



**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 13, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP1393-CR**

**Cir. Ct. No. 2005CF311**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**MICHAEL E. WESTON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Manitowoc County:  
PATRICK L. WILLIS, Judge. *Reversed and cause remanded.*

¶1 NETTESHEIM, J.<sup>1</sup> The State of Wisconsin appeals from a circuit court order dismissing a criminal complaint against Michael E. Weston alleging

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

thirty-three counts of failure to pay wages pursuant to WIS. STAT. §§ 109.03(1) and 109.11(3). The court ruled that the employees at issue were those of Weston Machine & Specialty (Weston Machine), not Weston personally. The court further held that the complaint failed to state a basis to pierce the corporate veil in order to track criminal liability to Weston. We disagree. We hold that the complaint states probable cause as to Weston's potential criminal liability. We reverse and remand for further proceedings on the criminal complaint.

¶2 The parties raise an additional issue as to whether a failure to pay wages is a continuing offense. This issue bears on two sub-issues: (1) whether the action was commenced within the statute of limitations, and (2) whether the offense of failing to pay wages is a continuing offense. The trial court did not address this question since it had dismissed the complaint on the threshold basis that the complaint failed to state probable cause. As to the statute of limitations issue, we need not answer this question on the merits since, even if the offense is not a continuing offense as Weston contends, the action was commenced within the applicable three-year statute of limitations pursuant to WIS. STAT. § 939.74(1). We otherwise leave the "continuing offense" question for the trial court on remand.

## FACTS

¶3 The criminal complaint is the only relevant document on appeal. The charging portion of the complaint alleges that Weston failed to pay wages due thirty-three employees of Weston Machine for the period of September 17, 2002,

to September 16, 2005.<sup>2</sup> However, the recitals in the probable cause portion of the complaint recite that Weston failed to pay wages for the period of September 17, 2002, to October 1, 2002. Weston is the registered agent and owner of Weston Machine. His wife, Gail, is the corporate president. On October 1, 2002, Weston advised the employees that M&I Bank had foreclosed on the corporate property, frozen all the corporate assets, and would be changing the locks on the building the next day. As a result, Weston told the employees that they would not be paid the wages due them. The M&I foreclosure complaint had been served on Weston on August 29, 2002, more than a month before Weston's announcement to the employees. However, the order freezing the corporate assets was not served until September 26, 2002.

¶4 On October 10, 2002, Gail Weston wrote a letter to the employees advising that Weston Machine had not applied the employees' September 2002 contributions for health and dental insurance to the premiums for such coverage. As a result, the insurance coverage had been cancelled. Later, the employees learned that since June or July of 2002, Weston Machine had also failed to apply their 401(k) contributions to their 401(k) accounts. Instead, Weston Machine had used these deductions to pay wages.

¶5 On October 16, 2002, Gail Weston wrote a letter on behalf of Weston Machine to "Our Valued Customers." This letter advised that Weston Machine had "closed its doors." The letter also stated that a newly formed corporation, Precision Machine Werks (Precision), had been formed and had

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<sup>2</sup> September 16, 2005, is the date on the original complaint, although it bears no file stamp.

purchased some of the assets of Weston Machine. The letter further advised that all future “inquiries, quotes and purchase orders should be made out to Precision Machine Werks, Inc., Attn: Mike Weston,” and that “[a]ll present purchase orders need to be re-issued under Precision Machine Werks, Inc.” The letter concluded, “Thank you for your patience and understanding during this transition time.” The letter recites the new mailing and shipping address of Precision, which is the home address of the Westons. Precision was incorporated on October 3, 2002, two days after Weston’s announcement to the Weston Machine employees. A newspaper account of the nonpayment of wages by Weston Machine quotes Weston as saying, “I am back in business under a new name, Precision Machine Werks, Inc.”

¶6 An affidavit filed by the M&I commercial auditor in the M&I foreclosure action states that Gail Weston had revealed an account carried on Weston Machine’s general ledger under the name of another entity, Two Rivers Tool and Machine, Inc. (TRTM). Gail Weston stated that TRTM has no income or expenses, no financial statements, no employees, no separate business facility, and that it receives nothing by way of remuneration from Weston Machine for any services provided to Weston Machine. Gail Weston further advised that TRTM is owned by Weston’s parents, but that Weston is the registered agent for TRTM. When asked by the auditor as to the business purpose of TRTM, Gail Weston declined to respond. The auditor’s review of the records revealed that from June 3, 2002, to August 19, 2002, receipts of \$175,578.76 paid to Weston Machine had been transferred to the TRTM account.

¶7 The circuit court in the M&I foreclosure action made the following findings: (1) the assets of Weston Machine were transferred to TRTM through the control and direction of Weston Machine, and Michael and Gail Weston; (2) the transfer of the assets was done with intent to defraud M&I; (3) the transfers were

diverted to TRTM for the “improper purpose of hiding assets and in a scheme designed to avoid the pre-existing liability of [Weston Machine] to M&I.”; and (4) TRTM is an alter ego of Weston Machine. Based on those findings, the circuit court ruled that the transfers were fraudulent pursuant to WIS. STAT. § 242.04(1)(a).

¶8 As noted, Weston is the registered agent of Weston Machine. The records of the Wisconsin Department of Financial Institutions regarding Weston Machine, Precision and TRTM reveal that the “same person was the registered agent of all three corporations.”

¶9 On November 20, 2002, the assets of Weston Machine were auctioned off. At the auction, Weston and another individual purchased tools and equipment valued at \$118,820. This equipment is now in use at Precision.<sup>3</sup>

¶10 The Westons, Weston Machine, and TRTM filed bankruptcy petitions on September 23, 2004.

### STANDARD OF REVIEW

¶11 Whether a criminal complaint sets forth sufficient probable cause to justify the criminal charge is a legal determination which we review de novo. *State v. Brown*, 2004 WI App 125, ¶7, 275 Wis. 2d 124, 683 N.W.2d 94.

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<sup>3</sup> Weston asserts that this is the only demonstration of any connection between him and Precision. We disagree. As we have noted, the complaint expressly alleges that Weston was the owner and registered agent of Weston Machine. The complaint then later alleges that a search of the records of the Wisconsin Department of Financial Institutions regarding Weston Machine, Precision and TRTM revealed that “the same person was the registered agent of all three corporations.”

## DISCUSSION

### *Probable Cause*

¶12 We begin by setting out the test for measuring the sufficiency of a criminal complaint. We do so at some length because these rules largely govern our ruling that the complaint states probable cause.

A criminal complaint is a self-contained charge that must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inference to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant probably committed it. To be sufficient, a complaint must only be minimally adequate. This is to be evaluated in a commonsense rather than a hypertechnical manner, in setting forth the essential facts constituting probable cause.

*State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989) (citations omitted).

¶13 In *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 425 N.W.2d 21 (Ct. App. 1988), the court of appeals stated:

[P]robable cause is not a technical, legalistic standard of certitude; it is simply a practical, commonsense measure of the plausibility of particular conclusions about human behavior. These conclusions need not be unquestionably correct, or even more probable than not; they need only be sufficiently more than a mere possibility so that reasonable people would appropriately act on them in the pragmatic affairs of everyday life. Probable cause ... may be established by inferences reasonably drawn from the facts, as well as directly by the facts themselves. These facts or inferences need only meet a test of “minimal adequacy” ... and the complaint will be held sufficient if it contains enough information to allow a fair-minded magistrate to reasonably conclude that the charges are not simply capricious, and that further proceedings against the defendant are justified.

*Id.* at 760 (citations omitted). If the allegations of the complaint support reasonable inferences both for and against probable cause, the inference in support of probable cause prevails and the complaint is deemed sufficient. *State v. Manthey*, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992).

¶14 A criminal complaint must adequately demonstrate the “five W’s”: (1) who is charged, (2) what is the charge, (3) when and where did the alleged crime occur, (4) why is the defendant charged, and (5) who says so and why is that person reliable. *Adams*, 152 Wis. 2d at 73-74. The issue in this case focuses on the fourth “W”: Does the complaint sufficiently establish why Weston is charged?

¶15 WISCONSIN STAT. § 109.11(3) states, in relevant part:

Any employer who, having the ability to pay, fails to pay the wages due and payable as provided in this chapter ... with intent to secure any discount upon such indebtedness or with intent to ... defraud the person to whom such wages are due, may be fined not more than \$500 or imprisoned not more than 90 days or both.

¶16 Weston does not dispute that under appropriate circumstances an individual may be held criminally responsible for acts done in the name of a corporation. *See, e.g., State v. Lunz*, 86 Wis. 2d 695, 273 N.W.2d 767 (1979); *State v. Laabs*, 40 Wis. 2d 162, 161 N.W.2d 249 (1968); and *State v. Kuhn*, 178 Wis. 2d 428, 504 N.W.2d 405 (Ct. App. 1993). “Since a corporation is an individual existing only in contemplation of the law, its criminal acts are those of its officers and agents; and thus persons in control of a corporation and who knowingly acquiesce to the corporation’s [criminal act] may be personally prosecuted for the criminal act.” *Lunz*, 86 Wis. 2d at 707.

¶17 However, Weston contends that the facts of this case do not allow for his criminal liability because the probable cause recitals of the criminal



complaint demonstrate that Weston Machine, not Weston himself, is the employer. Thus, Weston concludes that, but for Weston Machine's inability to pay the wages due, Weston Machine would be the proper defendant in this prosecution for failure to pay the wages.<sup>4</sup> Weston contends that the complaint fails to demonstrate that he was personally involved in, or responsible for, the failure of Weston Machine to pay its employees, noting that even his own wages were not paid. Weston points to the law holding that shareholders are not automatically liable for corporate debt or on the corporation's contracts. See *Milwaukee Toy Co. v. Industrial Comm'n*, 203 Wis. 493, 495, 234 N.W. 748 (1931) (corporate debt); *Posyniak v. School Sisters of St. Francis*, 180 Wis. 2d 619, 636-37, 511 N.W.2d 300 (Ct. App. 1993) (corporate contracts).

¶18 We agree with these general principles of law. However, the allegations of the criminal complaint, read in a commonsense, nonhypertechnical manner, allow for the reasonable inference that Weston was more than a latent actor and fellow victim in this matter. Weston was the registered agent and owner of Weston Machine. As such, he was a prominent (perhaps *the* prominent) figure in running the affairs of Weston Machine, and we do not understand Weston to contend otherwise. In sum, the complaint allows for the reasonable inference that Weston and Weston Machine constituted a "one-man band" with Weston calling the shots and, functionally, being the "alter ego" of Weston Machine.

¶19 Bearing in mind Weston's "alter-ego" role, we note the further allegations of the complaint showing that Weston Machine had transferred

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<sup>4</sup> WISCONSIN STAT. § 109.11(3) makes an employer criminally responsible for a failure to pay wages *unless* the employer does not have the ability to do so.

significant amounts of money to the “sham” legal entity TRTM.<sup>5</sup> These transfers covered the period of time from June 3, 2002, to August 19, 2002, the latter date a mere ten days before M&I filed the foreclosure action and forty-two days before Weston announced to the employees that they would not be paid. The circuit court in the foreclosure action found that TRTM was the “alter ego” of Weston Machine and that the transfers were accomplished at the direction of Weston Machine, Weston, and his wife, Gail. As a result the circuit court declared the transfers fraudulent. If that was so as to M&I, a reasonable inference is that the transfers were also fraudulent as to the Weston Machine employees. And a further reasonable inference is that this siphoning of funds from Weston Machine contributed to its financial collapse and resulted in its inability to pay its employees wages. Instead, the monies ended up in the pocket of TRTM, a “sham” corporation of which Weston Machine was the “alter ego,” and of which Weston was the registered agent. In summary, the criminal complaint allows for the reasonable inferences that TRTM was functionally Weston Machine and Weston Machine was functionally Weston. Thus, despite the multiple layers of business entities, Weston is shown to be the driving force and principal actor in all instances.

¶20 Other events alleged in the complaint also point the probable cause finger in Weston’s direction. Two days after the October 1, 2002 announcement to the Weston Machine employees, Precision was created with Weston as the registered agent and with Weston’s home address as the mailing and shipping address. Gail Weston’s letter to the former customers of Weston Machine

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<sup>5</sup> “Sham” was the adjective used by the circuit court when describing the role of TRTM. We agree.

announced the formation of Precision and instructed that all inquiries, quotes and purchase orders to Precision should be directed to the attention of Weston. And Weston is quoted as announcing, “*I’m back in business under a new name ....*” (Emphasis added.)

¶21 The circuit court reasoned, as does Weston on appeal, that there is no law supporting the State’s contention that a corporate owner’s personal assets should be considered when assessing the corporation’s ability to pay wages. Viewed in isolation, this reasoning makes sense. But the State’s argument on this point was hinged to its further argument in support of piercing the corporate veil. Here, we have already concluded that the complaint allows for a reasonable inference that Weston was the alter ego of Weston Machine, thus allowing for a piercing of the corporate veil. As such, the allegations of the criminal complaint track to Weston personally, not Weston Machine. Thus, Weston’s personal assets become very relevant on the question of ability to pay, an element of the offense of failure to pay wages. *See* WIS. STAT. § 109.11(3).

¶22 We disagree with Weston that there is no law to support this notion. Separate corporate identity is, of course, well accepted in the law. It exists to promote commerce and industrial growth. *Consumer’s Co-op v. Olsen*, 142 Wis. 2d 465, 474, 419 N.W.2d 211 (1988). However, it should not be extended to a point beyond its reason and policy, particularly when invoked in a fashion that subverts these goals. *State Bank of Cerro Gordo v. Benton*, 317 N.E.2d 578, 580 (Ill. App. Ct. 1974). Under those circumstances, the law will permit the corporate veil to be pierced in order to further the ends of justice and to protect or enforce the rights of other. *See Wiebke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 363-64, 265 N.W.2d 571 (1978). The corporate entity generally is disregarded where it is used as a cloak or cover for fraud or illegality, to work an injustice, to defend

crime, to defeat an overriding public policy, or where necessary to achieve equity. See *Brunswick Corp. v. Suzuki Motor Co., Ltd.*, 575 F. Supp. 1412, 1417 n.3 (E.D. Wis. 1983) (fraud, illegality, injustice); *Kuhn*, 178 Wis. 2d at 432 (officer responsibility for crime committed in corporate name); *Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (public policy); *Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 38, 253 N.W.2d 493 (1977) (equity).

¶23 Piercing the corporate veil to hold the individual wrongdoer accountable is proper when necessary to adequately effectuate the purpose behind the statute at issue. *Rayner v. Reeves Custom Builders, Inc.*, 2004 WI App 231, ¶17, 277 Wis. 2d 535, 691 N.W.2d 705, *review denied*, 2005 WI 60, 281 Wis. 2d 114, 697 N.W.2d 472. By the enactment of WIS. STAT. ch. 109, the legislature has decreed that the timely payment of wages is an important matter of public policy. To that end, the legislature created both civil and criminal actions to promote that public policy. “Where the corporate veil frustrates the purpose of a statute, we must assume the legislature intended to pierce it.” *Rayner*, 277 Wis. 2d 535, ¶17.

¶24 The circuit court distinguished *Kuhn* in support of its dismissal of the complaint. There, Kuhn was the president, treasurer, sole director and sole shareholder of a corporation. *Kuhn*, 178 Wis. 2d at 430. Acting on behalf of her corporation, Kuhn improperly diverted the proceeds from the sale of consignment property, resulting in a charge and conviction of theft by a bailee. *Id.* at 430-31. Kuhn appealed, arguing that the corporation, not she, was the wrongdoer. *Id.* at 432. The court of appeals disagreed saying, “[P]ersons in control of a corporation and who knowingly acquiesce to the corporation’s [criminal act] may be personally prosecuted for the criminal act.” *Id.*

¶25 The circuit court reasoned that, unlike Kuhn, who was directly implicated in the thefts, Weston was not alleged to have taken corporate funds that otherwise would have been available to pay wages. But, as we have demonstrated, this overlooks or misconstrues the allegations in the complaint creating a reasonable inference that Weston, as Weston Machine's alter ego, diverted significant monies of Weston Machine to TRTM, a "sham" corporate entity of which Weston was the registered agent. Here again, we note the findings of the circuit court in the foreclosure action that these transfers were fraudulent as to M&I. As we have previously observed, if that was so as to M&I, it also can be reasonably inferred that the transfers rendered Weston Machine, acting through Weston as its "alter ego," unable to pay the employees. Stated differently, but to the same effect, if Weston had not engaged in the fraudulent transfers, he, as Weston Machine's alter ego, would have had the ability to pay the employees' wages. Thus, this element of the crime of failure to pay wages is satisfied by the allegations in the complaint.

¶26 We also observe that in *Kuhn* the question of Kuhn's personal criminal liability was explored at a full-blown trial under the highest burden of proof known to the law. Here, the State's burden is much less under the standards for measuring the sufficiency of a criminal complaint. *See Adams*, 152 Wis. 2d at 73. As noted, the allegations of a criminal complaint need not lead to a conclusion that it is more probable than not that the defendant is guilty; instead, the allegations "need only be sufficiently more than a mere possibility." *State ex rel. Cornellier*, 144 Wis. 2d at 760. The criminal complaint in this case satisfies this test. In summary, *Kuhn* supports the State's, not Weston's, position.

¶27 We hold that the criminal complaint, read in a commonsense, nonhypertechnical manner, establishes probable cause that Weston failed to pay wages.

*Continuing Offense*

¶28 As a separate issue, the parties debate whether the complaint improperly charges a continuing offense against Weston. The trial court did not address this issue since it ruled on a threshold basis that Weston was not an employer.

¶29 We were left somewhat at sea by both parties' appellate briefs as to how or why this was an issue in this case. Only when we searched the trial court record did we learn that the debate related to an underlying statute of limitations question and the further question of Weston's ability to pay the wages.

¶30 As to the statute of limitations question, we need not answer whether WIS. STAT. § 109.11(3) constitutes a continuing offense given the facts alleged in the complaint. A criminal action is commenced upon the filing of the criminal complaint. WIS. STAT. § 968.02(2). The complaint in this case alleges the misdemeanor offense of failing to pay wages. The statute of limitations for a misdemeanor crime is three years. WIS. STAT. § 939.74(1). Here, the original criminal complaint does not bear a file stamp of the clerk of circuit court. However, the amended criminal complaint does bear a file stamp date of September 20, 2005. Self-evidently then, this action was commenced sometime before that date.

¶31 The criminal complaint recites that the records of the State of Wisconsin, Department of Workforce Development, Equal Rights Division show

that the employees claimed unpaid wages for the period of September 17, 2002, to October 1, 2002. While the earlier date is more than three years from the date of the commencement of this action, the latter date is within the three-year period.

¶32 WISCONSIN STAT. § 109.11(3) states in part, “Each failure or refusal to pay each employee the amount of wages *due at the time* ... constitutes a separate offense.” (Emphasis added). We construe the “due at the time” language of § 109.11(3) to refer to the deadline for paying wages under WIS. STAT. § 109.03(1).<sup>6</sup> Based on the facts recited in the probable cause portion of the complaint, the “due at the time” deadline was October 1, 2002, when Weston announced that M&I Bank would be locking the doors of the workplace the next day and the employees therefore would not be paid. This is confirmed by the employees’ claims filed with the Department of Workforce Development, which sought unpaid wages that were due on October 1, 2002.<sup>7</sup> As noted, this action was commenced sometime prior to September 25, 2005, less than three years after the “due date” of October 1, 2002. Thus, regardless of whether a failure to pay wages is a “continuing offense,” this action was commenced within the three-year statute of limitations.

¶33 Weston also raises a concern that the expanded period recited in the charging portion of the criminal complaint—September 7, 2002 to September 16, 2005—might allow for the charging of thousands of offenses. However, that is

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<sup>6</sup> WISCONSIN STAT. § 109.03(1) requires that “Every employer shall as often as monthly pay to every employee ... all wages earned by the employee to a day not more than 31 days prior to the date of payment.”

<sup>7</sup> We see nothing in the criminal complaint which alleges or implies that the employees were entitled to be paid their earned wages before October 1, 2002.

not the situation in this case. In point of fact, the complaint alleges but one count of failure to pay wages as to each of the thirty-three employees—hence thirty-three counts. The charges are discrete and singular as to each employee and are alleged to have occurred within a discrete period of time, albeit an admittedly long period of time, as to each employee. We address the complaint as it is framed, not on the hypothetical basis envisioned by Weston.<sup>8</sup>

¶34 Unlike the statute of limitations issue, the State’s further contention that Weston has the ability to pay the wages does invite us into the merits of whether the failure to pay wages is a “continuing offense.” We read the State to argue that WIS. STAT. § 109.11(3) envisions an expanded period of time regarding the ability to pay wages, not just the moment when the wages actually were due under the payment arrangement between the employer and employee. But, as noted, the trial court never reached this question. While it is within our discretion to address an issue not answered by the trial court, we decline to do so in this case. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Trial court rulings are often immensely helpful and informative to us when taking up an issue—even when, as here, the issue involves a question of law. See *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475-76, 507 N.W.2d 163 (Ct. App.1993). Since we have reversed the trial court’s threshold ruling that the complaint fails to

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<sup>8</sup> Instead, it strikes us that Weston’s concerns may travel more to the question of whether the extended time period alleged in the charging portion of the complaint is so overly broad such that he has not received fair notice as to when he committed the offenses and therefore cannot prepare a defense. Or he may be concerned about some conflict between the broad time period recited in the charging portion of the complaint and the much narrower time period referred to in the probable cause recitals. But those are not his current arguments, and we do not comment further.



state probable cause, the “continuing offense” issue is now ripe for determination by the trial court.

¶35 We reverse the trial court’s order dismissing the criminal complaint. We remand for further proceedings.

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.