COURT OF APPEALS
DECISION
DATED AND FILED

August 22, 2017

Diane M. Fremgen
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. 2016AP1303 **Cir. Ct. No. 2012CV7**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MICHAEL J. JOHNSON, INDIVIDUALLY AND MICHAEL & SONS AMUSEMENT, INC., A WISCONSIN CORPORATION,

PLAINTIFFS-APPELLANTS,

V.

DALE PAUTSCH, INDIVIDUALLY, SCHNEIDER FINANCIAL STRATEGIES, INC., A WISCONSIN CORPORATION AND ACE AMERICAN INSURANCE COMPANY,

DEFENDANTS,

JOHN P. SCHNEIDER, AN ADULT RESIDENT OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Michael Johnson and Michael & Sons Amusement, Inc. (collectively, Johnson) appeal an order granting summary judgment in favor of John Schneider. Johnson argues the circuit court erred by converting Schneider's motion to dismiss to a motion for summary judgment. Johnson also contends the court erred by granting Schneider summary judgment on grounds that were not argued by the parties. We reject Johnson's arguments and affirm.

BACKGROUND

¶2 Schneider is the sole shareholder of Schneider Financial Strategies, Inc. (SFS), which operates an H&R Block franchise in Sturgeon Bay. SFS employed Dale Pautsch as a tax preparer during the following time periods: January 1 to April 15, 2009; January 1 to April 15, 2010; December 1, 2010, to April 18, 2011; and November 20, 2011, to April 17, 2012. For each of these periods, Pautsch entered into a written employment agreement with SFS. Schneider signed each employment agreement as a "management representative" of SFS, and it is undisputed Schneider's duties with respect to SFS included "partial responsibility for hiring and training employees as well as portions of day to day management at the franchise locations."

¶3 In the course of his employment with SFS, Pautsch prepared tax returns for Johnson in 2010 and 2011. Pautsch also performed certain business services for Johnson during that time period.

¶4 In January 2012, Johnson filed the instant lawsuit against Pautsch and H&R Block,[1] accusing Pautsch of a number of negligent and fraudulent acts, contrary to his duties of ordinary and fiduciary care. In March 2012, Johnson filed an amended summons and complaint, naming SFS as an additional defendant. Over the next three years, the parties conducted discovery, including depositions of Schneider, Pautsch, and Michael Johnson. In April and May 2015, respectively, Johnson filed fourth and fifth amended complaints naming Schneider as a defendant. The fifth amended complaint alleged Schneider had negligently hired and supervised Pautsch and further asserted Schneider was liable for Pautsch's actions under the doctrine of respondeat superior.

¶5 Schneider subsequently moved to dismiss, arguing Johnson's fourth and fifth amended complaints failed to state a claim against Schneider upon which relief could be granted. *See* WIS. STAT. § 802.06(2)(a)6. (2015-16).[2] As relevant to this appeal,[3] Schneider argued he was immune from liability by virtue of the fact that Pautsch was employed by SFS, the corporation, rather than by Schneider, individually. Schneider cited case law for the proposition that corporations are separate legal entities from their individual shareholders. Although not expressly

[1] Johnson later settled with H&R Block, and it was dismissed from this lawsuit.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] Schneider also raised an additional argument regarding Johnson's contention that Schneider failed to purchase adequate insurance coverage. That issue is not relevant to the arguments raised on appeal.

stated as such, the crux of Schneider's argument appeared to be that Johnson could not hold Schneider personally liable without piercing the corporate veil.[4]

¶6 In addition to his piercing-the-corporate-veil argument, Schneider asserted Pautsch had admitted during his deposition that the acts which formed the basis for Johnson's claims were performed by Pautsch as an independent "business and tax consultant," rather than as part of Pautsch's employment by SFS. Schneider argued, "The fact that Dale Pautsch may have provided additional services to [Johnson], on his own, outside of tax season, should not trigger liability on the part of [SFS], much less John P. Schneider, personally."

¶7 In his brief in opposition to Schneider's motion to dismiss, Johnson asserted Schneider's argument regarding piercing the corporate veil "wholly misse[d] the point." Johnson claimed it was not necessary for him to pierce the corporate veil in order to state a claim against Schneider because he sought to hold Schneider liable for his own conduct, rather than to hold Schneider personally liable for the actions of SFS. In support of this argument, Johnson cited several Wisconsin cases for the proposition that an individual may be personally responsible for his or her own tortious conduct, even if that conduct occurred while the person was acting on behalf of a corporation. *See, e.g.*, ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 692, 273 N.W.2d 285 (1979); ***Ferris v. Location 3 Corp.***, 2011 WI App 134, ¶¶14-16, 337 Wis. 2d 155, 804 N.W.2d 822. In the alternative, Johnson argued the facts alleged in his fifth amended complaint supported piercing the corporate veil and holding Schneider personally liable for

[4] Piercing the corporate veil refers to "[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts." *Piercing the corporate veil*, BLACK'S LAW DICTIONARY (10th ed. 2014).

SFS's actions pursuant to the "alter ego" doctrine. *See* ***Consumer's Co-op of Walworth Cty. v. Olsen***, 142 Wis. 2d 465, 483-84, 419 N.W.2d 211 (1988).

¶8 In his reply brief, Schneider disputed Johnson's claim that Schneider could be held personally liable for his own tortious conduct under the facts in this case. Schneider again contended the undisputed facts showed that all of Pautsch's alleged misconduct occurred outside the scope of his employment by SFS.

¶9 Both parties submitted materials outside the pleadings in support of their briefs on Schneider's motion to dismiss. In an "appendix" to the motion, Schneider included several pages from a brief previously submitted to the circuit court, which contained typed excerpts of testimony from Pautsch's deposition. Schneider also submitted an affidavit of his attorney, Peter Hickey, attached to which were: (1) SFS's "Answers to Interrogatories and Response to Request for Production"; (2) SFS's franchise agreement with H&R Block; and (3) a "Franchise Offering Circular for Prospective Franchisees" provided by H&R Block to SFS. In response, Johnson submitted an affidavit of his attorney, Andrew Weininger, with six attached exhibits, including twelve pages from Schneider's deposition transcript and six pages from the transcript of Pautsch's deposition.[5] Schneider then submitted a supplemental affidavit of attorney Hickey, attached to which were two additional pages from Schneider's deposition transcript.

¶10 Schneider acknowledged in his reply brief that both parties had submitted materials outside the pleadings in support of their respective positions.

[5] Johnson submitted these evidentiary materials, despite noting in his response brief that a circuit court may not consider matters outside the pleadings when deciding a motion to dismiss for failure to state a claim. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

Schneider cited WIS. STAT. § 802.06(2)(b), which states that if matters outside the pleadings are "presented to and not excluded by the court" on a motion to dismiss for failure to state a claim, "the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08." Schneider ultimately asserted, "Whether denominated a motion to dismiss or motion for summary judgment, John P. Schneider, personally, should be dismissed from this action."

¶11 The circuit court held a hearing on Schneider's motion on February 29, 2016. At the outset, the court explained it agreed with Johnson that the issue was not whether Johnson could pierce the corporate veil in order to hold Schneider personally liable for SFS's actions, but whether Schneider himself had committed tortious conduct for which he could be held liable.

¶12 The court then addressed whether Schneider's motion should be treated as a motion to dismiss or a motion for summary judgment. The court acknowledged Schneider had not raised the conversion issue until his reply brief. The court also acknowledged that, under WIS. STAT. § 802.06(2)(b), if the court decided to convert the motion, it would be required to give both parties an opportunity to present pertinent materials. However, the court noted the case before it was not one in which the plaintiff "just filed a complaint … and somebody files a motion to dismiss and it becomes converted to a motion for summary judgment [and] there hasn't been an opportunity for discovery." To the contrary, the court observed the instant lawsuit had been pending for over four years as of the hearing date, Johnson had filed five amended complaints in the interim, and the depositions of the main witnesses had been taken more than three years before the hearing. The court stated, "[T]his is not [a case] where the facts

haven't had an opportunity to be developed." Under these circumstances, the court opted to treat Schneider's motion as a motion for summary judgment, rather than a motion to dismiss.

¶13 Following oral argument by the parties, the circuit court issued a written decision granting summary judgment to Schneider on April 21, 2016. Revisiting its prior decision to convert Schneider's motion to a motion for summary judgment, the court stated WIS. STAT. § 802.06(2)(b) "seems to mandate that when matters outside the pleadings are presented and accepted by the court, as both parties did rather extensively, the motion to dismiss is converted to one of summary judgment." With respect to the parties' opportunity to present relevant materials, the court reiterated the factors discussed in its oral ruling and also noted Schneider had cited § 802.06(2)(b) in his reply brief, which was filed approximately forty days before the hearing on Schneider's motion. Based on these factors, the court concluded Johnson had "more than a reasonable opportunity to present relevant material."

¶14 Addressing the merits, the circuit court assumed, without deciding, that Johnson's fifth amended complaint alleged sufficient facts to state a claim against Schneider. However, the court held Schneider was nevertheless entitled to summary judgment because the undisputed facts showed that Pautsch's alleged "acts or transgressions" were committed "outside of Pautsch's employment with [SFS], let alone Schneider personally." The court stated Johnson had failed to "put forth facts sufficient to plausibly demonstrate he [was] entitled to relief against Schneider, individually."

¶15 A written order dismissing Johnson's claims against Schneider was entered on May 10, 2016. Johnson now appeals.

DISCUSSION

I. Conversion to a motion for summary judgment

¶16 Johnson argues the circuit court erred by converting Schneider's motion to dismiss to a motion for summary judgment. A circuit court's decision to convert a motion to dismiss to a motion for summary judgment is discretionary. *See* ***CTI of Ne. Wis., LLC v. Herrell***, 2003 WI App 19, ¶8, 259 Wis. 2d 756, 656 N.W.2d 794. The court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrated rational process to reach a reasonable conclusion. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶17 As noted above, WIS. STAT. § 802.06(2)(b) permits a circuit court to convert a motion to dismiss to a motion for summary judgment when matters outside the pleadings are "presented to and not excluded by the court." However, the statute requires that all parties be given "reasonable opportunity to present all material" made pertinent by the conversion. ***Id.*** We have previously held that this statutory language "requires the court to notify the parties of its intent to convert a motion to dismiss for failure to state a claim to one for summary judgment." ***CTI***, 259 Wis. 2d 756, ¶5.

¶18 Here, it is undisputed the circuit court did not notify the parties of its intent to convert Schneider's motion to dismiss to a motion for summary judgment. Nonetheless, as we observed in ***CTI***, WIS. STAT. § 802.06(2)(b) requires the court to provide the parties with "reasonable opportunity" to respond, and "what constitutes a reasonable opportunity to respond … will vary from case to case." ***CTI***, 259 Wis. 2d 756, ¶10. Consequently, "because sometimes parties

do respond without prompting from the trial court, they may occasionally be precluded from arguing a lack of notice or opportunity to reply." ***Id.***

¶19 The ***CTI*** court cited ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 531 N.W.2d 357 (Ct. App. 1995), and ***Schopper v. Gehring***, 210 Wis. 2d 208, 565 N.W.2d 187 (Ct. App. 1997), as examples of cases in which the appellant was precluded from arguing that the circuit court provided inadequate notice of its intent to convert a motion to dismiss to a motion for summary judgment. *See* ***CTI***, 259 Wis. 2d 756, ¶10. In ***Envirologix***, the defendant filed a motion to dismiss, along with a supporting affidavit. ***Envirologix***, 192 Wis. 2d at 284. In response, the plaintiff filed its own affidavit, which it cited in its brief in opposition to the motion to dismiss. ***Id.*** at 285. Under these circumstances, we held the circuit court did not err by converting the defendant's motion to dismiss to a motion for summary judgment. ***Id.*** at 286-87. We emphasized that, by submitting its own affidavit, the plaintiff "contributed to the trial court's decision to use the summary judgment methodology … in a motion to dismiss setting." ***Id.*** at 287.

¶20 In ***Schopper***, we similarly concluded the circuit court did not err by converting the defendant's motion to dismiss to a motion for summary judgment, given that the plaintiff had submitted an affidavit in response to the defendant's motion. ***Schopper***, 210 Wis. 2d at 216. Moreover, as the ***CTI*** court noted, the plaintiff in ***Schopper*** "never suggested that he could produce additional, relevant evidence if given an opportunity." ***CTI***, 259 Wis. 2d 756, ¶10.

¶21 In both ***Envirologix*** and ***Schopper***, "although the [circuit] court never notified the parties of its conversion, the parties claiming error in conversion had already asserted their right to respond." ***CTI***, 259 Wis. 2d 756, ¶10. The

same is true here. Schneider submitted materials outside the pleadings in support of his motion to dismiss. Johnson—the party now claiming the conversion was error—then submitted his own evidentiary materials in opposition to Schneider's motion. Thereafter, Schneider submitted additional evidentiary materials along with his reply brief. In addition, Schneider expressly raised the possibility in his reply brief that his motion could be treated as a motion for summary judgment under WIS. STAT. § 802.06(2)(b).[6]

¶22 As the circuit court noted, over forty days elapsed between the filing of Schneider's reply brief and the hearing on Johnson's motion. During that time, Johnson made no effort to either submit additional evidentiary materials or contest Schneider's assertion that his motion could be treated as a motion for summary judgment. Johnson similarly failed to assert that additional evidence was needed during the time period between the motion hearing on February 29, 2016, and the issuance of the circuit court's written decision on April 21, 2016. Moreover, by the time the motion hearing occurred, the case had been pending for over four years, the complaint had been amended multiple times, and over three years had elapsed since the relevant depositions were taken. Under these circumstances, the circuit court properly exercised its discretion by concluding Johnson had a reasonable opportunity to present all materials relevant to Schneider's motion. Like the plaintiffs in ***Envirologix*** and ***Schopper***, Johnson's own conduct precludes him from now arguing the conversion was improper based on a lack of notice.

[6] In his reply brief on appeal, Johnson claims Schneider's reference to conversion was "relegated to a footnote on the ninth page of Schneider's reply brief." Johnson is incorrect. Schneider devoted a full paragraph to the conversion issue in the body of his reply brief, in which he specifically cited WIS. STAT. § 802.06(2)(b).

¶23 Johnson relies primarily on ***CTI*** in support of his argument that the circuit court provided inadequate notice of its intent to treat Schneider's motion as a motion for summary judgment. However, ***CTI*** is distinguishable. In ***CTI***, the defendants filed a motion to dismiss for failure to state a claim and submitted an affidavit in support of their motion. ***CTI***, 259 Wis. 2d 756, ¶2. In its brief in response to the defendants' motion, the plaintiff asserted the affidavit was inappropriate because the defendants' motion was limited to the sufficiency of the pleadings. ***Id.***, ¶3. The plaintiff also informed the circuit court that, if a motion for summary judgment were pursued, the plaintiff would submit evidence to contradict the defendants' affidavit. ***Id.*** However, the plaintiff explained it had not submitted any evidence in response to the defendants' motion because it believed such evidence was inappropriate in the context of a motion to dismiss. ***Id.*** On these facts, we concluded the plaintiff's conduct did not preclude it from arguing the circuit court failed to give adequate notice of its intent to treat the defendants' motion as a motion for summary judgment. ***Id.***, ¶11.

¶24 Johnson's conduct in response to Schneider's motion was a far cry from that of the plaintiff in ***CTI***. Unlike the plaintiff in ***CTI***, after Schneider submitted his motion to dismiss and an accompanying affidavit, Johnson responded by submitting evidentiary materials of his own. Johnson did not argue Schneider's affidavit was improper because Schneider's motion was filed as a motion to dismiss, nor did Johnson indicate he was in possession of countervailing evidence that he had declined to submit because Schneider's motion was not filed as a motion for summary judgment. On these facts, ***CTI*** does not persuade us the circuit court in this case erroneously exercised its discretion by converting Schneider's motion.

¶25 Johnson also asserts the circuit court erroneously exercised its discretion because its decision to treat Schneider's motion as a motion for summary judgment rested on an error of law. Johnson argues the court incorrectly believed that, because the parties had submitted materials outside the pleadings, the court was required to treat Schneider's motion as a motion for summary judgment. As Johnson correctly points out, when matters outside the pleadings are submitted to the court on a motion to dismiss, the court has discretion under WIS. STAT. § 802.06(2)(b) to decide whether to consider those additional materials. *See* ***CTI***, 259 Wis. 2d 756, ¶¶6, 8. If the court decides not to consider the materials, it must treat the motion as a motion to dismiss. ***Id.***, ¶6. Conversely, if the court elects to consider the materials, it must treat the motion as a motion for summary judgment. ***Id.*** The mere filing of supplementary materials, however, does not automatically result in conversion to a summary judgment motion. ***Id.***, ¶8.

¶26 Contrary to Johnson's assertion, the record as a whole shows the circuit court in this case did not erroneously believe it was required to treat Schneider's motion as a motion for summary judgment simply because the parties had submitted materials outside the pleadings. Although some of the court's remarks during the motion hearing arguably suggested the court held that belief, in its written decision the court properly stated that WIS. STAT. § 802.06(2)(b) "seems to mandate that when matters outside the pleadings are presented *and accepted by the court* … the motion to dismiss is converted to one of summary judgment." (Emphasis added.) This statement demonstrates the court correctly understood that conversion is required only when the court has "accepted" supplementary materials submitted by the parties. Here, the court chose to consider the additional materials submitted by the parties, and we have already concluded the court's decision to do so was not an erroneous exercise of

discretion. Having opted to consider the additional materials, the court properly treated Schneider's motion as a motion for summary judgment.

II. Decision to grant summary judgment to Schneider

¶27 Johnson also argues that, having decided to treat Schneider's motion as a motion for summary judgment, the circuit court erred by granting summary judgment in Schneider's favor. Whether the court properly granted Schneider summary judgment is a question of law that we review independently. *See* ***Biskupic v. Cicero***, 2008 WI App 117, ¶12, 313 Wis. 2d 225, 756 N.W.2d 649.

¶28 Johnson argues the circuit court erred by granting Schneider summary judgment on grounds not argued by the parties. Johnson asserts Schneider's motion set forth a single basis for the dismissal of Johnson's claims: that the corporate veil precluded all claims against Schneider, individually. Johnson contends the motion "failed to suggest [Schneider] was challenging the sufficiency of Johnson's evidence." As a result, Johnson asserts his response brief was "tailored to a motion to dismiss" and addressed only Schneider's arguments regarding the corporate veil. Under these circumstances, Johnson argues it was improper for the circuit court to grant Schneider summary judgment on a different basis—namely, that the undisputed facts showed the bad acts alleged in the fifth amended complaint were committed outside the scope of Pautsch's employment by SFS.

¶29 Johnson's argument fails because Schneider *did* raise the scope-of-employment issue in his motion to dismiss. As noted above, Schneider specifically asserted in his motion that Pautsch had admitted during his deposition that the acts which formed the basis for Johnson's claims were performed by Pautsch as an independent "business and tax consultant," rather than as part of

Pautsch's employment by SFS. Schneider went on to argue, "The fact that Dale Pautsch may have provided additional services to [Johnson], on his own, outside of tax season, should not trigger liability on the part of [SFS], much less John P. Schneider, personally." In response to Schneider's motion, Johnson submitted evidentiary materials addressing the issue of whether Pautsch's alleged bad acts were committed within the scope of his employment. Thus, contrary to Johnson's assertion, the circuit court did not grant summary judgment on a basis not raised by the parties.

¶30 In his reply brief on appeal, Johnson argues there is a disputed issue of material fact as to whether Pautsch's alleged bad acts occurred within the scope of his employment by SFS. *See* WIS. STAT. § 802.08(2) (summary judgment is appropriate if the parties' submissions show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law). We need not address arguments raised for the first time in a party's reply brief. ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998). Nonetheless, Johnson's argument that there is a disputed issue of fact regarding the scope of Pautsch's employment also fails on the merits.

¶31 In response to Schneider's motion to dismiss, Johnson submitted twelve pages from the transcript of Schneider's deposition. Schneider explained in his deposition testimony that when Pautsch completed a tax return for a customer, a bill was generated through SFS's "TPS" software. In addition to tax returns, Pautsch also performed certain "business services" for customers—for instance, "a report" or "sales tax"—which were billed as "non-TPS" transactions using different software. Schneider testified he and Pautsch had an unwritten, "handshake" agreement to the effect that, when Pautsch performed business services for clients, Schneider would receive sixty percent of the gross proceeds

and Pautsch would receive forty percent. Schneider further testified he was aware Pautsch had performed business services for Johnson pursuant to their handshake agreement. However, Schneider testified the "bad things" or "transgressions" alleged in the complaint were not within the scope of that agreement.

¶32 Schneider's testimony supports a conclusion that the bad acts alleged in Johnson's fifth amended complaint were performed outside the scope of Pautsch's employment by SFS. Johnson asserts one could draw a contrary inference that the business services Pautsch provided to Johnson under the handshake agreement with Schneider may have included the bad acts alleged in the complaint. However, Johnson provides no evidence in support of that inference, and it is directly contrary to Schneider's testimony. Johnson has therefore failed to demonstrate the existence of a genuine dispute of material fact that would have precluded the circuit court from granting Schneider summary judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.