2022 IL App (2d) 200076-U
No. 2-20-0076
Order filed January 20, 2022

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT ZITELLA and RICHARD PIETRANEK,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellees,	)	
v.	)	No. 14-L-507
MIKE'S TRANSPORTATION, LLC, RESTORATION SERVICES, LLC, SUSAN MARINO, KEITH MARINO, and F. MICHAEL MALONE,	)	Honorable William I. Ferguson, Robert G. Kleeman,
Defendants-Appellants.	)	Judges, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The individual plaintiffs lacked standing to maintain actions that properly belonged to the corporate entities.

¶ 2 This case returns to us a second time. See *Zitella v. Mike's Transportation, LLC*, 2018 IL App (2d) 160702 (*Zitella I*). In *Zitella I*, defendants, Mike's Transportation, LLC, Restoration Services, LLC, Susan Marino, Keith Marino, and F. Michael Malone, attempted to file an interlocutory appeal of a nonappealable discovery order. *Id.* ¶ 17. We dismissed *Zitella I* for lack of jurisdiction. *Id.* ¶ 21. Following our resolution of *Zitella I*, the matter returned to the circuit

court of Du Page County and was litigated to completion, with the court granting summary judgment in favor of plaintiffs, Robert Zitella and Richard Pietranek, and awarding plaintiffs $64,373 in damages and $681,399 in attorney fees. Defendants appeal the judgment of the court, arguing that (1) plaintiffs lacked standing to pursue what are corporate claims arising out of an April 21, 2012, asset purchase agreement (Agreement) and other, related, instruments, (2) the trial court made erroneous rulings adverse to defendants on various of the parties' motions for summary judgment, (3) the court overlooked plaintiffs' misconduct which should have precluded their claims, and (4) the court abused its discretion awarding attorney fees to plaintiffs. Because we determine that plaintiffs lacked standing to maintain their claims, we need not consider defendants' other arguments, and we reverse.

¶ 3 I. BACKGROUND

¶ 4 In *Zitella I*, we recounted the relatively early history of this case, focusing on the events leading to the trial court's preservation order. *Id.* ¶¶ 3-9. While there is necessarily some overlap, we focus on those portions of the record pertinent to the overall dispute and to our decision.

¶ 5 The individual defendants are family: Susan and Keith Marino are married, and F. Michael Malone is Susan's brother. The Marinos owned Restoration Services, and Malone owned Mike's Transportation. Mike's Transportation was a SERVPRO franchisee and provided emergency cleaning services to clients who had experienced property damage, such as from fire, flooding, and mold. Restoration Services worked with Mike's Transportation and provided construction and reconstruction services to clients who had utilized Mike's Transportation for the emergency clean up. Both Restoration Services and Mike's Transportation operated from a Hanover Park property

owned by the Marinos. As conceived by defendants, the two businesses were complementary and together offered a full-service approach to disaster clean up and reconstruction.

¶ 6 In 2010, the Marinos and Malone both decided to exit their businesses. Accordingly, in March 2011, they listed the assets of Restoration Services and Mike's Transportation for sale; the major assets of Mike's Transportation included two SERVPRO franchise licenses. As part of the process, defendants provided financial information to a firm specializing in such transactions, and the firm created a sales brochure for the asset listings which also explained the relationship between Restoration Services and Mike's Transportation.

¶ 7 In March 2012, Zitella submitted a nonbinding letter of intent to purchase the assets. Zitella brought in Pietranek, and the parties negotiated the Agreement to purchase the assets. Apparently as part of the negotiations, plaintiffs agreed to form companies to assume ownership of the assets being sold. On April 10, 2012, R&R Boardwalk, LLC, and R&R Park Place, LLC were incorporated. On April 21, 2012, the Agreement was executed.

¶ 8 The preamble of the Agreement stated:

> "**THIS ASSET PURCHASE AGREEMENT** is dated as of April 21, 2012[,] by and among Robert Zitella and Richard Pietranek, on behalf of entities to be created (hereinafter referred to as 'Buyer'), Mike's Transportation LLC, an Illinois limited liability company ('Mike's') and Restoration Service, LLC, an Illinois limited liability company ('RS') (Mike's and RS are hereinafter collectively referred to as 'Seller'), and Keith and Susan Marino and F. Michael Malone, the Principal Members of both Mike's and RS (hereinafter referred to collectively as the 'Principal Members')."

¶ 9 The balance of the Agreement refers to "Buyer" when referring to the purchasing entities. The signature block was executed by Malone and Keith Marino in their representative capacities as manager of Mike's Transportation and Restoration Services, respectively. The three individual defendants also executed the Agreement in their individual capacities. For the buyers, the signature block provided only spaces for Zitella and Pietranek and did not otherwise specify whether they were signing individually or as representatives for the "entities to be created" (which, as it turns out, had already been created at the time of the execution).

¶ 10 The Agreement further provided that, in section 2.4, as part of the conditions of the sale and purchase of the assets, defendants would execute a non-competition, non-solicitation agreement. An unexecuted copy of the non-competition, non-solicitation agreement was included as an exhibit to the Agreement. In turn, the non-competition, non-solicitation agreement pertinently stated in its recitals:

> "**WHEREAS,** the Companies [(defined as R&R Boardwalk and R&R Park Place)] desire the Seller [(defined as Mike's Transportation and Restoration Services)] and the Principal Members [(defined as the individual defendants)], in consideration of the Companies purchasing substantially all of the Seller's assets as set forth in the [April 21, 2012, Agreement], to refrain from performing any of the Companies [*sic*] business to third parties in competition with the Companies for the period of time specified herein, from soliciting the Companies [*sic*] employees and customers, and from disclosing any confidential information Seller sold to the Companies;
>
> **WHEREAS,** the Companies would not have agreed to enter into the [April 21, 2012, Agreement] unless the Seller and the Principal Members agreed to enter into and be

> bound by all of the terms and conditions of this [non-compete, non-solicitation agreement]."

In the signature block of the non-competition, non-solicitation agreement, spaces were provided for plaintiffs to execute the non-competition, non-solicitation agreement only in their representative capacities as managers of R&R Boardwalk and R&R Park Place.

¶ 11 Likewise, in the closing documents, plaintiffs executed the various documents in their representative capacities, as managers of R&R Boardwalk and R&R Park Place. The documents also declared that the buyers under the Agreement were R&R Boardwalk and R&R Park Place; they did not reference plaintiffs, individually, as "buyers" under the Agreement. Thus, pursuant to the Agreement, on June 18, 2012, the closing documents and other requisites of the Agreement were executed, and the sale and purchase of the assets of Mike's Transportation and Restoration Services was consummated.

¶ 12 Defendants assert that they performed their duties under the Agreement, such as working with R&R Boardwalk and R&R Park Place after the closing to assist with the transition of ownership. In October 2012, R&R Boardwalk and R&R Park Place, who, pursuant to the Agreement, had been leasing space from defendants in the individual defendants' Hanover Park building, terminated the lease and moved their operations to Glendale Heights. The Marinos moved to Florida, keeping both the Hanover Park building and their Illinois residence. According to defendants, they used the Hanover Park building to store their records, asserting that the records stored there were not subject to the Agreement or the sale of the businesses. Defendants further assert that plaintiffs' companies "were financially successful and remain in business today."

Moreover, in 2013 (the year after the sale of the businesses), plaintiffs' companies increased their operating income by about 20% over defendants' 2011 operating income.

¶ 13 In April 2014, plaintiffs began discussing potential litigation arising out of the Agreement. Pietranek alleged that, two days after meeting with his attorneys, he was in the Hanover Park building at the behest of the building's caretaker when he chanced upon boxes of financial documents that were undisclosed and pertained to the asset purchase. Pietranek rifled through the files and took at least 426 pages, spirited the documents into his car, and terminated his meeting with the caretaker, all without alerting the caretaker to the fact that he had taken the documents. On May 21, 2014, plaintiffs filed their verified complaint. Vigorous litigation ensued, including the abortive interlocutory appeal of *Zitella I*, and, on May 7, 2015, plaintiffs filed their amended verified complaint. On June 25, 2015, defendants moved to dismiss, in part, on the basis that plaintiffs lacked standing. On December 2, 2015, the trial court denied defendants' motion.

¶ 14 Eventually, On May 2, 2017, defendants filed a motion for summary judgment. In this motion, defendants argued that plaintiffs lacked standing. Plaintiffs were allowed to undertake discovery to respond to defendants' motion for summary judgment. On November 27, 2018, defendants' motion for summary judgment was denied; the trial court determined that factual issues precluded the grant of summary judgment.

¶ 15 On July 24, 2019, plaintiffs filed a motion for summary judgment on the amended verified complaint. Plaintiffs argued that, as alleged in the amended verified complaint, defendants breached the Agreement and made fraudulent representations by understating expenses and overstating earnings which caused plaintiffs to pay more for the assets than they were worth. Plaintiffs requested damages of $64,737.75 and attorney fees.

¶ 16 On January 28, 2019, defendants filed a motion for partial summary judgment on the fraudulent misrepresentation count (Count II) of the amended complaint. Defendants challenged whether plaintiffs established the elements of the claim as well as the materiality of the claim, arguing that roughly $20,000 out of a $3 million transaction is not material. On June 10, 2019, the trial court granted plaintiffs' motion for summary judgment and granted leave to plaintiffs to file a petition for attorney fees.

¶ 17 Plaintiffs filed their fee petition, and, on September 19, 2019, the trial court granted plaintiffs' fee petition in the amount of $639,963.83. Defendants moved for reconsideration of the summary judgment and fee petition orders, and, on November 26, 2019, the trial court denied the motion for reconsideration. Plaintiffs then filed a second fee petition, to cover the fees incurred after the grant of summary judgment. On January 16, 2020, the trial court granted plaintiff's fee petition in the amount of $41,434.79. It also denied defendant's pending January 2019 motion for partial summary judgment.

¶ 18 On January 27, 2020, the trial court "affirmed" and consolidated the orders on the various motions for summary judgment and the fee petitions. Specifically, the court awarded plaintiffs an aggregate $746,136.37, representing both damages and their full amount of attorney fees and costs incurred in this matter. The court also included Illinois Supreme Court Rule 304(a) (eff. Mar. 16, 2016) language to make the January 27 order immediately appealable. Defendants timely appeal.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendants argue that plaintiffs lacked standing to pursue the claims for breach of contract and fraudulent misrepresentation. Defendants also raise other arguments but, because we find the standing issue to be dispositive, we address it first.

¶ 21 A. Payment of Judgment

¶ 22 Before we address the issue of plaintiffs' standing, we must first consider plaintiffs' argument that, by paying the judgment, defendants have waived the basis of their appeal, as resolution of this issue is potentially dispositive. Plaintiffs argue that, on February 28, 2020, defendants paid in full the outstanding judgment. Relying on the principle that a voluntary payment of a judgment waives a party's right to appeal (*Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 25), plaintiffs assert that defendants' payment of the judgment was voluntary. We disagree.

¶ 23 Nearly 170 years ago, our supreme court determined that a litigant who pays a civil judgment does not thereby lose the right to appeal from that judgment. *Richeson v. Ryan*, 14 Ill. 74, 74 (1852). Indeed, "[p]ayment of a judgment in obedience to a decree does not affect the right to [appeal] and does not operate as a [waiver of the appeal] even if there is an agreement that a decree shall be executed as entered." *Jacksonville Hotel Building Corp. v. Dunlap Hotel Co.*, 350 Ill. 451, 458 (1932). In other words, payment pursuant to a judgment that obligates the judgment debtor to pay it is compulsory. *Id.* This principle is clarified by considering the other side of the coin. In *County of Cook v, Malysa*, 39 Ill. 2d 376, 379 (1968), the court considered whether the payment of an eminent domain judgment was voluntary or compulsory. The court held that the eminent domain judgment did not compel the condemnor to pay it; rather, it set the value that must be paid to acquire title. *Id.* Thus, because there was no obligation to pay, any payment of the eminent domain judgment was voluntary, unlike the general rule expressed by *Richeson*. *Id.*

¶ 24 With these principles in mind, we conclude that defendants' payment was compulsory and does not serve to waive their right to appeal. On January 27, 2020, the trial court entered its final

judgment in this matter. Defendants filed a timely notice of appeal. Pursuant to the judgment, on February 28, 2020, (after, we note, plaintiffs had initiated collection on the judgment by filing a citation to discover assets) defendants paid the judgment. Because the January 27, 2020, judgment obligated defendants to pay it, this case follows the general rule set forth in *Richeson* and *Jacksonville Hotel*, and we hold that defendants' payment of the January 27, 2020, judgment was compulsory, not voluntary.

¶ 25 Plaintiffs argue that "something more" than the naked judgment is required to render a payment compulsory, relying on *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 28 (citations to discover assets had been issued), *In re Marriage of Sobieski*, 2013 IL App (2d) 111146, ¶ 33 (no collection on the judgment had been started, but the wife "could have" executed the judgment), and *Long v. Tranka*, 146 Ill. App. 3d 428, 431 (1986) (no collection on the judgment had been started, and the judgment was paid in full). Despite plaintiffs' characterizations of these cases, only *Abbas* remotely supports their argument that something more than a judgment is needed to render a payment pursuant to that judgment compulsory. In both *Marriage of Sobieski* and *Long*, there was nothing more—only the judgment. Moreover, in applying their "something more" principle, plaintiffs admit that they had indeed begun the collection process by issuing a citation to discover assets. Thus, according to plaintiffs' own contentions, defendants' payment of the judgment was compulsory because plaintiffs had initiated the collection process—the "something more" (although we reject the notion that anything more than a judgment that obligates the judgment debtor to pay it is necessary for a payment of that judgment to be deemed compulsory).

¶ 26 Plaintiffs further suggest that, in order to preserve their right to appeal, defendants were required to post security pursuant to Illinois Supreme Court Rule 305(a) (eff. July 1, 2017). This contention is flatly incorrect. Rule 305 is concerned with obtaining a stay of judgment pending appeal, not perfecting an appeal. *Id.* In fact, requiring security or an appeal bond in order to prosecute an appeal is unconstitutional. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 355-56 (1972). Here, defendants could have posted security had they wanted to stay execution on the judgment, or they could have paid the judgment to prevent the accrual of further interest. In either case, defendants' right to appeal the judgment would have been unaffected. See *id.* (the right to an appeal is a matter distinct from the right to a stay of the judgment during the pendency of an appeal). We reject plaintiffs' contention. Accordingly, defendants have not waived their right to appeal the January 27, 2020, judgment. We now turn to the dispositive issue of plaintiffs' standing.

¶ 27 B. Plaintiffs' Standing

¶ 28 Defendants argue that plaintiffs lacked standing to maintain their action. Under the standing doctrine, courts limit their consideration of disputes to those that are truly adversarial and can be resolved by a judicial decision. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 488 (1988). In other words, the standing doctrine ensures that only parties with a real interest in the outcome of the dispute will present their issues. *Powell v. Dean Foods Co.*, 2012 IL 111714, ¶ 35. To demonstrate standing, a party must show only some injury in fact to a legally cognizable interest. *Greer*, 122 Ill. 2d at 492. The issue of standing presents a legal issue subject to *de novo* review. *Powell*, 2012 IL 111714, ¶ 35.

¶ 29 Generally, only a party to a contract or one in privity with a party may sue on a contract. *Landau, Omahana & Kopka, Ltd. v. Franciscan Sisters Health Care Corp.*, 323 Ill. App. 3d 487,

493 (2001). Defendants argue that plaintiffs were not parties to the Agreement. Defendants conclude that, because plaintiffs were not parties or in privity with parties to the Agreement, plaintiffs lack standing to maintain a cause of action arising out of the Agreement.

¶ 30 Plaintiffs are quick to point out that it is the Agreement, and only the Agreement, that is at issue in this case. While this may be true, for purposes of standing, we must nevertheless discern the intent of the Agreement as well as the parties to the Agreement. With this understanding, we turn to the language of the Agreement.

¶ 31 Our primary objective in considering a contract is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The language of the contract, given its plain and ordinary meaning, is the best indication of that intent. *Id.* at 233. We do not focus on a single clause or provision of the contract, rather, we consider the contract as a whole, viewing each part in light of the others to discern the parties' intent. *Id.* In this case, the issue is not so much the parties' intent as the parties' identity, but the principles of contract interpretation will also assist in discerning the parties to the contract.

¶ 32 As noted above, the preamble to the Agreement defined the "Buyer" as "[plaintiffs], on behalf of entities to be created." Section 2.4 of the Agreement specified that defendants would execute a non-competition, non-solicitation agreement. The non-competition, non-solicitation agreement was attached to the Agreement as an exhibit and defined the parties as R&R Boardwalk and R&R Park Place and defendants (both the individual and the corporate defendants). The non-competition, non-solicitation agreement also provided that plaintiffs would execute it in their representative capacities as managers of R&R Boardwalk and R&R Park Place.

¶ 33 The Agreement provided that the parties would conduct a formal closing to consummate the purchase and sale of the assets identified in the Agreement. To that end, on June 12, 2018, the parties completed the closing contemplated in the Agreement. In effecting the closing, the parties signed a number of documents. For example, Pietranek executed a "Closing Certificate" in his role as "Manager" of R&R Boardwalk; likewise, Zitella executed a "Closing Certificate" in his role as "Manager" of R&R Park Place. In the closing certificates, plaintiffs acknowledged that each "Buyer," as defined in the Agreement, namely each plaintiff on behalf of the entity to be formed (and which had been formed before the Agreement was executed), had performed its duties and that plaintiffs were properly authorized to execute the closing documents as a "Manager" of each buyer. The other closing documents included the consents of the manager of the R&R Boardwalk and R&R Park Place, bills of sale, assignments of contracts, closing statements, and State forms including bulk sales releases, requests for clearances from the Illinois Department of Employment Security, and notices of the sales to the Illinois Department of Revenue.

¶ 34 The closing documents do not by themselves resolve who are the parties to the Agreement; we are missing an interpretive piece to our puzzle. It is a well-settled principle that, where two or more instruments are executed by the same contracting parties in the course of the same transaction, the instruments will be considered together and construed with reference to each other because, together, they constitute a single contract. *Mt. Hawley Insurance Co. v. Robinette Demolition, Inc.*, 2013 IL App (1st) 112847, ¶ 44. This principle extends to instruments that were not executed at the same time but were still executed as parts of the same transaction. *Id.* Here, the Agreement specifically referred to the closing and other documents to be executed in order to consummate the sale and purchase of the assets. Likewise, the closing documents referred to the

Agreement. It is clear that the closing documents and the Agreement all pertain to the same transaction and were all executed in furtherance of the sale of the assets comprising defendants' businesses. Accordingly, we consider all the instruments together—the Agreement and the closing documents. *Id.*

¶ 35 If we construe all the related instruments together, as part of a single transaction, then the intent behind the Agreement comes into clear relief. The preamble of the Agreement defined "Buyer" as "[plaintiffs], on behalf of entities to be created." Considering the closing documents, it becomes clear that plaintiffs were not signing the Agreement in their individual capacity, notwithstanding the signature block of the Agreement, but were signing it in a representative capacity on behalf of the entities they created, namely, R&R Boardwalk and R&R Park Place. We further note that, at the time the Agreement was executed, April 21, 2012, the entities, having been incorporated on April 10, 2012, were in existence, notwithstanding their omission from the Agreement. Further, the closing documents were uniformly executed by plaintiffs in their representative capacities to consummate the sale and purchase of the assets and defendants' businesses.

¶ 36 Plaintiffs dispute our determination that the Agreement contemplated that they were signing it in their representative capacities on behalf of R&R Boardwalk and R&R Park Place. Relying on *Carollo v. Irwin*, 2011 IL App (1st) 102765, ¶ 50 (superseded by P.A. 101-553 (eff. Jan. 1, 2020), amending 805 ILCS 180/10-10 (West 2020)), plaintiffs argue that a corporate officer who signs his name on a contract without indicating that he or she is acting in a representative capacity is individually liable on the contract. This contractual liability is distinguished when an agent signs a document and indicates that he or she is acting in his or her corporate role, with the

result that the agent will not be held to be personally liable on the contract. *Id.* ¶ 51. Plaintiffs argue that, based on *Carollo* and previous cases, they are individually liable under the Agreement and, therefore, have standing to enforce the Agreement.

¶ 37 A close look at *Carollo* and the other cases cited by plaintiffs rebuts their contention. Plaintiffs cite *Carollo* for the proposition that "[a] corporate officer who signs his name on a contract, without more, is individually liable on the contract." *Id.* ¶ 50. However, plaintiffs ignore the sentence preceding their quoted passage: "The common law rule is that where an agent signs [a] contract in his own name and the contract nowhere mentions the existence of agency or the identity of the principal, the agent is personally liable." *Id.* ¶ 50. *Carollo* provides the rules regarding imposing personal liability on a corporate officer who signs a contract in an individual capacity and not in a representative or official capacity. In our case, of course, the issue is not plaintiffs' liability under the contract, but plaintiffs right and ability to enforce the contract, and *Carollo* does not speak to this issue whatsoever. Moreover, because the Agreement expressly states that plaintiffs are acting "on behalf of entities to be created," and the closing documents are all signed by plaintiffs on behalf of the corporate entities, there are clear indications that plaintiffs signed the Agreement on behalf of the corporate entities. In other words, the Agreement clearly indicated that plaintiffs were acting "on behalf of entities to be created," so this is not the case where "the contract nowhere mentions the existence of agency." *Id.* Because the Agreement indicates plaintiffs' agency, applying the rules in *Carollo* results in the determination that plaintiffs cannot be personally liable despite signing the Agreement without indicating, next to their signatures, that they were officers of the corporate entities.

¶ 38 *Carollo* is also factually distinguishable. In that case, the plaintiff was to get $30,000 if a property was not sold by December 31, 2008. *Id.* ¶ 1. The defendant attempted to sell the property to an unformed limited liability company, however, the company was never formed, and the sale was never consummated. *Id.* The issues on appeal were whether there was a sale (*id.* ¶ 15), and whether the contract was enforceable even though the company was never formed (*id.* ¶ 31). Specifically, the defendants argued that the promoter of the unformed limited liability company was personally liable on the purchase agreement, so a sale of the property occurred. *Id.* ¶ 48. However, the promoter had signed the purchase agreement on behalf of the unformed limited liability company, and the court held that the promoter was shielded from individual liability by virtue of the then-effective Limited Liability Company Act (805 ILCS 180/1-1 *et seq.* (West 1996)). *Id.* ¶ 61. In our case, the issue does not involve holding plaintiffs individually liable under the Agreement, but whether plaintiffs, individually, have standing to enforce the Agreement. In addition, unlike *Carollo*, not only were the corporate entities described in the Agreement actually incorporated, they also were already in existence at the time the Agreement was executed. For these reasons, *Carollo* is factually distinguishable and provides little guidance beyond providing general rules.

¶ 39 Defendants also rely on *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 62 (2005), *84 Lumber Co. v. Denni Construction Co., Inc.*, 212 Ill. App. 3d 441, 443 (1991), and *Zella Wahnon & Associates v. Bassman*, 79 Ill. App. 3d 719, 724 (1979), all for the proposition that a corporate officer who signs his or her name without indicating it is on behalf of the corporate entity is individually liable. This proposition is unhelpful to plaintiffs because the Agreement and closing documents, all properly considered together as they define the transaction between the

parties (*Mt. Hawley Insurance Co.*, 2013 IL App (1st) 112847, ¶ 44), indicate that plaintiffs were not executing the Agreement as individuals, but as representatives of the corporate entities. Thus, *Hadyeh*, *84 Lumber Co.*, and *Bassman* are all factually distinguishable because there is clear evidence in the various instruments under review here (and particularly in the Agreement itself) that plaintiffs were signing on behalf of R&R Boardwalk and R&R Park Place and not as individuals. Accordingly, we conclude that plaintiffs executed the Agreement not as individuals, but in their capacity as representatives for R&R Boardwalk and R&R Park Place.

¶ 40 In the amended complaint in this matter, plaintiffs sued as individuals to enforce the Agreement. Neither R&R Boardwalk nor R&R Park Place appear as parties in this action. However, as we have determined, the parties to the Agreement are defendants as sellers and R&R Boardwalk and R&R Park Place as buyers. Plaintiffs do not allege that they have been assigned or otherwise acceded to the interests of R&R Boardwalk or R&R Park Place in the Agreement. Instead, plaintiffs simply allege that they executed the Agreement individually. Above, we rejected the argument that plaintiffs executed the Agreement as individuals; instead, we determined that plaintiffs executed the Agreement as representatives of R&R Boardwalk and R&R Park Place. Plaintiffs do not have standing to maintain an action arising from the Agreement because they are not parties to the Agreement. *Landau, Omahana*, 323 Ill. App. 3d at 493.

¶ 41 We next consider whether plaintiffs have standing to enforce the Agreement by virtue of their status as shareholders of R&R Boardwalk and R&R Park Place. Defendants argue that plaintiffs do not have standing to sue individually by virtue of being the sole shareholders in R&R Boardwalk or R&R Park Place. In support of this argument, defendants cite the well-settled and longstanding principle that a corporate shareholder lacks standing to sue in their individual

capacity for an injury incurred by the corporate entity. *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1054 (2005) (citing 13 Ill. L. & Prac. *Corporations* § 159, at 400 (2000)). Defendants argue that *Perfection Carpet, Inc. v. State Farm Fire & Casualty Co.*, 259 Ill. App. 3d 21, 26 (1994), is analogous to the case before us. There, individual plaintiffs attempted to maintain actions individually, either as a director, officer, shareholder, or employee of the corporation. However, the status as director, officer, shareholder, or employee did not create a relationship with the defendant insurance company, so there was no privity of contract by which the individuals could sue to recover for an alleged wrong to the corporation. *Id.*; see also *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1103 (W.D. Wash. 2011) (individual plaintiffs/shareholders lacked standing in absence of any special duty owed to the individual plaintiffs or evidence of any injuries separate and distinct from those experienced by the corporation), *Schiff v. MAO, Inc.*, 31 So. 3d 650, 652 (Miss. Ct. App. 2010) (sole shareholder and officer of corporate entity lacked standing where he had signed a contract between the corporate entity and defendant in a representative capacity and no special duty was owed to the individual; the action belonged to the corporate entity). Defendants conclude from these cases that plaintiffs, even as shareholders, do not have standing to maintain the causes of action here.

¶ 42 Surprisingly, in responding to defendants' shareholder-standing argument, plaintiffs do not address the cases cited by defendants, *Perfection Carpet*, *Aventa Learning*, and *Schiff*. Instead, plaintiffs refer only to the cases from defendants' motion for summary judgment. According to plaintiffs, the cases cited by defendants in their motion for summary judgment actually support plaintiffs' argument that they have standing to bring this lawsuit. For example, in plaintiffs' analysis of *Mann v. Kemper Financial Cos., Inc.*, 247 Ill. App. 3d 966, 975 (1992) (citing

Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 732 (3d Cir. 1970)), plaintiffs contend that the shareholder standing rule applies to preclude the shareholder's individual standing where the injury to the shareholder is the indirect harm which consists in the decline in value of his or her shares in the corporation resulting from the impairment of corporate assets. This is nothing more than a vanilla statement of the shareholder standing rule. It is unclear from plaintiffs' argument what, beyond the claimed injury to the corporate entities caused by the overpayment in purchase price of the assets, they are claiming in this case, or how *Mann* supports their claim of standing.

¶ 43 Likewise, plaintiffs cite *Pearson v. Ford Motor Co.*, 68 F.3d 1301, 1303 (11th Cir. 1995), for little discernable effect. In *Pearson*, the plaintiff was determined not to be a party to the agreement at issue, so the plaintiff lacked standing. *Id.* The court distinguished its result from that in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971), because even though the plaintiffs were not signatories of the franchise agreement, they were " 'inextricably woven into' " that franchise agreement. *Id.* While plaintiffs provide no further analysis of *Pearson*, we presume that they are suggesting that, like the case *Pearson* distinguished, they are " 'inextricably woven into' " the Agreement here, so that *Pearson*, which plainly stands for the proposition that a nonparty to a contract lacks standing to raise a claim under the contract, would also be distinguishable on that same basis. Here, however, plaintiffs are not only not parties to the Agreement, R&R Boardwalk and R&R Park Place are the only parties to the Agreement and any action arising from the Agreement belongs to R&R Boardwalk and R&R Park Place. That plaintiffs are identified by name in the Agreement and signed the agreement without divulging their representative capacity does not render them "inextricably woven into" the Agreement. To the contrary, the Agreement and the closing documents indicate that plaintiffs are not parties to

the agreement, but only representatives of the corporate entities who are parties to the agreement. Under *Pearson*, plaintiffs are not inextricably woven into the Agreement, so the same result obtains: plaintiffs, as nonparties, lack standing. Plaintiffs' reliance on *Pearson* is thus unavailing because the circumstances and arguments here are factually distinct from those in *Pearson*.

¶ 44 Plaintiffs also cite *Cashman v. Coopers & Lybrand*, 251 Ill. App. 3d 730, 733 (1993) (quoting *Franchise Tax Board v. Alcon Aluminum Ltd.*, 493 U.S. 331, 336 (1990)), apparently for the proposition that, while the shareholder standing rule prohibits shareholders from initiating actions to enforce the corporate entity's rights, there exists " 'an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporations' rights are also implicated.' " Once again, plaintiffs provide no specific and express analysis that relates this principle to the facts here. We presume that plaintiffs are suggesting that they have " 'a direct, personal interest' " in this action so as to fall within the exception identified in *Cashman*. *Id.* However, plaintiffs alleged in their amended verified complaint that they were parties to the agreement, and it is this status, according to plaintiffs, that gives them the direct, personal interest in the action. We have determined above, however, that plaintiffs, individually, are not parties to the Agreement. Thus, the shareholder standing rule applies with no exceptions, and plaintiffs lack standing.

¶ 45 Plaintiffs attempt to salvage their argument that responds only to the cases cited below in support of defendants' motion for summary judgment, by noting that, because they, individually, paid the purchase price for the assets in the Agreement, they were woven into the fiber of the Agreement and possess a "direct, personal interest" in the causes of action in this case. Setting aside the wholly conclusory nature of this argument, the closing documents rebut plaintiffs'

contention that they purchased the assets. The closing documents indicate that R&R Boardwalk and R&R Park Place purchased the assets under the Agreement. Specifically, the closing documents include a closing certificate, a consent of manager, a bill of sale, an assignment and assumption of contracts, a closing statement, and various State forms, all of which identify the corporate entities (R&R Boardwalk and R&R Park Place) as the purchasers of the assets. Because the closing documents are properly considered along with the Agreement (*Mt. Hawley Insurance*, 2013 IL App (1st) 112847, ¶ 44), and because the closing documents indicate that the corporate entities are the purchasers of the assets (and the Agreement contemplates that plaintiffs were acting "on behalf of [corporate entities]"), plaintiffs' contention is rebutted by the record. Even accepting that plaintiffs provided the purchase funds, the Agreement and the closing documents show that the purchase funds were provided on behalf of the corporate entities, and the corporate entities were the purchasers as defined within the Agreement and the closing documents.

¶ 46 Plaintiffs' contention, at root, seems to be a request to ignore the corporate formalities established when plaintiffs incorporated R&R Boardwalk and R&R Park Place, as well as the terms of the Agreement and closing documents identifying the corporate entities as the purchasers of the assets. In other words, plaintiffs request that we ignore the corporate entities and allow plaintiffs to usurp the right of the corporate entities to enforce the terms of the Agreement. A corporate entity is a separate and distinct legal entity from the entity's shareholders, directors, officers, and employees. *Flores v. Westmont Engineering Co.*, 2021 IL App (1st) 190379, ¶ 29. The corporate veil of limited personal liability may be pierced where there is a substantial showing that the corporate entity is an alter ego or conduit of another individual or entity, but courts are reluctant to pierce the corporate veil. *Id.* Here, plaintiffs essentially request that the corporate veil

be pierced because they, as the corporate organizers, supplied the funds to the corporate entities to allow the corporate entities to be the purchasers of the assets as demonstrated in the closing documents and the Agreement. In other words, plaintiffs "seek the best of both words: limited liability for debts incurred in the corporate name, and direct compensation for [the corporate entity's] losses. That cushy position is not one the law affords. Investors who created the corporate form cannot rend the veil they wove." *Kagan v. Edison Brothers Stores, Inc.*, 907 F.2d 690,693 (7th Cir. 1990). Plaintiffs offer no evidence in the record to demonstrate that the corporate entities are a sham or a personal alter ego, so that the corporate form, that they themselves created and utilized to be the purchasers of the assets, should be dispensed with to allow plaintiffs, individually, to take over the cause of action properly belonging to the corporate entities. We reject plaintiffs' contention.

¶ 47 Plaintiffs dispute our conclusion that the Agreement and closing documents demonstrate that R&R Boardwalk and R&R Park Place are the parties to the asset purchase arrangement. Plaintiffs argue that the exhibit to the Agreement containing the non-competition, non-solicitation agreement contains the only mention of R&R Boardwalk and R&R Park Place in the Agreement, which otherwise indicates plaintiffs, individually, are the "buyers" under the Agreement. We disagree. As we have discussed above, the Agreement, defining the "Buyer" as "[plaintiffs], on behalf of entities to be created," along with the closing documents, sufficiently demonstrates that plaintiffs, individually, are not parties to the Agreement.

¶ 48 Plaintiffs also note that Zitella, individually, is designated as the person to receive notices for the buyer pursuant to the Agreement. In addition, Zitella is not identified as a representative for any of the corporate entities, and his home address is listed. Plaintiffs are correct that Zitella,

apparently individually, is identified as the buyers' contact for purposes of any notices required under the Agreement. This fact, however, does not outweigh the clear definition of "Buyer" in the Agreement as "[plaintiffs], on behalf of entities to be created." Moreover, the Agreement omits the entities despite the incorporation of R&R Boardwalk and R&R Park Place almost two weeks before the Agreement was executed, yet the closing documents all consistently identify R&R Boardwalk and R&R Park Place as the buyers under the Agreement. Considering all of the facts, including Zitella's individual designation as the person to receive notices on behalf of the "Buyer," does not change our determination: R&R Boardwalk and R&R Park Place, not plaintiffs, are the parties to the Agreement.

¶ 49 Plaintiffs also note that defendants indicated their representative capacity in section 5 of the Agreement, providing the sellers' warranties, but the parallel provision, section 6 of the Agreement, providing the buyers' warranties, does not indicate any sort of corporate role for the individual plaintiffs. Plaintiffs conclude from this that the Agreement deems them, individually, to be the "buyer." We disagree. The Agreement places obligation on the individual defendants and the corporate defendants. The Agreement did not need to differentiate among plaintiffs, individually, and the corporate entities because the agreement places obligations only on the parties to the agreement, namely R&R Boardwalk and R&R Park Place. Thus, we reject plaintiffs' contention that "the [Agreement] clearly reflects that Zitella and Pietranek were the buyers."

¶ 50 We conclude, therefore, that plaintiffs lack standing to enforce the agreement. This conclusion obviates our need to consider defendants' remaining arguments. Accordingly, we reverse the trial court's denial of defendants' motion for summary judgment alleging lack of

standing. Because the trial court should have held that plaintiffs lacked standing, we vacate its judgments thereafter and dismiss the action below for lack of standing.

¶ 51 III. CONCLUSION

¶ 52 For the foregoing reasons, we reverse the trial court's judgment on defendants' motion for summary judgment based on lack of standing and dismiss the cause.

¶ 53 Reversed and cause dismissed.