IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

LYNIAL ASHFORD, et al., *Plaintiffs/Appellants*,

v.

ACCUWRIGHT INDUSTRIES, INC., et al., *Defendants/Appellees*.

No. 1 CA-CV 19-0160
FILED 2-27-2020

Appeal from the Superior Court in Maricopa County
No. CV2014-002791
The Honorable Lindsay P. Abramson, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge David B. Gass joined.

C R U Z, Judge:

¶1 Appellants Lynial Ashford ("Ashford") and Betty Ashford challenge the superior court's ruling that Appellee Gunwright, LLC ("Gunwright") was not the "alter ego" of Appellee Accuwright Industries, Inc. ("Accuwright"). Ashford additionally contends that the superior court improperly instructed the jury. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 David Wright ("Wright") is the sole owner of Accuwright and Gunwright. Accuwright was founded in 1998 and performs titanium coating for the aerospace industry. Wright later formed Gunwright in 2009 as a start-up hobby limited liability company that modifies and builds custom gun parts. Wright patented a process to coat rifle barrels with titanium and developed the first-ever rifle sold with a titanium-coated barrel.

¶3 Wright was the only employee of Gunwright. Gunwright was capitalized with an initial investment of only $100, and it did not maintain more than a few hundred dollars in its bank accounts throughout its existence. As a start-up company, Gunwright did not have the required equipment to apply the titanium spray coating, and so Wright used the equipment and materials from Accuwright to complete its jobs. Gunwright also entered a written sublease with Accuwright and rented a room in Accuwright's office space for $750. Although there was an error on the leasing agreement, the term was intended to be for a year.

¶4 Wright's first sale for a titanium-coated rifle was to Robert Burnham ("Burnham"). Burnham was a customer of a gunsmithing company, the Gun Shop. Burnham asked the Gun Shop to create a custom, titanium-coated barrel for one of his rifles to make it lighter and more accurate. Ashford, an employee and gunsmith at the Gun Shop, manufactured the barrel. The process required Ashford to remove steel from the outside contour of the barrel, so the barrel was not too heavy once the titanium coating was applied. As Ashford was thinning the barrel, he expressed concern that the barrel's steel was too thin, but the Gun Shop's owner directed Burnham to remove even more steel.

¶5 After Ashford manufactured the barrel, the Gun Shop contracted with Gunwright to apply titanium to its exterior. Wright applied the titanium coat to the barrel on behalf of Gunwright, but he used Accuwright's equipment. Accuwright billed Gunwright for the equipment and materials used, as reflected in its accounts receivable ledger. Gunwright returned the coated barrel to the Gun Shop; the Gun Shop assembled the rifle and then sold it to Burnham.

¶6 Shortly after purchasing the rifle, Burnham handloaded his own custom cartridges and test-fired the rifle. Burnham immediately noticed evidence of excessive pressure, and he returned to the Gun Shop, believing the rifle to be unsafe. At the Gun Shop, Burnham expressed concern that the rifle exhibited high pressure. Ashford test-fired the rifle three or four times using Burnham's handloaded cartridges, and it continued to show signs of overpressure. The Gun Shop's owner told Burnham the bore on the rifle was too tight and he directed Burnham to re-size the bullets and lessen the powder used in each cartridge. Burnham made these adjustments but did not test the gun; instead, he returned the gun to the Gun Shop a few days later. Ashford again fired the rifle using Burnham's handloaded cartridges, and this time it exploded, causing Ashford to lose his left hand.

¶7 Ashford sued Gunwright and Accuwright, alleging the titanium coating applied to the rifle barrel was defective. Ashford alleged that Accuwright was liable because Gunwright was its alter ego. A jury trial was held on the issues of product liability, while the issue of alter ego liability was tried by way of a bench trial.

¶8 During the jury trial, evidence showed the barrel failed because it was too thin to contain the pressure generated upon firing and the borehole was off-center because of the thinning process. Ashford testified that he believed the titanium coating would provide sufficient

strength to the barrel to prevent it from failing. Evidence also showed Burnham created and handloaded the rifle cartridges he was using. Experts testified that handloading cartridges could lead to mixed powders, which could also cause excessive pressures and barrel failure.

¶9 At the close of the trial, the jury found for Ashford and awarded Ashford damages of $1,500,000. The jury found Ashford to be 20% at fault, Gunwright to be 5% at fault, the Gun Shop to be 55% at fault, and Robert Burnham to be 20% at fault. The jury did not find Accuwright to be at fault. A judgment of $75,000 was awarded to Ashford and against Gunwright.

¶10 At the bench trial, the superior court heard evidence on the issue of alter-ego liability. Evidence showed Gunwright had not paid Accuwright any rent and had not paid Accuwright any of the money owed for the materials and equipment Accuwright provided. Accuwright also provided $15,000 to Gunwright for research and development. However, Wright testified that the companies were separately incorporated, and he maintained separate bank accounts, invoicing, accounting records, and business licenses. Wright also testified that he intended that Gunwright pay Accuwright for the materials and equipment it provided. Following the hearing, the superior court held that Gunwright was not the alter ego of Accuwright, and therefore it was not liable for the judgment awarded against Gunwright and in favor of Ashford.

¶11 Ashford timely appealed the jury trial and bench trial judgments. We have jurisdiction under Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

I. Alter Ego Theory

¶12 Ashford first argues the superior court erred in ruling Gunwright was not the alter ego of Accuwright. We view the evidence in the light most favorable to sustaining the superior court's decision. *Dietel v. Day*, 16 Ariz. App. 206, 209 (1972). We review the superior court's ruling for clear error and will uphold that ruling if substantial evidence supports it. *Id.* However, we review legal conclusions *de novo*. *Enter. Leasing Co. of Phoenix v. Ehmke*, 197 Ariz. 144, 148, ¶ 11 (App. 1999).

¶13 One corporate entity generally is not liable for the obligations of another corporate entity, absent an express agreement. *See Dietel*, 16 Ariz. App. at 208. However, a court may "pierc[e] the corporate veil" and

impose liability when sufficient reason to disregard the corporate form exists. *Id.* "The corporate fiction will be disregarded when the corporation is the alter ego or business conduit of a person, and when to observe the corporation would work an injustice." *Ize Nantan Bagowa, Ltd. v. Scalia*, 118 Ariz. 439, 442 (App. 1978).

A. Unity of Interest and Ownership

¶14 First, Ashford must prove alter-ego status by demonstrating "there is such unity of interest and ownership that the separate personalities" of the corporations cease to exist. *Dietel*, 16 Ariz. App. at 208. "[T]he dominant corporation must so control and use the other as a mere tool or instrument in carrying out its own plans and purposes . . . ." *Jabczenski v. S. Pac. Mem'l Hosps., Inc.*, 119 Ariz. 15, 21 (App. 1978). Factors demonstrating unity of control include: common officers or ownership; payment of expenses by the dominant corporation; failure to maintain formalities of separate corporate existence; similarity of logos; plaintiff's lack of knowledge of separate corporate existence; making of interest-free loans; maintaining of financial records; commingling of personal and corporate funds; personal use of corporate property; observance of formalities of corporate meetings; and filing of corporate income tax returns and other reports. *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 160-61 (App. 1994).

¶15 Here, Gunwright and Accuwright were formed and owned by the same individual, Wright. However, those facts do not in and of themselves make this situation one in which the corporate form should be disregarded. *Id.* at 160 ("The mere fact that corporations have the same officers does not make one liable for the acts of the other.").

¶16 The corporations themselves are very different in nature. Accuwright provides services for the aerospace industry, while Gunwright was formed to modify and build custom gun parts. The two corporations operated with different purposes and interests, as evidenced by the fact that the two operated under different types of licenses. Gunwright held a firearms license issued by the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, while Accuwright did not. The superior court also found that Gunwright and Accuwright did observe separate corporate formalities. Gunwright was a registered corporation with a business license and its own operating agreement. Wright testified that he kept separate accounting and invoices for Gunwright and Accuwright. Wright also testified that he maintained separate financial

records and filed separate tax returns on behalf of Gunwright and Accuwright.

¶17 Accuwright paid Gunwright's expenses and provided labor and equipment to Gunwright. However, invoices were created, and an accounts receivable ledger was maintained to track the money owed to Accuwright. While Gunwright had not made any payments to Accuwright by the time of the bench trial, Wright testified that he intended for Gunwright to pay Accuwright for any outstanding charges. He further testified that Accuwright did not make any interest-free loans to Gunwright. Similarly, Accuwright subleased a room in its rented office space for Gunwright's use, though no sublease payments had yet been made. Again, Wright testified that Gunwright's debts to Accuwright had not been "wiped off the books," and he intended for Gunwright to pay back Accuwright.

¶18 Finally, Accuwright had no stock ownership of Gunwright, no significant evidence showed commingling of personal and corporate funds, and no evidence showed Gunwright's corporate property was diverted for Accuwright's use or benefit. Also, no evidence indicated Ashford was unaware of Gunwright's separate existence, and nothing in the record indicates Ashford believed Gunwright and Accuwright were the same entity. Both corporations had their own websites, the two corporate logos were not similar, and the invoices and communications to Ashford were clearly identified as being from Gunwright. The superior court was in the best position to weigh the credibility of the witnesses in consideration of these factors, and we will not substitute our views for that of the superior court. *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 482, ¶ 42 (App. 2015). Thus, the superior court did not err in finding no unity of interest and ownership between Gunwright and Accuwright.

B. Fraud or Injustice

¶19 Second, Ashford must demonstrate "that observance of the corporate form would sanction a fraud or promote injustice." *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37 (1991). "A fraud or injustice arises if observance of the corporate form would confuse the opposing parties and frustrate their efforts to protect their rights, while allowing the party responsible to evade liability." *Keg Rests. Ariz., Inc. v. Jones*, 240 Ariz. 64, 75, ¶ 38 (App. 2016).

¶20 Here, there was no "confusion of identities and acts as to work a fraud upon third persons." *Jabczenski*, 119 Ariz. at 21. Ashford did not

allege that he confused Gunwright and Accuwright, and no evidence showed Ashford believed he was working with any business other than Gunwright.

¶21 Ashford primarily argues that Gunwright's insolvency and lack of liability insurance was evidence of fraud, and leads to injustice because it prevents Ashford from collecting on his judgment. Ashford argues Gunwright "was insolvent from its very beginning and throughout its existence." Gunwright was capitalized with an initial investment of $100 and it carried an average balance of $375 in its bank accounts. "Undercapitalization, where it is clearly shown, is an important factor in determining whether the doctrine of alter ego should be applied," but in the absence of fraud or injustice, "it is not an absolute ground for disregarding a corporate entity." *Ize Nantan Bagowa*, 118 Ariz. at 443.

¶22 The superior court found no evidence Gunwright was intentionally undercapitalized at the date of incorporation or was formed to evade liability. Wright testified that Gunwright was a "start-up hobby company" and that due to this lawsuit commencing so soon after Gunwright's incorporation, the company had been unable to grow financially. The superior court found, and we agree, that Ashford did not show "by a preponderance of the evidence that the financial setup of the corporation is only a sham and causes an injustice." *See id.* Instead, "[t]he facts show no more than that the corporations were run in the same informal manner as is usually seen in closely held corporations." *See Bischofshausen, Vasbinder, & Luckie v. D.W. Jaquays Mining & Equip. Contractors Co.*, 145 Ariz. 204, 209 (App. 1985).

¶23 Ashford also argues Gunwright's failure to keep liability insurance is particularly problematic when engaged in an "inherently dangerous" business. As the superior court said, "[a]lthough the lack of insurance is troubling, avoiding personal liability is a legitimate purpose of incorporations." *See Dietel*, 16 Ariz. App. at 208; *see also Bischofshausen*, 145 Ariz. at 209 (finding no merit in the argument that the court pierce the corporate veil because the defendant should have had more assets if it was going to be engaged in an ultra-hazardous activity).

¶24 "The term injustice or unjust act as used in the Arizona cases is not easy to define." *Youngren v. Rezzonico*, 25 Ariz. App. 304, 306 (1975). While a tort victim's ability to collect on a judgment may be a factor in determining whether an injustice has occurred, it is not the sole factor. Though "[e]quity is reluctant to permit a wrong to be suffered without remedy," it is also true that "[b]efore a court is entitled to disregard the

corporate entity there must be a resulting injustice ***in addition to*** a situation that justifies a finding that the corporation is the alter ego" of another. *Id.* at 306. (emphasis added) (citations omitted) (internal quotation marks omitted). Here, there is no evidence of an intent to defraud, nor is there evidence that Accuwright was benefitting from Gunwright's young enterprise while avoiding financial responsibility. Absent a finding of joint and several liability, Gunwright's insolvency and failure to maintain insurance does not necessarily allow Ashford to collect the Gunwright judgment from another entity with an ability to pay. Without more, we cannot say it would promote an injustice to limit Ashford to seek recourse from only Gunwright.

¶25 Though this court acknowledges the severity of Ashford's injury, properly created corporate status will not be lightly disregarded, and "if the corporate fiction is too easily ignored, . . . then incorporation is discouraged." *Dietel*, 16 Ariz. App. at 208. Substantial evidence supports the superior court's alter-ego ruling. *See Chapman v. Field*, 124 Ariz. 100, 102 (1979). Therefore, we affirm the superior court's alter-ego determination, which precludes Ashford from collecting its judgment against Accuwright.

II. Jury Instructions

¶26 Ashford additionally argues the superior court erred in instructing the jury on assumption of the risk and sophisticated user. "We review a court's decision to give a jury instruction for abuse of discretion." *State v. Solis*, 236 Ariz. 285, 286, ¶ 6 (App. 2014). However, we review whether a jury instruction correctly states the law *de novo*, and "we view jury instructions as a whole to determine if they adequately reflect the law." *Id.* (citation omitted) (internal quotation marks omitted).

A. Assumption of the Risk Instruction

¶27 Ashford argues the superior court erred for three reasons: (1) the evidence did not warrant the assumption of the risk instruction; (2) the assumption of the risk instruction was an incorrect statement of the law; and (3) the language in the assumption of the risk instruction wrongfully took the issue of assumption of the risk from the jury.

¶28 First and foremost, Ashford did not properly preserve all his objections to the instruction. "In order to preserve an objection to a jury instruction as an issue on appeal, a party must state distinctly the matter objected to and the specific grounds for the objection." *Duran v. Safeway Stores, Inc.*, 151 Ariz. 233, 234 (App. 1986); *see also* Ariz. R. Civ. P. 51(c). During trial, Ashford objected to the instruction only on the grounds it was

not supported by the evidence, stating "[t]here's no evidence to support [it]." He further objected to the instruction on assumption of the risk "because you have to knowingly accept the risk, and the evidence is the barrel was not showing high pressure, and the cartridges were not showing high pressure signs" and "[t]he last time [Ashford] shot [the gun], [Ashford] looked at the cartridge and couldn't see anything that indicated high pressure signs."

¶29 Though Ashford properly objected to the instruction on the grounds it was unsupported by the evidence, Ashford failed to object to the instruction on the grounds he raises on appeal, i.e., that the instruction did not adequately state the law and that it took the issue away from the jury. Thus, these objections were not preserved for appeal. *See Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Elec. Corp.*, 176 Ariz. 383, 386-87 (App. 1993). Regardless, and even considering the merits of each of Ashford's arguments, the superior court did not err in its instruction on assumption of the risk.

¶30 The assumption of the risk instruction as given stated:

> Defendants claim Plaintiff caused his own injuries by assuming the risk of injury. Plaintiff assumed the risk of injury if he discovered or learned of a defect in the gun and notwithstanding the discovery of the defect, Plaintiff nevertheless used the gun.
>
> If you find Plaintiff assumed the risk of injury, you can reduce Plaintiff's damages in an amount proportionate to the relative degree Plaintiff assumed the risk that caused the injury.

¶31 Sufficient evidence in the record supports instructing the jury on assumption of the risk. "In determining whether a jury instruction is justified, we must view the evidence in the strongest manner supporting the theory of the party requesting the instruction. If there is any evidence tending to establish such a theory, the instruction should be given even if contradictory facts are also presented." *Pioneer Roofing Co. v. Mardian Constr. Co.*, 152 Ariz. 455, 462 (App. 1986).

¶32 The assumption of risk defense is based on an individual's knowledge of a particular risk and his consent or agreement to accept that risk. *See O.S. Stapley Co. v. Miller*, 103 Ariz. 556, 561 (1968). Ashford held himself out as a "master gunsmith," he had over twenty years of experience, and had earned a degree in gunsmithing. At trial, Ashford testified he was aware a barrel could fail if under too much pressure, and

he testified he knew overpressure was a serious condition in a rifle that can cause the user severe injury. Ashford testified Burnham returned the gun because it exhibited signs of overpressure. Ashford also testified he knew Burnham was handloading the cartridges he used, and whenever someone handloads, there is a danger of mixed powders. Ashford testified he understood mixed powders lead to unpredictability and can cause catastrophic pressure. Notwithstanding this knowledge and Ashford's experience, Ashford proceeded to test-fire the rifle using Burnham's handloaded cartridges. Viewing the evidence most favorable to Gunwright and Accuwright, sufficient evidence showed Ashford was acutely aware of the risks of firing a gun that may have been exhibiting signs of pressure in the barrel and was also loaded with mixed powder cartridges. We do not find the superior court abused its discretion in giving the instruction.

¶33 The instruction also is not an incorrect statement of the law. Our case law has defined assumption of the risk nearly identically to the included instruction: "[T]he user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it." *Id.* (quoting Restatement (Second) of Torts § 402A cmt. n (1965)). Ashford argues that the instruction failed to recite that Ashford must have "actual knowledge of the particular risk and appreciate its magnitude" as stated in *Hildebrand v. Minyard*, 16 Ariz. App. 583, 585 (1972). However, it is not reversible error where a jury instruction gives the basic outline of the law, as is the case here. *See Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 137 (App. 1995).

¶34 Additionally, reversal of a jury instruction "is justified only if the instruction was both erroneous and prejudicial to the substantial rights of the appealing party." *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 504 (1996) (citation omitted) (internal quotation marks omitted). Ashford failed to demonstrate prejudice, and the mere fact that the jury found some degree of fault on the part of Ashford does not demonstrate prejudice. *See Walters v. First Fed. Sav. & Loan Ass'n*, 131 Ariz. 321, 326 (1982) ("The prejudicial nature of the error will not be presumed but must affirmatively appear from the record.").

¶35 Finally, the instruction does not improperly take the issue of assumption of the risk away from the jury. Ashford cites *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283 (2000), to argue that the superior court did not give the jury "sole discretion" to apply assumption of the risk. However, in *Estate of Reinen*, the improper jury instruction explicitly said the plaintiff "***did*** voluntarily assume the risks." 198 Ariz. at 288 (emphasis added). Here, the instruction stated, "***If*** you find Plaintiff assumed the risk

of injury . . . ." (emphasis added). Unlike *Estate of Reinen*, the instruction here did not make a definitive statement of an issue in controversy. Rather, it was a conditional statement that required the jury to make an independent determination as to whether Ashford discovered or learned of the defect in the gun, and notwithstanding such discovery or knowledge, used the gun. In other words, the issue of assumption of risk was appropriately left for the jury to decide.

B. Sophisticated User Instruction

¶36 Ashford argues the jury instruction on the sophisticated user defense was improper because (1) the sophisticated user defense only arises in "failure to warn" cases, and (2) Ashford cannot be considered a sophisticated user due to his unfamiliarity with titanium-coated barrels. At trial, Ashford objected to the above instruction, arguing that there was no "evidence to suggest that Lynial Ashford is a sophisticated user of the titanium jacket." Ashford failed to object to the instruction on the grounds the defense only arises in "failure to warn cases," as he now does on appeal. *See Duran*, 151 Ariz. at 234. Nevertheless, both of Ashford's objections fail.

¶37 The jury instruction states:

> Defendants claim that they are not responsible for any harm to Plaintiffs based on a failure to warn because Plaintiff Lynial Ashford is a sophisticated user of the product.
>
> To succeed on this defense, Defendants must prove that, at the time of the injury, Plaintiff Lynial Ashford, because of his particular position, training, experience, knowledge, or skill, knew or should have known of the product's risk, harm, or danger.

¶38 Ashford claims the "sophisticated user defense applies solely to 'failure to warn' cases" and Ashford "did not bring a 'failure to warn' case to the jury." Ashford has not provided any case law to support such a proposition. Additionally, in his third amended complaint, Ashford specifically alleged a claim for product liability—information defect. In relevant part, the amended complaint states:

> As a proximate result of [Gunwright's] and [Accuwright's] ***failure to give [Ashford] adequate warnings*** or instructions on, with or about the . . . modified titanium alloy barrel involved in the subject accident, the product was defective and unreasonably dangerous for use in the reasonably

> foreseeable way the product was being used at the time of the subject accident.

(Emphasis added).

¶39 At trial, Ashford's counsel argued, "And you're going to see that [Ashford] thought that the reason it was okay to use that thin steel barrel is because Mr. Wright specifically told him that the titanium restored or replaced the strength of the steel." He later stated, "If [Wright] doesn't tell people the incorrect information about titanium being so strong it replaces steel, none of this happens, nobody has this barrel blow up on them." Ashford's counsel also asked Wright at trial, "Did you want people to believe that the barrel that they were going to get when the titanium cold spray process was applied to it, that it was just as safe as the barrel that they brought in?" At closing, Ashford argued that "the barrel went back to Mr. Wright, and he once again sprayed it without saying anything to anybody, did not say that barrel is too thin." Ashford's arguments and questions at trial relate to whether Ashford was adequately warned about the alleged defects of the modified gun.

¶40 Accordingly, sufficient evidence in the record supports the superior court's inclusion of the instruction. Although Ashford argues he had never used a titanium-coated barrel and it was "the first ever introduced into the public stream of commerce," Ashford was a "master gunsmith." Ashford went to gunsmithing school, was military trained, and he had about twenty years of gunsmithing experience. Sufficient evidence suggested Ashford's expertise in guns generally equipped him to recognize potential dangers and problems with the titanium-coated gun barrel. The instruction left the issue to the jury to decide whether Ashford was a sophisticated user. *See Pioneer Roofing Co.*, 152 Ariz. at 462. The superior court did not abuse its discretion by including the instruction of sophisticated user.

CONCLUSION

¶41 For the foregoing reasons, we affirm.