

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

No. 00-2211

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL E. KEYES,

PLAINTIFF-RESPONDENT,

V.

PRECISION MACHINE & MANUFACTURING, INC.,

DEFENDANT-APPELLANT,

MICHAEL T. MCGRAW,

DEFENDANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman, and Deininger, JJ.

¶1 PER CURIAM. Precision Machine and Manufacturing, Inc., (Precision) appeals from a judgment for \$88,177.89 in favor of Michael Keyes.

The claims that Keyes pursued in this action derived from his employment relationship with Forge Flite, Inc. The trial court held Precision liable on those claims upon concluding that Forge Flite was Precision's alter ego. Precision challenges several aspects of that holding. We affirm.

¶2 Michael McGraw and his wife own and operate Precision as a machine shop. In 1994, McGraw, Linda Merk, and John Dziedzic created and incorporated Forge Flite to manufacture and sell archery bows. Dziedzic operated the business until mid-1997 out of Merk's business premises, located next door to Precision in the same building. After Dziedzic left Forge Flite, McGraw acted as the sole owner and operator of Forge Flite, according to testimony offered at trial.

¶3 In January 1997, Forge Flite employed Keyes as its national sales manager. Keyes commenced this action in October 1997, alleging that Forge Flite breached his employment contract, and that it was entirely under the control of Precision. Forge Flite declared bankruptcy in September 1999.

¶4 At trial, a jury found that Forge Flite breached its employment contract with Keyes and awarded him damages of approximately \$43,000. Those findings are not at issue in this appeal. Acting in an advisory capacity only, the jury also found that Forge Flite was the alter ego of Precision. The trial court agreed and consequently held Precision liable for the damages for breach of Keyes's employment contract. Under a legal expense clause of the contract, the court also ordered Precision to pay Keyes's attorney's fees. That amount, plus interest and the \$43,000 in damages, resulted in a total judgment of \$88,177.89.

¶5 On appeal, Precision contends that: (1) it cannot be held liable under the alter ego doctrine because it had no ownership relation with Forge Flite; (2) the trial court erred by determining that Precision dominated and controlled the

employment relationship between Keyes and Forge Flite; (3) the court should have barred recovery from Precision under principles of estoppel and waiver; (4) Keyes failed to show injustice if he did not recover against Precision; and (5) the trial court erred by awarding excessive attorney fees.

¶6 The alter ego doctrine allows a court to “pierce the corporate veil” and impose liability when: (1) a person or entity other than the corporation completely dominates its finances, policy, and business practice, such that the corporate entity has no separate mind, will, or existence of its own; (2) the defendant has used control of the corporation to commit an unjust act affecting the plaintiff’s legal rights; and (3) the defendant’s breach of duty caused the plaintiff’s injury or unjust loss. *Consumer’s Co-op of Walworth County v. Olsen*, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988). Piercing the corporate veil is an equitable remedy. *Id.* at 472. The defendant may invoke waiver and estoppel as a defense. *Id.* at 492-94. The trial court has discretion in the matter and we will affirm the trial court’s decision if it is reasonable. *Id.* at 472-73.

¶7 Liability under the alter ego doctrine does not depend on ownership of the corporate entity. Precision contends that the corporate entity can be disregarded only to impose liability on its shareholders. We disagree. Under the alter ego doctrine “courts are concerned with reality and not form.” *Id.* at 484 (quoting 1 W. Fletcher, Cyclopedia Corporations, § 43.10 at 490 (rev. ed. 1983)). The trial court properly considered the reality of Precision’s control of Forge Flite, rather than their legal relationship.

¶8 Based on the evidence, the court reasonably determined that Precision had complete control of Forge Flite, an entity in name only. From at least 1996, Forge Flite was insolvent and Precision paid all of its bills. In total,

Precision paid several hundred thousand dollars, ostensibly as loans, but without loan documents, security, or even strict accounting of the amounts provided. At no time could Precision have reasonably believed that Forge Flite would repay these “loans.” Additionally, Forge Flite never observed any corporate formalities. After Dziedzic left in mid-1997, McGraw was the sole active participant in Forge Flite’s affairs. Checks from Precision paid Keyes’s salary, and Precision owned the company car he drove. During Keyes’s tenure there was a mingling of resources and employees between Precision and Forge Flite. Under these circumstances, the trial court reasonably considered Precision, and not Forge Flite, as the party liable for breaching Keyes’s employment contract.

¶9 Precision next argues that Keyes waived his right to assert a claim against Precision because he failed to adequately investigate Forge Flite’s finances before accepting employment. The record fails to indicate whether Precision raised this issue in the trial court. It was not presented in its motions after verdict. Even if the issue were preserved for appeal, however, Precision cites no authority for the proposition that an employee has a duty to investigate the employer’s financial condition. “[E]mployees are not normally in a position to do a full investigation [of the employer’s finances] or to negotiate guarantees. Rather, they tend to rely on the business’s appearance of substance Measures available to them would not necessarily reveal the relationship of the shareholders to the corporation and the corporation’s lack of economic substance.” *Consumer’s Co-op*, 142 Wis. 2d at 482 n.3 (citation omitted). Additionally, Keyes testified to a good faith belief that Precision was in fact, if not in name, his employer after mid-1997. He testified that McGraw gave him that assurance, in so many words, and the trial court found that testimony credible.

¶10 The trial court reasonably determined that denying recovery against Precision would do Keyes an injustice. The trial court accepted Keyes's testimony that he relied on McGraw's assurances that Precision would take care of him after Dziedzic resigned from Forge Flite. Additionally, Precision's actions as well as McGraw's words led Keyes to believe that Precision was, in fact, his employer. Keyes had no remedy against the insolvent Forge Flite. Under these circumstances, the court reasonably concluded that it would be unjust to deny Keyes's recovery on his losses.

¶11 The trial court did not award excessive attorney's fees to Keyes. Precision concedes that "the fees incurred by Keyes to prove the contract and to establish his contractual damages under [it] are appropriate attorney's fees for Keyes to include in his claim." However, Precision contends that the additional cost of proving the alter ego claim was not a claim under the contract. We disagree. Precision makes a distinction without a difference. The contract provided that "if Michael E. Keyes has to take Forge Flite, Inc., to court for the monies due him, Forge [sic] will pay for all legal expense related to this matter." Keyes went to court and proved Forge Flite to be the alter ego of Precision. The cost of doing so was a "legal expense related to this matter," and covered by the contract provision.

By the Court.—Judgment affirmed.

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

