

IN THE COURT OF APPEALS OF IOWA

No. 9-416 / 08-0811
Filed October 7, 2009

**SPECTRUM PROSTHETICS AND
ORTHOTICS, INC., TODD A.
SCHWEIZER, MARK A. MCDONALD
and JEFFREY J. BRUCE,**
Plaintiffs-Appellees,

vs.

**BACA CORPORATION, ANDREW
SHIRLEY, RHODA SHIRLEY,
ELIZABETH J. ANDERSON, and
AIMEE C. GRENSTEINER**
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Appellant appeals the district court's inclusion of a jury instruction of piercing the corporate veil. **AFFIRMED.**

Kathryn Barnhill of Barnhill & Associates, West Des Moines, for appellants.

Michael Lewis of Lewis Law Firm, Cambridge, for appellees.

Heard by Vogel, P.J., and Potterfield, J. and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

BACA Corporation (Corporation), Andrew Shirley, Rhoda Shirley, Elizabeth Anderson, and Aimee Grensteiner (collectively the BACA defendants) appeal the district court's inclusion of jury instructions of piercing the corporate veil. The BACA defendants claim that Spectrum Prosthetics and Orthotics, Inc., with principals, Todd Schweitzer, Mark McDonald, and Jeffrey Bruce, (Spectrum) made no claim or allegation in a pleading or responsive discovery that would have alerted the BACA defendants to the issue and eliminated unfair surprise at trial. Because we agree with the district court that the BACA defendants were on notice as to Spectrum's theory of recovery, we affirm.¹

I. Background Facts and Proceedings

In January 2003, the Corporation leased commercial office space to Spectrum. Spectrum asserted that after signing the lease, the property had significant and ongoing problems, including a leaking roof, and need for a new heating and cooling system. The poor maintenance by the Corporation created inadequate working conditions for Spectrum employees. Unable to work out their differences, the animosity between the parties escalated. The Corporation filed a small claims action against Spectrum in January 2007; Spectrum served a notice of termination of lease on the Corporation on February 1; and the Corporation changed all the locks on the leased premises on February 26. In response, Spectrum sought immediate injunctive relief against the Corporation, Andrew Shirley, and Rhoda Shirley. Spectrum asserted that the manager, Rhoda Shirley, entered the leased premises at "odd times of the day and night, without

¹ The named defendants are Rhoda Shirley and her three children.

notice, without permission, and while in the premises turned down the thermostat to the premises.” On February 27, temporary injunctive relief was granted, giving Spectrum possession of the leased premises and imposing a no contact order between the Spectrum plaintiffs and Rhoda Shirley. The Corporation asserted a counterclaim on March 20, alleging breach of contract and various other claims against Spectrum. After being granted leave to amend its petition, Spectrum added Elizabeth Anderson and Aimee Grensteiner as defendants and alleged additional claims against all of the BACA defendants. In response, Elizabeth Anderson and Aimee Grensteiner each filed a motion to dismiss, asserting that Spectrum did not allege facts that would pierce the corporate veil or impose personal liability on either of them. Both motions were reserved for consideration until trial.

At trial, the district court instructed the jury on the definition of piercing the corporate veil in jury instruction twenty, and in instruction twenty-one instructed the jury:

Plaintiffs allege that BACA Corporation was a sham corporation and that the acts or omissions of the directors, shareholders, or officers make them personally liable to the plaintiffs. To find personal liability against the officers, directors, or shareholders of the corporation, the plaintiffs must pierce the corporate veil. To pierce the corporate veil the plaintiff must prove all of the following propositions:

1. A defendant is a shareholder, officer or director of BACA Corporation.
2. BACA Corporation is indebted to the plaintiffs as a result of its breach of contract and/or abuse of process.
3. The defendants, Andrew Shirley, Elizabeth J. Anderson, Rhoda Shirley, and Aimee C. Grensteiner have abused the corporate privilege.
4. The amount owed by the corporation to the plaintiff.

If the plaintiff has failed to prove all of these propositions, the plaintiff is not entitled to damages in some amount.

The jury found that the BACA defendants had breached the contract, and returned a verdict for Spectrum. It also found that the corporate veil had been pierced. The BACA defendants filed a motion for judgment notwithstanding the verdict and a motion for a new trial; both motions were denied. The BACA defendants appeal.

II. Scope of Review

We review the district court's giving of jury instructions for the correction of errors at law. Iowa R. App. P. 6.4. We review the disputed jury instructions to determine if they are correct statements of the law based on the evidence presented. *Le v. Vaknin*, 722 N.W.2d 412, 414 (Iowa 2006). The district court's denial of a motion for judgment notwithstanding the verdict and a motion for new trial are also reviewed for correction of errors at law. Iowa R. App. P. 6.4.

III. Jury Instruction

The BACA defendants contend the district court erred in instructing the jury on piercing the corporate veil.² They argue there was insufficient information in the pleadings or record pertaining to personal liability of the named defendants to allow the corporate veil to be pierced, and further that they were not alerted to Spectrum's theory of recovery. "Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions." *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000). "Parties to

² The BACA defendants failed to specify which numbered jury instructions they assert the district court erred in instructing.

lawsuits are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record.” *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994). “When weighing the sufficiency of the evidence to support a requested instruction, we view the evidence in a light most favorable to the party seeking the instruction.” *Herbst*, 616 N.W.2d at 585.

In order to pierce the corporate veil, exceptional circumstances must be presented, for example, where the corporation is a mere shell. *Briggs Transp. Co. v. Starr Sale Co.*, 262 N.W.2d 805, 810 (Iowa 1978). Factors that would support such a finding include:

(1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation, (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.

Id. In determining whether the district court was correct in its instructions pertaining to piercing the corporate veil, we look to the record and determine whether there are facts sufficient to support these instructions and whether defendants were alerted to this theory of recovery.

When Spectrum filed the initial petition, the Corporation was not the only named party; Rhoda Shirley and Andrew Shirley were also individually named as defendants. Naming these individuals should have alerted them as to their liability exposure apart from the Corporation. Without the possibility of personal liability, individual defendants would not be included, and the Corporation alone would have been named as defendant. See *Fazio v. Brotman*, 371 N.W.2d 842, 846 (Iowa Ct. App. 1985) (stating that when the corporate veil is pierced, individual defendants can be found liable).

After filing the initial petition, Spectrum filed a motion for leave to amend the petition, in order to “ascertain the relationships between various owners of the building at issue in the hopes of identifying the relationships between the true parties in interest.” With no resistance by the Corporation, Spectrum amended its petition, adding Anderson and Grensteiner as individual defendants. Both responded by filing a motion to dismiss for failure to state a claim based on personal liability. Anderson and Grensteiner each separately asserted that Spectrum “stated no cause of action or theory to impose personal liability . . . and alleged no facts whatsoever that would pierce the corporate veil.” By these statements, Anderson and Grensteiner acknowledged the possibility that Spectrum was seeking recovery from them personally by piercing the corporate veil. Both motions were reserved for consideration until trial, but neither Anderson nor Grensteiner reasserted their motions to dismiss during trial. We agree with the district court’s post-trial ruling, that “[t]he amendment alone should have put the defendants on notice the plaintiffs were seeking to assign personal liability to individual defendants as well as the defendant corporation.”³

During the trial, Spectrum attempted to illustrate that the Corporation was a mere shell, thereby leaving the named defendants personally liable to Spectrum on the various claims asserted in its amended petition. The Corporation was incorporated on August 20, 2001. At trial, none of the named defendants, claiming to be various officers of the Corporation, could offer proof of

³ We note the Corporation, as well as the individual defendants, all appeared to be represented by the same attorney, although no answers were filed by the named individuals.

any corporate documents or financial records. Grensteiner, claiming to be treasurer of the Corporation, testified that she had never seen any corporate documents for the Corporation, could not estimate the corporation's net worth, and had no knowledge of the corporate bank account. Andrew Shirley, claiming to be vice president, testified that he had never seen the financial records or corporate books, and stated that no by-laws existed. Anderson, claiming to be president, also testified that she did not recall ever seeing a corporate document. All testified that they informally discussed matters concerning the corporation. However, "BACA Corporation" was administratively dissolved by the Secretary of State on August 2, 2004, for "failure to file the 2004 annual/biennial corporation report".⁴ See *Beck v. Equine Estates Dev. Co.*, 537 N.W.2d 798, 800 (Iowa Ct. App. 1995) ("Continued corporate activity by shareholders following administrative dissolution may also result in personal liability.").

Testimony is conflicting as to Rhoda's role in the Corporation. Prior to trial, Rhoda identified herself as the Corporation's unpaid manager, but at trial she stated that she became a vice president in August 2007. Grensteiner testified that Rhoda was the building manager; Andrew Shirley testified that Rhoda became a vice president of the Corporation in 2006; and Anderson testified that Rhoda became vice president in 2005. No corporate records to verify any of these assertions were produced at trial. Rhoda testified the corporate documents sought by Spectrum in its discovery requests were either

⁴ The only documents recorded by the Secretary of State were the Articles of Incorporation, filed on August 20, 2001, and a Biennial Report filed on January 8, 2002.

lost or the accountant had taken all the books to Arizona, including a document purporting to make Rhoda a vice president of the Corporation.

In September 2007, Rhoda, apparently on behalf of the named defendants, propounded interrogatories to Spectrum. Interrogatory twenty-one asked Spectrum to “[i]dentify how allegations made in #77 of Plaintiff’s amended brief will allow Plaintiffs to pierce the corporate veil.” Spectrum responded that “#77 does not speak of piercing the corporate veil.” With an interrogatory specifically directed at Spectrum’s attempt to pierce the corporate veil, any claimed surprise at trial by the BACA defendants as to that issue lacks credulity. We agree with the district court’s post-trial ruling that “there is no merit or basis to support the ‘ambush’ claim. . . .”⁵ It is clear from the record that the BACA defendants were alerted to or should have been aware of the potential of personal liability.

Spectrum elicited sufficient testimony from the named defendants such that the validity of the Corporation was called into question and the court correctly gave the challenged instructions. Sufficient evidence demonstrated that one, if not more, of the *Briggs* factors was met to support the exceptional circumstances necessary to pierce the corporate veil. *Briggs*, 262 N.W.2d at 810. Therefore, the district court did not err in instructing the jury on piercing the

⁵ Out of the presence of the jury, defense counsel stated on the record, “I knew he was trying to pierce the corporate veil to get director - - I mean, that is self-evident. But the grounds for that piercing the corporate veil is for their participation in the torts of the corporation.”

corporate veil, denying the motion for judgment notwithstanding the verdict, or denying the motion for a new trial on the same grounds.⁶

AFFIRMED.

⁶ The testimony was difficult to follow in the appendix, as each witness's name was not designated at the top of each page where the witness's testimony appears. Although not applicable to this appeal, effective January 1, 2009, the rules of appellate procedure require the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c) (2009).