# Supreme Court of Kentucky

Case No. 2010-SC-00183
Court of Appeals Case Nos. 2007-CA-002131 and 2007-CA-2180

THOMAS J. SCHULTZ — APPELLANT

v.

**Appeal from Jefferson Circuit Court**
**Honorable Denise Clayton, Judge**
**Civil Action No. 04-CI-003093**

GENERAL ELECTRIC HEALTHCARE FINANCIAL SERVICES, INC., et al. — APPELLEES

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## BRIEF OF APPELLEES

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Sheryl G. Snyder
Griffin Terry Sumner
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 589-5400
*Counsel for Appellees*

### CERTIFICATE OF SERVICE

It is hereby certified that on April 4, 2011 a copy of this Brief of Appellees was mailed by U. S. first class mail, postage prepaid to:

Hon. Denise Clayton, Judge
Jefferson Circuit Court
700 West Jefferson Street
Louisville, KY 40202

Hon. Bruce A. Brightwell
1212 State Street
New Albany, IN 47150

Samuel Givens, Jr.
Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

Griffin Terry Sumner
*Counsel for Appellees*

*May it please the Court:*

## INTRODUCTION

In spite of Schultz's express admission that he personally pocketed almost $1 million in corporate assets, he appeals the Court of Appeals' affirmance of the Jefferson Circuit Court's decision to pierce the corporate veil. The Court of Appeals' decision, based on well-settled Kentucky law, should be affirmed.

## STATEMENT CONCERNING ORAL ARGUMENT

Although Schultz's express and specific admission of his misappropriation of corporate funds requires affirmance on the existing record, Appellees believe that oral argument may be useful to the Court's analysis.

## STATEMENT OF POINTS AND AUTHORITIES

## COUNTERSTATEMENT OF THE CASE

***Undisputed facts mandated judgment in favor of GE.***

This is a collection action in which Appellees General Electric Healthcare Financial Services, Inc., General Electric Company, and General Electric Capital Corporation (collectively, "GE"[1]) seek to enforce a prior judgment against Intra-Med Services, Inc., through piercing its corporate veil to reach the personal assets of Appellant Thomas J. Schultz, the president and sole shareholder of Intra-Med. Schultz's Answer expressly admitted GE's specific allegations – including his misappropriation of corporate assets after GE's initial judgment against the company. The Jefferson Circuit Court therefore properly granted judgment on the pleadings in favor of GE. [RA 1806: Order of September 10, 2007.] That judgment was affirmed by the Court of Appeals and should be again affirmed by this Court. *See* Court of Appeals Opinion Affirming entered February 19, 2010 (hereinafter "Op.") at 10.

It is undisputed that in 2001, GE entered into a contract to lease certain medical diagnostic imaging equipment to Intra-Med Services, Inc. Intra-Med subsequently defaulted on the contract by failing to make the required lease payments.

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[1] General Electric Capital Corporation, General Electric Healthcare Financial Services, Inc., and General Electric Company are separate and distinct entities. The collective reference herein to these entities as "GE" is merely for convenience and is in no way intended to diminish their corporate separateness or to suggest that they are agents of one another.

After the default, GE filed suit against Intra-Med and obtained a judgment in the amount of $4,746,921.80, plus interest, against Intra-Med. [RA 1196: Complaint[2] at 2 and Exhibit 1; RA 1306: Answer at 1.] That judgment amount represented amounts past due under the equipment lease's original terms, as well as the amount due pursuant to the lease's acceleration clause. GE was only able to collect approximately $700,000 of the judgment against Intra-Med through garnishments and the sale of repossessed equipment formerly leased by Intra-Med to another company.

While trying to collect on its judgment against Intra-Med, GE learned about certain documents that Intra-Med had produced in discovery in a lawsuit involving Diagnostic Medical Imaging Associates, P.S.C. Those documents revealed Schultz's complete dominion over Intra-Med and his use of Intra-Med's assets for his own personal gain – including personally pocketing the $850,000 proceeds from a post-judgment sale of property that had been purchased using Intra-Med funds. GE intervened in this subsequent case and filed a third-party complaint against Schultz, seeking to pierce the corporate veil and hold him liable for the judgment against Intra-Med. [RA 1196-1301: Complaint.]

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[2] GE's "Complaint" is actually the third-party complaint in a case originally brought by Intra-Med against another party, but is referenced here simply as "Complaint."

In his Answer to GE's Complaint, Schultz admitted all of the specific allegations of his self-dealing and misappropriation of corporate assets, including the following key factual averments:

> 9. On November 15, 2004, GE was awarded a judgment in the amount of $4,746,921.80, plus interest against Intra-Med.
>
> 10. Schultz had knowledge of the GE Judgment on or after November 15, 2004.
>
> . . .
>
> 14. On or about December 1998, Schultz, individually, purchased real property located at 7405 New LaGrange Road, Louisville, Kentucky 40242 using Intra-Med funds.
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> 15. Intra-Med did not receive any of the proceeds from the subsequent sale of the real property located at 7405 New LaGrange Road, Louisville, Kentucky 40242 in March of 2004.
>
> 16. On or about October 2000, Schultz, individually, purchased and improved real property located at 8700 Dixie Highway, Louisville, Kentucky 40258 using Intra-Med funds.
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> 17. After entry of the GE Judgment, Schultz sold the real property located at 8700 Dixie Highway, which had been purchased and renovated by Schultz with Intra-Med funds, for $850,000.00.
>
> 18. Intra-Med did not receive any of the proceeds from the sale of the real property located at 8700 Dixie Highway.
>
> 19. On or about May 24, 2001, Schultz, individually, purchased a marina slip for $23,000.00 with funds that had been provided to him by Intra-Med.
>
> 20. Intra-Med did not receive any of the proceeds from the subsequent sale of the marina slip.

[*See* RA 1198-99: Complaint and RA 1306: Answer at ¶¶ 4, 7 (expressly and specifically admitting paragraphs 8-10, 14-21 in GE's Complaint).]

Schultz also admitted that he instructed Intra-Med to disregard GE's November 15, 2004 Judgment and to pay Intra-Med's creditors other than GE. [RA 1307: Answer at ¶ 11.]

***Both lower courts correctly held that Schultz's misconduct warranted piercing the corporate veil.***

Based on the facts admitted in Schultz's Answer, GE filed a motion for partial judgment on the pleadings. [RA 1594-1604.] GE requested a partial judgment in the amount of $1,150,000 – the amount of Intra-Med funds which Schultz used improperly, according to his admissions. The Circuit Court found that the admitted facts supported piercing the corporate veil, but that questions might remain about the amount of the judgment because Schultz alleged he had loaned Intra-Med $700,000.

In order to obtain a judgment and end the litigation, GE made a subsequent motion for judgment in the amount of $450,000, which represented the difference between the $1,150,000 of corporate funds that Schultz admitted misusing and the alleged $700,000 loan. [RA 1803-05.] Judgment in that amount was entered in favor of GE. [RA 1806: Order of September 10, 2007.] Schultz then appealed the judgment.

The Court of Appeals correctly applied well-settled law to affirm the judgment in favor of GE, describing Schultz's conduct as "blatant use of corporate funds." Op. at 9. The Court of Appeals held that GE was entitled to pierce Intra-Med's paper-thin corporate veil under the instrumentality theory:

> Mr. Schultz treated the corporation as a mere instrumentality by using corporate funds for his own individual purposes to purchase real estate and a boat slip. The admitted facts also demonstrate that Mr. Schultz harmed GE by using corporate funds as his own even after GE obtained a monetary judgment against Intra-Med. Money that could have been used to satisfy that judgment was used by Mr. Schultz for his own purposes. Finally, not piercing the corporate veil would subject GE to an unjust loss. As previously stated, money that could have been used to satisfy GE's judgment against Intra-Med was removed from the company and used elsewhere. GE has only been able to recover around $700,000 from a $4.7 million judgment. Piercing the corporate veil appears to be the only method for GE to recover its judgment.

Op. at 7. The judgment should also be affirmed by this Court.

## ARGUMENT

Although corporate shareholders are usually shielded from personal liability by the corporate veil of a separate legal entity, the veil will be pierced where – as here – the separate legal entity is used to "justify wrong, protect fraud or defend crime...." *Dare To Be Great, Inc. v. Com., ex rel. Hancock*, 511 S.W.2d 224, 227 (Ky. 1974).

It is black letter law that a shareholder – even when he owns all the stock of a corporation – cannot ignore corporate formalities and deal with corporate property as his own. *Laine v. Commonwealth*, 151 S.W.2d 1055, 1058 (Ky. 1941).

For more than thirty years, Kentucky courts have applied three basic theories when considering whether to hold corporate shareholders responsible for corporate liabilities: (1) the instrumentality theory; (2) the alter ego theory; and (3) the equity formulation. *White v. Winchester Land Development Corp.*, 584 S.W.2d 56 (Ky. App. 1979); *Daniels v. CDB Bell, LLC, et al.*, 300 S.W.3d 204 (Ky. App. 2009). *Accord United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993). Here, the Court of Appeals affirmed the trial court's judgment in favor of GE under the

instrumentality theory, but could have affirmed under any of these formulations of the doctrine.[3]

Under the instrumentality theory, three elements are required to justify piercing the corporate veil: (1) the corporation was a mere instrumentality of the shareholder; (2) the shareholder exercised control over the corporation in such a way as to defraud or harm the plaintiff; and (3) a refusal to disregard the corporate entity would subject the plaintiff to an unjust loss. *White*, 584 S.W.2d at 61; *Daniels*, 300 S.W.3d at 212.

Under the alter ego theory, the requisite elements include: "(1) that the corporation is not only influenced by the owners, but also that there is such unity of ownership and interest that their separateness has ceased; (2) the facts are such that ... treatment as a separate entity ... would sanction a fraud or promote injustice." *White*, 584 S.W.2d at 61-62.

Finally, recognizing the equitable nature of the determination made by a court, the *White* court identified several factors to be balanced in a piercing inquiry: undercapitalization; observation of corporate

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[3] *E.g., Commonwealth Natural Resources and Environmental Protection Cabinet v. Neace*, 14 S.W.3d 15, 20 (Ky. 2000) ("An appellate court may affirm a trial court under an alternate theory not relied upon by the trial court"); *Revenue Cabinet v. Joy Technologies, Inc.*, 838 S.W.2d 406, 410 (Ky. App. 1992)("a correct decision by a trial court is to be upheld on review, notwithstanding it was reached by improper route or reasoning"); *Old Republic Ins. Co. v. Ashley*, 722 S.W.2d 55, 58 (Ky. App. 1986) (Court of Appeals may affirm the judgment "if the record on appeal discloses any ground on which the decision could properly have been made").

formalities; payment of dividends; siphoning of funds by shareholders; and any shareholders' guaranty of corporate liabilities. *Id.*

Here, regardless of the theory used for the inquiry, it is difficult to imagine a more clear-cut case justifying piercing the corporate veil. This is not merely a case where a business owner paid a few *de minimis* personal expenses out of a corporate checking account or used the company car and got lazy with the paperwork. Schultz admitted to purchasing and improving two pieces of real property using Intra-Med funds and keeping the sale proceeds from both properties. [RA 1306: Answer at ¶¶ 4, 7 (specifically admitting GE's allegations).] Despite the fact that he used Intra-Med's funds to purchase the property, Schultz admitted he charged Intra-Med rent for its use of that property. [*Id.*] He admitted that he subsequently sold one of the properties for $850,000 ***after GE's $4.7 million judgment against Intra-Med was entered*** – and personally pocketed the funds. [*Id.*] None of those funds ever went to Intra-Med – much less to GE. Schultz also admitted purchasing a $23,000 boat slip for himself using funds which belonged to Intra-Med. [*Id.*] This egregious misuse of Intra-Med's assets, combined with Shultz's direction to Intra-Med to favor other creditors in winding down the business, left Intra-Med unable to respond to GE's judgment.

The Court of Appeals correctly affirmed the judgment in favor of GE. Schultz expressly admitted facts which entitled GE to that judgment under well-settled Kentucky law. None of Schultz's affirmative defenses

— including assertions that GE had seen Intra-Med's financial records prior to the misconduct and that GE did not obtain a personal guaranty from Schultz — addressed the material requirements for veil piercing and therefore could not have precluded the judgment.

## I. Judgment on the pleadings in favor of GE was proper because Schultz expressly admitted facts mandating a piercing of the corporate veil.

It is black letter law that judgment on the pleadings is appropriate when the admitted facts entitle a party to judgment as a matter of law. *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727, 729 (Ky. 1963); *see also* CR 12.03. The purpose of judgment on the pleadings is to expedite the termination of a controversy when the material facts are not in dispute. *See* Clay, KENTUCKY PRACTICE 208 (3d Ed. 1974); CR 12.03.

Here, Schultz expressly admitted facts in the pleadings establishing that he treated Intra-Med's corporate funds and property as his own, that he disposed of corporate property after GE obtained its judgment against Intra-Med, that he kept the proceeds of the sale as his own, and that he directed Intra-Med so that remaining corporate assets were used to pay other creditors instead of GE. Piercing the corporate veil is clearly warranted under Kentucky law.

The Court of Appeals correctly held that the facts admitted by Schultz established the three elements required under the instrumentality theory:

> Mr. Schultz treated the corporation as a mere instrumentality by using corporate funds for his own individual purposes to purchase real estate and a boat slip. The admitted facts also demonstrate that Mr. Schultz harmed GE by using corporate funds as his own even after GE obtained a monetary judgment against Intra-Med. Money that could have been used to satisfy that judgment was used by Mr. Schultz for his own purposes. Finally, not piercing the corporate veil would subject GE to an unjust loss. As previously stated, money that could have been used to satisfy GE's judgment against Intra-Med was removed from the company and used elsewhere. GE has only been able to recover around $700,000 from a $4.7 million judgment. Piercing the corporate veil appears to be the only method for GE to recover its judgment.

Op. at 7.[4]

Schultz, however, argues that judgment on the pleadings was improper. In spite of his express and specific admissions of misconduct, Schultz misrepresents his pleadings as having "denied the majority of th[e] allegations," as being "specific denials Schultz made to *all the allegations* in GE's Complaint about piercing the corporate veil," and as having "specifically denied *all of GE's allegations* regarding the instrumentality theory." *See* Appellant's Brief at 3, 6, 7 (emphasis supplied). *But cf. supra* pages 2-3. In fact, Schultz's Answer did no such thing. [*Cf.* RA 1306: Answer at ¶¶ 4, 7.] Schultz only denied conclusions

[4] While the Court of Appeals affirmed under the "instrumentality" theory, the circuit court's decision could be affirmed under any of the veil piercing theories. *Cf.* Op. at 7.

of law pleaded separately in the Complaint. He expressly admitted all of the underlying allegations of fact — as CR 11 required him to do. *Id.*

The denial of legal conclusions is not enough. *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727 (Ky. 1963). "Only the denial of material facts will be effective in defeating a motion for judgment on the pleadings." Op. at 5, citing *Archer*, 365 S.W.2d at 729. In *Archer*, this Court squarely held that an appellant's denial of a paragraph in a pleading alleging a legal conclusion was "ineffective" for purposes of opposing a motion for judgment on the pleadings where factual admissions established appellee's right to judgment. *Id.* at 729. *See also Sheffer v. Chromalloy Mining and Mineral Div. of Chromalloy Am. Corp.*, 578 S.W.2d 594 (Ky. 1979); *Sublett v. Carpenter's Adm'x*, 298 Ky. 85, 182 S.W.2d 239, 240 (1944).

Schultz nonetheless contends that the Answer's general denial of the conclusory statements of the legal elements for piercing the corporate veil should be enough to defeat GE's motion for judgment, even though he admitted all material facts establishing those elements.

Schultz objects to the lower court making an "equitable determination" or "judgment call," contending that a court in equity cannot "balance various factors in deciding a judgment on the pleadings." *Cf.* Appellant's Brief at 15. But where, as here, the material facts are undisputed, there is no reason why the court cannot make that decision on a motion for judgment on the pleadings, as the veil-piercing

decision is an equitable one to be decided by the Court and not a jury. *Daniels*, 300 S.W.3d at 213; *see also Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 959 (6th Cir. 1976) (applying Kentucky law).[5]

The Court of Appeals properly applied the *Archer* standard to reject Schultz's argument:

> We find that his denials were insufficient to withstand a judgment on the pleadings because they were denials of conclusions of law and not material facts. As noted in *Archer, supra,* at 729, only the denial of material facts will be effective in defeating a motion for judgment on the pleadings.

Op. at 7. The lower courts' decisions must be affirmed to prevent Schultz's attempt to hide behind the corporate veil that he himself admittedly disregarded.

## II. Schultz's alleged affirmative defenses were insufficient to avoid piercing the corporate veil.

The Court of Appeals properly held that Schultz's general denial of legal conclusions and ostensible affirmative defenses did not affirmatively establish a lack of fraud. Op. at 8. Schultz nonetheless contends that certain of his affirmative defenses "negated a finding of fraud."

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[5] The Court of Appeals applied a *de novo* standard of review to the trial court's decision to pierce the corporate veil. Op. at 5; *see also Daniels*, 300 S.W.3d at 210. But traditionally, matters of equity and equitable remedies are within the discretion of the trial court. *See W.T. Grant Co. v. Indian Trail Trading Post*, 438 S.W.2d 91, 92 (Ky. 1968); *Western Casualty & Surety Co. v. Meyer*, 192 S.W.2d 388, 391 (Ky. 1946). Accordingly, the decision should be viewed for an abuse of that discretion. *See generally Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790 (Ky. 2004) (equitable remedy reviewed under abuse of discretion standard).

Appellant's Brief at 9.[6] Schultz pled that GE had access to Intra-Med's financial information at the time of the lease. Schultz also pled that GE knew that, if Intra-Med defaulted on the lease, it could not satisfy the acceleration clause. *See id.* at 9. The Court of Appeals properly found that Schultz's suggestion that these defenses would defeat veil piercing was "without merit." Op. at 8.

First, Schultz is incorrect that "fraud" is an essential element of piercing the corporate veil. Under the instrumentality theory, the second element requires that "the shareholder exercised control over the corporation in such a way as to defraud **or to harm** the plaintiff." *White*, 584 S.W.2d at 56 (emphasis supplied). The language is clear: defraud or harm. Under the alter ego theory, the second element requires that adherence to separate corporate existence would "sanction a fraud **or promote injustice.**" *Id.* at 62. Again, the use of alternative language is clear.[7] The Court of Appeals therefore correctly held that "[w]hile the admitted facts show fraud on the part of Mr. Schultz, it is clear they also demonstrate harm to GE." Op. at 8.

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[6] Although Schultz's argument heading states that his affirmative defenses "negated two of the essential elements for piercing the corporate veil", *cf.* Appellant's Brief at 9, the argument appears only to argue that fraud is an essential element and was somehow negated. Schultz is incorrect on both points.

[7] *See also Thomas v. Brooks*, 2007 WL 1378510 (Ky. App. 2007). (copy attached as Ex. A). In the *Thomas* case, the Court of Appeals held that the manipulation of the corporate form – which limited the corporation's ability to respond to the plaintiffs damage claim – was sufficiently "unjust" conduct to justify piercing the corporate veil.

Moreover, Schultz's argument regarding the element of fraud also demonstrates a misunderstanding of the claims arising from his admitted misconduct. Schultz's assertions certainly do not "establish that there w[as not] any deception by Schultz." *Cf.* Appellant's Brief at 10. Schultz complains that GE did not plead a material misrepresentation of fact relied upon by GE, but the fraudulent conduct is not a misrepresentation or fraudulent inducement to enter the original lease. Rather, Schultz committed fraud through the fraudulent conveyances that occurred after the lease in question (and after GE's judgment).

It cannot seriously be contended that Schultz's actions did not "defraud" GE. His actions certainly bear significant characteristics of fraudulent conduct – what this Court has referred to as the "badges of fraud." *Cf. Russell County Feed Mill, Inc. v. Kimbler*, 520 S.W.2d 309, 311-312 (Ky. 1975) (identifying recognized badges of fraud in the context of Kentucky's fraudulent conveyance statute). His actions were also contrary to Kentucky law, which prohibits debtors from making preferential transfers to creditors, to the exclusion of others, in anticipation of insolvency. *See* KRS 378.060.

Schultz's argument also fails to explain how any of his alleged affirmative defenses preclude piercing the corporate veil. The assertions that GE had access to the company's financial information before the original lease transaction, or knew that the company may not have

assets to pay out the lease's acceleration clause – even if taken as true - miss the point. *Cf.* Appellant's Brief at 10, 16. Schultz's argument presumes that GE knew Intra-Med would default on the original lease terms and that the lease's acceleration terms would be invoked. But a credit decision for a lease is based on the ability to meet the monthly payment obligations. There is no suggestion that GE did not believe that the company could and would make the lease payments as they became due. More importantly, there is no suggestion that GE had any knowledge that Schultz would misappropriate corporate assets for his own personal use.

The Court of Appeals also properly rejected Schultz's contention that Intra-Med's corporate veil should not be pierced because GE "failed to mitigate its damages" before it obtained the judgment it is trying to collect. But this is a collection action, after a prior judgment on the lease terms in a separate action. Mitigation of damages is not grounds for collaterally attacking that judgment and is not a defense on the issue of veil piercing. The amount of GE's damages under the lease terms was never at issue in this case. GE already had a *monetary judgment* against Intra-Med. The only question before the trial court in this case was whether Schultz should be held personally liable for that debt.

Schultz also affirmatively pled his allegation that he "only charged minimal, below market rent to Intra-Med to use his property for its business." *Cf.* Appellant's Brief at 13. Although described as an

"affirmative defense" and argued below only as evidence of the appropriateness of his conduct, Schultz contends that this "defense" raised factual issues precluding judgment on the pleadings. But this completely ignores the fact that he expressly admitted that the property in question was purchased with Intra-Med funds and thus should have been treated as Intra-Med's property – not Schultz's property that he could "rent" to Intra-Med. Indeed, Schultz's collection of ***any*** rent from Intra-Med for its use of property purchased using Intra-Med funds is merely additional evidence of Schultz's improper personal use of Intra-Med property and reinforces why he should not be permitted to use Intra-Med's paper-thin corporate existence as a shield against liability to GE.

Schultz's alleged affirmative defenses failed – as a matter of law – to defeat the veil piercing required by his specific admissions of misconduct. Accordingly, the lower courts' decisions should be affirmed.

## III. Kentucky law does not – and cannot – limit corporate veil piercing to transactions where a creditor obtained a personal guaranty from the shareholder.

Kentucky law does not require a lender to obtain the personal guarantee of the owner of the corporate borrower before it can hold the owner liable for the debt. If the lender had the owner's personal guarantee, the lender would not need to pierce the corporate veil.[8] By

[8] If a corporate debt is secured by a personal guaranty, a creditor can simply bring a personal action to enforce the guaranty and there is no need for an equitable remedy against the individual shareholder.

definition, the doctrine applies in cases where there is no personal guarantee. And if this Court were to hold that the lender's failure to obtain the owner's personal guarantee always precludes piercing the corporate veil, it would be abrogating the doctrine. Accordingly, the fact that GE did not request nor obtain Schultz's personal guarantee is not fatal to its request to pierce Intra-Med's corporate veil.[9]

Schultz's reliance upon two non-Kentucky cases *KMart Corp. v. First Hartford Realty Corp.*, 810 F. Supp. 1316 (D. Conn. 1993) and *Truckweld Equipment Co. v. Olson*, 618 P. 2d 1017 (Wash. App. 1980), to support the creation of such a requirement is misplaced. First, neither case applies Kentucky law. Second, neither case supports Schultz's position.

The Kmart case is factually distinguishable, but more importantly did not involve any holding that a personal guaranty was an affirmative defense – or a dispositive factor – in a veil-piercing determination. The *Kmart* court, instead, considered a personal guaranty as one of many equitable factors. Similarly, the *Truckweld* case involved – like *White v. Winchester Land Dev. Corp* – allegations of undercapitalization, when a personal guaranty may be more relevant. Like the *White* case, the *Truckweld* court also looked to the personal guaranty as merely one of many factors to be considered.

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[9] The Court of Appeals, based on language in the *White* case, noted that the existence of a personal guaranty is merely one factor to be considered by a court – not a dispositive factor. Op. at 9.

Schultz nonetheless erroneously contends that GE's failure to secure a personal guaranty from him, should have precluded veil piercing. But there is no such thing as a "failure to secure a guaranty" affirmative defense.

Schultz's argument – that it is essentially unfair to hold him personally liable because General Electric Company is a large corporation and should have done more to protect itself – is merely a transparent attempt to shift this Court's focus away from his own admitted misconduct.[10] The issue here is whether, given Schultz's improper personal use of Intra-Med's assets, it would be unjust or inequitable to allow Schultz to hide behind the legal fiction of Intra-Med's corporate existence to avoid liability on Intra-Med's debt to GE.

Schultz concedes, as he must, that – even if a personal guaranty were required – such a requirement would not apply where the shareholder falsified financial statements at the outset of the transaction. Here, Schultz has admitted facts demonstrating a fraudulent conveyance of corporate assets, continuing even after GE's initial judgment against the company. Schultz fails to explain how his own admitted misconduct would not also negate any requirement of a personal guaranty.

No Kentucky court has ever held that the existence of a shareholder's personal guaranty is a mandatory prerequisite to piercing a

[10] Indeed, Schultz neglects to explain how GE – even if it had "examined Intra-Med's financial records" (as another affirmative defense alleged) – should have known that Schultz would later divert substantial corporate assets to himself.

corporate veil. The lower courts' refusal to create such a requirement – thereby abrogating the veil piercing doctrine – should be affirmed.

### IV. Schultz is not entitled to a "credit" for alleged miscalculations of Schultz's actual misappropriation of and personal use of corporate assets.

Schultz is not entitled to any setoff or credit because once the court determined that the undisputed facts were sufficient to pierce the corporate veil, Schultz could have been held liable up to the full amount of Intra-Med's debt to GE. Schultz cites no authority – because there is none – for the proposition that the amount of a judgment is limited to the amount of corporate assets diverted.

Schultz nonetheless argues that even if the trial court properly pierced the corporate veil, the amount of the judgment should be reduced because he asserts the trial court took into account both the amount of Intra-Med funds used to buy and improve the Dixie Highway property and the $850,000 that Schultz received from the sale of the property. Thus, Schultz argues, his admissions of personal use of corporate property "only" amount to $923,000 and the judgment should be reduced by $227,000. Appellant's Brief at 18-20.

This Court should not engage in Schultz's mathematical gymnastics. The conduct expressly admitted by Schultz demonstrates that he misappropriated at least $923,000 in corporate assets. To avoid further litigation, GE willingly agreed to take a reduced judgment of $450,000. No setoff or further reduction is required or appropriate.

The Court of Appeals therefore properly held:

> Once the corporate veil is pierced, Mr. Schultz could have been held liable for the $4 million; therefore, a $450,000 judgment is not excessive.

Op. at 9. That decision should be affirmed.

**CONCLUSION**

Schultz now seeks to hide behind the corporate veil of Intra-Med, which he – as Intra-Med's sole shareholder – previously ignored and abused by misappropriating funds and valuable assets that should have belonged to the company. As a result of Schultz's admitted and undisputed extraordinary misconduct, GE was unable to collect its judgment against Intra-Med.

The Court of Appeals properly affirmed the circuit court's judgment in favor of GE because the misconduct expressly and specifically admitted by Schultz supported piercing the corporate veil. The lower courts' decisions should be affirmed.

Respectfully submitted,

Griffin Terry Sumner
Sheryl G. Snyder
Griffin Terry Sumner
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 589-5400

*Counsel for Appellees*