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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Judge

Appellate Case Number 2023-000353

Civil Action Number 2018-CP-23-01643

Jason Tuck . . . . . Appellant,

v.

On the Mark Automotive Repair and Refinishing, LLC d/b/a On the Mark Automotive, LLC, Carolina's Best Auto Sales, LLC, Carolina's Best Finance, 828A St. Mark Road, LLC, Affordable Auto Finance, Inc., Southeastern Recovery and Towing, LLC, John D. Watts III (a/k/a John D. Watts), ... Respondents.

REPLY BRIEF OF APPELLANT

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I. Introduction

John Watts uses the corporate forms of Respondents for one purpose only: To avoid paying liabilities and legal obligations. If this Court finds that this is fundamentally fair, then South Carolina has neither a single business enterprise ("SBE") doctrine nor a viable piercing theory. The appellate decisions to date define what is not an SBE. This case presents the opportunity to easily define part of the outer boundary of what is an SBE. As for piercing the corporate veil, established equity principles lead to only one conclusion.

II. Argument

A. SBE

1. Respondents acknowledge that the SBE analysis boils down to equitable issues of fundamental unfairness.

Respondents do not contest Tuck's showing that they are intertwined for purposes of the first prong of the *Pertuis* test. (Respondents' Init. Brief 28 ("Without question, the record demonstrates significant intertwining of Respondent companies."); *id.* at 4 ("Appellant did produce evidence of intertwining of the corporate entities. This fact cannot be denied."). All that is left then is the second prong, which focuses on fundamental unfairness.

2. Respondents' "insolvency and undercapitalization" argument

Respondents argue that Tuck must show "insolvency and under capitalization" under *Sturkie* to invoke SBE. (Respondents' Init. Brief 4). Respondents argue that this is necessary because the real issue is whether the "corporate shell of OTM . . . is to be pierced." (*Id.* at 5). There are two fundamental problems with this argument.

Pertuis never mentions "insolvency," "undercapitalization," or any derivation of those words. *Stoneledge* only mentions the word "insolvent" in passing with respect to the facts.[1] *Stoneledge* never suggests that insolvency is required and never mentions it as an element. In short, Petitioners seek to impose a requirement that does not exist.

To the extent their proposition is somehow correct, it is self-defeating. OTM is insolvent, and Watts has no intention of letting it meet its obligations:

> Q. Is On the Mark capable of paying the judgment that's been entered in this action?
>
> A. No.
>
> Q. Has it made any plans or taken any steps in order to make payments on the judgment?
>
> A. No.

R. p. 371 lines 17-22, *cited in* Tuck Tuck Br. of Appellant § III(G). OTM should not be allowed to argue on the one hand that it is solvent while claiming that it cannot (and will not) pay the judgment. That is precisely the kind of argument equity should foreclose.

3. Respondents claim that Watts's recycling scheme is fine.

a. Watts always deprives consumers of their equity

Tuck has already shown that Watts does not refund customers any equity, either through bogus expenses he never incurred or by sabotaging the vehicles so he can repurchase them at auction. (Tuck Br. of Appellant § III(C)). Respondents

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[1] *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., LLC*, 435 S.C. 109, 123, 866 S.E.2d 542, 550 (2021) ("Cox testified IMK was insolvent and did not have any money to satisfy a possible judgment in favor of the HOA.").

argue that Watts "candidly testified that refunds typically were not paid, because in most instances . . . consumers had only paid interest." (Respondents' Init. Brief 21). Then why cheat at all? And when Watts says "most," there is no evidence that anybody received any money.

Nor can Watts explain how consumers have no equity in vehicles repossessed through Carolina's Best ("CB"). They certainly had equity or CB would not have given them a title loan in the first place.

b. The secret "if bid" rights rig the auctions

Watts's entire "if bid" claim illustrates how he used a common scheme to defraud consumers and the auction market for used cars. Watts still cannot explain, for example, how one company exercised the secret "if bid" rights of CB, which never bought cars. (Tuck Br. of Appellant §§ III(C)(1)(a), V(B)(3)).[2] Instead, he now tries to muddy the waters further to suggest that the whole "verbal" scheme doesn't exist.

Respondents bet large on their hopes that the Court does not know what an auction is. Armed with neither logic nor evidence, they claim that "if bid" rights result in a higher sale price. That makes no sense. Buyers at auction do not bid more than they need to win. They don't know how high to bid because only Watts has that information after the fact. The notion that "if bid" rights result in a higher

[2] Respondents argue that the relationship between Carolina's Best and Affordable Auto is irrelevant. (Respondents' Init. Brief 5). The relationship between all Respondents is necessarily relevant. As to CB and Affordable, how is it irrelevant that one purchased parts for the other during the relevant time?

price begs another question: Why would Watts do something secretly that forces him to pay more than necessary?

Respondents also argue that Tuck mischaracterizes Watts's testimony because what Watts said was that he had more information about other buyers about his car than he has about cars offered by other sellers. (Respondents' Init. Brief 21). Putting aside that Tuck mischaracterized nothing, we essentially say the same thing. By sabotaging cars and listing them at the riskiest levels, Watts deprives other buyers of information that would increase market value and benefit the consumer. It does not matter what information Watts has about other cars. He kept buying the same ones. (Tuck Br. of Appellant § III(C)(1)(a) (noting that Watts was successful nine times out of ten and that the same cars would cycle through OTM four or five times). What is important is that other dealers and potential buyers have no way of knowing what Watts has done. That is not a defense. That is fraud.

Watts's effort to justify his action by testifying as to what other dealers do also fails. (See Respondents' Init. Brief 22). As shown in the excerpt reprinted in Respondents' brief, the Undersigned objected when Watts tried to say what other dealers do at auction. (*Id.* n. 5). Watts is not competent to say what others do, and he never laid a foundation for his self-serving "but they do it too" defense.

The Undersigned also objected when Watts's own attorney led him with questions about what would happen at auctions where Watts was not present. Again, Watts did not lay any foundation for such testimony. Respondents nonetheless attempt to use this testimony to suggest that Watts could not trump

bids at auction. (Respondents' Init. Brief 24). But that is what Kelly Albanese already established and what Watts already admitted to. (Tuck Br. of Appellant §§ III(C)(1)(a) , IV(B)(3)). And if this was all on the up-and-up, why was it not documented like any other bid? As Watts testified, "everything is verbal." (*Id.*) Why? We know why: So Watts can make his "there is no evidence" arguments when hauled into court.

Moreover, if Watts's latest spin is true, then there is no "if bid" rights. Either Watts has the same bidding rights and participation as other bidders, or he does not. But why would only a seller have purported "if bid" rights if it is bidding like anyone else? None of that makes any sense. Watts did not fool the jury and should not be permitted to fool the courts.

c. Respondents' spin on scrapping cars and pocketing the money

Until caught, Watts pocketed the money he got from scrapping vehicles based on false affidavits of ownership. (Tuck Br. of Appellant § III(C)(2)). Respondents retort with nothing more than more diversion.

Respondents first argue that the absence of any deposited funds before Watts was caught proves nothing. They reason that Tuck never showed that sales occurred before Tuck unearthing the evidence in discovery. On its face, that makes no sense. Watts's practice came to light *because* of the evidence that it happened. And it happened during the period for which there are no accounting entries.[3]

[3] Daryl Smith was employed in 2018 and part of 2019. (R. p. 457, line 12; *see* r. p. 584 ¶¶ 1-2). He provided the blank and false affidavits and testified that, during this period, there were cars scrapped for which payments were made directly to Watts personally. (Tuck Br. of Appellant § III(C)(2)).

Respondents' new argument that Watts paused the practice for certain months has nothing to do with what Tuck proved. (Respondents' Init. Brief 27). Putting aside the fact that there is no evidence of a price decline in commodities, Tuck proved the practice occurred when Watts did not record the revenue from checks made to him personally. It is that simple.

d. The private sales argument

Respondents also argue that private sales can comply with the UCC. (Respondents' Init. Brief 19). Respondents never explain how this matters when Watts simply pockets the money and never refunds a single consumer. (Tuck Br. of Appellant § V(B)(2)). No law justifies that.

e. The false bid sheets argument

Typical of Respondents' arguments is that falsifying bid sheets to show a market sale doesn't matter because Watts was not required to obtain bids. (Respondents' Init. Brief 19; *see* Tuck Br. of Appellant § III(C)(1)(b)). They then declare that Watts held his own auctions and would accept the highest bid. (Respondents' Init. Brief 20). There is no evidence of that other than the fake bid sheets Respondents now claim don't matter.

f. The OTM credit card argument makes no sense

Respondents argue that OTM used other companies' credit cards until it got one in Watts's name. (Respondents' Init. Brief 7-8). Respondents point to different evidence than what Tuck relies on and argue that Tuck is trying to improperly infer that OTM made payment to Watts for his own benefit. (Respondents' Init. Brief 8). When Watts got caught running personal expenses through the credit card, he changed to a different type of fraud. He claimed reimbursement for parts. But that

also fell apart when he admitted that the company never spent that kind of money on parts. (Tuck Br. of Appellant § III(D)(2)). When pinned down, Watts invented a computer glitch to explain how massive amounts once booked as personal expenses are now booked as "parts," and then he claimed he was confused. (*Id.*)

In this context, Respondents make another remarkable argument that resembles his "everything is verbal" excuse for undocumented auctions: "The general ledger entries themselves demonstrate nothing definitive about these payments." (Respondents' Init. Brief 8). But shouldn't they? A general ledger's purpose is to identify how a company attributes its costs to specific accounts.[4] As a tax lawyer with an LLM from NYU, Watts knows that. And Watts could never properly attribute an expense to the appropriate account if "nothing definitive" exists to explain the entry. But he never intended to. Every time he is caught in a lie, it's "all verbal," "not definitive," some employee's fault, or an inexplicable data corruption.

g. Tuck's complicity in the non-existent scheme

Without any evidence, Watts suggests that Tuck knew about Watts's fraudulent use of the estimates and was somehow complicit. (Respondents' Init. Brief 6). In other words, "I did not rob the bank, but if I did Tuck drove the getaway car." As with every other defense that Watts has floated throughout this case, there is no evidence to support Watts's latest suggestion.

4 https://www.investopedia.com/terms/g/generalledger.asp

h. The preponderance of the evidence standard does not require a lead pipe cinch.

Tuck and others detailed the scheme in which Watts sells, repossesses, sabotages or creates false charges, and then buys back the vehicle. (Tuck Br. of Appellant § III(C)(1)(a), V(B)(2)-(3)). Respondent argues that the totality of Tuck's evidence is "thin," and it does not make this case "a lead pipe cinch." (Respondents' Init. Brief 5; *id.* at 6). This is a de novo appeal. The preponderance burden applicable here never approaches anything involving proverbial lead pipes. *Fountain v. Fred's, Inc.*, 436 S.C. 40, 871 S.E.2d 166 (2022) (citing Gilbert v. McLeod Infirmary, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951)).

What is significant, however, is that Respondents offer only Watts's bald denials and absurd excuses. His assertions on appeal are no more credible than his assertion at trial that Tuck conveniently resigned voluntarily on the same day his replacement started. The jury made short work of that assertion, and the same result is warranted here.

Respondents have never impeached Tuck, Friedline, Albanese, or Scott. Nor has one person taken an oath to affirm a single statement made by Watts. And is it any wonder? Consider that Watts twice blames employees for evidence of the interrelatedness of the companies and his illegal actions. (*See* Respondents' Init. Brief 16 (blaming his bookkeeper for not suggesting that Watts charge a management fee that never existed); *id.* at 18 n. 4 (blaming an employee for not obtaining PEO licenses)). At the same time, Watts argues that these

employees – in whom he has supposedly reposed such trust – never know what they are talking about. (*See, e.g.*, Respondents' Init. Brief 23-24).[5]

4. The credit card evidence

Respondents release a school of red herring to avoid the evidence of how Watts lived off corporate credit cards and bilked the entities. (Respondents' Init. Brief 7-9).

Watts never explains his "receivable" against the massive personal spending on luxury items by Watts and his wife, who does not even work for any of the entities. (Tuck Br. of Appellant § III(D)(2)).

5. The common bookkeeping and other support services.

Respondents are partially correct about whether common bookkeeping, human resource, and other management services is relevant. (Respondents' Init. Brief 15-18). Tuck offered this evidence to show how the companies are intertwined, a point that Respondents now concede. (*Supra* § III(A)(1)).

6. The staffing companies

Another undeniable illegality is how Watts uses unlicensed PEO companies to escape paying the correct workers compensation rates. To create the illusion of separateness necessary to comply with the law, Watts even put one of these companies in his wife's name, even though she has nothing to do with it. (Tuck Br. of Appellant § III(E)).

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[5] Even Watts could snow this Court into believing that it is all his employees' fault, that is not a defense. Respondents are liable for all actions of their employees and agents, whose collective knowledge is imputed to respondents. *Bankers Trust Co. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984).

Watts cannot wiggle out of his admission that he did this because of workers compensation rates. Respondents still argue that Watts can justify his violations of the law because they result in more efficient operations. (Respondents' Init. Brief 17-18). Again, there are multiple problems with this assertion. First, there is no "efficiency" exception in the law. Second, starting separate PEO companies is only more "efficient" if you break the law and fail to meet the licensing requirements. Third, it is not more efficient. How is starting a separate company to pay employees and bill the actual employer more "efficient" than simply paying the employees? It's not about efficiency. It is all about skirting insurance and licensing laws.

7. Analysis of each entity

a. 828A St. Mark Road

As Tuck has already shown, the December 21 Order also does not address Plaintiff's showing as to the second prong of *Pertuis*. (Tuck Br. of Appellant § V(C)(1)).

Respondents argue that 828A and OTM are very different because, while OTM works on cars, 828A is a "real estate property holding company." (Respondents' Init. Brief 9). Respondents also argue that it is not unusual for real estate holding companies to have no operations. (Respondents' Init. Brief 9).

828A is nothing. It does nothing. It has nothing other than legal title to what is essentially OTM. An actual "real estate property holding company," would lease the property it has. But 828A does not.[6] An actual "real estate property holding

[6] Respondents have never produced or offered any lease.

company" would charge rent. But 828A does not. And that is why it does not even have a bank account. (Tuck Br. of Appellant § III(F)).

Respondent argues that none of this matters because, if Watts had done things properly, he would have a right to distribution of profits. (Respondents' Init. Brief 10). Profits from what? There is no rent or other income. There are no expenses. There is nothing from which there could be profits or losses. Would things be different if they were different? Perhaps, but that is not the inquiry.

Respondents argue that there is no evidence that the rent charge is greater than fair market value. (Respondents' Init. Brief 10-11). That is because there was no evidence that fair market value has anything to do with anything. Watts took what he wanted to take from OTM, he put it in a *personal* account along with rent from apartments he owns and from other sources. (Tuck Br. of Appellant § III(F)).

If 828A is distinguishable from OTM, then South Carolina has no SBE. Watts has used the corporate form for only one purpose: To create a legal argument that assets cannot be used to satisfy the liabilities he causes. For all other purposes, he ignores the separate corporate forms. This Court cannot countenance such efforts under the guise of "equity." The very purpose of equity is to avoid such contrived efforts to evade one's obligations. Roger Young & Stephen Spitz, *SUEM - Spitz's Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. Rev. 175, 179 (2003) (discussing the maxim that "Equity Will Not Suffer a Wrong to be Without a Remedy").

b. Southeastern

The trial court's Order also does not address Plaintiff's showing as to the second prong of *Pertuis* with regard to Southeastern Towing & Recovery ("Southeastern"). (Tuck Br. of Appellant § V(C)(2)). Respondents understate the facts by suggesting that only a few of Southeastern's employees were on the OTM payroll, and only for a certain period of time. (Respondents' Init. Brief 12). To be clear: Since Southeastern had a workers compensation claim, **all** Southeastern employees have been put on the OTM payroll or on other payrolls at **all** times. (Tuck Br. of Appellant § III(C)(3)).

Respondents argue that Watts did not do this to cheat on workers compensation rates, even after Watts admitted that he based his decisions on workers compensation rates. (Respondents' Init. Brief 12; *see* Tuck Br. of Appellant § III(C)(3)). Respondents argue that having employees work for one company be paid by another that charges back the first company fosters "efficiency." (Respondents' Init. Brief 14). How? They can't say. Nor do they explain the coincidence of moving the employees out of the company that had a workers compensation claim.

Just as puzzling is Respondents' criticism of Friedline for not testifying as to Watts's motives. (Respondents' Init. Brief 12-13). Friedline is a fact witness. She is not clairvoyant. She can only testify as to what she knows, including what she heard Watts say. That is all she did, and her testimony further cements the fact that Watts's belated efforts to explain everything are just another sham. (*See* Tuck Br. of Appellant § III(C)(3)).

c. Carolina's Best

The December 21 Order does not address Plaintiff's showing as to the second prong of *Pertuis* with regard to CB. (Tuck Br. of Appellant § V(C)(3)). CB is directly involved in the fraud. Watts defrauds consumers borrowing from CB when he uses CB's "verbal" "if bid" rights on behalf of Affordable Auto Finance ("Affordable") to recycle cars without giving the consumer any benefit of their equity. CB is just another convenient means for Watts to obtain vehicles at low to no cost to send through a rigged auction and to sell through Affordable.

d. Affordable Auto

Finally, the trial court did not analyze the second prong of *Pertuis* as to Affordable. (Tuck Br. of Appellant § V(C)(4)). Nor do Respondents specifically address Tuck's showing.

B. Alter ego and piercing the corporate veil: Defendant Watts

Respondents limit their piercing arguments to the fundamental unfairness prong of *Sturkie*. And for that purpose, they offer only one different argument. Respondents contend that the evidence of Watts and his wife living large off the CB credit card should not matter. (Respondents' Init. Brief 28). But Watts cannot bilk CB without the involvement of his vertically integrated recycling scheme of which OTM is a central cog.

Watts is not merely taking out profits to which he is otherwise entitled. His personal spending far eclipses any profit. (Tuck Br. of Appellant § III(D)(2)). He manages that only by engaging in inexplicable bookkeeping to move money to him and out of companies like OTM. The result? Victims of his duplicity are left with no means to obtain redress for his myriad illegal and unethical activities. Tuck is

just one example. A jury found that he is entitled to a substantial sum because of Watts's lies intended to deprive Tuck of his contractual rights. Meanwhile, Watts lives a life of luxury, hiding behind the laws he flouts daily and the corporate forms he never honored.

Respondents argue that none of this is fundamentally unfair. It would be a sad day indeed if this Court agreed.

III. Conclusion

For these reasons and those outlined in Tuck's Brief of Appellant, OTM's liability should be attributed to 828A, Southeastern, CB, and Affordable. OTM's liability also should be attributed to Watts.

Respectfully submitted this 22nd day of November 2023.

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