

NO. A08-1681

State of Minnesota
In Court of Appeals

Geoffrey and Nancy Thompson,

Appellants,

vs.

James Kinney, *et al.*,

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. **The District Court Abused Its Discretion when It Entered Default Judgment, Granting Respondents' Piercing Claim.**

The success of Respondents' arguments on appeal turn on the validity of the District Court's apparent decision to grant Respondents' piercing claim on entry of default, after denying the same on summary judgment. Respondents' also insinuate that Appellants Geoff and Nancy Thompson should be held liable for their personal involvement in this matter, the District Court has yet to rule on any issues regarding the involvement of Appellants in their personal capacity. Instead, the singular issue on appeal is whether Appellants may be held personally liable for the debts and wrongful acts of the Defendant Corporations, prior to a trial on the merits. Because the District Court abused its discretion when it granted Respondents' piercing claim and entered a default judgment against Appellants in an amount in excess of \$22 million, this Court should reverse the decision of the District Court and find that the District Court erred in failing to grant Appellants' motion for summary judgment.

As Respondents concede in their brief, no Minnesota authority stands for the proposition that non-shareholder individuals may be found personally liable for the acts of any corporation. Instead, piercing the corporate veil may only be accomplished under the "alter ego" or "instrumentality" theory to impose liability on an **individual shareholder**." *Victoria Elevator Co., Inc. v. Meridan Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979) (emphasis added). "Courts will pierce the corporate veil if an entity ignores corporate formalities and acts as the alter ego or instrumentality of a **shareholder**." *Tom*

Thumb Food Markets, Inc. v. TLH Properties, LLC, 1999 WL 31168 (Minn. Ct. App. 1999) (emphasis added). Case law also provides that members of a limited liability company may be found personally liable for the acts, debts, liabilities, or obligations of a limited liability company under the same theory. Minn. Stat. 322B.303 Subd. 2; *see also Tom Thumb Food Markets*, 1999 WL 31168 at *3.

Respondents' selectively quote from legal authority in order to give this Court the impression that courts – both in Minnesota and in other states – have found non-shareholders liable for the acts of a corporation. First, Respondents' citation to *State v. Strimling*, makes the argument that Minnesota courts will disregard the corporate form in order to hold “the silent strong man” personally liable for the debts or wrongdoing of a corporation. (Resp. Br. at 16.) However, the full passage, interpreting the application of Minn. Stat. § 300.60, reads as follows:

“When the simplest construction of the statute covers the facts here present, we would be particularly ill-advised to allow a person in either Strimling’s or Hedulnd’s position to insulate himself from liability under the statute merely by making certain that he is not formally designated as an official of the corporation whose property he wishes to divert.”

Strimling, 265 N.W.2d 423 (Minn. 1978) (emphasis added). Furthermore, the *Strimling* Court determined that the legislature had intended a broad application of the statute, when it restricted the application of Minn. Stat. § 300.61 to “every officer, agent, or employee of any corporation.” *Id.* at 431, footnote 7. In short, *Strimling*, deals with a narrow issue of statutory construction, rather than standing for the fictitious proposition that a court will pierce the corporate veil against non-shareholders.

Second, Respondents cite various – and purportedly persuasive – authority from Nebraska and Illinois in an attempt to persuade this Court that other jurisdictions have alternately found non-shareholders, officers or directors liable for the debts and wrongful acts of a corporation. Respondents cite this authority for the proposition that “[o]ther jurisdictions have determined that documentation of an individual as a shareholder, member, owner, or director is not a prerequisite to liability under the alter-ego theory.” (Resp. Br. at 16.) However, none of the cases cited by Respondents actually stand for this proposition; each requires that personal liability attach to a shareholder, officer or director of the corporation.

Medlock v. Medlock dealt with the law of not-for-profit corporations, and found that the defendant was the alter ego of the subject non-profit. *Medlock v. Medlock*, 642 N.W.2d 113 (Neb. 2002). Because not-for-profit corporations do not have shareholders, the *Medlock* Court determined that the defendant’s exclusive financial control of the corporation, in addition to his roles as a documented director and president of the subject non-profit, was sufficient to establish a piercing claim. *Id.* at 126. The Court made the argument for an extension of the piercing doctrine to nonprofits, stating that “[t]he reality of blurring between for-profits and non-profits is continuing to change the legal rules that apply to nonprofits, and as nonprofits have become more business-like in character, many laws once considered inapposite have become relevant.” *Id.* at 127. As such, *Medlock* does not stand for the proposition that a non-shareholder, marginally affiliated with a for-profit corporation, may be found personally liable for the wrongdoing of the corporation.

Respondents further cite two cases decided by the Appellate Court of Illinois, utilizing the “unity of interest and ownership” alter ego theory to pierce the corporate veil; a theory not adopted in Minnesota, which further minimizes their utility as persuasive authority. In *Macaluso v. Jenkins*, the Appellate Court of Illinois determined that, like *Medlock*, not-for-profit corporations are susceptible to claims to pierce the corporate veil. 420 N.E.2d 251 (Ill. App. Ct. 1981). Also like *Medlock*, the defendant “was the treasurer and chairman of the board of directors” of the non-profit. *Id.* at 254. In addition, he “made most or all of the decisions concerning [the non-profit].” *Id.* at 255. *Fontana v. TLD Builders, Inc.*, extends the holding in *Macaluso* to non-shareholders of a for-profit corporation; however, it still required that personal liability attach to an officer or director of the corporation, and the “documents admitted into evidence showed shareholder action appointing [the defendant] as president and secretary of [the corporation].” 840 N.E.2d 767, 774 (Ill. App. Ct. 2005). Therefore, no cases cited by Respondents stand for the proposition that individuals not otherwise officers, directors or shareholders of a corporation may be held personally liable for the debts and wrongful acts of that corporation. At most, these cases may be cited for the proposition that – like shareholders – officers and directors exerting exclusive control over a corporation may be held personally liable under an “alter ego” theory.

As the non-moving party on summary judgment – which appears to be the basis for the District Court’s entry of default – any inferences drawn from the disputed facts cited by Respondents must be made in the light most favorable to Appellants. It is undisputed that Respondents have failed to present – or even allege – any evidence that

Appellants are, or ever were, shareholders, directors or officers of IPM, J&J or Amerifunding. While Respondents alleged that those entities are “vehicle[s] pursuant to which Abbott and Cole [but not Appellants] have furthered their fraudulent enterprise.” (A-0002; A-00013, A-00025; A-00039.) Rather, the District Court held, and Respondents cling, to the assertion that because a few documents identify Appellants as “Principals” of IPM, J&J or Amerifunding, that a corporate veil may be pierced to hold “Principals” personally liable for corporate acts, whatever a “Principal” may be. It is also undisputed that Respondents failed to present – or even allege – any evidence that Appellants exerted complete control over IPM, J&J or Amerifunding, such that any of those corporations or limited liability companies could be considered “alter egos” of Appellants.

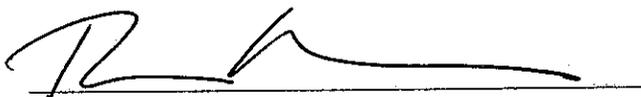
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CONCLUSION

Because no legal authority exists for the proposition that Appellants – as non-shareholders, non-directors, non-officers – may be held personally liable for the debts and wrongful acts of the Defendant Corporations, the District Court abused its discretion in piercing the corporate veil. As such, this Court should reverse the entry of default judgment against Appellants and enter summary judgment in favor of Appellants on all claims.

SKJOLD • BARTHEL, P.A.

Dated: December 16, 2008



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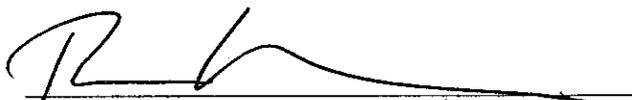
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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Office Word version 2003, which reports that the brief contains 112 lines and 1,304 words.

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