

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY WINDSOR,

Plaintiff-Appellee,

v

HURON MACHINE, INC. and NORMAN
JOSEPH WINDSOR, JR.,

Defendants-Appellants.

UNPUBLISHED

June 27, 2006

No. 257976

Iosco Circuit Court

LC No. 04-1099-AV

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendants appeal by leave granted from a circuit court order affirming in part and reversing in part a district court opinion and order awarding plaintiff restitution, transferred asset damages, and stock valuation damages. We conclude that the district court was not biased, that defendant Windsor was properly adjudicated personally liable for plaintiff's judgment, and that defendants lack standing to appeal on behalf of Windsor Brothers, but that the district court's award of transferred asset damages and stock valuation damages is improper in its entirety. We thus affirm in part, vacate in part, and remand.

Plaintiff is the brother of defendant Norman Joseph Windsor, Jr. In 2000, plaintiff joined defendant Windsor's business, Huron Machine, Inc. as an employee. Per a January, 2001 operating agreement and the acceptance of an offer to purchase stock, plaintiff was thereafter issued 9000 shares of Huron Machine, Inc. stock. In May 2002, plaintiff's employment with Huron Machine Inc. ("defendant Huron") was terminated and this action was filed shortly thereafter.

Plaintiff's action consisted of claims for claim and delivery of his tools and personal effects that he claims were wrongfully retained by defendants after his discharge, and breach of contract for unpaid overtime, wages, and vacation pay. Prior to trial, the parties stipulated to allowing additional theories of recovery to be introduced at trial. A bench trial was then held, at the conclusion of which the trial court entered an opinion and order, awarding plaintiff \$25,000.00 (the jurisdictional limit of the court) in damages together with statutory costs. Defendants' subsequent motion for a new trial was denied.

Plaintiff and defendants appealed the trial court's decision to the Iosco County Circuit Court. On August 26, 2004, the circuit court entered an order reversing that portion of the trial

court's opinion and order finding that plaintiff was entitled to payment for his shares of stock. The circuit court thus reduced plaintiff's awarded damages by \$9,000.00. The remainder of the opinion and order was affirmed. Defendants now appeal both the trial court's decision and the circuit court's order.

Defendants raise several arguments on appeal, the first being that the district court was biased to the extent defendants were denied a fair trial. MCR 2.003 provides that allegations of bias be raised before the trial court in the context of a motion to disqualify. Defendants failed to pursue such a motion, instead raising this issue on appeal before the circuit court. The issue is therefore not preserved. See *Illes v Jones Transfer Co*, 213 Mich App 44, 56 n 2; 539 NW2d 382 (1995). However, because "[t]he Due Process Clause requires an unbiased and impartial decisionmaker," *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996), we review this (like other unpreserved constitutional issues) for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

As a general matter, "the party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain, supra* at 497. Due process has been held to justify judicial disqualification "without a showing of actual bias in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Crampton v Michigan Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). "Disqualification for bias or prejudice is only constitutionally required in the most extreme cases." *Cain, supra* at 498. Such situations include where the judge "(1) has a pecuniary interest in the outcome; (2) 'has been a target of personal abuse or criticism from the party before him'; (3) is 'enmeshed in [other] matters involving petitioner . . .'; or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." *Crampton, supra* at 351 (citations omitted and alteration in original). Analysis of bias "requires a case-by-case determination of when the risk of actual bias is too prevalent, so that the constitutional guarantee of a fair trial would be inhibited. . . . [I]t is only through an examination of the four listed scenarios and their concomitant examples that the 'experience teaches' test . . . is rendered meaningful." *Cain, supra* at 514.

Here, defendants fail to establish a due process violation rooted in bias. They proffer no evidence indicating that the district court enjoyed a pecuniary interest in the outcome of this litigation, and the record does not demonstrate that the court had been a target of abuse or criticism by defendants. *Crampton, supra* at 351. Likewise, there is no evidence suggesting that defendants and the district court even had a relationship prior to this litigation. *Id.* Put another way, there is not so high a probability of bias as to render the district court's adjudication constitutionally infirm. *Cain, supra* at 514.

Defendants have also failed to establish personal bias under MCR 2.003. The initial evidence defendants offer in support of their allegations of bias concern various bench rulings the court made. However, judicial rulings are generally insufficient to constitute grounds upon which to establish bias. *Cain, supra* at 496. Defendants further cite nothing to show that this is one of those rare circumstances where a court's rulings display such a deep-seated antagonism that bias is established.

Defendants claim the court's award of transferred asset and stock valuation damages is without justification. However, the district court justified its damages ruling in a well-reasoned opinion. Defendants also argue that the district court's bias is shown in its alleged improper exercise of jurisdiction over a non-party. This argument too is without merit, as discussed *infra*. Defendants' claim that the court's entry of an ex parte order is also offered to illustrate bias, yet the court subsequently vacated this order. Finally, they argue that the court's failure to sanction plaintiff for alleged misrepresentations illustrates bias. Not only did defendants failed to present any law to indicate that sanctions are required, the trial court's decision is illustrative of neither passion nor prejudice, but merely the exercise of discretion. See, e.g., *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 90-91; 592 NW2d 112 (1999).

To further illustrate bias, defendants proffer a post-judgment comment regarding their credibility made by the court during their motion for a new trial. They fail to recognize, however, that as the trier of fact, the district court sat in judgment of their credibility. See *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). Accordingly, defendants have failed to overcome the "heavy presumption of judicial impartiality." *Cain, supra* at 497.

Defendants next argue that plaintiff was not a shareholder of the corporation at issue and, therefore, the district court's award of transferred asset and stock valuation damages was erroneous. We agree. Resolution of this issue involves a question of statutory interpretation which we review de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005).

"The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature." *Franchino v Franchino*, 263 Mich App 172, 183; 687 NW2d 620 (2004). Unambiguous statutory language is afforded its plain meaning and is enforced as written. *Id.* "When the provisions in question are part of the Business Corporation Act [BCA], MCL 450.1101 *et seq.*, they must be construed liberally and 'applied to promote its underlying purposes and policies,' which include giving 'special recognition to the legitimate needs of close corporations.'" *Id.* at 183-184, quoting MCL 450.1103; see also *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 278; 649 NW2d 84 (2002).

The BCA empowers corporate shareholders to pursue actions against corporate officers or directors for illegal, oppressive, or fraudulent action. MCL 450.1489; *Estes, supra* at 277-285. MCL 450.1109(1) defines "shareholder" as "a person holding units of proprietary interest in a corporation and is considered to be synonymous with 'member' in a nonstock corporation."

The BCA also authorizes corporations to enter into subscription agreements for the purchase of unissued shares. MCL 450.1305. "A contract with a corporation to purchase its shares to be issued is a subscription agreement and not an executory contract to purchase shares, unless otherwise provided in the contract." MCL 450.1305(3). "A subscription for shares made before or after organization of a corporation shall be paid in full at the time, or in installments and at the times, as shall be determined by the board." MCL 450.1306(1)(a). "When the corporation receives the consideration for which the board authorized the issuance of shares, the shares issued are fully paid and nonassessable and the subscriber has all the rights and privileges of a holder of the shares." MCL 450.1314(4).

In this dispute, the parties entered into an agreement for plaintiff's purchase of 15 percent of the stock (9000 shares) of the corporation at issue. On appeal, the circuit court concluded that plaintiff failed to remit the \$9,000 purchase price, pursuant to this agreement and reversed the district court to that extent. The parties have not appealed this determination, leaving that portion of the circuit court's order undisturbed. By failing to tender amounts due on the contract, plaintiff failed to tender "the consideration for which the board authorized the issuance of shares." MCL 450.1314(4). Section 314(4) affords persons tendering full payment on a contract for the purchase of shares "all the rights and privileges of a holder of the shares." MCL 450.1314(4). By implication, an individual failing to tender full payment for the shares does not acquire the full rights of a holder of shares. By failing to tender full consideration for the shares, plaintiff accordingly did not acquire the rights and privileges of a holder of the corporation's shares.¹

Plaintiff accordingly did not acquire shareholder status, pursuant to the BCA.² The logical implication of this conclusion is that the district court's award of transferred asset damages and stock valuation damages is improper in its entirety. Because this award was predicated upon plaintiff's status as a shareholder, and because the legal implications of the circuit court's conclusion that plaintiff failed to tender consideration for his shares precludes a determination that plaintiff was such a shareholder, the entire transferred asset and stock valuation award of \$29,507.46 is vacated. The balance remaining on the award, \$4,175.48, is neither subject to dispute on appeal nor improper in light of the foregoing, because it was grounded in plaintiff's status as an employee.

Defendants next argue that the district court improperly held defendant Norman Windsor (defendant Windsor) personally liable for plaintiff's judgment. We disagree. The act of piercing the corporate veil, or disregarding the corporate entity, is "[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, and shareholders for the corporation's wrongful acts." Black's Law Dictionary (7th ed). A decision whether or not to pierce the corporate veil is reviewed de novo "because of the equitable nature of the remedy." *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996).

¹ The BCA generally, and § 314(4) specifically, contemplate that a corporate board will issue shares prior to a purchaser's full tender of consideration. Section 306 gives corporate boards discretion to authorize payment of share subscriptions, and to retain security interests in shares issued, in the event of defaults in payment. MCL 450.1306(1)(a) and (c). Section 314(4) contemplates that shares will be "issued" prior to full payment. MCL 450.1314(4).

² The circumstances in this dispute give rise to an ostensible conflict between § 109(1) and § 314(4). The former precludes the recognition of shareholder rights prior to full tender of consideration, even when a person is in possession of share certificates, while the latter recognizes shareholder status merely by virtue of the possession of shares. Compare MCL 450.1109(1), (2) with MCL 450.1314(4). "[P]rovisions of a statute that could be in conflict must, if possible, be read harmoniously." *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 517 (2002). We therefore interpret § 314(4) as dictating the moment a subscriber *becomes* a holder of shares under § 109(1). This construction avoids a statutory conflict, while preserving § 314(4)'s provision that shareholder rights are acquired upon full tender of consideration.

“Nevertheless, the decision will not be reversed unless the factual findings are clearly erroneous or the reviewing court is convinced that it would have reached a different result had it occupied the trial court’s position.” *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 43-44; 436 NW2d 70 (1989).

Michigan courts typically consider corporations legally distinct from their shareholders, even if a single shareholder owns all the stock. *Dep’t of Consumer & Industry Services v Shah*, 236 Mich App 381, 393; 600 NW2d 406 (1999). “A court’s treatment of a corporate entity clearly rests on notions of equity, whether it is an action at law or at equity. Equity has the power to look through and behind the legal entity of corporate existence. Piercing the corporate veil is appropriate when there is evidence of fraud, illegality, or injustice. Each case involving disregard of the corporate entity rests on its own special facts.” *Id.* (internal quotation marks and citations omitted). In order to justify piercing, (1) the corporate entity must have been “a mere instrumentality” of another individual or entity, (2) it must have been the instrument of a wrong or fraud, and (3) unjust injury or loss to the plaintiff must have resulted. *Rymal v Baergen*, 262 Mich App 274, 293-294; 686 NW2d 241 (2004).

In concluding that defendant Windsor was personally liable for its judgment, the district court made the following findings:

I further find that Defendant, Norman Joseph Windsor, Jr., was clearly using the corporate entity . . . as an extension of himself. He took unilateral action without notice to shareholders, and he took such actions that were clearly detrimental to the Corporation and other shareholders. The actions of Norman Joseph Windsor, Jr., through the corporate entity . . . caused great immediate financial loss to Plaintiff.

Regarding the first element of the *Rymal* test, the record clearly indicates that defendant Windsor used the corporation as a mere instrumentality. *Rymal, supra* at 293. As the district court observed, substantial evidence indicated that defendant Windsor operated the corporation “as an extension of himself.” Plaintiff presented evidence of defendant Windsor’s personal use of thousands of dollars of corporate funds, for his benefit and the benefit of his family. Defendants were unable to offer adequate business justifications for the expenses at issue. The district court, then, did not err in relying on such evidence.

The district court did, however, err in concluding that the second element was established by virtue of defendant Windsor’s actions that were “detrimental to the Corporation and other shareholders.” Although evidence indicated that defendant Windsor failed to provide notice of shareholder meetings or to properly disclose corporate information upon request, “[d]isregard of corporate formalities alone is not . . . sufficient to justify piercing.” *Soloman v Western Hills Dev Co*, 110 Mich App 257, 263; 312 NW2d 428 (1981). Rather, “fraud, illegality, or injustice need be shown.” *Id.* “[T]he injustice sought to be prevented must in some manner relate to a misuse of the corporate form short of fraud or illegality.” *Id.* at 264.

Nevertheless, “it is axiomatic that this Court will not reverse a trial court’s decision if the correct result is reached for the wrong reason.” *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005). In the context of addressing defendant Windsor’s

conveyances under the Uniform Fraudulent Conveyance Act (UFCA), MCL 566.11 *et seq.* (repealed 1998), the district court expressly concluded as follows:

Prior to the termination of Plaintiff's relationship with . . . [the corporation] substantial funds were transferred . . . for the benefit of Norman Joseph Windsor and his immediate family. After the termination all of the assets . . . were transferred to . . . [a newly formed corporation, Windsor Brothers] which, in reality, is the immediate family of Norman Joseph Windsor, Jr.

At the time of the conveyances, Plaintiff had valid claims for his tools, vacation pay, value of his stock and a percentage of inappropriately transferred funds. I find that the conveyances of the assets . . . as described above, were fraudulently made as regards the Plaintiff

This conclusion is not clearly erroneous. *Rose, supra* at 43-44. Defendant Windsor testified that he conveyed the corporate assets to a newly formed corporation, Windsor Brothers, owned by his wife and sons, to enable them to "make a go of it." No consideration was tendered for this conveyance. Moreover, "the courts will closely scrutinize transactions between a husband and wife when creditors are involved." *Regan v Carrigan*, 194 Mich App 35, 39; 486 NW2d 57 (1992). Windsor Brothers was established as the successor to Huron Machine, Inc., performing essentially the same operations with essentially identical equipment. Defendant Windsor's sons' testimony revealed they knew very little about the finances and mechanics of their corporation. Defendant Windsor's wife was not a machinist, though she previously worked in machine shops. Further, evidence suggested that defendant Windsor, while not an owner of Windsor Brothers, nevertheless spent substantial amounts of time at the business site. He also had no outside income and ensured that the customer base of the former business entity was transferred to Windsor Brothers. This is sufficient to create the inference of a transfer to avoid creditors, as the district court concluded.

This transfer of assets is sufficient to satisfy the requirement that defendant Windsor perpetrated a wrong or fraud via the corporate form. *Rymal, supra* at 293. See *Regan, supra* at 39-40; *CMS Energy Corp v Attorney General*, 190 Mich App 220, 232; 475 NW2d 451 (1991). Regarding the third element, the record supports the conclusion that plaintiff suffered financial losses resulting from defendant Windsor's actions. Indeed, the parties have not appealed the district court's conclusion that plaintiff was entitled to restitution in wrongfully withheld equipment and vacation pay.

Thus, the district court properly held that defendant Windsor was personally liable for plaintiff's judgment because the evidence presented justified piercing the corporate veil.

Defendants next argue that the district court improperly entered a judgment against Windsor Brothers, a non-party. We decline to address this issue because defendants lack standing to raise it. "Whether a party has standing is a question of law." *Lee v Macomb Co Bd of Commr's*, 464 Mich 726, 734; 629 NW2d 900 (2001). Whether a court has personal jurisdiction over a party is also a question of law. *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001). Questions of law are reviewed de novo. *Lee, supra* at 734.

“Standing is a legal term used to denote the existence of a party’s interest in the outcome of litigation that will ensure sincere and vigorous advocacy.” *House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). It requires that an action be prosecuted by a “real party in interest, . . . one who is vested with the right of action.” *Kalamazoo v Richland Twp*, 221 Mich App 531, 534; 562 NW2d 237 (1997); see also MCR 2.201(B). To demonstrate standing, a party must establish the following:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” [*Lee, supra* at 739, quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1991) (citations omitted).]

It is “a general rule [that] one may not claim standing to vindicate the . . . rights of some third party.” *People v Rocha*, 110 Mich App 1, 16; 312 NW2d 657 (1981); see also *Dep’t of Treasury v Comerica Bank*, 201 Mich App 318, 329-330; 506 NW2d 283 (1993).

In the instant dispute, defendants lack standing to argue on behalf of Windsor Brothers that any judgment against Windsor Brothers is void for want of jurisdiction because Windsor Brothers was not joined as a party-defendant. Defendants attempt to stand in Windsor Brothers’ shoes, asserting its rights. However, they enjoy no legally protected interest in any property Windsor Brothers may possess, and have suffered no “injury in fact.” *Lee, supra*. Indeed, defendants repeatedly argued before the district court that Windsor Brothers is a wholly distinct entity, unrelated to defendant Windsor or the original corporation. Thus, they cannot assert any claim on behalf of Windsor Brothers because they lack standing to do so. *Comerica Bank, supra* at 329-330.

Because of our resolution of these issues, we decline to address defendants’ remaining issues on appeal.

We affirm the circuit court’s conclusion that the district court was not biased. We affirm that defendant Windsor was properly adjudicated personally liable for plaintiff’s judgment. We vacate the district court’s award of transferred asset and stock valuation damages. And we conclude that defendants lack standing to appeal on behalf of Windsor Brothers. Remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto