COURT OF APPEALS DECISION DATED AND FILED

March 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-1216

Cir. Ct. No. 01CV002100

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

ADVANTAGE LEASING CORPORATION,

PLAINTIFF-APPELLANT,

V.

NOVATECH SOLUTIONS, INC.,

DEFENDANT,

RUTH H. BRASH,

DEFENDANT-RESPONDENT,

BROWN COMMUNICATIONS, LTD., D/B/A J. BROWN COMMUNICATIONS, AND JESSICA BROWN, D/B/A JESSICA ANN BROWN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Reversed and cause remanded*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Advantage Leasing sued several parties in connection with a lease agreement. One of Advantage Leasing's claims, intentional misrepresentation, was directed at Ruth Brash personally. Brash is the president of NovaTech Solutions, Inc. The circuit court granted summary judgment dismissing the tort claim against Brash. The court reasoned that NovaTech's "corporate veil" protected Brash from a suit against her personally because the false statements alleged were made by Brash in the course of her activities on behalf of NovaTech. We disagree. Brash may be sued personally for the tort of misrepresentation because an individual is personally responsible for his or her own tortious conduct. We also reject Brash's argument that she was entitled to summary judgment on other grounds. Accordingly, we reverse and remand.

Background

¶2 In 2000, Brown Communications was in the market for computer equipment. Brown's president was Jessica Brown. NovaTech Solutions was a seller of computer equipment. NovaTech's president is Ruth Brash. Brown Communications wished to acquire computer equipment, but needed financing. Advantage Leasing, the plaintiff in this case, provided financing to Brown Communications to facilitate the acquisition of computer equipment that Advantage Leasing believed was to be supplied by NovaTech. The parties dispute various details of the three-way arrangement. However, looking, as we must, at allegations in the pleadings and submissions in a light most favorable to Advantage Leasing, they reveal the following.

¶3 On August 15, 2000, an application for equipment financing in the amount of $33,000 was signed by Jessica Brown, on behalf of Brown Communications, and submitted to Advantage Leasing. The application indicates that the equipment would be supplied by NovaTech. Ruth Brash filled out part of the application and it was faxed to Advantage Leasing from NovaTech offices.[1] In response, the same day, Advantage Leasing faxed to Brown Communications a "commitment" to lease computer equipment to Brown.

¶4 On August 17, 2000, NovaTech sent a bill for $33,000 to Advantage Leasing. The bill referenced "Sales of Equipment," "J. Brown Communications," and "Quote #JBROWN081000." The $33,000 amount corresponds to the total of seven quotes from NovaTech to Brown Communications dated August 10, 2000. Each of the seven quotes has "JBROWN081000" on it.[2] The quoted $33,000 price is entirely attributed to computer equipment on these documents.[3]

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[1] The application indicates at the top that it was faxed from NovaTech. Also, an Advantage Leasing employee testified that the faxed page received by Advantage Leasing indicated that it had been faxed from NovaTech. Jessica Brown's admissions include the admission that Ruth Brash filled out part of the application.

[2] The quotes were in the possession of Advantage Leasing and they all are on forms with "NovaTech Solutions, Inc." and NovaTech's address on the top. An affidavit of an Advantage Leasing employee avers that these quotes were delivered to Advantage Leasing by NovaTech.

[3] The record reflects a dispute over whether Advantage Leasing was misled into believing that the $33,000 amount covered only computer equipment when in fact Ruth Brash and Jessica Brown intended that part of that money compensate NovaTech for technical services. The invoices NovaTech apparently sent to Advantage Leasing indicate that NovaTech intended to supply $33,000 in computer equipment. The "Sales Report" generated by Advantage Leasing indicates "3 work stations, 2 servers and 1 lap top for $27,000 and a fax machine. Total: 33,000." But there is evidence that when NovaTech received the $33,000 payment from Advantage Leasing, it immediately withheld $11,848 for technical services and forwarded the remainder to Brown Communications.

Our decision, however, is unaffected by any dispute in this regard. Regardless whether a portion of the $33,000 amount was intended by Ruth Brash and Jessica Brown to go to NovaTech

(continued)

¶5 According to a "Sales Report" generated by Advantage Leasing, on Wednesday, August 16, 2000, Brash called Advantage Leasing to say that the equipment for Brown Communications would be delivered on that Friday or the following Monday. The same report indicates that on Friday, August 18, 2000, Brash again called Advantage Leasing regarding Brown Communications and said she, Brash, was going in that day and Monday to finish the job.[4]

¶6 In an admission, Jessica Brown admitted that prior to August 21, 2000, Brash proposed to Jessica Brown that Brown Communications should acknowledge to Advantage Leasing the delivery and acceptance of NovaTech computer equipment before the equipment was delivered to Brown Communications because that would enable NovaTech to obtain payment from Advantage Leasing that NovaTech would then use as a down payment on the purchase of the computer equipment. Also, in her cross-claim, Jessica Brown asserted that "[f]ollowing August 10, 2000," Brash asked Brown to acknowledge receipt of the equipment before it was delivered so that NovaTech could get the cash necessary to purchase the equipment. Brash, however, asserts in her affidavit that Brown found another equipment vendor.

¶7 On August 21, 2000, Advantage Leasing and Brown Communications entered into a lease agreement that identified NovaTech as the supplier of computer equipment. Per the lease, Brown Communications was

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for technical services, the misrepresentation claim by Advantage Leasing against Ruth Brash personally should not have been dismissed.

[4] The "Sales Report," supported by an affidavit, appears on its face to be admissible as recorded recollection or as a record of regularly conducted activity under WIS. STAT. §§ 908.03(5) or (6) (2003-04). In any event, Brash does not argue that the "Sales Report" information is inadmissible evidence.

obliged to pay Advantage Leasing 36 monthly payments of $1,216.56. On that same day, Jessica Brown, on behalf of Brown Communications, signed and delivered to Advantage Leasing a certification that Brown Communications had received all equipment listed in the lease agreement. Also that day, Advantage Leasing delivered to NovaTech a check in the amount of $33,000.

¶8 On August 23, 2000, Ruth Brash cashed the check from Advantage Leasing. That same day, NovaTech transferred $21,152 to Brown Communications and retained $11,848.

¶9 In its complaint, Advantage Leasing claims breach of contract against NovaTech based on the assertion that NovaTech failed to deliver equipment to Brown Communications as required by the contract between Advantage Leasing and NovaTech. Advantage Leasing also alleges a claim against Brash personally for intentional misrepresentation. Advantage Leasing contends that Brash's misrepresentations regarding the delivery of equipment to Brown Communications induced Advantage Leasing to perform on its contract with Brown Communications by giving NovaTech the $33,000. The issues on appeal pertain only to Advantage Leasing's claim against Brash.

Discussion

¶10 This court reviews summary judgment decisions *de novo*, applying the same method employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That method is well established and need not be repeated in its entirety. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. For our purposes, it is sufficient to say that the moving party is entitled to summary

judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.***, ¶24.

Brash's Personal Liability for Tortious Conduct

¶11 Advantage Leasing sued Ruth Brash personally, alleging intentional misrepresentation. The supreme court set forth the elements of this claim in ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, 270 Wis. 2d 146, 677 N.W.2d 233:

> All misrepresentation claims share the following required elements: 1) the defendant must have made a representation of fact to the plaintiff; 2) the representation of fact must be false; and 3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage. The plaintiffs here allege intentional misrepresentation, which carries the following additional elements: 4) the defendant must have made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false; and 5) the defendant must have made the misrepresentation with intent to deceive and to induce the plaintiff to act on it to his detriment or damage.

Id., ¶13 (citations omitted).

¶12 Brash moved for summary judgment, seeking dismissal of the intentional misrepresentation claim against her personally. She argued that Advantage Leasing had not presented evidence supporting the standard for piercing the corporate veil and, therefore, no factual dispute precluded dismissal of the claim against her. The circuit court adopted Brash's view that, in order to hold her personally liable, Advantage Leasing was obliged to "pierce the corporate veil," and dismissed the claim against her.

¶13 The circuit court relied on ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), and, in particular, the part of ***Consumer's Co-op*** holding that the corporate veil cannot be pierced if any one of three specified elements is absent. ***Id.*** at 484-85.[5] The circuit court concluded that Advantage Leasing's submissions did not contain evidence sufficient to show all three elements.

¶14 The circuit court's reliance on ***Consumer's Co-op*** was misplaced. However, we begin our discussion not with ***Consumer's Co-op***, but with the case that does apply, ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 273 N.W.2d 285 (1979).

¶15 Advantage Leasing does not seek to pierce the corporate veil and hold Brash personally liable for an obligation of NovaTech. Rather, Advantage Leasing seeks to hold Brash liable for her own tortious conduct. We agree with Advantage Leasing that, under ***Oxmans'***, a corporate officer or agent may be held

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[5] The three factors, as recited in ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 419 N.W.2d 211 (1988), are:

> "(1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> "(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
>
> "(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

Id. at 484 (quoting 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.10, at 490 (rev. ed. 1983)).

personally liable for his or her own tortious conduct, regardless of that person's position in the corporation and regardless whether the action was taken on behalf of the corporation. The ***Oxmans'*** court explained:

> An individual is personally responsible for his own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.

Id. at 692-93 (citing 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1143 and RESTATEMENT (SECOND) OF TORTS §§ 523, 549).[6] Whatever the contours of this rule, it squarely applies to intentional misrepresentation. Indeed, ***Oxmans'*** itself involved a claim of "fraudulent misrepresentation" (also known as intentional misrepresentation) by a corporate officer and shareholder acting in the course of his corporate duties. ***Oxmans'***, 86 Wis. 2d at 692.

¶16 Brash contends that the portion of ***Oxmans'*** quoted above was modified or overruled by the supreme court in ***Consumer's Co-op***. We disagree.

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[6] The most current version of this section of the treatise states:

> A corporate officer or agent who commits fraud is personally liable to a person injured by the fraud. An officer actively participating in the fraud cannot escape personal liability on the ground that the officer was acting for the corporation. Similarly, it is immaterial that the officer received no benefits from the transaction. The corporation also may be liable, but the individual is not thereby relieved of his or her own responsibility.

3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1143, at 232-36 (perm. ed., rev. vol. 2002) (footnotes omitted).

The court in ***Consumer's Co-op*** did not address whether corporate employees may be held personally liable for their own tortious conduct.

¶17 In ***Consumer's Co-op***, the plaintiff, Consumer's Co-op, sold bulk fuel to a closely held corporation. The corporation failed to keep current in its payments and Consumer's Co-op obtained a judgment against the corporation. Later, when the corporation failed to satisfy the judgment, Consumer's Co-op sued the corporation's two primary officers—one of whom was the majority shareholder—seeking to hold them personally liable for the money judgment against the corporation. ***Consumer's Co-op***, 142 Wis. 2d at 470-72. The circuit court decided that the facts warranted piercing the corporate veil and concluded that the officers were personally liable for the corporate debt. ***Id.*** at 470. Thus, the ***Consumer's Co-op*** court focused its attention on appropriate factors to consider when a party seeks to hold a corporate employee or shareholder personally liable for an obligation of a corporation. *See* ***id.*** at 473; *see also* ***Capsavage v. Esser***, 224 Wis. 2d 404, 410-11, 418, 591 N.W.2d 888 (Ct. App. 1999) (piercing-the-corporate-veil doctrine applied to determine whether a 50% shareholder in a corporation could be held liable for an alleged contractual breach by the corporation). Nothing in ***Consumer's Co-op*** addresses whether a corporate employee may be held personally liable for his or her own tortious conduct.[7]

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[7] The reference to tort actions in ***Consumer's Co-op*** is not a reference to tort actions against individuals. Rather, the court is speaking to the difference between tort and contract actions against the corporation and whether this difference supports the proposition that undercapitalization should not be considered in a piercing-the-corporate-veil analysis when the action against the corporation is in contract only. ***Consumer's Co-op***, 142 Wis. 2d at 481-82.

¶18 Brash asserts that ***Oxmans'*** is off topic because the decision specifically notes that piercing the corporate veil is not an issue. She relies on the following footnote in ***Oxmans'***:

> [The defendant] correctly asserts that the trial court in the case at bar did not expressly find that the contacts it relied on were contacts by [the defendant] as an individual and not as a corporate agent. Nor did the trial court expressly invoke the doctrine of "piercing the corporate veil" and find that [the defendant] and [the corporation] were one and the same. As we explain, however, such findings are not necessary under the circumstances of this case.

Oxmans', 86 Wis. 2d at 691 n.5. Brash misses the meaning of this footnote. It simply says that "piercing the corporate veil" is not necessary to hold a defendant personally liable for his or her own tortious conduct. That is exactly Advantage Leasing's position in this case.

¶19 Brash also argues that ***Oxmans'*** is not on point because it is concerned with jurisdiction. We agree that the main discussion in ***Oxmans'*** arises in the context of a challenge to the jurisdiction of Wisconsin courts over the officer of an out-of-state corporation. However, the ***Oxmans'*** court rejected this jurisdictional challenge because the complaint alleged that the defendant personally committed a tort in Wisconsin and the court concluded that such a claim may proceed, regardless of the defendant's affiliation with an out-of-state corporation and regardless of any law limiting the ability of states to obtain jurisdiction over agents of out-of-state corporations. ***Id.*** at 686, 690-93. Notably, the ***Oxmans'*** court did not support its conclusion with law developed to sort out whether a state may obtain jurisdiction over a corporate agent, as would be expected if the court's holding was limited to the issue of jurisdiction. Instead, the court relied on a treatise setting forth the general rule that corporate officers are

personally liable for their own fraud or deceit. *See* ***id.*** at 692-93 (citing 3A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1143 and RESTATEMENT (SECOND) OF TORTS §§ 523, 549). The section from Fletcher's treatise the court relied on does not mention inter-state jurisdictional issues.

¶20 In sum, we agree with Advantage Leasing that it need not meet the standard for piercing the corporate veil in order to sue Brash personally in tort for Brash's own tortious conduct.

Whether Advantage Leasing Alleged a Valid Intentional Misrepresentation Claim

¶21 Brash argues that Advantage Leasing failed to allege a "valid" intentional misrepresentation claim against her. Brash admits that Advantage Leasing's complaint alleges that Brash misrepresented the delivery of equipment to Brown Communications and that this misrepresentation induced Advantage Leasing to perform on the leasing agreement by sending $33,000 to NovaTech. Further, Brash admits no equipment was delivered. Still, Brash contends that these alleged misrepresentations do not form a valid cause of action in tort because, at worst, Advantage Leasing was induced only to perform on its existing contractual obligation. Stated differently, Brash contends that Advantage Leasing was required to perform on the leasing agreement and had that obligation regardless whether NovaTech delivered equipment to Brown Communications. According to Brash, the law in Wisconsin is clear that misrepresentations that occur after the formation of a contract are not actionable in tort, but instead solely in contract. However, the "clear" law Brash refers to fails to support her argument.

¶22 Brash relies on ***Eklund v. Koenig & Associates, Inc.***, 153 Wis. 2d 374, 451 N.W.2d 150 (Ct. App. 1989), for her assertion that misrepresentations occurring after contract formation are not actionable in tort, but instead solely in contract. But the case says nothing of the sort.

¶23 The other three cases Brash relies on, ***Digicorp, Inc. v. Ameritech Corp.***, 2003 WI 54, 262 Wis. 2d 32, 662 N.W.2d 652; ***Kailin v. Armstrong***, 2002 WI App 70, 252 Wis. 2d 676, 643 N.W.2d 132; and ***Douglas-Hanson Co. v. BF Goodrich Co.***, 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999), *aff'd*, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621, all discuss the economic loss doctrine. But none of these cases discuss whether an individual may be sued for his or her own personal tortious conduct. The economic loss doctrine, as discussed in these cases, might apply to prohibit a tortious misrepresentation claim against NovaTech, assuming there was a contract between Advantage Leasing and NovaTech, but the doctrine has no apparent application to Advantage Leasing's tort claim against Brash as an individual. Brash does not assert that she personally had a contractual relationship with Advantage Leasing.

Statement of Existing Fact

¶24 The submissions, viewed favorably to Advantage Leasing, reveal that Brash allegedly told Advantage Leasing during two telephone conversations that the computer equipment for Brown Communications would be delivered and that she was going "in today and Monday" to finish the job. Brash argues that these statements are not actionable because they are "statements of future events," not statements of existing fact. She asserts that there is no evidence she ever represented to Advantage Leasing that the computer equipment *was* delivered,

only that it would be delivered. Brash's argument, however, is undercut by one of the cases she herself relies on.

¶25 Brash points to ***Consolidated Papers, Inc. v. Dorr-Oliver, Inc.***, 153 Wis. 2d 589, 451 N.W.2d 456 (Ct. App. 1989). In that case, the plaintiff alleged that the defendant represented that a "clarifier to be constructed would meet the 'specific operating requirements' of [the plaintiff] and would be reasonably fit for the production of white liquor." ***Id.*** at 594. We held in ***Consolidated Papers*** that this statement was not actionable as a misrepresentation because it was a promise of future performance, not a statement of fact. ***Id.*** In her brief, Brash quotes our explanation: "Statements of fact must relate to present or pre-existing facts, not something to occur in the future." ***Id.*** But Brash omits the very next sentence in our decision: "[The defendant] is liable in tort for such representations only if it intended not to create such a clarifier when it made the representations." ***Id.*** Thus, our complete statement of the law is as follows: Statements of fact must relate to present or pre-existing facts, not something to occur in the future, except when statements contain an expression of intent to do something in the future though the speaker has no such intent. *See also* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶13, 239 Wis. 2d 78, 619 N.W.2d 271 ("[S]tatements of opinion may result in a misrepresentation cause of action if the speaker knows of facts incompatible with his or her opinion ….").

¶26 It is Advantage Leasing's theory that when Brash told an Advantage Leasing employee on Wednesday, August 16, 2000, that equipment for Brown Communications would be delivered on Friday or Monday and when, on that Friday, Brash said she was going in "today and Monday" to finish the job, Brash was making misrepresentations because she had no intent at the time of the telephone calls to deliver any equipment to Brown Communications. If

Advantage Leasing proves this, it proves a representation of fact that is false for purposes of the tort of intentional misrepresentation.

Reliance

¶27 Brash points to the reliance element of intentional misrepresentation. She asserts that the only representation that mattered to Advantage Leasing was the one made by Jessica Brown when she certified that Brown Communications had received the computer equipment from NovaTech. Brash asserts that it is undisputed that Advantage Leasing would not have paid NovaTech but for the certification from Brown Communications. Brash argues: "By their own admission, Advantage concedes that no other representations from anyone else would be sufficient for [Advantage Leasing] to release any funds." Stated differently, Brash asserts that Advantage Leasing's decision to send the $33,000 check to NovaTech depended only on the confirmation from Jessica Brown that Brown Communications had received the equipment. In Brash's view, this means that Advantage Leasing cannot now claim it relied on statements about delivery made by Brash. We reject this argument.

¶28 The Wisconsin pattern jury instructions provide an apt summary of reliance for purposes of intentional misrepresentation:

> Representations are to be tested by their actual influence on the person to whom made [not upon the probable effect of such representation upon some other person]. In determining whether (plaintiff) actually relied upon the representations, the test is whether (plaintiff) would have acted in the absence of the representation. It is not necessary that you find that such reliance was the sole and only motive inducing (plaintiff) to enter into the transaction. If the representations were relied upon and constitute a material inducement, that is sufficient.

WIS JI—CIVIL 2401 (footnotes omitted).

¶29 It is readily apparent that the facts in the submissions support at least one reliance theory, namely that Advantage Leasing relied, in part, on Brash's telephone calls as assurance that the computer equipment was delivered to Brown Communications and, consequently, relied on Brash's statements to deliver the check to NovaTech for $33,000. As the jury instruction makes clear, it is not necessary that reliance on Brash's statements was the sole motive inducing Advantage Leasing to send NovaTech the check; it is sufficient if Brash's statements constituted a material inducement. *See* ***First Nat'l Bank in Oshkosh v. Scieszinski***, 25 Wis. 2d 569, 573, 131 N.W.2d 308 (1964) ("False representations must be a material but need not be the sole inducement ….").

Frivolousness

¶30 The circuit court concluded that Advantage Leasing's misrepresentation claim against Brash was frivolous within the meaning of WIS. STAT. §§ 802.05 and 814.025 (2003-04). On appeal, Brash has asked this court to declare Advantage Leasing's appeal frivolous. We reverse the circuit court's frivolousness determination and deny Brash's motion to declare the appeal frivolous.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.