COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1929 **Cir. Ct. No. 2004CV148**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CITY OF HILLSBORO,

PLAINTIFF-APPELLANT,

V.

CLETUS E. HARDY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. The City of Hillsboro appeals from an order dismissing its claim for unpaid taxes against Cletus Hardy. The issues relate to piercing the corporate veil and a statutory claim. We affirm.

¶2 The City's amended complaint alleged that Hardy Construction Company, Inc., failed to pay personal property taxes for years 1999 through 2003. The City alleged that Hardy exercised control over the corporation, that he used his control to avoid payment of property taxes, and that it would be inequitable to allow him to avoid payment of taxes by use of this "corporate fiction." It also sought recovery under a statute that relates to claims against shareholders who have received distribution of a dissolved corporation's assets.

¶3 After a trial to the court, the court rejected both theories. The court concluded that "[t]he facts are not in dispute." As for the City's attempt to "pierce the corporate veil," the court concluded that Hardy "presents as a grandiose individual ill-suited for the world of small business," but "grandiosity and ineptitude in business do not equal the kind of quasi-criminal fraudulent intent which must be demonstrated to pierce the corporate veil."

¶4 The City argues that the above quote about "quasi-criminal fraudulent intent" shows that the court erroneously exercised its discretion by applying the wrong legal standard. The City regards this quote as a misstatement of one of the necessary elements of a corporate-veil claim, namely, that the defendant's control of the corporation "must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights." ***Consumer's Co-op v. Olsen***, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988).

¶5 While it is clear that the circuit court's formulation was not an exact quotation of this case law, the City does not explain precisely what legal difference it believes exists between the two versions, or why that difference matters in this case. As Hardy points out, both parties' trial briefs relied on the

same case law quoted above, and it was not disputed that this was the correct law to be applied to the City's claim. Under these circumstances, we accept the court's formulation as a shorthand version or summary of the correct standard. We do not believe this passage is properly read as indicating that the court actually applied some other standard to the facts before it.

¶6 The City next argues that the court failed to specify the facts on which it based its discretionary determination against piercing the corporate veil. We regard the court's findings as sufficient. First, the court stated that the facts were undisputed, which we take to be a statement about the historical facts. Further, it is clear from the court's decision, as quoted above, that the court found Hardy to be merely grandiose and ill-suited to business, rather than having the requisite positive intent to commit acts that satisfy the standard for piercing the veil. To the extent the City is arguing that this finding was clearly erroneous, its argument does not specify precisely why the finding is clearly erroneous. The City simply recites the evidence that might support a contrary finding.

¶7 We turn next to the City's other theory, based on WIS. STAT. § 180.1408(2) (2005-06),[1] which provides:

> If the dissolved corporation's assets have been distributed in liquidation, a claim not barred under s. 180.1406 or 180.1407 may be enforced against a shareholder of the dissolved corporation to the extent of the shareholder's proportionate share of the claim or the corporate assets distributed to him or her in liquidation, whichever is less, but a shareholder's total liability for all claims under this section may not exceed the total amount of assets distributed to him or her. As computed for

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> purposes of this subsection, the shareholder's proportionate share of the claim shall reflect the preferences, limitations and relative rights of the class or classes of shares owned by the shareholder as well as the number of shares owned, and shall be equal to the amount by which payment of the claim from the assets of the corporation before dissolution would have reduced the total amount of assets to be distributed to the shareholder upon dissolution.

The City's theory of liability here is that Hardy received, in his role as a shareholder, distributions of certain corporate assets from the Hardy Construction Corporation as it dissolved. We address the assets individually.

¶8 The City argues that Hardy received net proceeds from an auction of the corporation's personal property. Specifically, it argues that Hardy received $3,000 in cash and a money order for approximately $11,000. At trial, Hardy testified that he used the former amount to pay workers at the auction for their services, and the parties stipulated that the latter amount was used to repay money the corporation borrowed from Hardy's brother. The City argues that, regardless of what Hardy decided to do with these funds after he received them, they were, in fact, corporate assets disbursed to him in liquidation.

¶9 We reject this argument because, in light of the use to which the funds were found to have been put, these funds were not disbursed to Hardy *in his role as shareholder*, which are the kind of funds to which WIS. STAT. § 180.1408(2) is directed. Rather, these funds were given to Hardy, and spent by Hardy, in his role as a corporate officer involved in implementing the dissolution of the corporation. The payments Hardy made with these funds appear to be nothing more than payment of financial obligations owed by the corporation.

¶10 The City argues that Hardy received a 1972 Mack truck and a 1972 GMC Sierra truck. The City asserts that the circuit court "clearly did not believe"

Hardy's assertions that these trucks were always his own property, not the corporation's. We do not agree with this description of the circuit court's decision. The circuit court at one point wrote that "some trucks of very modest value" (presumably these trucks) "may have gone into Hardy's next attempt at the construction business." However, as we read the court's decision and ultimate conclusion, the court implicitly found either that these trucks were not corporate property, or that the value of them was de minimis.

¶11 The City argues that Hardy received a distribution of certain Hardy Construction corporate real estate. This property had continued to be held in the corporation's name even after the formal dissolution, but was later transferred by Hardy at no cost from Hardy Construction to another corporation he controlled. The City asserts that the other corporation then sold the property, and that Hardy used those funds to pay off a Hardy Construction bank loan and Hardy Construction obligations to the Internal Revenue Service. The City argues that, because the corporation itself had already been dissolved, leaving only Hardy as personally responsible for those obligations, this transfer of the real estate was, in effect, a distribution of a corporate asset to shareholder Hardy as part of the liquidation, who then sold it to reduce his own personal obligations. As a result, according to the City, under WIS. STAT. § 180.1408(2) Hardy can be held responsible for the corporation's tax obligations to the City, up to the amount of the real estate value, which would fully cover the tax claim in this case.

¶12 This issue does not appear to have been expressly decided in the circuit court's decision. However, it was argued in the parties' trial briefs, and therefore we will address it. One of the essential legal propositions in the City's argument is that the dissolution of a corporation extinguishes the corporation's obligation to pay debts or other obligations, leaving only individual guarantors

responsible. The City cites no legal authority for this proposition, and does not make any specific argument in support of it, beyond simply asserting that it is so. We have not attempted exhaustive research on the question, but the argument appears inconsistent with a readily found statute, specifically WIS. STAT. § 180.1405, which provides in part:

> (1) A dissolved corporation continues its corporate existence but may not carry on any business except that which is appropriate to wind up and liquidate its business and affairs including the following:
>
> ….
>
> (c) Discharging or making provision for discharging its liabilities.

¶13 Based on the facts of this case, it appears that Hardy's transfer of the real estate to his other corporation, and the subsequent sale of that real estate and use of the proceeds to pay Hardy Construction's corporate obligations, were acts that Hardy performed as a corporate officer discharging or making provision for discharging corporate liabilities under WIS. STAT. § 180.1405(1)(c). Accordingly, we conclude that the transfer of the real estate was not a distribution made to Hardy as a shareholder that would allow the City to pursue a claim under WIS. STAT. § 180.1408(2).

¶14 Hardy moves for an award of attorney fees under WIS. STAT. RULE 809.25(3) on the ground that this appeal was frivolous because the City knew or should have known that the appeal was without any reasonable basis in law or equity. We deny the motion. Not all of the arguments discussed above are frivolous. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.