COA Opinion: Members of a limited liability company are jointly and severally liable for outstanding construction debt when they assent to distributions while knowing the company was insolvent.

4. May 2011 By Aaron Lindstrom

In *Florence Cement Co. v. Vettriano*, the Court of Appeals determined that a limited liability company's corporate veil should have been pierced because its members failed to treat it as a separate entity, as evidenced by its and its member's finances.

Three individuals (Essad, Bencivenga, and Vettriano) founded Shelby Property, a limited liability company, to own, develop, and sell vacant lots for residential construction (and A.V. Investment later replaced Vettriano as a member). To finance the development at issue in the underlying case, Shelby Property and its individual members took out a series of loans from Comerica Bank. To do the actual development work, Shelby Property contracted Florence Cement to perform concrete and asphalt work. But the project was not successful, and while Shelby Property was able to pay all of its other contractors and subcontractors, it could not pay Florence Cement. Later Essad signed a sworn statement to Comerica, stating that Shelby Property owed Florence Cement $142,000, when the actual amount owed was over $256,000. After receiving the $142,000, Florence Cement filed the instant action against the LLC and its individual members to collect the balance.

The trial court entered a consent judgment for $114,000 in Florence Cement's favor and against Shelby Property, which was insolvent. The case proceeded to trial against the individual members of the LLC. The individual members moved for a directed verdict on the piercing-the-corporate-veil claim, and the trial court determined that the elements required to pierce the corporate veil were not met and entered a judgment of no cause of action against Vettriano and A.V. Investment. The trial court entered judgments of $19,000 against Essad and Bencivenga individually for improper distributions, but it declined to hold Essad and Bencivenga jointly and severally liable for the $38,000.

Reversing the trial court, the Court of Appeals determined that the corporate veil should have been pierced because defendants, the individual members of the LLC, did not treat the LLC as an entity separate from themselves. The Court highlighted several member actions that demonstrated a lack of separation; for example, Shelby Property made payments at the behest of the individual members that were not beneficial to the company, and the members borrowed money in their own names to provide capital for the company. The Court also concluded that Shelby Property committed a wrong or fraud. First, Essad (a licensed attorney) committed fraud when he indicated to Comerica that Shelby Property only owed Florence Cement $142,000, when he knew (because he signed the contract with Florence Cement) that the actual amount owed was $256,000. Second, the members knew that Shelby Property was significantly undercapitalized—it owed millions of dollars while having only $2,000 in capital contribution. Finally, the Court determined that Essad and Bencivenga should be jointly and severally liable for Shelby Property's improper distributions because they assented to the distribution even though they knew the company was insolvent.