COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 99-0014 and 99-1253

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

Case No. 99-0014

CHARLES TREUBER, AND DIANNE TREUBER,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

LUMBERMEN'S UNDERWRITING ALLIANCE,

INVOLUNTARY-PLAINTIFF,

V.

NEWMAN MACHINE COMPANY, INC.

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

LINDSAY MACHINERY, INC.,

DEFENDANT-CO-APPELLANT.

Case No. 99-1253

CHARLES TREUBER, AND DIANNE TREUBER,

PLAINTIFFS,

V.

NEWMAN MACHINE COMPANY, INC.,

DEFENDANT-APPELLANT,

LINDSAY MACHINERY, INC.,

DEFENDANT-RESPONDENT.

APPEALS and CROSS-APPEAL from judgments of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Judgments affirmed in part; reversed in part and cause remanded with directions; cross-appeal dismissed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. This products liability action was brought by Charles and Dianne Treuber (the Treubers) because of an injury Charles suffered as the result of what was alleged to be a defective glue press manufactured by Raytherm, Incorporated, a solely owned subsidiary of Newman Machine Company, Inc. Newman appeals a judgment against it, and in favor of the Treubers, based on the legal conclusions that Raytherm was the instrumentality (alter ego) of Newman, and also that Newman was the successor corporation to Raytherm. Newman also appeals a judgment based on the conclusion that it has the legal obligation to indemnify the dealer, Lindsay Machinery, Inc., who sold the glue press to Charles's employer. Because we agree with Newman that there is no legal basis for liability against it, we reverse the judgments against it and we remand to the circuit court for dismissal of all claims against Newman.

Additionally, we dismiss the Treubers' cross-appeal because of our legal conclusions in regard to Newman.

¶2 Lindsay also appeals a judgment in favor of the Treubers against it. Because Lindsay was the dealer who placed the press in the stream of commerce, it has potential liability to the Treubers for the injury that was sustained. We also conclude that there was sufficient evidence presented to support the jury's findings in favor of the Treubers; however, because the circuit court committed reversible error when it did not instruct the jury and submit a special verdict question about whether the press was substantially modified subsequent to its delivery, we remand for a new trial on liability. In regard to damages, we conclude there was sufficient evidence in the record to support the jury's findings; therefore, damages need not be retried.

BACKGROUND

¶3 Charles was an employee of Webster Industries, where he operated a glue press, the Panel Master 100. Charles was seriously injured on June 29, 1993, when his left hand was caught in the Panel Master. The Panel Master was manufactured in 1986 by Raytherm and sold to Lindsay, one of Raytherm's distributors, for $35,250. Lindsay then sold the Panel Master to Webster, for $40,000.

¶4 Raytherm was incorporated in Massachusetts on March 22, 1971, under the name of ERZ, Inc. by Joseph Erz, Harry Simonds and Richard Wilder. ERZ, whose manufacturing operations were conducted in Massachusetts, was in the business of fabricating high frequency machinery, generally to be used in a gluing or bonding process. Newman, a North Carolina corporation which has been in business since at least 1934, bought a majority of the shares of ERZ in

1974 and changed ERZ's name in 1975,[1] when Newman became the sole shareholder. Newman's primary line of machinery was single and double four-sided surfacers and planers that were used to remove the surface from wood. It also manufactured cold presses to which it was asked by customers to apply high frequency generators (HF units) to speed the glue drying process. Newman purchased Raytherm because it was one of the few companies that manufactured a HF unit for glue bonding of wood products and Newman had had difficulty securing sufficient HF units from another supplier to sell in conjunction with its cold presses.

¶5 When Raytherm was first purchased, Joseph Erz remained as president and chief operating officer (COO) of the corporation. In 1975 after Joseph Erz resigned and sold his remaining shares of stock back to Raytherm, John Drees, an employee of Newman, acted as the interim president and COO for approximately one-year, until Raytherm hired Herman Delano as the COO. Delano had significant experience in manufacturing HF units. He ran Raytherm as its president and COO through 1991, when he retired. After Delano retired, Raytherm was unable to secure another employee with sufficient experience in manufacturing HF units to operate Raytherm. Therefore, Newman transferred what was then left of Raytherm's business to North Carolina, liquidated its assets, and discontinued Raytherm's operations. Newman applied the money it received in the liquidation of Raytherm's assets to debt Raytherm owed Newman. The corporate form of Raytherm still exists, but it has no active operations or assets.

[1] Between the time Raytherm was legally named ERZ, Inc. and the time when its legal name was Raytherm, Inc., it had an intervening name. However, neither that name nor the circumstances surrounding it have any relevance to this appeal. Therefore, we refer to the manufacturer of the Panel Master simply as Raytherm.

¶6 The Treubers brought products liability and negligence claims against Newman and Lindsay. Both Newman and Lindsay denied liability to the Treubers and Lindsay cross-claimed for contribution from Newman. The Treubers' personal injury claims were tried to a jury which found that when the "RayTherm Panel Master" "left the possession of the seller," it was "in such defective condition as to be unreasonably dangerous to a prospective user as to the limit switch"; that such defective condition was a cause of Charles's injuries; and that Charles was not contributorily negligent. The principal amount of damages awarded to the Treubers was $578,549.89, including $200,000 for future loss of earning capacity.

¶7 During the course of the trial, the jury was presented with evidence supportive of two conflicting theories about how the accident happened. The Treubers' expert opined that a defectively designed limit switch caused the accident and Newman presented evidence that the Panel Master had been modified subsequent to its sale to Webster with a "jump wire," which caused the accident. As designed, the Panel Master required an operator to use two hands, before the press would compress the wood sheets. The two-handed requirement assured that neither of the operator's hands would be in the press when it cycled downward. However, the jump wire permitted the operator to set the press in motion by pushing one button with one hand, rather being required to push two buttons with two hands. Newman requested a special verdict question and jury instruction on the issue of whether the press had been subjected to a substantial modification subsequent to its delivery to Webster. The circuit court refused its request.

¶8 Because the jury also heard evidence that the press had activated in the past when Charles had not consciously set it in motion and that Charles had reported this malfunction to Webster, Newman also requested special verdict

questions and instructions on whether Webster negligently maintained the press and whether that was a cause of the accident. The circuit court denied that request as well.

¶9 Although the jury found liability and damages against Raytherm, it made no findings in regard to either Newman or Lindsay. Instead, the circuit court held a separate trial on the relationship of Newman and Lindsay to Raytherm and determined that Raytherm acted as a "mere instrumentality" of Newman. It also determined that Newman was a successor corporation of Raytherm. And finally, it concluded that Lindsay was entitled to "contribution and/or indemnification" from Newman for any and all monies awarded by the jury. Therefore, it entered a judgment against Newman and in favor of the Treubers in the amount of $644,363.56, principal, interest and costs. It also entered judgment in favor of the Treubers against Lindsay in the amount of $699,626.47, principal, interest and costs,[2] and it entered judgment in favor of Lindsay and against Newman, in the amount of $645,777.06. Newman and Lindsay appeal the judgments against them.

¶10 And finally, during the course of the litigation, the Treubers made a settlement offer to Newman to settle all claims of both plaintiffs for $200,000. The circuit court determined that the Treubers' offer did not comply with WIS. STAT. § 807.01(3) (1995-96). The Treubers cross-appeal that determination.

[2] Because Lindsay was assessed double costs and more interest, the Treubers' judgment against Lindsay was larger than their judgment against Newman.

DISCUSSION

Standard of Review.

¶11 Piercing the corporate veil is an equitable remedy; therefore, we review decisions which do so under the erroneous exercise of discretion standard. *See* ***Paterson v. Paterson***, 73 Wis. 2d 150, 154, 242 N.W.2d 907, 909 (1976). However, in order to affirm a discretionary determination there must be a reasonable basis in the record, factually and legally, for the circuit court's determination. *See* ***Consumer's Co-op of Walworth County v. Olsen***, 142 Wis. 2d 465, 472-73, 419 N.W.2d 211, 213 (1988). Findings of fact made by the circuit court will not be set aside on appeal unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1997-98). Additionally, all discretionary determinations must be grounded in the correct rule of law. *See* ***Consumer's Co-op***, 142 Wis. 2d at 472-73, 419 N.W.2d at 213. We give no deference to a discretionary determination based on clearly erroneous facts or on an erroneous view of the law. *See* ***id.***

¶12 We will sustain a jury's answer to a special verdict question if there is any credible evidence in the record to support it. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). Whether evidence was presented sufficient to warrant the submission of a matter to the jury is a question of law subject to *de novo* review. *See* ***Zintek v. Perchik***, 163 Wis. 2d 439, 454, 471 N.W.2d 522, 527-28 (Ct. App. 1991), *overruled on other grounds*, ***Steinberg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). However, our review of a request for a jury instruction is limited to whether the circuit court acted within its discretion when it refused to give the requested instruction. *See* ***State v. Randall***, 222 Wis. 2d 53, 59, 586 N.W.2d 318,

321 (Ct. App. 1998), *review denied*, 222 Wis. 2d 674, 589 N.W.2d 628 (1998). We will reverse and order a new trial only if the instructions, taken as a whole, communicated an incorrect statement of the law or otherwise probably misled the jury. *See* ***id.*** at 59-60, 586 N.W.2d at 321.

Newman's Potential Liability. [3]

¶13 It is undisputed that when the Panel Master was manufactured by Raytherm, Raytherm was a solely owned subsidiary corporation of Newman. The Treubers and Lindsay argue that three legal doctrines support holding Newman liable for Charles's accident with Raytherm's Panel Master: (1) Raytherm's corporate veil ought to be pierced because Raytherm was an instrumentality or alter ego of Newman; (2) Raytherm's corporate veil ought to be pierced because Newman was Raytherm's successor corporation; and (3) Newman and Raytherm engaged in joint ventures. The circuit court agreed with the Treubers and Lindsay that the liability originating with Raytherm under Wisconsin's product liability law ought to be transferred to Newman. We disagree.

¶14 We begin by noting that as a general legal principle, absent fraud or bad faith, a corporation is not liable for the acts of its subsidiaries because there is a presumption of separateness. *See* 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43, at 711-13 (perm. ed. rev. vol. 1999). Wisconsin follows this general rule in that corporations are treated as separate entities, notwithstanding the fact that they may be solely

[3] Because of the complexity of the relationships of the parties and the issues asserted on appeal, those issues which relate solely to Newman's liability will be dealt with in a separate section from those issues relative to any liability Lindsay may have.

owned by another corporation or by one individual.[4] In Wisconsin, the corporate status is not one to be lightly disregarded. *See* ***Consumer's Co-op***, 142 Wis. 2d at 474, 419 N.W.2d at 213. The principle of corporate separateness and its salutory effect on commerce has long been recognized in Wisconsin. *See* ***Milwaukee Toy Co. v. Industrial Comm'n of Wis.***, 203 Wis. 493, 495, 234 N.W. 748, 749 (1931). The supreme court has explained the principle of corporate separateness and its importance in detail. For example, in ***Consumer's Co-op*** it noted:

> The purpose of limited liability is to promote commerce and industrial growth by encouraging shareholders to make capital contributions to corporations without subjecting all of their personal wealth to the risk of the business. This incentive to business investment has been called the most important legal development of the nineteenth century.

Consumer's Co-op, 142 Wis. 2d at 474, 419 N.W.2d at 213-14 (quoting David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371-72 (1981)).

¶15 In the case at hand, the circuit court held a trial to the court[5] to determine the claims against Newman and Lindsay. At the trial's conclusion, the court incorporated, as its findings of fact and conclusions of law, statements which were taken verbatim from suggestions of the Treubers' and Lindsay's trial attorneys. The practice of having trial counsel submit proposed findings of fact and conclusions of law is not uncommon, nor necessarily to be discouraged.

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[4] In the proceedings before the circuit court, the parties relied on Wisconsin law to determine whether Raytherm's corporate veil should be pierced. Additionally, there is a presumption that Wisconsin law applies to a case tried in Wisconsin courts. *See* ***Hunker v. Royal Indem. Co.***, 57 Wis. 2d 588, 599, 204 N.W.2d 897, 903 (1973). Therefore, based on the parties arguments to the circuit court and the presumption of ***Hunker***, we apply Wisconsin law.

[5] Testimony from four witnesses were offered at this proceeding: Frank York (Newman's president), Jane Myers (Newman's controller), Herman Delano (Raytherm's former president) and John Drees (Raytherm's former interim president).

However, a circuit court must assure itself that there is adequate support in the record for the factual findings and legal conclusions it decides to make and also that those findings are sufficient to prove each and every element necessary to the claims which it concludes have prevailed at trial. Here, some of the findings which the court adopted have no support in the record; and the totality of the facts, as found by the circuit court, are insufficient, as a matter of law, to prove any of the three theories which the Treubers and Lindsay contend support liability of Newman.

1. Instrumentality/Alter Ego.

¶16 In Wisconsin, there is an almost unwavering adherence to shareholder non-liability. However, as with most legal principles, there are exceptions. One of those exceptions is the instrumentality or alter ego doctrine. *See* FLETCHER, *supra*, § 43, at 719. However, that exception is very narrow and it requires proof of three elements before the principle of corporate separateness may be set aside. As the supreme court explained, in order to sustain a claim that the corporate veil ought to be pierced because a corporation is a mere instrumentality of its shareholder, a person seeking that relief must prove all of the following:

> (1) Control, not mere majority or complete stock control, but complete dominion, 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 [corporation] 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.

Consumer's Co-op, 142 Wis. 2d at 484, 419 N.W.2d at 217-18 (citation omitted). It is important to note that all three elements must be proved before corporate separateness can be disregarded. And even when unfairness is present, "injustice, absent the establishment of control, would not constitute adequate grounds to pierce the corporate veil." ***Id.*** at 485, 419 N.W.2d at 218 (citation omitted).

a. Complete domination.

¶17 Lindsay and the Treubers rely on finding number 34 to show absolute control of Raytherm by Newman. It states that "during its period of operations, Newman, Industrial, and Guilford[6] executed corporate guarantees on loans from Congress Financial to Raytherm." However, there is no evidence in the record to support this finding. The only evidence about the loans from Congress Financial was that they were made to Newman, *not to Raytherm*, and the undisputed testimony shows that Raytherm never made payments on those loans.

¶18 Lindsay and the Treubers rely on finding number 38 in a similar fashion. It states that "[d]uring the period of operation of Raytherm, Frank York, President of Newman, pledged assets of Raytherm to pay off Newman debt obligations." It is true that at the request of Newman's corporate lender, Raytherm permitted its collateral to stand as security for lending to Newman,[7] just as all of Newman's solely owned subsidiaries were required by Newman's lender to do.

[6] Guilford Foundry and Industrial Advertising were also wholly owned subsidiaries of Newman.

[7] *See* Frank York's uncontradicted testimony from his experiences as the president and COO of Newman from 1973 through the time of trial.

However, this requirement tends to prove that Newman's lender was treating Newman and its subsidiaries as separate entities because if they were simply one pool of assets, Newman's pledge of its assets would have been sufficient to reach the assets of all its subsidiaries and no collateral agreements would have been necessary. Therefore, finding number 38 tends not to show absolute control of Raytherm by Newman.

¶19 Lindsay and the Treubers also point to the persons who were appointed to Raytherm's board of directors as proof of the complete domination element. Raytherm's board of directors was comprised of two or three persons from Newman and two persons from Raytherm. Herman Delano and Paul Angus generally served as the two directors from Raytherm. However, the record contains no evidence which indicates that either Angus or Delano were ever a member of the board of directors of Newman, so membership on the boards of the two companies was not identical.

¶20 Additionally, the method of appointment to the board of directors of Raytherm is cited as evidence of complete control. In that regard, the court made a finding that Frank York, president of Newman, was on the board of Raytherm, and that he appointed all of the directors of Raytherm. While the Treubers and Lindsay make much of this finding, we fail to see its relevance. The record shows that the by-laws of Raytherm required the shareholders to elect the board of directors. When York made the complained of appointments, Newman was the sole shareholder; therefore, under Raytherm's by-laws, no one else could have elected the directors except Newman, acting through its president, Frank York.

¶21 The circuit court also found (finding number 8) that Raytherm's board of directors never met during the time that it was a wholly owned subsidiary

of Newman. While there was some trial testimony which could have been interpreted to support this finding, it is not significant to proving whether Raytherm was the alter ego of Newman because there was no testimony that formal meetings were required. Furthermore, the record shows that the board of Raytherm had minutes prepared and signed, evincing the decisions the board made. It is also undisputed that Raytherm's directors prepared and signed annual meeting minutes in compliance with its corporate by-laws, showing it re-elected officers each year. Finally, the supreme court has instructed that in determining whether the instrumentality doctrine should be applied, courts should not be concerned with formalities but rather, they should focus on the day-to-day operations of the corporation. *See* ***Consumer's Co-op***, 142 Wis. 2d at 484, 419 N.W.2d at 217.

¶22 In that regard, during the time that Raytherm was an ongoing operation, and after Newman had become its sole shareholder, Raytherm conducted all of its manufacturing in Massachusetts. The record contains undisputed evidence that during that time Raytherm had its own COO, who made daily decisions for Raytherm; it had its own engineers, who designed the products it sold; it had its own attorney, to handle its legal affairs; it had its own bank accounts; and it had its own accountant, who maintained Raytherm's corporate financial records.[8] Additionally, it is undisputed that Newman did not agree to pay Raytherm's creditors or suppliers and Newman did not collect for the sales of Raytherm's machines, except when it acted as one of Raytherm's distributors.[9]

[8] The record shows that Newman provided bookkeeping and/or accounting services to Raytherm only when Raytherm moved to North Carolina in 1991 or 1992 and stopped all but wind-up activities.

[9] *See* testimony of Frank York, trial exhibit 94, the partial deposition of Herman Delano, and testimony of Jane Myers.

Furthermore, it is also undisputed that Newman had a separate board of directors, separate bank accounts, separate attorneys, separate accountants[10] and separate employees during the time it owned Raytherm, and that Newman never conducted manufacturing activities in Massachusetts.

¶23 Cut to its essence, what the Treubers and Lindsay repeatedly rely on is simply Newman's complete stock ownership of Raytherm. However, Newman's owning all the shares in Raytherm is an insufficient reason to depart from the usual rule of corporate separateness. *See* ***Posyniak v. School Sisters of St. Francis***, 180 Wis. 2d 619, 636-37, 511 N.W.2d 300, 308 (Ct. App. 1993).

b. Perpetuation of fraud or wrong.

¶24 In addition to failing to show that Newman had complete control over Raytherm, there are no findings which show that whatever elements of control the court believed Newman had over Raytherm were used by Newman to commit a fraud, or a wrong, or to perpetuate the violation of a statutory or other positive legal duty which Newman or Raytherm had to Charles. The Treubers and Lindsay focus on finding number 16, which states that Newman did not purchase products liability insurance to cover Raytherm's products. However, they have not identified how that operated as a fraud or the violation of a statutory or other positive legal duty.

¶25 The court also found that Raytherm was undercapitalized. There is nothing in the record to show what capitalization Raytherm had in 1971 when it

[10] Although Newman had a consolidated financial statement prepared for it and all of its subsidiaries, those statements were not prepared by the same accountants and bookkeepers who assisted with Raytherm's financial affairs.

was incorporated under the name of ERZ, Inc. However, when under-capitalization is used as a basis for the second element of the ***Consumer's Co-op*** test, it is the initial capitalization that is relevant, not the capitalization when a corporation is purchased years later and certainly not the capitalization of a corporation which has been in active business for twenty years, as Raytherm was. The supreme court rejected the contention which Lindsay and the Treubers make here that there is a continuing requirement to maintain an adequate level of capitalization for an ongoing corporation. It explained:

> The adequacy of capital is to be measured as of the time of formation of the corporation. A corporation that was adequately capitalized when formed but which subsequently suffers financial reverses is not undercapitalized.

Consumer's Co-op, 142 Wis. 2d at 486, 419 N.W.2d at 218 (citation omitted).

c. Fraud/injury link.

¶26 And finally, even if Lindsay and the Treubers could have established the first and second elements of the ***Consumer's Co-op*** test, there are no findings, nor have we discovered testimony in the record before us, which show that such allegedly fraudulent conduct by Newman caused Charles's injury. Therefore, we conclude that the facts as found by the circuit court are insufficient, as a matter of law, to satisfy the test of ***Consumer's Co-op*** necessary to prove that Raytherm was the instrumentality or alter ego of Newman. Because the circuit court applied the wrong standard of law when it determined that Raytherm was the instrumentality or alter ego of Newman, it erroneously exercised its discretion.

2. Successor Corporation.

¶27 In addition to concluding that Newman had liability under the instrumentality/alter ego theory, the circuit court also concluded that Newman was the successor corporation of Raytherm, as another basis for assigning liability to Newman for Charles's injuries. Generally, the successor corporation doctrine is available only when one corporation purchases all of the assets of another business and one of four other conditions exist:

> (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) when the purchaser corporation is merely a continuation of the seller corporation; or (4) when the transaction is entered into fraudulently to escape liability for such obligations.

Tift v. Forage King Indus., Inc., 108 Wis. 2d 72, 75-76, 322 N.W.2d 14, 15 (1982) (citation omitted).

¶28 Newman argues that the successor corporation doctrine cannot apply where the stock of a corporation is purchased, rather than purchasing only the assets. We disagree because to conclude otherwise would thwart the policy that underlies the doctrine. As the supreme court explained, the policy that underlies successor corporation liability is that no business, whatever the form in which it operates, should be permitted to manufacture a defective product, place it in the stream of commerce and escape liability merely through corporate transformations. *See* ***Tift***, 108 Wis. 2d at 77, 322 N.W.2d at 16. Therefore, we conclude that when one corporation purchases all the stock in another corporation and subsequently purchases all the assets of that corporation and also continues to operate the business of the corporation whose stock and assets were purchased, it is possible for successor corporation liability to arise.

¶29 Here, two of the potential triggers of successor corporation liability are clearly absent because there was no proof offered to show that Newman expressly or impliedly agreed to assume the liabilities of Raytherm and there was no allegation that either the purchase of Raytherm stock or the sale of its assets to a third party was fraudulently accomplished to escape liability. In examining whether the purchase of Raytherm's stock constituted a merger, we note that the key element used to determine whether there was a merger is absent. That is, Newman did not pay for Raytherm's stock with stock in Newman. It paid for the stock with cash. *See* ***Fish v. Amsted Indus., Inc.***, 126 Wis. 2d 293, 301, 376 N.W.2d 820, 824 (1985) (citations omitted). Additionally, as we have explained in detail above, Raytherm operated as a separate subsidiary corporation of Newman, which also suggests that no merger occurred and that Newman was not a continuation of Raytherm. And finally, Raytherm had a different manufacturing business: it manufactured machines that utilized HF units to speed gluing processes, such as machines used in automobile carpet installation, furniture upholstering and wood lamination.[11] Raytherm's specialized HF unit production was the reason Newman purchased Raytherm. When Delano retired and Newman could find no one with HF unit production experience to operate Raytherm, Raytherm's manufacturing ceased. Newman simply didn't know how to manufacture the products that Raytherm did. Newman did not carry on

[11] As noted earlier, Newman's primary line of machinery was single and double four-sided surfacers and planers that were used to remove the surface from wood. It also manufactured cold presses to which it was asked by customers to apply HF units to speed the glue drying process.

Raytherm's business and there is no evidence to suggest that these companies merged. Therefore, Newman was not the successor corporation of Raytherm.[12]

3. Joint Venture Liability.

¶30 As a final basis for assigning liability for Charles's injuries to Newman, the Treubers rely on finding number 12, that "[a]t times" Newman and Raytherm were joint venturers in the manufacturing and sale of machinery. If parties engage in a joint enterprise, then each is the agent of the other, within the scope of the enterprise, and each may be held vicariously liable to one who brings a claim arising from the product of the joint venture. *See* ***Spearing v. County of Bayfield***, 133 Wis. 2d 165, 173, 394 N.W.2d 761, 765 (Ct. App. 1986). A joint venture occurs when four essential elements are found:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Id. (citing RESTATEMENT (SECOND) OF TORTS § 491, cmt c (1965)). Therefore, in order for Newman to be liable for the injuries caused by the Panel Master, the manufacturer of that press would have had to have satisfied all four elements set forth in ***Spearing***.

¶31 Newman contends that this theory of liability was not argued to the circuit court; therefore, it is waived. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489,

[12] We also note that simply making one product line that the original corporation made is insufficient to cause the purchasing corporation to be liable for the selling corporation's defective products. *See* ***Fish v. Amsted Indus., Inc.***, 126 Wis. 2d 293, 304-05, 376 N.W.2d 820, 826 (1985).

339 N.W.2d 333, 342 (Ct. App. 1983). However, this rule is one of judicial administration, not an absolute bar to our consideration of such an issue. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140, 146 (1980). Here, rather than employing that rule of administration, we note that the circuit court did not make findings sufficient to satisfy the four elements set forth in ***Spearing***. It merely listed the legal conclusion that the parties were joint venturers, as a single "finding."

¶32 Additionally, the liability of a joint venturer is confined to the scope of the enterprise. *See* ***Spearing***, 133 Wis. 2d at 173, 394 N.W.2d at 765. Testimony showed that on several occasions, large presses were manufactured where Newman would make some of the component parts and Raytherm would make other parts and the resulting presses were then sold to third parties. However, the Panel Master was a small press. And, there is no evidence in the record that Newman ever participated in the manufacture of the Panel Master 100 or shared the expenses and the profits of manufacturing that type of press. The Panel Master was a high frequency press, which Newman lacked the technical expertise to produce. Because manufacturing Panel Master 100 presses was never a joint enterprise, we conclude that Newman and Raytherm were not engaged in a joint venture sufficient to provide a legal basis for liability of Newman for Charles's injuries.

4. Contribution.

¶33 Our decision in regard to Newman's lack of liability for the injuries caused by the Panel Master also precludes liability to Lindsay on its claim for contribution, as a right of contribution requires joint tort liability to the same person with one party bearing an unequal proportion of the resultant damages. *See*

Giese v. Montgomery Ward, Inc. 111 Wis. 2d 392, 404, 331 N.W.2d 585, 591 (1983) (citation omitted). Because we have concluded that Newman is not a joint tortfeasor, contribution cannot lie against it.[13]

5. Costs.

¶34 In their cross-appeal, the Treubers contend that the circuit court erred when it found their statutory settlement offer insufficient to justify the doubling of costs. However, because we have concluded that there is no legal basis for liability against Newman by the Treubers or by Lindsay, Newman will not be required to pay any costs. Therefore, we do not address the merits of the parties' arguments in this regard. And finally, because there are no damages for Newman to pay, its contention that interest was improperly assessed against it is moot and we choose not to address it.

Lindsay's Potential Liability.[14]

¶35 The circuit court also entered judgment in favor of the Treubers against Lindsay, as the dealer who sold the Panel Master. A dealer of a defective product may be held strictly liable for injuries caused by a defective product, if it actively placed the defective product in the stream of commerce. *See* ***Sedbrook v. Zimmerman Design Group, Ltd.***, 190 Wis. 2d 14, 25-26, 526 N.W.2d 758, 762-63 (Ct. App. 1994) (citing ***Dippel v. Sciano***, 37 Wis. 2d 443, 155 N.W.2d 55

[13] According to the filings in this court, Lindsay and Newman agree that if Newman is not liable to the Treubers, it is not liable to Lindsay as well. *See* July 6, 1999 motion by Attorney Steeves on behalf of Lindsay.

[14] Although the Treubers sued in both negligence and strict liability for a defective product, the circuit court dismissed all negligence claims against Lindsay. That decision has not been appealed. Therefore, we address only the potential liability which may be strictly imposed for a defective product.

(1967)). Here, it is undisputed that Lindsay was a regular dealer of manufacturing equipment when it purchased the Panel Master from Raytherm and sold it to Webster. Additionally, even though the Panel Master was shipped directly from Raytherm to Webster and Lindsay never had control of it, that undisputed fact, in and of itself, is insufficient to foreclose all potential liability against Lindsay. *See* ***Sedbrook***, 190 Wis. 2d at 29-30, 526 N.W.2d at 764.

¶36 Here, Webster asked Lindsay to find it a particular type of machine. Lindsay submitted a quote for the Panel Master, which Webster accepted. Lindsay then paid Raytherm $35,250 for the press and sold it to Webster for $40,000. In so doing, it was an active participant in placing the Panel Master into the stream of commerce and it opened the door to potential liability for injuries resulting from its use. *See* ***id.***

¶37 Lindsay also contends that if it has potential liability to the Treubers, it is entitled to a dismissal because there was insufficient evidence to support the jury's finding that: (1) the Panel Master was in such a defective condition as to be unreasonably dangerous due to the limit switch; and (2) that the defective limit switch was a cause of Charles's injuries. We review this challenge by examining the record to determine if it contains any credible evidence to support the jury's finding. *See* ***D'Huyvetter***, 164 Wis. 2d at 320, 475 N.W.2d at 592. Here, the jury heard the testimony of the Treubers' expert who opined that the limit switch was defective in its design and that defect caused the accident. If the jury believed this testimony, it was sufficient to support the findings the jury made in the special verdict. Therefore, this contention is not sufficient for reversal of the judgment against Lindsay.

¶38 Lindsay then argues that even if the evidence is sufficient to support the jury's findings, a new trial is warranted because the circuit court committed prejudicial error when it refused to submit a special verdict question on whether the Panel Master had been substantially modified, subsequent to its delivery.[15] As delivered, the press could not be activated to cycle downward, unless two buttons were pushed. Those two buttons were spaced in such a way that an operator could not commence the pressing action by which Charles was injured without using two hands, thereby assuring that both of the operator's hands were out of harm's way. However, testimony was presented by the defendants that the Panel Master had been modified subsequent to delivery by the insertion of a "jump wire" in the amperite tube circuitry. The use of this jump wire permitted the machine to be operated by using only one of the two buttons which the manufacturer had installed. Therefore, it could be operated with only one hand.

¶39 Strict liability in a products case does not make a dealer an insurer for all injuries that could arise from the use of a machine, nor does it impose absolute liability. *See* ***Dippel***, 37 Wis. 2d at 459-60, 155 N.W.2d at 63. In order to establish a dealer's liability, a plaintiff must prove all of the following elements:

> (1) that the product was in a defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause (a substantial factor) of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related

[15] The Treubers contend that Lindsay waived this argument by not participating in the last two days of trial which dealt with the form of the special verdict and jury instructions. However, Newman requested a special verdict question on modification. Under the facts of this case, it matters not whether Lindsay made the request or whether Newman made it. Therefore, we reject this waiver argument because the circuit court had the opportunity to consider the same argument we are now addressing on appeal.

> to the principal business of the seller, and (5) that the product was one which the seller expected to and did reach the user or consumer *without substantial change* in the condition it was when he sold it.

Glassey v. Continental Ins. Co., 176 Wis. 2d 587, 599, 500 N.W.2d 295, 300 (1993) (emphasis in original). A "substantial change" has been defined as a "change in the design, function or character of the product linked to the accident." ***Id.*** at 600, 500 N.W.2d at 301. Whether a change is substantial is a question for the jury, unless the evidence is undisputed and permits only one meaning. ***Id.*** at 605, 500 N.W.2d at 303.

¶40 Here, the evidence was conflicting. The defendants presented expert testimony that there had been a substantial change in the Panel Master by the addition of the jump wire, which permitted Charles to commence the downward cycle of the press by using only one hand, thereby causing his injury; and the Treubers presented evidence that the limit switch was the cause of the accident, which switch was not affected by the jump wire. The defendants requested a special verdict question and instruction on whether the Panel Master had been substantially modified subsequent to delivery, but the circuit court refused to give it. In so doing, it relieved the Treubers from proving the fifth ***Glassey*** element, to the prejudice of Lindsay. Therefore, we conclude that Lindsay is entitled to a new trial on whether it is strictly liable to the Treubers for the injuries Charles sustained. *See* ***Odya v. Quade***, 4 Wis. 2d 63, 75, 90 N.W.2d 96, 103 (1958).

¶41 Lindsay also contends that there was insufficient proof to support the jury's finding that Charles suffered a loss of earning capacity of $200,000. While damages for lost earning capacity are not required to be supported with mathematical precision, credible evidence must be presented upon which the jury could "estimate with reasonable probability what would have happened had the

injury not occurred." ***Schulz v. St. Mary's Hosp.***, 81 Wis. 2d 638, 657, 260 N.W.2d 783, 789 (1978). Here, the Treubers presented a vocational expert, Dr. Ross Lynch, who opined that Charles's loss of capacity in wages was $12,563 per year, for approximately ten years. Lynch also testified that Charles had a loss of benefits above and beyond the loss of capacity in wages. He did not state what dollar amount that might be. However, Harry Turner testified that Charles's loss of benefits on monthly basis was as follows: $384.70 for health insurance premiums and $3.58 for life insurance premiums. If the jury took the testimony of Lynch that Charles's loss of earning capacity would extend over approximately ten years, it could have found he lost a total of $46,164 in health insurance premiums and $429.60 in life insurance premiums. Additionally, Turner testified that over the next eight years Charles would have lost $4,450 in bonuses, with additional years running at $500 per year. Therefore, we conclude that sufficient evidence was presented to support the jury's decision on the loss of earning capacity element of the damages it found; and as a result, damages do not need to be retried.

CONCLUSION[16]

¶42 Because we agree with Newman that there is no legal basis for liability against it, we reverse all judgments against it and we remand to the circuit court for dismissal of all claims against Newman. Additionally, because Lindsay was the dealer who placed the press into the stream of commerce, it has potential liability to the Treubers. We conclude that there was sufficient evidence presented

[16] This case has been under submission for a long time, in part because counsels' citations to the record often did not support the proposition asserted prior to the record citation. Accuracy on counsels' part is a great assistance to this court and we request that in future appeals more care be given to this part of counsels' appellate work.

to support the jury's findings about the defective condition of the limit switch which it made in favor of the Treubers; however, because the circuit court committed reversible error when it did not instruct the jury and submit a special verdict question about whether the press was substantially modified subsequent to delivery, we remand for a new trial on liability. In regard to damages, we conclude there was sufficient evidence in the record to support the jury's findings; therefore, damages need not be retried.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions; cross-appeal dismissed.

Not recommended for publication in the official reports.