

Case No. A10-1149
STATE OF MINNESOTA
IN COURT OF APPEALS

Amcon Block & Precast, Inc.,

Appellant,

vs.

Michael Paul Suess,

Respondent.

**APPELLANT'S REPLY BRIEF AND
SUPPLEMENTAL APPENDIX**

Gerald W. Von Korff, #113232
RINKE-NOONAN
1015 West St. Germain Street, Suite 300
P.O. Box 1497
St. Cloud, MN 56302-1497
(320) 251-6700

*Attorneys for Appellant Amcon Block &
Precast, Inc.*

Daniel R. Kelly, #247674
Felhaber, Larson, Fenlon & Vogt, P.A.
US Bank Plaza
220 South Sixth Street, Suite 2200
Minneapolis, MN 55402
(612) 339-6321

*Attorneys for Respondent Michael Paul
Suess*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i, ii
I. INTRODUCTION	1
II. CORPORATE VEIL-PIERCING HAS ABSOLUTELY NOTHING TO DO WITH THIS CASE	3
III. SUESS’S CONCESSION THAT HIS CORPORATION IS SUBJECT TO CRIMINAL LIABILITY UNDER SECTION 514.02 COMPELS THE CONCLUSION THAT SUESS IS A PERSON WHO CAUSED THE CORPORATION TO COMMIT A CRIME	5
IV. SUESS WRONGLY ASSERTS THAT SECTION 514.02 SUBDIVISION 1(B) LIMITS CRIMINAL RESPONSIBILITY FOR BREACH OF THE SUBDIVISION 1(A) TRUST OBLIGATION TO ONLY ONE PERSON, AND SINCE THE CORPORATION IS RESPONSIBLE, THE PRESIDENT CANNOT ALSO BE LIABLE	9
V. CONCLUSION	12
SUPPLEMENTAL APPENDIX	

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Air Traffic Conference v. Marina Travel 69 N.C. App. 179, 316 S.E.2d 642 (N.C. App. 1984)	9
Ecuador Importadora-Exportadora Cia. Ltda. v. ITF (Overseas) Corp. 94 A.D.2d 113, 463 N.Y.S.2d 208 (N.Y. App. 1983)	9
Ellingson v. World Amusement Service Association, Inc. 175 Minn. 563, 222 [**7] N.W. 335 (1928)	9
Holzer v. Tonka Bay Yachts And Marine Sales, Inc. 386 N.W.2d 285 (Minn. App. 1986)	4, 9
State v. Bren 704 N.W.2d 170, 174 (Minn. App. 2005)	1, 7
State v. Harris 134 Minn. 35, 158 N.W. 829 (1916)	7
State v. Reps 302 Minn. 38, 42-43 (Minn. 1974)	7
State of Minnesota v. Boyce 2007 Minn. App. Unpub. LEXIS 1070	1, 9
State of Minnesota, by Humphrey v. Alpine Air Products, Inc. 490 N.W.2d 888 (Minn. App. 1992)	4
T. E. S. Construction, Inc. v. Chicilo 2010 Minn. App. LEXIS 92	11
 <u>Statutes:</u>	
Minnesota Statutes Section 302A.425	4
Minnesota Statutes Section 605.05, Subd. 1	5

Other Authorities:

Olson, Business Law Deskbook, 20 Minnesota Practice Series Sect 1:6, 2:36
page 15, 85 1, 4

Matheson, Corporation Law and Practice, 19 Minnesota Practice Series
Sect 5.13, page 158; and Sect 10:15 pages 462ff 1, 4

W. Knepper, Liability of Corporation Officers and Directors
§ 7.09 (3rd ed. 1978) 9

I. INTRODUCTION

Suess argues that the liability imposed by Section 514.02 is a form of veil piercing. In Part II of this Reply we rebut that contention. Veil piercing occurs when a corporate owner is held responsible for a corporate obligation by virtue of his ownership. Veil piercing is a highly limited exception to the fundamental rule that a shareholder's responsibility by virtue of ownership is limited to his contribution to capital. Amcon seeks instead to hold a corporate officer and sole shareholder responsible for causing his corporation to commit a crime. Doing so is not an exception to any rule--it is black-letter law. State v. Bren, 704 N.W.2d 170 (Minn. App. 2005); State of Minnesota v. Boyce, 2007 Minn. App. Unpub. LEXIS 1070; See Olson, Business Law Deskbook, 20 Minnesota Practice Series Sect 1:6, 2:36, page 15, 85 (limited liability protects shareholders from personal liability for the corporation's debts and obligations, but does not negate for liability of officers or directors); Matheson, Corporation Law and Practice, 19 Minnesota Practice Series Sect 5.13, page 158; Id. Sect 10:15 pages 462ff. It is Suess, not Amcon, who is arguing for a massive exception to black letter law by arguing that a corporate officer who causes his corporation to commit a crime should be immunized from criminal and civil liability for committing that crime. Corporate officers who cause their corporation to commit a crime are, in fact, criminally liable for the same crime as an aider and abettor under Minnesota Statutes Section 605.05 subdivision 1.

Suess's civil liability thus follows from mechanical application of the plain language of Section 514.02 subdivision 1(b). Suess concedes that his corporation is criminally responsible for improper diversion of payment proceeds for commercial construction. Suess Brief at Page 15. That concession destroys any suggestion that House File 2563 had no impact on commercial contractors. See Part III of this Reply. Since a corporation that wrongfully diverts commercial construction proceeds commits theft, then it follows that a person who causes the corporation to commit that theft is, in turn criminally responsible as an aider and abettor. Application of this principle is fully consistent with the way in which the Courts have routinely applied the statute. It is also consistent with the plain language of the Section 514.02 subdivision 1(a) which does not restrict criminal culpability to the corporate entity but says rather says that "if a person fails to use the proceeds of a payment made to that person for the improvement....knowing that the cost of the [improvement] performed remains unpaid....shall be guilty of theft of the proceeds."

Since Suess concedes that a corporation is criminally responsible for wrongful diversion of commercial construction proceeds, it follows that one who causes the corporation to commit that crime is a person who commits the theft under subdivision 1a(1), and Suess's civil liability flows mechanically from that conclusion.

II. CORPORATE VEIL-PIERCING HAS ABSOLUTELY NOTHING TO DO WITH THIS CASE.

We have decided to spend considerable space in this Reply rebutting Sues's argument that Amcon's claim involves piercing the corporate veil, because the District Court in this case and the Hennepen County District Judge cited by Sues missed a fundamental point of corporate law. There is no shield for wrongdoing perpetrated by the officers, owners, or employees of the corporation, and thus the question of veil piercing does not arise when a corporate employee is sued for causing his corporation to commit a crime. See Mattheson, *supra*. The liability for wrongdoing committed by an employee or officer does not arise from veil piercing, which is an exception to the limited liability feature of ownership protected in section 302A.425. Olson, *supra* at page 86.

To understand the narrow application of veil piercing, and why it is irrelevant to our suit, one looks to fundamentals of the law of the law of business corporations embodied in Chapter 302A. The corporate shield has nothing to do with the liability of corporate officers and employees. Corporate officers and employees are never liable for corporate debts under the shield piercing doctrine (unless they happen also to be a majority shareholder subject to liability in that capacity). The corporate shield doctrine shields the shareholders of the corporation from liability for the debts of the corporation by virtue of their ownership. The corporate shield doctrine is designed to encourage entrepreneurs to invest in business enterprises conducting business lawfully, not to encourage them to cause their corporations to commit crimes, by limiting their liabilities

as owners to the amount that they have invested in the corporation. Limited liability flows from Section 302A.425 and it is this feature which distinguishes ownership of a corporation as opposed to a partnership or individual proprietorship¹. See Olson, Business Law Deskbook, 20 Minnesota Practice Series Sect 1:6, 2:36, page 15, 85 (limited liability protects shareholders from personal liability for the corporation's debts and obligations, but does not negate for liability of officers or directors); Matheson, Corporation Law and Practice, 19 Minnesota Practice Series Sect 5.13, page 158; Id. Sect 10:15 pages 462ff. Corporate officers and employees are always personally responsible when they commit a tort or intentional act that causes damages to third parties. See, eg., State of Minnesota, by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888 (Minn. App. 1992) (corporate officer personally liable for misleading promotional claims) Holzer v. Tonka Bay Yachts And Marine Sales, Inc., 386 N.W.2d 285 (Minn. App. 1986).

Civil liability for tortious acts committed by a corporate employee, then, results from simple application of the principle that all individuals must account for the damages they cause by their negligent or tortious acts. Criminal liability for causing corporate criminal activity likewise results from mechanical application of time honored application of the principle that a person that directs or causes another to commit a crime is also

¹ Section 302A.425 says: "A subscriber for shares or a shareholder of a corporation is under no obligation to the corporation or its creditors with respect to the shares subscribed for or owned, except to pay to the corporation the full consideration for which the shares are issued or to be issued."

responsible for that crime. Minn. Stat. Section 605.05, Subdivision 1. Suess's brief strangely omits any reference to that statute. As an aider and abettor of the corporate criminal actions, Suess is a person who committed the crime of theft, and thus the civil liability provisions of section 514.02 subdivision 1a(1) clearly apply to him.

III. SUESS'S CONCESSION THAT HIS CORPORATION IS SUBJECT TO CRIMINAL LIABILITY UNDER SECTION 514.02 COMPELS THE CONCLUSION THAT SUESS IS A PERSON WHO CAUSED THE CORPORATION TO COMMIT A CRIME.

Suess contends that a snippet of an exchange between Representatives Storm and Bishop proves that House File 2563 had nothing in it impacting commercial construction. But that contention is obviously incorrect. House File 2563 was not a narrow bill dealing only with civil liability reform. House file 2563, which became Minnesota Laws 2000 Chapter 430, comprehensively rewrote Section 514.02, modernizing its language, adding a newly written subdivision 1(a), and as part of that process, negated a recently decided Court of Appeals decision finding that there was no civil liability for breach of the section 514.02 fiduciary obligation. We've included a full copy of the Bill as enacted in our Supplemental Appendix (SA1 - SA2) to this Reply. One can see that the trust obligation, the criminal responsibility, and the civil liability, all flow from House File 2563, which Suess claims did not impact commercial contractors.

Thus, when Representatives Bishop and Storm were saying that "the Bill" only applies to residential construction, they clearly were not referring to the entire bill (or they didn't understand the plain language of their own bill). Storm and Bishop had to have

been referring to a part of the Bill as having application to residential transactions only, and the real question here is which part of the Bill is restricted to residential transactions only. It is far more likely that Representative Bishop and Storm were referring to the addition of civil liability for shareholders, agents and others, which seeks far more broadly to impose liability to such persons, not for diverting proceeds out of trust, but for receiving those payments.

This contention that the entire Bill was restricted to residential transactions is completely negated by Suess's acknowledgment at page 15 of his Brief that "MSC" is the person who committed the alleged theft and is the "person that is potentially guilty of theft under the statute..." That is a concession that House File 2563 did apply to commercial contractors and that the legislation specifically continued the criminal liability for diversion of improvement payment proceeds out of a commercial contractor, whether doing business in corporate or individual form. Suess is further conceding that both subdivision 1(a)—the civil trust obligation, and subdivision 1(b), the criminal responsibility subdivision, apply to both residential and commercial transactions. A further consequence of this concession, of course, is that when Suess authorized and allowed the transfer of funds out of trust, Suess was causing his wholly owned corporation to violate the trust obligation created by subdivision 1(a), and he was causing

the corporate to commit a crime under subdivision 1(b).² His argument, then, is reduced to claiming that for some reason the statute should be construed to allow him to violate the trust obligation that applies to his corporation with impunity.

It would make absolutely no sense for the legislature to establish a trust obligation as to corporate contractors, but then to immunize the persons who cause the trust to be violated. The very purpose of creating the trust obligation, or fiduciary duty of some kind, has always been to create criminal liability. See State v. Harris, 134 Minn. 35, 158 N.W. 829 (1916) (trust obligation inserted in mechanics lien statute to establish criminal culpability). This point is restated in State v. Reps, 302 Minn. 38, 42-43 (Minn. 1974). This connection, between the criminal responsibility and the fiduciary duty has persisted for nearly a century. Its purpose is to create an obligation that will avoid the constitutional problem of holding a natural person criminally responsible for failing to pay a debt obligation. State v. Bren, 704 N.W.2d 170, 174 (Minn. Ct. App. 2005)

So we are clear, our position that the trust obligation applies to commercial

² To the extent that Suess flirts with the suggestion his corporate accountant is the person responsible for the transfers, that suggestion simply cannot be sustained by the record. Suess was the president and 100% owner of MSC Concrete, Inc. ("MSC"). (R.Hatton Aff. Exs. A-G.) During post judgment request for documents, MSC produced 1,119 checks. (R.Hatton Aff. Ex. G.) Every check is signed by Suess. (*Id.* ¶ 9.) Suess identifies himself as the 100% owner of MSC in its taxes. (*Id.* ¶¶ 4, 5; Exs. B, C.) Finally, Suess signed as both buyer and seller when MSC transferred all of its assets to MPS Construction, Co. d/b/a MSC Concrete. (*Id.* F.) Thus, Suess was the only person influencing the corporate activities.

improvements isn't based solely on Sues's concession alone. That concession is compelled by the plain language of sections 1(a) and 1(b). There is absolutely nothing in Section 514.02 subdivision 1(a) obligation which seeks to narrow the trust obligation to residential construction only.³ "Proceeds of payments received by a person" is not limited in section 1(a) to payments for residential payments. The words "contributing to an improvement to real estate" is similarly not limited to residential improvements. As we explained in our original brief, the phrase "improvement to real estate" is broadly defined in Chapter 514, and clearly includes commercial real estate. The century's old trust obligation created by section 514.02, and its predecessors, has never purported to be limited to residential construction only. The critical component of the comprehensive plan of Chapter 514 to make sure that owners and contractors of all kinds are not forced to pay twice for the same improvement.

Despite the above acknowledgment, we cannot find anywhere in Sues's brief a further acknowledgment that when he signed checks, over a thousand of them, and when he transferred all of the assets of his old corporation to the new, that he personally caused the corporation to breach the trust obligation and that he personally caused the corporation to commit a crime. This failure to acknowledge that he personally engaged in

³ "Proceeds of payments received by a person contributing to an improvement to real estate within the meaning of section 514.01 shall be held in trust by that person for the benefit of those persons who furnished the labor, skill, material, or machinery contributing to the improvement.

a breach of the trust obligation imposed by subdivision 1(a) also allows him to avoid coming to grips with the fundamental principle that an officer of a corporation is liable for the corporation's tortious conversion of a third person's property if the officer actually participated in the transaction or acquiesced in it. Holzer v. Tonka Bay Yachts And Marine Sales, Inc., supra⁴

IV. SUESS WRONGLY ASSERTS THAT SECTION 514.02, SUBDIVISION 1(B) LIMITS CRIMINAL RESPONSIBILITY FOR BREACH OF THE SUBDIVISION 1(A) TRUST OBLIGATION TO ONLY ONE PERSON, AND SINCE THE CORPORATION IS RESPONSIBLE, THE PRESIDENT CANNOT ALSO BE LIABLE.

Suess's argument contains the contention that under section 514.02 subdivision 1(b), one person and only one person has a trust obligation under section 514.02 subdivision 1(a). This argument represents a false dichotomy. Suess says, "I didn't breach the trust, my corporation did," as if it were legally impossible for two persons both to commit the crime. This false dichotomy that asserts that only one person can possibly violate a duty has been tried repeatedly in section 514.02 cases without success. In fact, a corporation cannot break a law unless someone causes it to break that law.

In the unpublished Boyce case, State of Minnesota v. Boyce, 2007 Minn. App.

⁴ The case cites W. Knepper, Liability of Corporation Officers and Directors, § 7.09 (3rd ed. 1978); Ecuador Importadora-Exportadora Cia. Ltda. v. ITF (Overseas) Corp., 94 A.D.2d 113, 463 N.Y.S.2d 208 (N.Y. App. 1983); Air Traffic Conference v. Marina Travel, 69 N.C. App. 179, 316 S.E.2d 642 (N.C. App. 1984); see also Ellingson v. World Amusement Service Association, Inc., 175 Minn. 563, 222 [**7] N.W. 335 (1928) (corporate officer who takes part in tort committed by corporation personally liable).

Unpub. LEXIS 1070, the Court of Appeals found a corporate officer liable for theft when he diverted the proceeds and rejected the argument that Boyce was not “the person” who violated the trust obligation because the corporation did it. In affirming Boyce’s conviction for being a person who committed the crime, this Court italicized the following language as being dispositive:

If a person fails to use the proceeds of a payment made to that person for the improvement, for the payment for labor, skill, material, and machinery contributed to the improvement, knowing that the cost of the labor performed, or skill, material machinery furnished remains unpaid, and who has not furnished the person making such payment either a valid lien waiver under section 514.07, or a payment bond in the basic amount of the contract price for the improvement, conditioned for the prompt payment to any person entitled thereto for the performance of labor or the furnishing of skill, material, or machinery for the improvement, shall be guilty of theft of the proceeds of the payment and is punishable under section 609.52.”
(Italics in Court of Appeals decision).

The court explicitly held that the italicized language which penalizes diversion of the trust funds, that made “unambiguously liable” for the theft⁵. The italicized language quoted above is precisely the language that Sues here argues does not impose liability on corporate officers, but only imposes liability on the corporation. If Sues were correct,

⁵ The Court stated: “The language in paragraph (b) that is emphasized above unambiguously prohibits a person who receives a payment for an improvement to real property from using the proceeds of the payment for any purpose other than paying any outstanding amount owed for labor, skill, material, or machinery that was contributed to the improvement if the person knows that there is any amount outstanding. The emphasized language informs a person of ordinary intelligence that if the person knows that labor, skill, material, or machinery that were contributed to an improvement have not been paid for when the person receives a payment for the improvement, the person must use the proceeds of the payment to pay for these items.”

the Boyce court would have said that this language does NOT apply to corporate officers, and that the issue of criminal liability hinged upon whether Boyce violated the subsequent sentence on the grounds that he was a recipient of funds under the circumstances contemplated by that sentence.

This Court again rejected the contention that the trust liability falls on either the corporation or a controlling corporate officer, and not both, in the Chicilo case, T. E. S. Construction, Inc. v. Chicilo, 2010 Minn. App. LEXIS 92. Suess is thus wrong that Chicilo is consistent with his position. In Chicilo, the corporate officer made the “either the corporation or me” argument, contending that he wasn’t “the person” who contributed to the real estate, only the corporation was. The Chicilo Court rejected this “either the corporation or me” argument and held:

“Section 514.02 clearly and unambiguously states that civil liability for theft of the proceeds ‘is limited to a person who contributes to the improvement in real estate.’ Siemens, 684 N.W.2d at 917. Here, appellant was an officer and director of Chicilo Homes, the company that appellant admits acted as the general contractor for construction on the properties. The fact that Chicilo Homes also owned the properties does not alter the fact that appellant, by virtue of his corporate role with Chicilo Homes, contributed to their improvement. (Emphasis added).

The Chicilo decision is consistent with the sweep of holdings in the appellate courts, that the diversion of trust proceeds is not a legitimate corporate act, but rather an act of wrongdoing, and that when a corporate officer aids or abets or causes that wrongdoing, the corporate officer is a wrongdoer by virtue of the officer’s use of the corporate role to cause the corporation to violate the trust.

V. CONCLUSION

The District Judge evidently found this statute to be ambiguous. We think it is not ambiguous, but that civil liability flows mechanically from the fact that Sues is a person who caused his corporation to commit a crime, and as such, he is a person who is guilty of the theft, subjecting him to subdivision 1a(1) civil liability. However, if one starts with the assumption that this statute is ambiguous, neither the District Court nor Sues really explain why their construction is at all in harmony with the statutory purpose of section 514.02. Since it is conceded that there is a trust obligation as to commercial construction payment proceeds, removal of aider and abettor liability would not further the statutory purpose, it would eviscerate it. For, the one time when that liability serves any purpose is when the corporate ownership seeks to dissolve the corporation. When that happens, the Court's construction of the statute makes the trust obligation and civil corporate liability meaningless.

Dated: September 20, 2010

Respectfully Submitted,

RINKE NOONAN

By



Gerald W. Von Korff, #113232
Attorneys for Appellant
P.O. Box 1497
St. Cloud, MN 56302-1497
320 251-6700