RENDERED: OCTOBER 27, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000740-MR

AHMAD ALBAKRI, AND JORUSA INTERNATIONAL, INC. — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE CHARLES L. CUNNINGHAM JR., JUDGE
ACTION NO. 11-CI-007143

A&M OIL CO., INC. — APPELLEE

OPINION AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Ahmad Albakri and Jorusa International, Inc. appeal a judgment entered against them in the sum of $19,903.82 plus eight percent interest. After careful review of the briefs, record, and hearings below, we affirm in part and reverse in part and remand. First, we hold that under the facts presented

below, the trial court should not have pierced the corporate veil and held Albakri personally liable for Jorusa's corporate debt, and we reverse the trial court's partial summary judgment order. Second, we affirm an evidentiary ruling regarding hearsay evidence. Finally, we reverse and remand for the trial court to enter written findings of fact and conclusions of law so an appellate court may review the remaining issues, should the parties choose to pursue further appellate review of the claims. We begin with a detailed recitation of the background information adduced below.

**BACKGROUND**

Albakri is the sole officer and stockholder of Jorusa, a Kentucky-incorporated corporation that owned a gas station named Tony's Food Mart. For a period of years, the gas station purchased gasoline from A&M Oil Co., Inc. To partially compensate A&M for fuel deliveries, A&M would automatically receive funds from credit card transactions for fuel at the service station. To cover the fuel transactions that were not paid for by credit card, A&M would send invoices to Jorusa for the outstanding balance. Jorusa would then remit checks to A&M. It is undisputed that Jorusa paid A&M hundreds of thousands of dollars – perhaps even a million dollars – during their business relationship. However, a ledger created by A&M shows that at the end of their business relationship, Jorusa had an unpaid, five-figure balance.

On November 2, 2011, A&M filed a Complaint in Jefferson Circuit Court against Albakri, seeking to collect $19,903.82 plus 18.00% interest.

Attached to the Complaint was a "Credit Policy" and "Personal Guarantee" on A&M letterhead. The document was purportedly signed by Albakri as "President" and dated June 19, 2006. The document reads as follows:

> CREDIT POLICY
> We look forward to serving you as a customer. We extend credit to you as a matter of making it easier for you to do business with us. We request that you honor our credit terms that apply to your account. We take your account seriously and ask that you do the same with regards to payment.
> Any outstanding balance due A&M Oil, Inc., shall bear interest at a rate of 18% per annum. The parties agree that A&M Oil, Inc., shall be entitled to reimbursement for its costs and expenses, including a reasonable attorney's fees, in collecting the amount owed it, which costs and expenses shall bear interest at a rate of 18% per annum. In the event a payment by check is returned to us for any reason, there will be a $25.00 service charge added to your account. After the 3rd such incident your account will be on prepaid allocation. Should you encounter problems with paying us and want to insure continued service, please call to make special arrangements.
>
> This document must be signed and returned with your credit application in order to complete the credit approval. Thanks for your business and we look forward to doing business with you for many years to come.
>
> PERSONAL GUARANTEE
> In consideration of credit being extended by A&M Oil, Inc. for merchandise to be purchased whether applicant be an individual or individuals, a proprietorship, a partnership, a corporation, or other entity, the undersigned guarantor or guarantors each hereby contract and guarantee to A&M Oil, Inc. the faithful payment, when due, of all accounts of said applicant for the purchases made within five years next after the date of this application. The undersigned guarantor or guarantors each

> hereby expressly waive all notice of acceptance of this guarantee, notice of extension of credit to applicant, presentment, and demand for payment on applicant, protest and notice to undersigned guarantor or guarantors of dishonor or default by applicant or with respect to any security held by A&M Oil, Inc., extension of time of payment to applicant, acceptance of partial payment of partial compromise, all other notices to which the undersigned guarantor or guarantors might otherwise be entitled and demand for payment under this guarantee. Absent written permission by creditor, this personal guarantee may not be revoked.

Also attached to the Complaint was a "Customer Ledger[] for the period from Jan 1, 2009 to Apr 21, 2011[.]" It showed the gas station received $354,454.24 worth of fuel during that time period and paid to A&M $339,502.23.

Albakri then filed an Answer denying the allegations and asserting multiple defenses, including a claim that the signature on the Credit Policy and Personal Guarantee was not his own.

The parties next propounded discovery requests on one another, including multiple sets of interrogatories and requests for production of documents. In the course of those interrogatories, Albakri admitted he was the sole officer and sole stockholder of Jorusa. He admitted he was the manager of Jorusa. He claimed he had been both shorted in fuel supplied and overcharged for fuel delivered by A&M. Albakri admitted that "Jorusa International, Inc. was *ever* capitalized in any amount." (Emphasis added). In response to whether Jorusa ever paid a dividend, Albakri stated, "I don't know if I paid a dividend or not." And in response to whether Jorusa twice had its corporate charter revoked for failing to

file an annual report, Albakri stated, "Admit. However, each time it was reinstated."

Following these interrogatories, on May 14, 2013, A&M was granted leave to file an amended complaint adding Jorusa as a defendant and claiming Jorusa and Albakri were jointly and severally liable for the $19,903.82 plus interest.

A&M next filed, on July 8, 2013, a motion for summary judgment. A&M moved the trial court for two items of relief: (1) to pierce Jorusa's corporate veil and hold Albakri personally responsible for Jorusa's debts; and (2) to find no genuine issue of material fact concerning the monetary claim for fuel delivered and enter a judgment accordingly. A&M claimed the veil should be pierced because multiple facts proved Jorusa only existed to shield Albakri from personal liability:

> 1. Albakri purportedly admitted "Jorusa International, Inc., was never capitalized in any amount."[1]
>
> 2. Jorusa had its corporate charter revoked twice for failing to file an annual report.
>
> 3. Jorusa only issued stock to Albakri.
>
> 4. Jorusa never filed bankruptcy.
>
> 5. Albakri did not know if Jorusa had ever paid a dividend.

[1] A&M references response No. 4 to the third request for admissions to support this allegation. As shown above, Albakri admitted only that "Jorusa International, Inc. was *ever* capitalized in any amount." (Emphasis added).

6. Albakri denied signing the individual guarantee with A&M oil.

A&M also moved the trial court to find that Albakri's defenses raised no material issues of fact and failed as a matter of law, and that Jorusa owed $19,903.82 to A&M.

Albakri and Jorusa filed a joint response. They first claimed various evidentiary errors with documents attached to A&M's motion for summary judgment. They next claimed the motion should not be granted because an affidavit attached thereto erroneously shortened A&M Oil Company, Inc. to AM Oil Co., Inc. Finally, they summarily asserted that the corporate veil should not be pierced because A&M failed to prove that any debt was owed to A&M by Jorusa or by Albakri.

A&M filed a reply, pointing out some typographical errors with Albakri and Jorusa's response and disagreeing with their legal arguments.

The trial court then "informally" ordered the parties to mediate. The parties' attempt to settle the case was unsuccessful.

On August 27, 2014, the trial court then entered an order denying in part and granting in part A&M's motion for summary judgment. The trial court's order focused on an eleven-part checklist for piercing the corporate veil as laid out in *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012). The trial court found and held that the three main factors from the *Inter-Tel* list were present in the instant action:

> Here, Plaintiff directs the Court to the Defendant's answers to Requests for Admissions to support his contention that all three emphasized factors in *Inter-Tel* favor piercing the corporate veil. First, in the Plaintiffs [sic] Third Request for Admissions, Defendant admits Jorusa International was never capitalized in any amount. In those same admissions, Defendant admits that twice Jorusa's Corporate charter was revoked by the Secretary of State, only to eventually have it reinstated both times. Additionally, Jorusa never paid a dividend to anyone. Finally, concerning the third prong, Albakri had complete and unfettered control over Jorusa. He was the only stock-owner and made all decisions regarding the company. He likewise would have made any decisions regarding the payment of dividends and signed all the required incorporation documents filed with the Secretary of State. In his defense, Albakri contends that while some of the 11 factors of *Inter-Tel* are met, not all are present, thus creating a material issue of fact. The Court finds this statement of the law absurd. As stated above, not all 11 factors will come into play in every case. The Court understands the defendants' argument to be in cases where one or two factors are not applicable, summary judgment cannot ever be appropriate. Without stating which of the several factors fail and supporting that assertion with evidence, Defendant submits that a genuine issue of material fact exists. The Court disagrees and thinks that Plaintiff has met its burden under *Inter-Tel* to pierce the corporate veil.

The trial court then denied A&M's motion for summary judgment on the questions of contractual breach and damages, finding a material issue of fact precluded granting summary judgment. A&M subsequently moved the trial court to conduct a bench trial.

Counsel for Albakri and Jorusa then were granted leave to withdraw. Albakri and Jorusa obtained new counsel, who has remained on the case through this appeal. New counsel filed a combined trial memorandum and motion to reconsider and vacate the order piercing the corporate veil. Albakri and Jorusa averred they would present proof that Albakri did not sign the Credit Policy and Personal Guarantee. They also argued the Credit Policy violated the statute of frauds, and the ledger A&M sought to introduce was hearsay that was inadmissible because it was not a document kept in the usual course of business. Finally, Albakri and Jorusa moved the trial court to reconsider and vacate its partial summary judgment motion on the piercing-the-corporate-veil issue. A&M then filed a response, and Albakri and Jorusa filed a reply.

Also before the bench trial occurred, Albakri and Jorusa filed a motion to dismiss A&M's claims. They argued that both the Credit Policy and Personal Guarantee were unenforceable under the statute of frauds. *See* KRS[2] 371.010; 371.065. They also filed a motion to strike A&M's ledger showing a $19,903.82 balance due because, they claimed, the ledger was hearsay that was not a business record kept in the usual course of business. *See* KRE[3] 803(6). A&M then filed responses to Albakri's and Jorusa's motions, and it also filed a motion to exclude the testimony of Albakri's and Jorusa's expert witness. It does not appear

[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Evidence.

that any of these motions were ruled upon by written orders of the trial court prior to the hearing.

A bench trial was then held on December 15, 2015. Albakri's and Jorusa's counsel first informed the trial court that the motions were outstanding. Albakri and Jorusa then called a handwriting expert to testify. She had examined the Credit Policy and Personal Guarantee and compared the signature therein with documents containing known Albakri signatures. She concluded, "It is clear to me that the author of the question documents is not the writing of . . . Albakri."

Following this testimony, Albakri moved the trial court to reconsider its order granting partial summary judgment. The trial court orally overruled the motion to reconsider, stating it was irrelevant whether it was Albakri's signature on the Credit Policy and Personal Guarantee. It noted the handwriting expert would bear on the truthfulness of any witnesses A&M would present on damages.

A&M then called Mark Stout to testify. Stout is the president of A&M. Stout testified that he, personally, went to Albakri's place of business and witnessed Albakri sign the Credit Policy and Personal Guarantee. A&M then, multiple times, delivered fuel to Albakri's. Though Albakri claims A&M shorted him on fuel deliveries, Stout did not agree and testified that he has had fewer than 10 complaints by customers over the past 30 years of business.

Stout then identified the ledger that had been created showing the debits and credits on Jorusa's account. Albakri and Jorusa objected to the document's admission, arguing the information was hearsay from a Marathon

website, and there was no representative from Marathon to verify that the contents were information kept in the normal course of business. The trial court deferred ruling on the motion, opining that the information in the document would go to the weight to be given the testimony. Stout then testified that the document is created in the normal course of his business and is relied upon by A&M to determine net profits and losses and to maintain customer accounts. The ledger shows three items in dollar amounts: debits for fuel delivered by A&M to the gas station; credits for credit card transactions that occurred at the pumps; and credits for checks remitted to A&M from the gas station. The ledger keeps a rolling balance, adding and subtracting the relevant amounts. The ledger showed all transactions between January 1, 2009, and April 21, 2011. A&M compiles ledgers for all its customers. The trial court found the document was admissible under the business-record hearsay exception and admitted the document subject to cross-examination.

Stout then identified some invoices showing fuel was delivered to the gas station. Stout explained that A&M's trucks go to suppliers, such as Marathon, and purchase fuel. The instruments used to measure the amount of fuel purchased are regulated by government officials and certified to be accurate. That fuel on A&M's trucks is then delivered and pumped into tanks at gas stations. Stout denied that A&M's delivery trucks ever shorted Jorusa on any fuel deliveries. Stout thoroughly went through numerous transactions on the ledger, both on direct and cross-examination. The ledger showed that between January 1, 2009, and April 21, 2011, A&M delivered $364,454.24 worth of fuel, and Jorusa paid

$339,502.23 for that fuel. A&M called no other witnesses and closed its case-in-chief.

Albakri and Jorusa then made a number of motions: to exclude the ledger as inadmissible hearsay; to grant a directed verdict;[4] to dismiss the case because the credit agreement violated the statute of frauds inasmuch as the agreement lasted longer than a year and was not properly signed by Albakri; and for a finding that the signatures on the documents were not Albakri's. The trial court overruled all of the motions. It held that the ledger was admissible, as it was a record compiled in the normal course of A&M's business, it was not created for this litigation, and any hearsay in the record from a third party only went to the weight to be given the evidence in the ledger. It held the statute of frauds was not violated because the transactions would only take approximately a week to complete, as the business regularly delivered the fuel and sent invoices. It made a factual finding that the signature on the Credit Policy and Personal Guarantee was not Albakri's, however the court held that those documents were only relevant to show that Albakri agreed to pay 18 percent interest, which the trial court did not believe was enforceable. [5]

Albakri then testified for the defense case. He claimed the truck driver who delivered the fuel would not give him the fuel unless Albakri paid the

---

[4] A directed verdict is improper in a bench trial. Instead, a party should move for early dismissal pursuant to Kentucky Rules of Civil Procedure ("CR") 41.02. *See R.S. v. Commonwealth*, 423 S.W.3d 178, 184 (Ky. 2014); *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004).

[5] The trial court ultimately granted A&M interest at an eight percent rate.

bill of lading in advance. Albakri would pay by check, money order, and cash. He always paid the invoice in order to get the gasoline.

Albakri claimed he ceased doing business with A&M because he did not believe they were trustworthy. He claimed he was having difficulties with the truck driver. He testified that he never received an invoice, as he always paid the truck driver upon delivery.

On cross-examination, Albakri admitted he was not at the gas station all the time, so some of his employees would pay for the deliveries if necessary. He claimed A&M would call in advance to let him know how much the delivery would cost so he could have the check or money order ready. Albakri also admitted Jorusa owned the gas station, but Jorusa was a defunct corporation. Albakri sold the gas station around the same time the invoices that are the subject of the instant case went unpaid. Albakri is also affiliated with other companies and businesses.

The trial court then orally ruled from the bench as follows. Factually, the trial court found Stout's payment method was the more credible version than Albakri's. Because a significant amount of payments were remitted to A&M by the credit-card system, Albakri would not have to use a collect-on-demand payment system. The trial court found the ledger showed an increasing debt because gasoline prices were increasing during that period of time. So, by the time the invoices were paid, more money was due on a fuel delivery that occurred in the interim.

The trial court held that A&M was entitled to a judgment in the amount of $19,903.82. The trial court then orally made the factual finding that the credit agreement was unenforceable because it did not have a valid signature. Thus, the 18 percent interest and attorney's fees from the credit agreement could not be applied to the judgment. Instead, the trial court awarded eight percent interest compounded annually from February 1, 2010, until the judgment was paid in full. A judgment to that effect was entered on December 22, 2015. The judgment did not incorporate into its written order the oral factual findings or legal conclusions from the bench trial.

On December 31, 2015, Albakri and Jorusa filed a combined motion to vacate the judgment and a motion for findings of fact and conclusions of law. CR 52.02; 59.05. They first argued that the trial court should vacate the judgment because the Amended Complaint only alleged a written contract, and the trial court made the factual finding that Albakri did not sign the contract. They next argued that because the trial court found Albakri did not sign the contract, it should also find Stout's testimony incredible because Stout testified he witnessed Albakri sign the contract. They requested specific, written findings of fact regarding whether the signature was Albakri's, whether Stout was credible, and how those findings affected the weight of the evidence.

The motion also requested the Court to reconsider its admission of the hearsay evidence in the ledger. It then prayed that the court vacate the prejudgment interest award, as A&M had only sought prejudgment interest

pursuant to the contract, and the trial court found the contract was not signed by Albakri.

Albakri and Jorusa then argued that the corporate veil should not have been pierced, and they requested specific factual findings and legal conclusions. Finally, they requested written factual findings and legal conclusions regarding their argument that a commercial credit contract existed and/or that it violated the statute of frauds. A&M filed a brief, four-paragraph response to the motion, after which Albakri filed a three-page reply solely concerning piercing the corporate veil.

On May 5, 2016, the trial court summarily denied the motions. Albakri and Jorusa timely filed a notice of appeal from the final judgment and the order denying the post-judgment motions. We now turn to the merits of their claims.

## ANALYSIS

Albakri and Jorusa raise multiple allegations of error. A&M also claims procedural errors with Albakri's and Jorusa's appeal. We first address A&M's alleged procedural errors. We next address Albakri's claim that the trial court erred by piercing the corporate veil. Finally, we resolve the remaining issues.

### I. Procedural claims.

We begin our analysis with A&M's procedural arguments. A&M claims Albakri and Jorusa did not substantially comply with the appellate rules because they failed to list in their notice of appeal the order granting partial summary judgment. A&M also claims Albakri and Jorusa did not present enough citations to the record and law in their Appellants' Brief.

Regarding the first claim, it is true that Albakri and Jorusa failed in their notice of appeal to list the August 27, 2014 order granting partial summary judgment. This error is not fatal to their appeal, however. "Excepting for tardy appeals and the naming of indispensable parties, we follow a rule of substantial compliance." *Johnson v. Smith*, 885 S.W.2d 944, 950 (Ky. 1994). In their notice of appeal, Albakri and Jorusa did list the judgment and the order denying the motion to alter, amend, or vacate. The claims presently before us were all presented either at the hearing or in the motion to alter, amend, or vacate, or both. In fact, our thorough review of the record indicates the piercing-the-corporate-veil issue was raised multiple times during the proceedings below. A&M cannot credibly claim it has been blindsided by Albakri's and Jorusa's appellate issues.

Nonetheless, A&M claims it is harmed by the notice of appeal because confusion has resulted regarding what standard of review should be applied to the issues arising from the August 27, 2014 order. We find no such confusion in the briefs. A&M's repeated arguments that summary judgment was granted in its favor on the piercing-the-corporate-veil issue, which was the subject of the August 27, 2014 order, make clear that A&M understands a summary-

judgment standard of review should apply. And, if A&M needed additional clarification, it needed only review the bench trial, where Albakri and Jorusa stated numerous times that they were seeking reconsideration of the summary judgment order. A&M even argued at the bench trial that damages was the only issue left to be resolved because the piercing-the-corporate-veil issue had been disposed of by partial summary judgment. It is apparent from the record that all parties were aware of the relevant issues and orders. There is no confusion on appeal as to what standard of review should be applied for any of the presented issues. Thus, we decline to impose any sanctions. *Wilkerson v. Williams*, 336 S.W.3d 919, 921 (Ky. App. 2011) (citing *City of Devondale v. Stallings*, 795 S.W.2d 954, 956-57 (Ky. 1990)).

Regarding the alleged briefing errors, we do not find that Appellants' Brief is so lacking in sufficient citations to the record and law to warrant sanctions. CR 76.12(8). Thus, we turn to the substantive issues.

**II. Piercing the corporate veil.**

In its summary judgment order, the trial court held that Jorusa's corporate veil could be pierced so A&M could seek judgment against Albakri. "The standard of review on appeal of a summary judgment is whether the trial court found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996) (citing CR 56.03). We review the trial court's decision *de novo* with no deference to the trial court because factual findings are

not at issue. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014); *Scifres*, 916 S.W.2d at 781 (citing *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992)).

Under our well-settled jurisprudence, we review on appeal whether the trial court, viewing the evidence in a light most favorable to the non-moving party, erred by finding no genuine issues of material fact existed and the moving party was entitled to judgment as a matter of law. *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In Kentucky, corporate veils may be pierced when two dispositive elements are proven: "(1) domination of the corporation resulting in a loss of corporate separateness *and* (2) circumstances under which continued recognition of the corporation would sanction fraud or promote injustice." *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*, 360 S.W.3d 152, 165 (Ky. 2012) (emphasis in original). *See also Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 469 (Ky. App. 2012) ("Thus, under Kentucky law, two elements must be met: (1) the loss of corporate or entity separateness, as established by analysis of the eleven factors; and (2) the sanctioning of fraud or promoting injustice."). To assess the first element, courts should analyze the following factors:

> "(1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the

> corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere façade for the operation of the dominant stockholders."

*Inter-Tel*, 360 S.W.3d at 163 (quoting *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 379 (7th Cir. 2008)). These factors are not simply a checklist to determine if the first element is met. Instead, a court should examine the factors with more emphasis placed on three factors: grossly inadequate capitalization; egregious failure to observe corporate formalities; and a high degree of control over the corporation's day-to-day operations and decisions. *Inter-Tel*, 360 S.W.3d at 164.

To assess the second element, "the trial court should state specifically the fraud or injustice that would be sanctioned if the court declined to pierce the corporate veil." *Inter-Tel*, 360 S.W.3d at 165. Evidence of actual fraud is not required to meet this element, but "the injustice must be something beyond the mere inability to collect a debt from the corporation." *Ibid*.

> Examples of injustice include where "a party would be unjustly enriched; [where] a parent corporation that caused a sub's liabilities and its inability to pay for them would escape those liabilities; or an intentional scheme to squirrel assets into a liability-free corporation while heaping liabilities upon an asset-free corporation would be successful.

*Inter-Tel*, 360 S.W.3d at 164 (quoting *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 524 (7th Cir. 1991)).

In the instant case, the trial court only focused on the first element. It found three factors that it believed required the corporate veil to be pierced. First, the trial court found Jorusa was never capitalized in any amount. This finding is erroneous. Albakri admitted only that "Jorusa International, Inc. was *ever* capitalized in any amount." (Emphasis added). Indeed, it appears Jorusa was capitalized, as the ledger provided by A&M shows that over $300,000.00 of payments were remitted to A&M by Jorusa. Also according to that ledger, Jorusa delivered approximately 40 checks or money orders to A&M in multiple-thousand dollar amounts. And A&M's president testified that the ledger was only some of the business transacted between Jorusa and A&M, with the total business likely approaching one million dollars. Out of all its business dealings, A&M only claims it was not paid $19,903.82, or about two percent of the total transactions. None of this evidence demonstrates that Jorusa was undercapitalized. *See, e.g., Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657 (9th Cir. 2017) (finding company with arguably illiquid assets was not undercapitalized because it had, for the past 20 years, satisfied all its judgments and maintained $1.7 million in net assets and equity). Thus, the trial court erred by using this factor to support the first element.

Second, the trial court found two violations under the "egregious failure to observe legal formalities and disregard of distinctions between parent and subsidiary" factor. Specifically, the trial court found Albakri admitted that

Jorusa's corporate charter was twice revoked by the Secretary of State and reinstated both times, and the trial court also found that Jorusa never paid a dividend to anyone. Regarding the corporate charter being revoked, Albakri and Jorusa note that the charter was administratively dissolved due to failure to pay annual dues but reinstated when those dues were paid. They point us to *Pannell v. Shannon*, 425 S.W.3d 58 (Ky. 2014), which held that an administratively-dissolved, limited liability company's reinstatement dates back to the date of the dissolution. In other words, "Reinstatement under the statute literally undoes the dissolution." *Pannell*, 425 S.W.3d at 68. "This means that under the statute, 'the existence of the LLC is not interrupted, and it is as if the administrative dissolution never took place.'" *Id*. at 71 (quoting Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 Ky. L.J. 1, 38 n. 179 (1995)).

A&M responds by summarily asserting Albakri's and Jorusa's argument is "based upon semantics" because "no corporate entity existed." This argument lacks merit. The trial court's order stated Jorusa's corporate charter was reinstated. A&M admitted it had been doing business with Jorusa for many years. And A&M sought to pierce Jorusa's corporate veil. Clearly, Jorusa was a corporation that existed.

All of these arguments miss the mark, though. The factor to be considered is whether Jorusa suffered from an "egregious failure to follow legal formalities." Failing to hold annual board meetings for multiple years, having the

exact same officers serve on both the parent and subsidiary corporation's boards, treating the parent and subsidiary corporation as interchangeable for tax returns, and the like, are all evidence of an egregious failure to observe standard corporate formalities and processes. *Inter-Tel*, 360 S.W.3d at 157. No such evidence of an egregious failure to follow corporate formalities was put forth by A&M. At worst, Albakri failed to file necessary documents with the Secretary of State twice during the corporation's existence. This failure is hardly egregious.

Moreover, Albakri did not admit that Jorusa never paid a dividend. Albakri admitted only that he was unaware whether Jorusa paid a dividend. But assuming, *arguendo*, that no dividend was paid, that fact alone does not demonstrate an egregious failure to follow corporate formalities. Not only must corporations meet certain restrictions in order for their directors to distribute a dividend, but the decision to make a distribution "rests within the fair discretion of the directors." *Taylor v. Axton-Fisher Tobacco Co.*, 295 Ky. 226, 173 S.W.2d 377, 380 (1943); KRS 271B.6-400. Moreover, because dividends are essentially doubly taxed, "small business corporations may seek to avoid this double taxation by paying out earnings in salaries and bonuses rather than declaring dividends." Corporate disadvantages, 4A Ky. Prac. Methods of Prac. § 14:3. Such small business owners are cautioned that "income tax gatherers are likely to look askance at salaries considerably in excess of the value of service rendered by the recipients to the corporation." *Ibid*.

Here, A&M proffered no proof that Jorusa was either capable of distributing a dividend or that doing so was a wise choice in light of the double taxation for dividends. And, most importantly to the veil-piercing analysis, A&M proffered no proof that Albakri was egregiously ignoring corporate formalities by exercising his discretion and not making a distribution. Thus, the trial court's reliance on the second factor is erroneous.

Finally, the trial court relied on the fact that Albakri had "complete and unfettered control" over Jorusa to pierce the corporate veil. As this factor is the only remaining factor justifying piercing the corporate veil, we find the trial court erred by granting summary judgment. We note that *Inter-Tel*, rendered February 23, 2012, held that the General Assembly gave statutory recognition to veil-piercing by enacting KRS 271B.6-220(2), which reads:

> (2) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation shall not be personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his own acts or conduct.

After *Inter-Tel* was rendered, and effective July 12, 2012, the General Assembly amended KRS 271B.6-220 by adding subsection 3: "(3) That a corporation has a single shareholder is not a basis for setting aside the rule recited in subsection (2) of this section." Thus, it appears the fact that Albakri was the sole shareholder of Jorusa should not be a consideration in our piercing-the-corporate-veil analysis.[6] It likewise follows that Albakri, as the sole shareholder and manager of Jorusa,

[6] We were unable to locate any published authority that has interpreted KRS 271B.6-220(3).

would also exercise dominion and control over the company. At minimum, this factor in and of itself does not justify piercing the corporate veil.

Thus, we hold that the trial court erroneously analyzed the three factors it considered important under the first element of the piercing-the-corporate-veil analysis. Additionally, had the trial court analyzed the second element of the analysis, it would have found summary judgment inappropriate.

Under the second element, we must examine what fraud or injustice will be perpetrated if we do not pierce the corporate veil. *Inter-Tel*, 360 S.W.3d at 165. As stated above, evidence of actual fraud is not required to meet this element, but "the injustice must be something beyond the mere inability to collect a debt from the corporation." *Ibid*.

The inability to collect a debt from the corporation is precisely the injustice proffered by A&M. It is undisputed that Jorusa paid hundreds of thousands of dollars to A&M during the many years the two conducted business. A&M benefited greatly from this business relationship. They only seek to pierce the corporate veil to satisfy a few thousand dollars remaining on the debt. This reason is insufficient to satisfy the second element. *Howell Contractors, Inc. v. Berling*, 383 S.W.3d 465, 469-70 (Ky. App. 2012) (holding the second element not met because the plaintiff only "established its present inability to collect a debt owed" and failed to demonstrate any fraud or injustice).

Accordingly, as neither element was met in the case, the trial court erred by piercing the corporate veil. We REVERSE AND REMAND the judgment

entered against Albakri. We now turn to the remainder of Albakri's and Jorusa's claims.

**III. Did the trial court err by admitting and/or using the ledger as evidence?**

Albakri and Jorusa next argue the trial court erred by admitting and using the ledger as evidence. They claim the ledger is inadmissible hearsay. We review a trial court's evidentiary rulings for an abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Under this standard, a trial court is empowered to make a decision of its choosing that falls within a range of permissible decisions, and we will only declare the decision an abuse of discretion if it is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) (citations omitted).

Pursuant to KRE 803(6), a record of regularly conducted activity is not excluded by the hearsay rules, provided that record is:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of

> preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Here, Stout testified that A&M created ledgers for every business to whom A&M delivered fuel. A&M compiled the information in-house using data from its drivers, its fuel suppliers, and its business customers. The ledger was a compilation that was kept in the normal course of A&M's business. Under these circumstances, we hold that the trial court did not abuse its discretion by admitting the ledger into evidence. *See, e.g., St. Clair v. Commonwealth*, 140 S.W.3d 510, 537-38 (Ky. 2004); *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654, 665 (Ky. App. 2009) ("Moreover, the documents were sent from the business of one co-defendant to another in the regular course of business and properly within the business records exception to the hearsay rule."). Accordingly, we AFFIRM the trial court on this issue.

**IV. Did the trial court err by failing to make specific findings of fact and conclusions of law?**

Albakri and Jorusa next argue the trial court erred by failing to make specific findings of fact and conclusions of law following the bench trial. We agree inasmuch as it relates to the commercial credit contract and statute of frauds claims, the claim that the trial court erred by finding A&M met its burden of proof, and the claim that the trial court erred by making the factual finding that Stout's

testimony was more believable than Albakri's.[7] To review these issues we require factual findings, including but not limited to: what were the terms of the commercial credit contract between the parties; whose signature was on the Credit Policy and Personal Guarantee; was fuel delivered to Jorusa for which A&M was not paid; was Jorusa ever shorted on a fuel delivery; and what parts of Stout's and Albakri's testimony, if any, did the trial court find credible.

Following a bench trial, a trial court must specifically find facts and separately state its conclusions of law and render an appropriate judgment. CR 52.01. These factual findings and legal conclusions are necessary for appellate review. "To perform meaningful review of a trial court's decision, this Court must be able to fully understand the facts and evidence upon which the court relied." *Patmon v. Hobbs*, 495 S.W.3d 722, 728 (Ky. App. 2016). "We remind the circuit court that it speaks only through written orders entered upon the official record." *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 349 (Ky. App. 2010). Any oral findings of fact and conclusions of law should be specifically incorporated into a written judgment. *See ibid*.

---

[7] Concerning the credibility of witnesses, we note that on appeal a trial court's factual findings following a bench trial are reviewed for clear error, with due regard given to the trial judge's opportunity to consider the witnesses' credibility. *Goshorn v. Wilson*, 372 S.W.3d 436, 439 (Ky. App. 2012) (citing *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995); CR 52.01). "In fact, 'judging the credibility of witnesses and weighing evidence are tasks within the exclusive province *of the trial court*.'" *Barber v. Bradley*, 505 S.W.3d 749, 754 (Ky. 2016) (emphasis in original) (citing *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004)). Though there is a certain disconnect between finding Stout was not credible when he testified that he saw Albakri sign the document and finding Stout credible in the remainder of his testimony, we note that factfinders in Kentucky "may believe all of a witness's testimony, part of a witness's testimony, or none of it." *Robinson v. Commonwealth*, 325 S.W.3d 368, 371 (Ky. 2010) (citing *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (1926)). It is, thus, imperative for appellate review that the trial court enter a written order expressing its factual findings regarding the credibility of these witnesses.

In the instant case, the judgment was summary in nature with no specific factual findings or legal conclusions as required by CR 52.01. The judgment did not incorporate any of its oral factual findings or legal conclusions. We note that the trial court orally overruled Jorusa's motions relating to the commercial credit contract and statute of frauds claims. The trial court also made various oral factual findings as outlined above, including the factual finding that the Credit Policy and Personal Guarantee did not contain Albakri's signature. Noting the error with the written judgment, Albakri and Jorusa even filed a post-judgment motion for the trial court to enter specific factual findings, which the trial court denied. CR 52.04.

A&M proffers that no factual findings or conclusions of law were necessary because the only issue at the bench trial was the amount of damages, with the remainder of the issues and facts having been resolved in the partial summary judgment motion. Having thoroughly reviewed the record and the bench trial, we do not agree. First, a trial court makes no factual findings during summary judgment proceedings. *Caniff*, 438 S.W.3d at 372. Second, numerous other claims were raised before, during, and after the bench trial that required factual findings and legal conclusions. And even if the partial summary judgment motion resolved the other claims, it was still subject to change because an order granting partial summary judgment is "interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and

liabilities of all the parties." CR 54.02(1); *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99 (Ky. App. 2011).

Prior to the bench trial, and after the bench trial in a CR 59.05 motion, Albakri and Jorusa thoroughly contested the partial summary judgment order's holdings. They filed numerous written motions prior to the trial, presented expert testimony regarding Albakri's signature, and made many oral motions during the trial. Albakri and Jorusa specifically moved the trial court set aside its holdings in the partial summary judgment order. The trial court entertained the motions and orally overruled them at the bench trial. Post-judgment, and prior to their notice of appeal, Albakri and Jorusa also filed a motion to alter, amend, or vacate the judgment, again re-raising issues that had been decided in the partial summary judgment order. The trial court summarily overruled the motion to alter, amend, or vacate. It is apparent from the record that the bench trial concerned more than just damages.

Furthermore, whether Albakri and Jorusa were required to make such a motion or not, *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), they moved the trial court for specific factual findings and legal conclusions. Given that a bench trial was held during which numerous legal and factual issues were resolved, the trial court should have issued written factual findings and legal conclusions. While the trial court's order granting partial summary judgment and its evidentiary rulings from the bench were sufficient for us to review the other claims raised on appeal, the judgment and order denying the motion to alter, amend, or vacate were

insufficient to address the remaining claims. Thus, we REVERSE AND REMAND for factual findings and legal conclusions on these remaining issues.

**V. Issues raised in the Reply Brief.**

Finally, we note that Albakri and Jorusa raise two new issues in their Reply Brief. They fail to note where the issues were preserved below, nor can we find where they were presented to the trial court. Likewise, the issues are not responsive to the arguments raised in Appellee's Brief. Accordingly, we will not consider the arguments in the Reply Brief. *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006).

## CONCLUSION

Concerning the piercing-the-corporate-veil claim, we REVERSE AND REMAND the trial court's orders. Jorusa's corporate veil should not be pierced to hold Albakri personally liable for its debts. We also REVERSE AND REMAND the judgment for the trial court to enter detailed factual findings and legal conclusions on all issues that were presented to it. Finally, concerning the trial court's evidentiary ruling regarding the ledger, we AFFIRM that the ledger was admissible.

KRAMER, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Gregory Ward Butrum
Louisville, Kentucky

BRIEF FOR APPELLEE:

Paul A. Zimlich
Taylorsville, Kentucky