Opinion issued September 10, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00311-CV

MICHAEL A. PHILLIPS, MARIA E. PHILLIPS, and QUANTUM INVESTMENT PARTNERS, L.L.C., Appellants

V.

B.R. BRICK AND MASONRY, INC., Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2005-54026

MEMORANDUM OPINION

Appellants, Michael A. Phillips, Maria E. Phillips, and Quantum Investment Partners, L.L.C. ("Quantum"), challenge the trial court's judgment, entered after a jury trial, in favor of appellee, B.R. Brick and Masonry, Inc. ("BR Brick"), in BR Brick's suit against appellants for violating the Texas Uniform Fraudulent Transfer Act ("TUFTA").[1] In three of their four issues, appellants contend that the evidence is legally insufficient to support the jury's findings that certain transfers made by Michael were voidable or fraudulent and Maria is personally liable for Quantum's role in making the transfers. In their fourth issue, appellants contend that the trial court erred in including postjudgment interest in calculating the amount of damages awarded in the judgment.

We reverse in part, and affirm in part.

Background

In 2000, BR Brick, which worked with Michael on certain masonry projects, was sued for deficient workmanship on three of the projects. Two of the lawsuits settled, but the third resulted in a judgment against BR Brick. Although Michael had agreed to indemnify BR Brick against any such judgment, his insurer refused to cover the claim. In January 2001, BR Brick formally demanded indemnity from Michael. After Michael refused to pay, BR Brick sued him, and, in July 2002, a judgment in favor of BR Brick was entered in the amount of $310,000, which was

[1] *See* TEX. BUS. & COM. CODE ANN. §§ 24.01–.13 (Vernon 2009).

modified on appeal to $662,700.

The instant suit arose out of BR Brick's attempts to collect on its judgment. In its Third Amended Original Petition, BR Brick alleged that Michael had made fraudulent transfers to Quantum to avoid paying the judgment, and it sought to pierce the liability shield of Quantum to hold Maria personally liable for "the wrongful conduct of Quantum."

Michael testified that in the 1980's he had declared bankruptcy because his construction business had foundered. After that, he and Maria, his wife, held all of their community assets in her name "to protect the family" and avoid probate. Michael explained that in 2000, Maria formed Quantum to operate Marble Slab ice cream shops and diversify their income because "construction has its ups and downs." Although Michael did not own any interest in Quantum, he did "help out some" and hired Loretta Sheffield to have "day-to-day responsibility for Quantum." Because Michael did not know "if Quantum had set up or not the [bank] accounts," he wrote checks to Sheffield against his construction company bank account to pay for her time and expenses in setting up the ice cream shops. In 2001, Michael transferred $190,000 into Quantum to start up the ice cream shops, and he later transferred more money "to help keep them going" and for expenses related to "the build out of stores, the equipment, architectural." Michael also transferred money from Quantum to himself to pay expenses and keep his

construction company operating.

Michael further testified that after his relationship with BR Brick ended in 2004, he, in 2005, began subcontracting to HDE, Inc. on masonry jobs. Michael directed HDE to pay Quantum for his services instead of paying him directly.

Prior to the BR Brick suit, Michael had been sued a number of times, but he had escaped personal liability because "the insurance always took care of it." In February 2002, Dallas Fire Insurance ("DFI"), Michael's insurer, sent him a "reservation of rights letter," in which it stated, "there is no coverage under the [DFI] policies for the contractual indemnity claims of B.R. Brick." Regardless, he remained unconcerned that he might be personally liable to BR Brick because in the previous lawsuits, DFI had always reserved the right not to pay. Michael did not become "seriously" concerned until 2007, when BR Brick first garnished one of his bank accounts.

On cross-examination, Michael admitted that in his 2004 deposition he had stated that Quantum was set up to work with "flowers." He also admitted that he had failed to disclose to BR Brick a joint bank account that he had in the Cayman Islands. Michael denied that he knew that BR Brick was seeking to satisfy its judgment from his personal assets. He noted that BR Brick had never sought to garnish his construction company bank account, but he admitted that it had garnished two other bank accounts.

Maria Phillips testified that any personal or real property that she and Michael had acquired was held in her name because "that's the way that [they had] always done it" since Michael had gone through bankruptcy. Maria knew that BR Brick had sued Michael and DFI had denied coverage for the claim. She conceded that Michael's creditors could not reach assets held in her name. Maria explained that she had formed Quantum, a limited liability company, in 2000 to operate Marble Slab ice cream shops and Michael helped her "oversee everything," but he was not a "part owner."

Loretta Sheffield testified that Michael had hired her in 2000 to consult with Quantum regarding the ice cream shops. Maria was the president of Quantum, but Michael was the "general manager" and was "running the show." Michael, doing business as "Michael Phillips Construction," wrote checks to Sheffield to pay for her "expenses and debts" in "setting up" the ice cream shops.

Donnie Eckhardt, owner of HDE, Inc., testified that in 2005, Michael began subcontracting to HDE on masonry jobs. Although Michael had requested that HDE pay Quantum for his masonry services, HDE had not worked for or with Quantum. Also, Eckhardt was not familiar with Quantum's business, but he understood that it was "Michael's company."

Legal Sufficiency

In their first issue, the Phillipses and Quantum argue that the evidence is

legally insufficient to support the jury's findings that the transfer of $399,120 from Michael to Quantum made payable to Sheffield was fraudulent and voidable because Sheffield was a good faith transferee who gave reasonably equivalent value in return for the transfers. In their second issue, the Phillipses and Quantum argue that the evidence is legally insufficient to support the jury's finding that the transfers from Michael and HDE to Quantum made payable to Quantum were fraudulent transfers because "Quantum returned . . . an even greater amount to [Michael]." In their third issue, the Phillipses and Quantum argue that the evidence is legally insufficient to pierce the liability shield of Quantum and hold Maria liable for the fraudulent transfers to Quantum because no evidence shows that Maria was Quantum's alter ego or used Quantum to evade an existing legal obligation or to perpetuate a fraud.

We will sustain a legal sufficiency or "no-evidence" challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal sufficiency review, a "court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would

support it." *Id*. at 822. If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998). "'[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). However, if the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. *Keller*, 168 S.W.3d at 822; *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Keller*, 168 S.W.3d at 822.

Transfers to Quantum Made Payable to Loretta Sheffield

In support of their argument that the evidence is legally insufficient to support the jury's answer to Question No. 1, the Phillipses and Quantum assert that Michael made transfers directly to Sheffield and not to Quantum.

We note that TUFTA section 24.005(a)(1) provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay,

or defraud any creditor of the debtor." TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon 2009). A creditor seeking relief under TUFTA may obtain avoidance of a transfer made by the debtor with such actual fraudulent intent "to the extent necessary to satisfy the creditor's claim." *Id*. § 24.008(a)(1) (Vernon 2009). However, the transferee of the fraudulent transfer may assert as a defense against avoidance of the transfer that she "took in good faith and for a reasonably equivalent value." *Id*. § 24.009(a) (Vernon 2009); *see Hahn v. Love*, No. 01-07-00096-CV, 2009 WL 793637, at *6 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, pet. denied) (noting that transferee may assert good faith purchaser defense against judgment creditor seeking to avoid fraudulent transfer).

The section 24.009(a) good faith defense is an affirmative defense that the party asserting carries the burden of establishing. *Hahn*, 2009 WL 793637, at *6. A transferee "who takes property with knowledge of such facts as would excite the suspicions of a person of ordinary prudence and put him on inquiry of the fraudulent nature of an alleged transfer does not take the property in good faith and is not a bona fide purchaser." *Id*. at *7. If the party seeking relief fails to submit any element of an affirmative defense to the jury, he waives that ground on appeal unless the evidence conclusively establishes the defense. TEX. R. CIV. P. 279; *Akin v. Dahl*, 661 S.W.2d 911, 913 (Tex. 1983). This is because "[i]f a claim is established as a matter of law, no question must be submitted to the jury for

consideration." *Bank of Texas v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Here, the jury specifically found that Michael transferred $390,120 to Quantum which was "payable to" Sheffield, who is not a party to this suit.[2] Quantum did not ask for a jury instruction on the affirmative defense, none was given, and the evidence does not conclusively establish the defense. Thus, Quantum has waived the affirmative defense. Also, the evidence shows that Sheffield was employed by Quantum to consult regarding the start up of the ice cream shops and to assist with setting up the shops. Sheffield did not work for Michael's construction company from which the cash transfers were made. Moreover, Michael's construction company had no business or other relationship with Quantum. Even if Sheffield, acting as Quantum, took the cash transfers from Michael's construction company in good faith to pay for her expenses in setting up the ice cream shops, neither Sheffield nor Quantum provided any reasonably equivalent value *to Michael's construction company* in exchange for the cash transfers. For example, the cash transfers were not made in satisfaction of a loan that Quantum had made to Michael's construction company, a capital infusion into

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[2] In the court's charge, the jury was asked, "Did Michael Phillips fraudulently transfer assets to Quantum Investment Partners L.L.C.?" The jury answered "Yes" for all but one of twenty-seven separate transfers from Michael Phillips Construction made payable to Sheffield.

Quantum for which Michael's construction company gained an ownership interest, payment for products or services provided by Quantum to Michael's construction company, or payment for services provided by Sheffield to Michael's construction company.

We conclude that because Michael's construction company did not receive any reasonably equivalent value from Quantum or Sheffield in exchange for the cash transfers, Quantum is not a good faith transferee. Accordingly, we hold that the evidence is legally sufficient to support the jury's finding that the transfers from Michael's construction company to Quantum, which were made payable to Sheffield, were fraudulent and the evidence does not conclusively establish that Sheffield or Quantum was a section 24.009(a) good faith transferee.

We overrule appellants' first issue.

Transfers to Quantum Made Payable to Quantum

In support of their argument that Michael received a benefit for his payments to Quantum, the Phillipses and Quantum rely on *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992). They note that in a fraudulent transfer case, the focus is on "whether the net effect of the transfer has depleted the [debtor's assets]."[3] *Id*. at 485. Here, the record shows that Michael transferred to

[3] Appellants also rely on *In re Hinsley*, 201 F.3d 638, 644 (5th Cir. 2000). Because both cases involve bankruptcy trustees seeking to avoid transfers as fraudulent, we need discuss only the *Jeffrey Bigelow* case.

Quantum approximately $473,000 and caused HDE to transfer to Quantum approximately $339,000, for a total of $812,000. Quantum transferred to Michael approximately $694,000.[4] The Phillipses and Quantum assert that they should be given credit for the transfers from Quantum to Michael in the analysis of whether the transfers from Michael and HDE to Quantum were fraudulent transfers.

The court in *Jeffrey Bigelow* interpreted a United States Bankruptcy Code provision that allowed a bankruptcy trustee to avoid fraudulent transfers. *Id*. at 484. The court stated that "the proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors." *Id*. The debtor, in a three-party transaction, received infusions of cash from a bank against a line of credit procured for its benefit by a third-party and then made payments to the bank, not the third-party, in satisfaction of the line of credit. *Id*. at 480–81. In holding that the transfers were not fraudulent, the court stated that the creditors should not gain the benefit of the money received from the infusions from the line of credit and also the benefit of avoided transfers made as payment against the line of credit. *Id*. at 485.

Here, BR Brick was not a bankruptcy trustee seeking to avoid transfers to

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[4] In their briefing, appellants assert that the total amount of the transfers from Quantum to Michael, as evidenced by the checks included in Plaintiff's Exhibit 1, is $788,660. After a careful review of the exhibit, this Court's calculation of the total amount of the checks is approximately $694,000.

preserve Michael's estate for unsecured creditors. Under TUFTA, BR Brick had to prove, through the following "badges of fraud," that Michael made or caused to be made the transfers to Quantum with actual intent to hinder, delay, or defraud BR Brick:

> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
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> (5) the transfer was of substantially all the debtor's assets;
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> (6) the debtor absconded;
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> (7) the debtor removed or concealed assets;
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> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
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> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
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> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
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> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

TEX. BUS. & COM. CODE ANN. §§ 24.005(a)(1), (b) (Vernon 2009).

Viewing the evidence in the light most favorable to the verdict, the following badges of fraud are supported: Michael transferred or caused transfers

of money to be made to an insider, Quantum, owned by his wife; he retained control of the money after the transfers because he was Quantum's general manager and a signatory on its bank account; Michael had been sued or threatened with suit by BR Brick before the transfers; the money received by Quantum was concealed from BR Brick and unavailable to satisfy its judgment; and, though Michael was routinely transferring cash between himself and Quantum, there is no evidence that, at the time Michael made the transfers to Quantum, he received any value in return. Additionally, Michael knew that holding assets in a name other than his own protected them from his creditors. He knew that BR Brick had a judgment against him that his insurer would not cover and could garnish his bank accounts in satisfaction of its judgment. The transfers were not, as in *Jeffrey Bigelow*, in satisfaction of a debt Michael owed to Quantum so the transfers were not a choice by Michael to pay one creditor over another. The transfers out do not equal the amounts that Michael transferred in, and the evidence at trial did not conclusively prove that the payments to Michael were made in consideration of the monies he invested. Thus, the jury reasonably could have concluded that the transfers were not for reasonably equivalent value, and that the transfers were made with an intent to hinder Michael's creditor.

Accordingly, we hold that the evidence is legally sufficient to support the jury's finding that the transfers from Michael and HDE to Quantum were made

with actual intent to hinder, delay, or defraud BR Brick.

We overrule appellants' second issue.

Piercing the Limited Liability Shield of Quantum

In support of their argument that there is no evidence to support the jury's finding that Maria was responsible for the conduct of Quantum, the Phillipses and Quantum assert that she took no "actions that hindered Quantum's creditors" and she had no relationship with BR Brick.

Courts will "disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result."[5] *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex. 1986). This prevents the "use of the corporate entity as a cloak for fraud . . . or to work an injustice." *Love v. State*, 972 S.W.2d 114, 119 (Tex. App.—Austin 1998, pet. denied). Texas takes a "flexible fact-specific approach" in applying this exceptional equitable remedy. *Castleberry*, 721 S.W.2d at 273. Courts are generally "less reluctant to disregard the corporate entity in tort cases than in breach of contract cases." *Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 375 (Tex. 1984).

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[5] Texas has applied the principles used to pierce the corporate veil to pierce the liability shield of limited liability companies. *See Sanchez v. Mulvaney*, 274 S.W.3d 708, 712 (Tex. App.—San Antonio 2008, no pet.).

Disregarding the corporate form "involve[s] some type of wrongdoing" or injustice or inequity. *Wilson v. Davis*, 305 S.W.3d 57, 69 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (internal citations omitted). Determination of "injustice" and "inequity" is not a "subjective perception of unfairness by an individual [fact-finder]"; rather, these words are indicative of the kinds of abuse that the corporate structure should not shield, such as fraud or evasion of existing obligations. *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008). Therefore, although the relationship between two entities is a consideration, another consideration is "whether the entities' use of limited liability was illegitimate." *Id*.

When there has been no objection to the court's charge, we assess the legal sufficiency of the evidence according to the instructions given by the trial court to the jury.[6] *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). Here, the trial court's

[6] We note that the law regarding piercing the corporate veil was modified in 1999 with the adoption of a statute by the Texas Legislature which narrowed the *Castleberry* doctrine by providing that shareholders could not be held individually liable for "any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the [shareholder] is or was the alter ego of the corporation or on the bases of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory," unless the plaintiff shows that the shareholder "caused the corporation to be used for the purposes of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the [shareholder]." *See* TEX. BUS. ORGS. CODE ANN. § 21.223 (Vernon 2009) (formerly codified at TEX. BUS. CORP. ACT ANN. art. 2.21). Neither party here argued that section 21.223 or article 2.21 applied to BR Brick's fraudulent transfer claim, and the jury charge issued by the trial court, without either party objecting to its form, did not reference section 21.223 or article 2.21. Thus, even

charge, in pertinent part, reads as follows:

> Is Maria Phillips responsible for the conduct of Quantum Investment Partners L.L.C.?
>
> Maria Phillips is responsible for the conduct of Quantum Investment Partners L.L.C. if:
>
> 1. Quantum Investment Partners L.L.C. was organized and operated as a mere tool or business conduit of Maria Phillips and there was such unity between Quantum Investment Partners L.L.C. and Maria Phillips that the separateness of Quantum Investment Partners L.L.C. had ceased and holding only Quantum Investment Partners L.L.C. responsible would result in injustice.
>
>   In deciding whether there was such unity between Quantum Investment Partners L.L.C. and Maria Phillips that the separateness of Quantum Investment Partners L.L.C. had ceased, you are to consider the total dealings of Quantum Investment Partners L.L.C. and Maria Phillips, including -
>
>   a. the degree to which Quantum Investment Partners L.L.C.'s property had been kept separate from that of Maria Phillips;
>
>   b. the amount of financial interest, ownership and control Maria Phillips maintained over Quantum; and
>
>   c. whether Quantum had been used for personal purposes of Maria Phillips.
>
> 2. Maria Phillips used Quantum Investment Partners L.L.C. as a means of evading an existing legal obligation, and holding only Quantum Investment Partners L.L.C. responsible would result in injustice.

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if section 21.223 or article 2.21 might have been applicable to BR Brick's claims against Maria, we do not review the sufficiency of the evidence against an allegedly proper instruction if the defect was never brought to the trial court's attention and the instruction never requested. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

3. Maria Phillips used Quantum Investment Partners L.L.C. as a sham to perpetrate a fraud, and holding only Quantum Investment Partners L.L.C. responsible would result in injustice.

> "Fraud" is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests.

Thus, Maria could be held personally liable for the transfers of money made by Michael to Quantum on three theories: alter ego, evading an existing legal obligation, or sham to perpetrate a fraud. *See Castleberry*, 721 S.W.2d at 272.

Alter Ego

The alter ego theory imposes liability on a shareholder for corporate obligations when "a corporation is organized and operated as a mere tool or business conduit of another" and there is such "unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." *Id*. (citations omitted); *Wilson*, 305 S.W.3d at 69. However, the mere fact that an individual owns a majority or even all of the shares in a corporation does not make the corporation the alter ego of the individual. *See Dominguez v. Payne*, 112 S.W.3d 866, 870 (Tex. App.—Corpus Christi 2003, no pet.) Alter ego "is shown from the total dealings of the corporation and the individual, including (1) the degree to which corporate formalities have been followed and corporate and individual property have been kept separately, (2) the amount of financial interest, ownership and control the

individual maintains over the corporation, and (3) whether the corporation has been used for personal purposes." *Castleberry*, 721 S.W.2d at 272; *Wilson*, 305 S.W.3d at 69. The rationale behind alter ego is that "'if the shareholders themselves disregard the separation of the corporate enterprise, the law will also disregard it so far as necessary to protect individual and corporate creditors.'" *Wilson*, 305 S.W.3d at 69–70 (quoting HENRY WINTHROP BALLANTINE, BALLANTINE ON CORPORATIONS § 123 at 294 (1946)).

Viewing the evidence in the light most favorable to the jury's finding, the record shows that Maria was at least part-owner of Quantum and its president. No evidence addresses the degree to which Maria maintained the corporate formalities of Quantum or how she managed the company. Quantum did maintain assets, liabilities, and equity ledger, and accountants prepared documents for Quantum. Quantum property was kept separate from Maria's personal property as evidenced by the checks written between the Phillipses' personal checking account to Quantum and from Quantum to the Phillipses. Some checks were written on the Quantum bank account to pay for personal expenses of the Phillips family. Michael, who held no ownership interest in Quantum, was the general manager over Quantum operations and signed all of the checks in the record written on Quantum's bank account. Maria may have allowed Michael to, as BR Brick asserts, "use Quantum bank accounts to hide his personal assets from his

creditors"; however, the most important fact is that, at the time of the transfers, neither Maria nor Quantum had any relationship with or obligation to BR Brick such that *Maria* could have been acting as the alter ego of Quantum with respect to BR Brick. Accordingly, we hold that the evidence is legally insufficient for the jury to have found that Maria was Quantum's alter ego.

Avoid an Existing Legal Obligation

The use of the corporate fiction to evade an existing legal obligation usually involves an individual or company transferring assets or using other entities to avoid an existing legal obligation of the individual or company. *See Dick's Last Resort of W. End, Inc. v. Mkt./Ross, Ltd.*, 273 S.W.3d 905, 912 (Tex. App—Dallas 2008, pet. denied). In *Dick's Last Resort*, three defendants, Schiff, Dick's Texas, and Dick's Holding Company, manipulated a lease signed by defendant Dick's Last Resort and guaranteed by defendant Dick's Chicago to avoid paying plaintiff Market/Ross one percent of Dick's Last Resort's gross sales as required by a provision in the lease if the lease was assigned before the term was up. *Id*. at 911–12. The court of appeals found this evidence sufficient to pierce the corporate veil and hold Schiff, Dick's Texas, and Dick's Texas Holding Company liable for using Dick's Last Resort to evade an existing contractual obligation of Dick's Last Resort and Dick's Chicago to "pay rent for the full term of the lease and to make payment under the guaranty and the 1% provision." *Id*. at 912.

In *Klein v. Sporting Goods, Inc.*, a shareholder of a corporation formed a second corporation which bought the inventory of the first corporation at a foreclosure sale and paid off the first corporation's secured creditor but left the first corporation's unsecured creditors unpaid. 772 S.W.2d 173, 174–75 (Tex. App.—Houston [14th Dist.] 1989, writ denied). The shareholder then continued operations under the second corporation. *Id*. at 175. The court found the evidence sufficient to support that the shareholder was personally liable for the debts to the unsecured creditors because he used the foreclosure sale and set up of the second corporation "as a method to avoid creditors" of the first corporation. *Id*. at 176.

Here, although there is evidence that Michael used Quantum to evade the legal obligation of his construction business to BR Brick, there is no evidence that Maria personally or through Quantum, owed any legal obligation to BR Brick that she tried to avoid. Maria was not part owner of Michael's construction business, and neither Maria nor Quantum had any relationship with BR Brick. Thus, there is no evidence in the record that Maria, unlike the defendants in *Dick's Last Resort* and *Klein*, used Quantum to avoid an existing legal obligation owed by her or Quantum to BR Brick. Accordingly, we hold that the evidence is legally insufficient for the jury to have found that Maria used Quantum to evade an existing legal obligation.

Sham to Perpetrate a Fraud

Under *Castleberry*, the "sham to perpetrate a fraud" theory requires a tort claimant to, at a minimum, show constructive fraud, or the "breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others," by the entity that the claimant seeks to hold responsible. 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Nothing, however, precludes a claimant from showing actual fraud, or a "dishonesty of purpose or intent to deceive" by the entity the claimant seeks to hold responsible. *See id*.; *Lucas*, 696 S.W.2d at 375 ("In a tort case, it is not *necessary* to find an intent to defraud.") (emphasis added). The gist of *Castleberry* is that the corporate fiction will be disregarded when the "facts are such that adherence to the fiction would promote injustice and lead to an inequitable result." 721 S.W.2d at 273 (internal citation omitted). In *Castleberry*, the court found a sham to perpetrate a fraud when two shareholders created a new corporation and transferred all of the assets of the original corporation to it to avoid the original corporation's obligation to pay the third shareholder for the buy-back of his shares. *Id*. at 274–75.

Although with constructive fraud, the actor's intent is irrelevant, no evidence shows that Maria or Quantum had a confidential or fiduciary relationship with BR Brick, Maria breached a legal or equitable duty that she or Quantum owed to BR

Brick, or Maria's actions tended to deceive BR Brick. *See Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 366 (Tex. App.—Dallas 2009, pet. denied) (noting that constructive fraud includes breach of legal or equitable duty in context of a fiduciary relationship); *In re Estate of Kuykendall*, 206 S.W.3d 766, 771 (Tex. App.—Texarkana 2006, no pet.) (noting that constructive fraud may consist of breach of confidential relationship); *Vela v. Marywood*, 17 S.W.3d 750, 761 (Tex. App.—Austin 2000), *pet. denied*, 53 S.W.3d 684 (Tex. 2001) ("constructive fraud encompasses those breaches that the law condemns as 'fraudulent' merely because they tend to deceive others"). Accordingly, we hold that Maria's actions with respect to Quantum were not constructively fraudulent toward BR Brick.

BR Brick asserts that Maria's "dishonesty of purpose or intent to deceive" can be shown by the fact that she "had a substantial financial interest in Quantum," allowed Michael "complete access to Quantum's bank accounts," knew that assets held in hers or Quantum's name were not accessible by Michael's creditors, allowed Michael to "run his construction business" through Quantum, "knew of the fraudulent activity of Quantum" including Michael's using it to hide his assets, and Maria "did nothing to stop it." That Maria had a substantial financial interest in Quantum is not dispositive of an intent to deceive because any sole owner of an entity would have a substantial financial interest in the entity. That Michael had

complete access to Quantum's bank account is also unremarkable since he acted as Quantum's general manager. Although Maria was aware that BR Brick had sued Michael, DFI had denied coverage, and assets not held in Michael's name could not be reached by his creditors, BR Brick brought no evidence addressing Maria's "dishonesty of purpose or intent to deceive" BR Brick. Sheffield testified that Michael was the general manager of Quantum, and all of the checks drawn on Quantum's bank account and those deposited into Quantum's bank account drawn on the Phillipses' personal bank account were signed by Michael. There is no evidence in the record regarding Maria's activities as owner and president of Quantum or about the role she played, if any, in the transfers from her and Michael's personal bank accounts, Michael's construction account, or HDE. Because no more than a scintilla of evidence addresses Maria's intent, we hold that the evidence is legally insufficient for the jury to have found that Maria acted with "dishonesty of purpose or intent to deceive" BR Brick and that she used Quantum to perpetrate a fraud against it.

We sustain appellants' third issue.

Accrual of Post-Judgment Interest

In their fourth issue, appellants argue that the trial court erred in including postjudgment interest in its calculation of the amount of the underlying judgment because the underlying judgment did not specify a postjudgment interest rate and

BR Brick failed to reform the judgment on appeal.

In 1997, the Texas Finance Code was codified by the Texas legislature in "a topic-by-topic revision of the state's general and permanent statute law without substantive change." TEX. FIN. CODE ANN. § 1.001(a) (Vernon 1998). The modified Texas Finance Code provides that "[a] money judgment of a court in this state must specify the postjudgment interest rate applicable to that judgment" and "postjudgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment is rendered and ending on the date the judgment is satisfied." TEX. FIN. CODE ANN. §§ 304.001, 304.005 (Vernon 2006). The version of the statute prior to codification provided that "all judgments of the courts of this state earn interest at the rate published by the consumer credit commissioner in the Texas Register." Act of May 17, 1983, 68th Leg., R.S., ch. 107, § 1, 1983 Tex. Gen. Laws 518, *repealed by* Act of May 24, 1997, 75th Leg., R.S., ch. 1008, § 6, 1997 Tex. Gen. Laws 3601, 3602. The Texas Supreme Court has held that this prior version "does not require, as a prerequisite for accruing interest, that judgments specifically include an award of post judgment interest." *The Office of the Attorney Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528 (Tex. 2002).

The Phillipses and Quantum argue that because BR Brick's judgment against Michael in the indemnity action did not specify the postjudgment interest rate, the underlying judgment amount in this case should be $637,254 rather than

$1,096,525, and BR Brick has waived any claim that it is entitled to postjudgment interest by not seeking to reform the judgment on appeal. In support of their argument, they rely on *Wohlfahrt v. Holloway*, 172 S.W.3d 630, 639 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).[7] In *Wohlfahrt*, the trial court in its judgment set the postjudgment interest rate at ten percent. *Id*. The appellants complained that the rate should have been five percent but, in the trial court, they had only complained that the rate should be six percent. *Id*. The court of appeals held that the appellants had waived their complaint because their argument on appeal did not comport with their argument in the trial court. *Id*. at 639–40.

Here, in B.R. Brick's underlying indemnity action against Michael, the trial court did not set the postjudgment interest rate or even specifically award postjudgment interest. However, considering the directive of section 1.001 that the 1997 changes to the Finance Code were intended to be a non-substantive codification of the existing statutes together with sections 304.001 and 304.005 and the authority of *Lee*, BR Brick was entitled by statute to recover postjudgment interest even though the indemnity judgment did not mention postjudgment interest

[7] Appellants also rely on *El Universal, Compania Periodistica Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*, 802 S.W.2d 799, 804 (Tex. App.—Corpus Christi 1990, writ denied), and *Daniell Motor Co., Inc. v. Nw. Bank*, 713 S.W.2d 808, 812 (Tex. App. —Fort Worth 1986, no writ). However, appellants cite to the portions of these opinions relating to *pre*judgment interest. *Phoenician Imports* specifically acknowledges that "[p]ostjudgment interest is a creation of statute to which appellant is entitled whether or not specifically awarded in the judgment." 802 S.W.2d at 804.

and BR Brick did not seek to reform that judgment on appeal. *See RAJ Partners, Ltd. v. Darco Constr. Corp.*, 217 S.W.3d 638, 653 (Tex. App.—Amarillo 2006, no pet.) ("postjudgment interest is mandated by statute, and is recoverable even if the trial court's judgment does not mention it").[8] Accordingly, we hold that the trial court did not err in including postjudgment interest in calculating the amount of damages awarded in the underlying judgment.

We overrule appellants' fourth issue.

[8] *See also SAP Trading Inc. v. Sohani*, No. 14-06-00641-CV, 2007 WL 1599719, at *2 (Tex. App.—Houston [14th Dist.] June 5, 2007, no pet.) (mem. op.) ("Post-judgment interest is mandated by section 304.001 of the Texas Finance Code, and is recoverable whether or not specifically awarded in the judgment."); *Hinojosa v. Hinojosa*, No. 13-06-00684-CV, 2007 WL 1933586, at *4 (Tex. App.—Corpus Christi July 5, 2007, no pet.) (mem. op.) ("Post-judgment interest . . . is automatic and required by statute, even if not specifically awarded or narrated in the judgment."); *McDonald v. Taber*, No. 05-03-01642-CV, 2004 WL 2915312, at *4 (Tex. App.—Dallas Dec. 17, 2004, pet. denied) (mem. op.) ("Whether or not specifically awarded in the judgment, appellant is entitled to postjudgment interest because it is a creation of statute."); *Rainbow Group, Ltd. v. Johnson*, No. 03-00-00559-CV, 2002 WL 1991141, at *13 (Tex. App.—Austin Aug. 30, 2002, pet. denied) (mem. op.) (noting that post-judgment interest is mandated by the Texas Finance Code and "is recoverable whether or not specifically awarded in the judgment.").

Conclusion

We reverse that portion of the trial court's judgment holding Maria personally liable for the transfers of money made by Michael to Quantum. We affirm the remainder of the trial court's judgment.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.