a corporation will be protected from individual liability by the corporate entity, Washburn v. Rabun, 487 So. 2d 1361 (Ala.1986). In this case, the mere fact that minor formalities, such as those cited by Co-Ex in the business operations of AlaPak, were not followed does not rise to such a level that the corporate veil should be pierced. There is no indication in the record that AlaPak attempted to fraudulently induce Co-Ex into any contractual arrangements, nor is there any indication that the ends of justice would be disserved if the corporate veil were not pierced.

"Co-Ex also argues that AlaPak was under-capitalized and, therefore, that the corporate veil should be pierced. Co-Ex suggests that the $1,000.00 of capital stock and the $300,000.00 business credit line were inadequate to cover the potential debts of the corporation. Gantt counters by arguing that AlaPak conformed to the general operating standards of one-man corporations and argues that Co-Ex did not rely on any representation regarding AlaPak's financial condition when it contracted with it, and that Co-Ex initiated an inadequate inquiry into the financial status of AlaPak. Gantt further argues that at the time of incorporation, AlaPak's assets exceeded its liabilities. We find Gantt's argument persuasive. We recently held in East End Memorial Ass'n v. Egerman, 514 So. 2d 38 (Ala.1987), that 'a party who has contracted with a financially weak corporation and is disappointed in obtaining satisfaction of his claim cannot look to the dominant stockholder or parent corporation in the absence of additional compelling facts.' 514 So. 2d at 44, quoting Tigrett v. Pointer, 580 S.W.2d 375, 382 (Tex. Civ. App. 1978). No evidence was presented showing that Co-Ex inquired about the status of AlaPak, other than through a

bank credit check, nor was there any evidence that Co-Ex requested a personal guarantee from Gantt.

"Voluntary creditors of corporations are held to a higher standard because they 'are generally able to inspect the financial structure of a corporation and discover potential risks of loss before any transaction takes place. Consequently, courts are less sympathetic with voluntary creditors who, having had the opportunity of inspection, nevertheless elected to transact with an undercapitalized corporation.' Disregarding the Entities of Closely Held and Parent-Subsidiary Corporate Structures, 12 Cum. L. Rev. 155, 165 (1981). We, therefore, must affirm the trial court's refusal to pierce the corporate veil for the reasons advanced by Co-Ex.

"The rule in Alabama as to ore tenus evidence, is, as stated in Barrett v. Odum, May & DeBuys, 453 So. 2d 729 (Ala.1984), that 'every presumption will be indulged in favor of the trial court, and its findings will not be disturbed on appeal unless palpably wrong or clearly erroneous.' Co-Ex contends that the trial court erred in its reliance on Paddock, Smith & Aydlotte v. WAAY Television, 410 So. 2d 106 (Ala. Civ. App. 1982), to decide the issues in this case because, it says, many evidentiary features distinguish the two cases. We must disagree. We find the following similarities in Paddock sufficient to uphold the trial court's reliance on that case:

> "1) Paddock, Smith & Aydlotte ('Paddock') was a duly formed corporation.
>
> "2) No evidence of Paddock's corporate status was intentionally concealed.

> "3) WAAY failed to make adequate inquiries into the financial status of Paddock.

"Similar factors were present in the instant case. Therefore, we will not disturb the trial court's use of that precedent as a yardstick in evaluating the evidence in this case."

Co-Ex Plastics, 536 So. 2d at 38-40.

> " '[A] separate legal existence will not be recognized when a corporation is "so organized and controlled and its business conducted in such a manner as to make it merely an instrumentality of another," Forest Hill Corp. v. Latter & Blum, 249 Ala. 23, 28, 29 So. 2d 298, 302 (1947), or when it is the "alter ego" of the person owning and controlling it. Whether the separate legal entity of a corporation may be "pierced" and personal liability imposed is "a question of fact treated as an evidentiary matter to be determined on a case by case basis." Messick v. Moring, 514 So. 2d 892, 893 (Ala.1987); accord Deupree v. Ruffino, 505 So. 2d 1218 (Ala.1987).'[8]

"Ex parte AmSouth Bank of Alabama, 669 So. 2d 154, 156 (Ala. 1995).

"_____

"[8]See also R. Thigpen, Alabama Corporation Law § 8:3 (3d ed. 2003) (explaining that our courts do not appear to have established a consistent line analytically between those circumstances when a corporation is said to be an 'alter ego' as opposed to an 'instrumentality'); id. at § 8:7 (discussing

> 'brother-sister corporations and the theory of "enterprise entity" ')."

Hill v. Fairfield Nursing & Rehab. Ctr., LLC, 134 So. 3d 396, 408 (Ala. 2013).

Granger Construction was a limited-liability company. The evidence presented to the trial court indicated that Granger signed the Articles of Organization creating Granger Construction ("the articles") on April 6, 2007, and that he filed them in the Baldwin Probate Court on April 9, 2007. The articles listed Granger as the registered agent for the company and listed Granger's home address as the registered office of the company. The articles also listed Granger as the initial member, organizer, and manger of the company. Granger was the only listed member of the company.

Contrary to the assertions in the Pommers' brief to this Court, Melissa, who was Granger's wife, also introduced into evidence the operating agreement for Granger Construction that was signed by Granger on April 6, 2007. Copies of the tax returns for the Grangers and Granger Construction were also introduced into evidence. Further, copies

of various documents for Granger Construction were entered into evidence, including copies of Granger Construction's business licenses; copies of Granger Construction's license from the Home Builders Licensure Board; copies of 1099-A "Miscellaneous Income" and 1099-B "Proceeds from Broker and Barter Exchange Transactions" tax forms that had been issued by Granger Construction; copies of some of Granger Construction's contracts and change-order forms; a copy of a 2016 workers' compensation yearly audit for Granger Construction; and a March 25, 2016, certificate of liability insurance for Granger Construction. Furthermore, evidence was presented indicating that Granger had consistently held himself out as doing business as Granger Construction Company, LLC.

The Pommers argue that Granger Construction was undercapitalized. However, they did not present any evidence as to what would constitute adequate funding for a single-member limited liability construction company. Additionally, it is undisputed that the Pommers

did not make any inquiry into Granger Construction or its financial status before they entered into the contract.

The Pommers argue that the fact that Granger Construction never conducted any meetings demonstrates that the company disregarded the corporate form. However, the Pommers have not cited any relevant authority to support their argument in this regard. The Pommers do not cite to any provisions of the former Alabama Limited Liability Company Law, former § 10-12-1 et seq., which was subsequently renumbered as § 10A-5-1.01 et seq., Ala. Code 1975, or its successor, the Alabama Limited Liability Company Law of 2014, § 10A-5A-1.01 et seq., Ala. Code 1975, to support its assertion that Granger Construction was required to conduct any meetings. Rather, they rely solely on this Court's decision in Econ Marketing, Inc. v. Leisure American Resorts, Inc., 664 So. 2d 869 (Ala. 1994). However, nothing in Econ Marketing addresses the issue whether a limited-liability company must conduct meetings. Rather, it merely addresses the failure of a corporation "to keep complete and correct records of all transactions of the corporation and minutes of the

proceedings of its shareholders and board of directors." Econ Mktg., 664 So. 2d at 870. Therefore, the Pommers' argument in this regard does not comply with Rule 28(a)(10), Ala. R. App. P.

The Pommers also point to the fact that Granger Construction did not have any employees. However, the fact that this single-person limited-liability construction company did not have any employees would not support piercing the corporate veil in this case. Although Granger Construction did not have any employees, evidence was presented indicating that Granger performed work under the contract and that Granger Construction also hired subcontractors, including Childs, to perform work under the contract. These facts do not support a finding of fraud in asserting the corporate existence and do not support a finding that the recognition of the corporate existence would result in an injustice or inequitable consequences.

Finally, the Pommers assert that Granger Construction was the alter ego of Granger. During the hearing on the issue of piercing the corporate veil, Melissa, Granger's wife and the administratrix of his

estate, testified. Melissa testified that she was never a member, manager, or officer of Granger Construction, that she never owned any part of Granger Construction, and that she never held a position with Granger Construction. Melissa gathered and produced all the documents for Granger Construction that she could find. Evidence was presented indicating that Granger Construction maintained a checking account separate and distinct from the Grangers' household checking account and from Melissa's separate business account. The Pommers presented evidence indicating that Granger wrote checks to himself. However, Melissa testified that those were Granger's paychecks. The Pommers also presented evidence indicating that there were some checks that were written to Melissa. Melissa testified that those were some of Granger's paychecks, that she did the household banking, and that Granger would write the checks to her so that she could deposit them when he was not able to go to the bank. The Pommers also assert that Granger routinely used Granger Construction's bank account to pay personal bills. The Pommers presented evidence indicating that some of the checks written

on the company's bank account were either for, or appeared to be for, personal purposes. However, Melissa testified that she did not have knowledge of what many of those checks were written for or what they related to. During the Pommers' examination of Melissa, the following occurred:

> "[PLAINTIFFS' COUNSEL:] Okay. Was it unusual for Mr. Granger to pay personal bills with company checks?
>
> "[MELISSA;] It -- I don't know. I was not party to how he did his business. I have -- I have a -- I had my own business, and we discussed how we generally ran our individual LLCs, but I did not watch over him.
>
> "[PLAINTIFFS' COUNSEL:] Okay. I'm going to call your attention to -- I took your deposition November 5, 2019; right?
>
> "[MELISSA:] I assume that's the date if you're telling me. I don't remember specifically.
>
> "[PLAINTIFFS' COUNSEL:] But you did give a deposition?
>
> "[MELISSA:] I did give a deposition.
>
> "[PLAINTIFFS' COUNSEL:] I call your attention to page 15 and I want to -- I'm going to show it to you. I'm going to read the question. I want you to read the answer.

"[PLAINTIFFS' COUNSEL:] 'Was it unusual to pay personal bills out of the Granger Construction, LLC account?' (As read.)

"[MELISSA:] 'Okay. Not for himself. He counted it as a draw.' (As read.)

"[PLAINTIFFS' COUNSEL:] So when your deposition was given, you testified that it was typical for him to pay personal bills with a personal check?

"[MELISSA:] Yes. But you're asking me if I have knowledge. I was not there with him when he did it. So, yes, that was the general way that we both, sole proprietors, run our businesses, but we count them as draw.

"[PLAINTIFFS' COUNSEL:] What do you mean? Are you talking about you or him now when you count them as draw?

"[MELISSA:] I'm talking about how we as a married couple who each had in his case -- has still, in my case -- a single member sole proprietor LLC, how we did things on our own in our businesses.

"[PLAINTIFFS' COUNSEL:] Are you saying that he counted that as a draw? If he went and bought $50 worth of groceries for the house, that he counted it as a draw?

"[MELISSA:] If it was for the house, he would have counted it as a draw. If it was for clients who he wanted to bring something, then he would have counted it -- I can't speak to what each and every item was."

Melissa also testified that there were occasions when their household account was used to pay Granger Construction expenses.

The evidence presented at trial would support a finding by the trial court that Granger did not ignore the corporate forms of Granger Construction and that the company was not run as an instrumentality of or as the alter ego of Granger. Additionally, the evidence presented would also support a finding by the trial court that the Pommers did not establish fraud in asserting the corporate existence and did not establish that the recognition of the corporate existence, under the facts of this case, would result in an injustice or inequitable consequences. Therefore, the trial court's denial of the Pommers' request to pierce the corporate veil of Granger Construction was not plainly and palpably wrong.

Conclusion

Based on the forgoing, in case number 1190525, we affirm the trial court's judgment as to Granger Construction. However, we reverse the trial court's judgment as to Childs and render a judgment in favor of Childs. In case number 1190580, we affirm the trial court's judgment.

1190525 and 1190580

1190525 -- AFFIRMED IN PART; REVERSED IN PART; AND JUDGMENT RENDERED.

1190580 -- AFFIRMED.

Parker, C.J., and Bolin, Bryan, and Mitchell, JJ., concur.

Shaw, Sellers, Mendheim, and Stewart, JJ., concur in the result.