

NO. A10-263

State of Minnesota
In Court of Appeals

JL Schwieters Construction, Inc.,

Respondent,

vs.

Goldridge Construction, Inc., et al.,

Defendants/Cross-Claimants,

and

Goldridge Group, LLP,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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LEGAL ISSUE

- I. When the evidence presented at Defendant's Motion to Dismiss demonstrated Goldridge Group WP IGH, LLC and Goldridge Construction, Inc. were mere alter egos of Goldridge Group, LLP, did the District Court err in finding it has personal jurisdiction over Goldridge Group, LLP?

The District Court held that Goldridge Group, LLP does have the minimum contacts necessary for a Minnesota Court to exercise personal jurisdiction by virtue of its subsidiaries that had numerous contacts with Minnesota and are nothing more than the alter ego of Goldridge Group, LLP.

Apposite Cases:

Zimmerman v. American Inter-Insurance Exchange, 386 N.W.2d 825 (Minn. Ct. App. 1986).

Hardrives, Inc. v. City of LaCrosse, Wisconsin, 240 N.W.2d 814 (Minn. 1976).

STATEMENT OF THE CASE

Respondent JL Schwieters Construction, Inc. ("JL") initiated this mechanic's lien foreclosure action in the fall of 2008 after Defendant Goldridge Construction, Inc. ("GCI") failed to pay for more than \$300,000.00 worth of labor and materials provided by JL to construct a senior living facility. After conducting discovery, JL uncovered a corporate shell game orchestrated by the principals of GCI and Goldridge Group WP IGH, LLC ("WPIGH") that was used to defraud WPIGH's bank and GCI's subcontractors.

JL moved the District Court to allow it to amend the Complaint to add Goldridge Group, LLP ("GG") as a party and assert claims against it for fraudulent transfers. The District Court granted JL's motion and the Amended Complaint was served on GG. A number of the other mechanics' lien claimants asserted cross claims against GG. On

October 21, 2009, Appellant brought a motion to dismiss for lack of personal jurisdiction. A hearing was held on November 9, 2009 on GG's motion and on December 10, 2009, the Honorable Judge Joseph T. Carter entered an Order denying GG's motion to dismiss. GG served and filed a Notice of Appeal on February 4, 2010 appealing Judge Carter's determination that WPIGH and GCI, who have the necessary minimum contacts, are mere alter egos of GG.

STATEMENT OF FACTS

I. THE PARTIES

A. JL Schwieters Construction, Inc.

JL is a Minnesota corporation with its principal office located at 13925 Fenway Boulevard North, Hugo, Minnesota 55038. JL is a framing and finishing contractor for both residential and commercial construction projects.

B. Goldridge Group, LLP

GG is a Wisconsin limited liability partnership with its principal office located at 310 Pinnacle Way, Suite 300, Eau Claire, WI 54701. (A-38). GG is owned by Gerard Koehn and Steven Stamm. (A-57; A-117). GG's business operation revolves around owning various pieces of real estate and operating wholly owned subsidiaries that own real estate. (A-56-57; A-117).

According to Mr. Koehn, at least three of the business entities recently created and wholly owned by GG, were set up without following corporate formalities. (A-60). For example, there are no officers or employees, the companies have no bank accounts and all money earmarked to these companies gets redirected to GG. (A-60-61; A-63-64; A-

69; A-117). Throughout the construction of the White Pines Senior Living Facility (“White Pines”) virtually every construction draw was wired from Minnwest Bank to GG, rather than to GCI, the general contractor. (Appellant’s Br. at 12; A-67; A-120).

C. Goldridge Group, WP IGH, LLC

WPIGH is a Wisconsin LLC established solely for the purpose of owning real property in Inver Grove Heights, Dakota County, Minnesota. (A-60; A-117). The property is known as the White Pines Senior Living Center.

The District Court found that:

- (a) WPIGH has no officers, directors, or employees (A-60-61; A-63; A-117);
- (b) WPIGH has no bank accounts (A-64; RA3-5);
- (c) WPIGH shares the same address as GG (A-64; A-117);
- (d) WPIGH flows all money directly to GG (A-69; A-117); and
- (e) Was insolvent for months during construction of the White Pines. (A-72).

The record demonstrates that despite owning WPIGH, Gerard Koehn generally does not know anything about its operation. (A-63-64; A-67). Mr. Koehn continually refers to GG as the company running the project, the resources to obtain more funds and to generally make all decisions. (A-66; A-69; A-70). That is, but for WPIGH owning the Project, WPIGH would serve no purpose as it has no functional business operation, thus making WPIGH a mere instrumentality of GG. (A-60; A-120).

D. Goldridge Construction, Inc.

GCI is a Wisconsin corporation wholly owned by Stamm and Koehn. (A-59; A-116). GCI's business headquarters are shared with GG and WPIGH. (Appellant's Br. at 7-8). GCI was the general contractor hired by its sister corporation WPIGH to construct White Pines. (A-59; A-117).

GCI was also the general contractor of identical projects in Washington County (Cottage Grove) and River Falls, Wisconsin. (A-56). Like this Inver Grove Height's project, these projects were built, but the subcontractors were not paid millions of dollars. (A-59-60). GCI has, upon the commencement of this lawsuit (and others), conveniently gone out of business. (A-59). According to Mr. Koehn's testimony, it went out of business as a result of a lawsuit filed by M&I Bank against GG. (A-62).

II. THE PROJECT: WHITE PINES SENIOR LIVING CENTER

A. GG Orchestrates Purchasing Real Estate in Minnesota and then Constructing the White Pines Senior Living Center Through Two Alter Ego Companies: WPIGH and GCI.

On October 26, 2007, WPIGH purchased certain real property in Dakota County, Minnesota legally described as: Lot 1, Block 1, Arbor Pointe 16th Addition (the "Subject Property"). (A-60; A-119). WPIGH then entered into a contract with GCI wherein GCI agreed to construct the White Pines. (A-65; A-119). The White Pines is a multi-unit apartment complex specifically constructed for seniors. *Id.*

B. GCI Hires Subcontractors to Construct the Project, But Fails to Pay Them.

In the summer and early fall 2007, GCI hired numerous subcontractors (many of whom are mechanic's lien claimants in this lawsuit) to construct the White Pines. (A-70; A-117). The District Court found that the subcontractors were induced into performing the work by GCI who promised to pay for all services provided. (A-66; A-117).

According to the owner Mr. Koehn, in the spring of 2008, when White Pines was only 50% complete, GCI and WPIGH were aware that they would not have the money to pay subcontractors to complete the construction, but failed to tell the subcontractors of this fact. (*Id.*; A-117). Instead the shell companies allowed the subcontractors to believe they would be paid. (*Id.*). Koehn justified this position because he believed that GG, the real party behind the construction, would obtain bridge loans and other financing to pay everyone. (A-66).

On or around September 2008, the subcontractors completed construction on White Pines. (*Id.*; A-117). It was then that GCI informed the subcontractors that there was no money to pay them and they were shutting the doors. (*Id.*; A-117). The shortfall was approximately \$1.5 million dollars. (A-66). Mechanic's liens were filed and this lawsuit ensued. JL Schwieters claim—which the Goldridge Defendants admit is owed—totals \$323,746.73. (A-67-68).

III. THE GOLDRIDGE SCHEME UNFOLDS: GCI AND WPIGH ARE NOTHING MORE THAN ALTER EGOS OF GG.

Shortly after the lawsuit commenced, GCI terminated its business operations. Discovery uncovered that identical scenarios are playing out in Washington County,

Minnesota and River Falls, Wisconsin. (A-58; A-60). That is, GG through GCI failed to pay subcontractors despite telling them it had the money to do so, and then GCI promptly went out of business telling creditors that the entities owning the real estate, all sharing common ownership with GCI, could not pay their bills. (*Id.*; A-59; A-66). Both projects are involved in protracted litigation similar to this matter.

The evidence demonstrates, and the District Court found, that GCI and WPIGH are nothing more than the alter ego of GG. (A-120). According to Mr. Koehn own testimony:

- (a) WPIGH had no employees, officers, or directors (A60-61; A-63; A-117; A-120);
- (b) WPIGH had no separate bank accounts or had no recollection if any existed (A-64; RA3-5; A-117; A-120);
- (c) That all money owed to WPIGH flowed directly to GG (A-69; A-117);
- (d) That WPIGH operated using the employees and credit of GG but had no management services agreement in place (A-63-64; A-70);
- (e) That GCI was insolvent (A-72);
- (f) That GCI was operating using GG employees but had no management services agreement in place (A-70; A-120);
- (g) That GCI's income was flowing to GG (A-71); and
- (h) Neither GCI nor WPIGH has paid obligations as they became due. (A-72).

A. Fraudulent Transfers Flowing From WPIGH to GCI and GG.

The evidence in the record, primarily coming from the testimony of Mr. Koehn, also demonstrates GCI and WPIGH were not able to pay debts when they became due,

were undercapitalized for the entire period that construction was underway, and most importantly they were completely controlled by GG. (A-70-72; A-120). Mr. Koehn also testified that all money paid to these alter ego entities during the relevant time flowed directly to GG despite no legal entitlement to the money. (A-69; A-118). Finally, GG readily admits that it received seven separate wire transfers from Minnwest Bank for the construction funds. (Appellant's Br. at 12; A-67; A-120). This money was suppose to be wired to GCI or WPIGH who were in turn required to pay the subcontractors. (A-67). However, because WPIGH and GCI are but mere instrumentalities of GG the money was wired to it for payment of the subcontractors—a duty it failed to perform. (*Id.*).

B. GG Executes a Guaranty on Behalf of WPIGH Acquiescing to the Jurisdiction of Minnesota Court.

Because WPIGH had no assets other than the real property White Pines was constructed on, Minnwest Bank required GG, the controlling parent company, to execute a guaranty. (Appellant's Br. 10-11; A-118; A-120). In the guaranty, GG consented to jurisdiction in Minnesota for any litigation arising out of the guaranty between Minnwest Bank and GG. (*Id.*).

STANDARD OF REVIEW

An order denying a motion to dismiss for lack of personal jurisdiction is appealable as a matter of right. *Stanek v. A.P.I., Inc.*, 474 N.W.2d 829, 831 (Minn. Ct. App. 1991). Whether personal jurisdiction exists is a question of law that the Court of Appeals reviews *de novo* on appeal. *Id.* at 832.

ARGUMENT

I. THE AMENDED COMPLAINT ALLEGES AND THE EVIDENCE IN THE RECORD DEMONSTRATES THAT WPIGH AND GCI ARE NOTHING MORE THAN THE ALTER EGOS OF GG AND THEREFORE MINNESOTA COURTS HAVE PERSONAL JURISDICTION OVER GG.

A. Personal Jurisdiction Standard in Minnesota.

A Minnesota court may assert personal jurisdiction over a nonresident corporation under Minnesota's long-arm statute. Minn. Stat. §543.19, subd. 1 (2009). In doubtful cases, the court resolves the jurisdictional question in favor of retention of jurisdiction. *Hardrives, Inc. v. City of LaCrosse*, 240 N.W.2d 814, 818 (Minn. Ct. App. 1995). The Minnesota Supreme Court has held that “[i]f the personal jurisdiction requirements of the federal constitution are met, the requirement of the long-arm statute will necessarily be met also.” *Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 411 (Minn. 1992).

To satisfy federal due process, a plaintiff need only demonstrate that the defendant purposefully established “minimum contacts” in the forum state. *Domtar, Inc. v. Niagara Fire Ins. Co.*, 533 N.W.2d 25, 30 (Minn. 1995). When considering whether personal jurisdiction exists, the court may consider matters outside the pleadings; the court may inquire, by affidavits or otherwise, into the facts as they exist. *Stevens v. Redwing*, 146 F.3d 538, 543 (8th Cir. 1998). For the purposes of determining whether the plaintiff has made a prima facie showing of personal jurisdiction, the court must view the evidence in the light most favorable to the plaintiff and resolve all factual conflicts in the plaintiff's favor. *Dent-Air, Inc. v. Beech Mountain Air Serv.*, 332 N.W.2d 904, 907 n. 1 (Minn. 1983). Taking JL's allegations, and other evidence presented to the trial court, as true, as

this court on review must do, it is readily apparent that GG purposefully availed itself of the jurisdiction of Minnesota Courts by using its subsidiaries as mere instrumentalities to defraud subcontractors and the bank.

B. GCI and WPIGH are Nothing More than the Alter Egos of GG and Therefore Minnesota Courts Have Personal Jurisdiction over GG.

1. GG Admits Minnesota has Jurisdiction Over its Wholly-Owned Subsidiaries

GG admits the findings of the District Court that its subsidiaries WPIGH and GCI “engaged in substantial business transactions within the State of Minnesota” and therefore have sufficient minimum contacts to be sued in Minnesota. (Appellant’s Br. at 6; A-119). GG also does not dispute the factual findings of the District Court that all payments to WPIGH flowed directly to GG, that GG is owned by the same two people who own WPIGH, and that all of the construction funds loaned by Minnwest Bank were wired directly to GG’s bank account. (*Id.* at 6 and 12; A-117; A-120). Because GG admits that WPIGH and GCI had substantial contacts with Minnesota, the only issue on appeal is whether the pleadings together with the evidence in the record demonstrate that these entities are nothing more than the alter ego of GG.

2. Minnesota Courts have Personal Jurisdiction Over a Parent Company When its Wholly-Owned Subsidiaries are Nothing More than its Instrumentalities.

Minnesota Courts have long held that evidence tending to show that a subsidiary is nothing more than the alter ego of the parent satisfies the minimum contacts requirement and will subject the parent to personal jurisdiction. *Busch v. Mann*, 397 N.W.2d 391, 395 (Minn. Ct. App. 1986); *see also, Scott v. Mego International, Inc.*, 519 F.Supp. 1118,

1126 (D. Minn. 1981) (holding that a subsidiary's activities may subject the parent company to jurisdiction if the companies are so organized that one is an instrumentality or adjunct of the other); *Miller v. Tony and Susan Alamo Foundation*, 924 F.2d 143, 148 (8th Cir.1991) (holding that the appearance of an alter-ego of a defendant is a sufficient basis for personal jurisdiction over that defendant); and *Lakota Girl Scout Counsel, Inc. v. Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 638 (8th Cir.1975) (where a corporation is the alter ego of the stockholders so as to justify disregard of the corporate entity, jurisdiction over the corporation will support jurisdiction over the stockholders). In a Minnesota, a subsidiary is considered the alter ego of its parent company if the subsidiary is organized and operated so that it is merely an instrumentality of the other corporation. *Zimmerman v. American Inter-Insurance Exchange*, 386 N.W.2d 825, 828 (Minn. Ct. App. 1986).

The fiction of corporate entity may be disregarded, where one corporation is so organized and controlled and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation. *Lakota Girl Scout Counsel, Inc.*, 519 F.2d at 637. Even a non-owned corporation may act as agent for another corporation. *Id.* “No all embracing rule has been laid down under which the relationship between two corporations may be determined. The circumstances in each case must be examined to determine whether a corporation through the activities of another corporation has subjected itself to jurisdiction in a state under its long arm statute.” *Id.*

3. The District Court Correctly Found that WPIGH and GCI are Alter Egos of GG.

GG argues that *Scott v. Mego International, Inc.*, 519 F.Supp. 1118 (D.Minn. 1981) supports its argument that GCI and WPIGH are not alter egos of GG because the entities are not “**virtually inseparable.**” (Appellant’s Br. at 9) (emphasis in original). Even a cursory reading of *Mego* illustrates that the standard is not “virtually inseparable.” In fact no where in the *Mego* opinion does the court ever announce that the rule is the entities must be “virtually inseparably.” Even if that were the standard, however, it would be met in this case given that Koehn, the owner of the various companies, cannot even keep them all straight during his deposition testimony and the evidence demonstrates GG was in complete control of both GCI and WPIGH. (A-60; A-63; A-67; A-70-71).

In *Mego*, the court exercised jurisdiction over a foreign parent corporation, Mego International, under the theory that its subsidiary, Mego Corp., was nothing more than an alter ego. The parent company in *Mego* conducted much of its “business through its wholly-owned subsidiaries which [were] closely interrelated. *Id.* at 1126. The two corporations had a number of common directors and officers, maintained offices at the same location, and the parent company guaranteed loans and other credit facilities for its subsidiaries. *Id.*

The Court of Appeals in *Mego* affirmed the lower court holding that “because of the nature of the parent-subsidiary relationship and the activities in Minnesota of its wholly-owed subsidiary, defendant Mego, this court also has personal jurisdiction over

defendant Mego International, Inc. *Id.* Despite GG's argument, the laundry list of items demonstrating the companies were alter egos that the *Mego* court articulated are not all required factors before a court can find personal jurisdiction over a parent company. Indeed, courts specifically avoid any formulaic rule for determining when a company is an alter ego of its parent. *Lakota Girl Scout Counsel, Inc.*, 519 F.2d at 637.

Here, the Amended Complaint alleges, and the District Court found that the evidence in the record from the testimony of Gerard Koehn, the owner of GG, clearly demonstrates that GG created shell companies to purchase real estate, enter into contracts with Minnesota subcontractors, never sufficiently capitalized the companies, and used them to hold the liabilities while all money and assets flowed directly to GG. (A-60; A-64; A-66; A-69; A-117; A-120).

By Koehn's own admission, WPIGH did not have any employees (A-60; A-117); its own bank accounts (*id.*); was never capitalized properly by GG (A-64; A-120); did not maintain corporate formalities (A-60-61; A-117); and transferred all money it made directly to GG's bank accounts (A-69; A-117-118). Just like the parent company in *Mego*, GG also guaranteed the loan Minnwest Bank made to WPIGH. (Appellant's Br. at 10-11; A-118; A-120). Where, as here, a company disregards the corporate form and utilizes other shell companies as its alter ego, Courts routinely hold personal jurisdiction is proper over the so-called parent company. *See Scott v. Mego International, Inc.*, 519 F.Supp. 1118 (D.Minn. 1981); *Bielicki v. Empire Stevedoring Co., Ltd.*, 741 F.Supp. 758 (D. Minn. 1990).

More specifically, Rick Bowe, the former President of GG, was also the authorized representative of WPIGH during the construction of the White Pines and negotiated the bank loan with Minnwest on behalf of WPIGH as borrower. (A-60; A-64). Koehn testified that Bowe was in charge of money coming into WPIGH from the bank and also in charge of money flowing out to GG. (A-60). Moreover, Koehn testified that he routinely made trips to Minnesota in his capacity as the owner of GG, which is the sole member of WPIGH, to monitor the construction progress and have site meetings. (A-68). Even Koehn during his deposition confuses the entities and referred to GG owning the various Senior Living Facilities that GCI has built throughout the years. (A-56).

There is no serious question that WPIGH and GCI are nothing more than the alter egos of GG. (A-119-120). Koehn and Stamm attempted to create shell companies and divert all money from those companies to GG without it ever having to also accept the associated liabilities with doing business in Minnesota. This type of corporate shell game is a textbook example of alter ego companies and therefore Minnesota Courts have continuing personal jurisdiction over GG.

C. The District Court Properly Considered the Guaranty that GG Executed and the Numerous Wire Transfers it Received During the Construction.

GG argues that the District Court erred in considering the guaranty it signed on behalf of WPIGH and the seven wire transfers it received for the construction draws from Minnwest Bank. (Appellant's Br. at 10-12). GG argues that because the guaranty and

wire transfers only relate to business it transacted with Minnwest Bank, the District Court should not even consider these transactions. *Id.* This argument is misplaced.

The District Court examined and consider the seven wire transfers and the guaranty under the rubric of JL's alter ego theory of personal jurisdiction. (A-119-120). The District Court did not undertake a minimum contacts analysis using these facts, as argued by GG, because GG admits that GCI and WPIGH do have the minimum contacts. (Appellant's Br. at 6; A-118-119). Rather, the District Court was only concerned with whether the evidence and pleadings taken in the light most favorable to JL tended to demonstrate that WPIGH and GCI are alter egos of GG. (A-119-120).

The fact that GG signed a corporate guaranty on behalf of its wholly-owned subsidiary is highly probative in an alter ego analysis. (A-118; A-119). Indeed, it was one of the factors considered by the *Mego* Court in finding Minnesota Court had personal jurisdiction over a parent company that did not do business in Minnesota. *Mego International, Inc.*, 519 F.Supp. at 1126. Similarly, the fact that GG requested, and Minnwest Bank complied, that construction draw funds be wired directly to it rather than the general contractor or owner of the White Pines also demonstrates that these wholly-owned subsidiaries are nothing more than instrumentalities of GG. (A-120). If WPIGH or GCI had bank accounts and were operating independently there would be no reason for the construction funds to be wired to GG. In fact, it is entirely improper that the money was wired to GG if it truly is a complete stranger to this construction project.

CONCLUSION

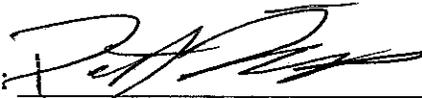
GG and its owners have devised the perfect plan to create equity in its real estate projects. First, GG sets up alter ego corporations to hold title to the Minnesota real estate projects and then it hires GCI to act as a general contractor, which the GG owners also own. GG then obtains a loan through the corporate alter ego to construct a building on the land and has GCI hire subcontractors to construct a building on the land. Finally, GCI refuses to pay the subcontractors and instead uses the money earmarked for the subcontractors for its own benefit and then the principals shut down GCI so that the subcontractors cannot collect from GCI or the company that actually owns the real estate because it has no *real* assets. Magically, the Project then has equity equal to the value of the money owed to the subcontractors—in this case \$1.5 million dollars—and hopefully the subcontractors go away.

GG has orchestrated the identical scheme in three different projects: Inver Grove Heights, MN, Cottage Grove, MN and River Falls WI. To allow GG to shield itself from liability through creating alter ego shell companies and then hide behind a disingenuous lack of jurisdiction argument, flies in the face of justice and fair play. Minnesota Courts have a compelling interest in continuing its jurisdiction over GG and providing a forum for its resident subcontractors that have been wronged by this entity. To allow GG out of the case precludes hard working subcontractors who placed their trust in these sham entities to lose millions of dollars while GG retains ownership of these completed buildings and laughs all the way to the bank with the subcontractor's money.

For the foregoing reasons, Respondent, JL respectfully requests that this Court affirm the District Court's Order denying the GG's Motion to Dismiss for lack of personal jurisdiction.

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