COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2007

David R. Schanker
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. 2006AP1793 | **Cir. Ct. No. 2004CV933**

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

JAMES GRAFFT,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

DONALD G. JENSEN, JR. AND EQUITY MANAGEMENT SERVICES, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 DYKMAN, J. James Grafft appeals from a judgment following a bench trial awarding Grafft zero dollars in his negligence action against his former accountant, Donald Jensen. Grafft contends that the circuit court erred in refusing to apply the collateral source doctrine to prevent reducing Grafft's damages by money he obtained from third parties, in reducing Grafft's damages by the amount the court found Grafft had mitigated through his own actions, and in holding that certain damages were not recoverable. We conclude that the circuit court erred in finding that certain damages were not recoverable based on public policy. We uphold the circuit court's factual determinations as to the amount of damages Grafft suffered as a result of Jensen's negligent conduct. Because the court did not make all the findings necessary to determine the amount Grafft may recover based on our conclusion that all the claimed items are recoverable, we remand for those findings.

¶2 Jensen cross-appeals from the portion of the judgment finding Jensen negligent. Jensen argues that the circuit court erred in finding that Grafft's negligence action was not barred by the statute of limitations, that Jensen owed a duty to Grafft and breached that duty, and that Jensen could be personally liable for the claimed negligence. Jensen also argues that the circuit court erred in failing to allocate negligence to other parties. We reject each of Jensen's contentions, and affirm those portions of the court's judgment that Jensen challenges.

Background

¶3 The following is taken from trial testimony and the circuit court's findings. In 1990, Rusty Schoville formed Injection Technologists, Inc. (ITI). ITI manufactured custom plastic-injection-molded components. In 1992, James Grafft

purchased twenty-five percent of the shares in ITI. At that time, Schoville owned fifty percent of the stock in ITI and Schoville's brother and sister-in-law, Fred and Rhonda Schoville, owned the remaining twenty-five percent. Subsequently, Grafft made a personal loan of $125,000 to ITI to purchase machinery. Grafft's personal loan to ITI was secured by equipment owned by ITI. In 1996, Grafft purchased Fred and Rhonda Schoville's shares, making Grafft and Schoville each fifty percent shareholders in ITI. Schoville was president of ITI and handled all of the day-to-day operations of the business. Grafft served in an advisory position on the board of directors and as an officer.

¶4 In 1993, Johnson Bank loaned ITI $56,000. Between 1993 and 1996, the bank had an ongoing financial relationship with ITI, extending ITI up to $90,000 worth of credit. Because ITI was not profitable during that time, the bank became unwilling to extend further credit. However, the bank expressed to ITI that it would be willing to extend additional credit to ITI if the loan was personally guaranteed by Grafft, because Grafft had a strong credit history with the bank. In August 1996, Grafft personally guaranteed a loan from the bank to ITI for $60,000. Grafft signed two additional guarantees with Johnson Bank so that the bank would extend more credit to ITI between 1996 and 1999: a $60,000 guaranty in 1998, and a $20,000 guaranty in 1999.

¶5 In 1999, following continued financial difficulties, ITI ceased operations. ITI owed $117,276 on Grafft's personal loan to ITI and the balance on several loans from Johnson bank. Johnson Bank took an active role in trying to collect the amount owed to it by ITI. The bank collected receivables as they came to ITI to begin reducing the debt ITI owed. In January 2000, the bank decided it had recovered all it could through ITI, and demanded payment from Grafft in the amount remaining outstanding on his personal guarantees. To satisfy his personal

guaranty to the bank, Grafft borrowed $58,444.86 from his personal line of credit with Johnson Bank and applied it to the balance owed by ITI. In exchange, the bank assigned to Grafft two promissory notes signed by ITI totaling $120,000. The bank also assigned to Grafft its first-position security interest in ITI's assets. Thus, after the exchange between Grafft and the bank in January 2000, Grafft had personally paid $58,444.86 on his personal guaranty for the bank's loan to ITI,[1] and received from the bank its security interest in ITI's assets. Grafft took possession of the assets to satisfy ITI and Schoville's debts to him.[2] Grafft then used the assets he acquired from ITI and began a new business, Pro Plastics of Wisconsin, LLC.

¶6 In 2000, after ITI ceased operations, Grafft obtained payroll histories of ITI that had been retained by ITI's accounting firm, Equity Management Services ("EMS"). The payroll records revealed that Schoville had taken multiple paychecks within single pay periods from 1996 until ITI ceased operations, increasing his annual salary beyond the amount agreed by the shareholders. Grafft testified that he first learned that Schoville had taken unauthorized paychecks when he reviewed the paychecks at EMS.

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[1] Grafft also made a final payment on his $20,000 guarantee in the amount of $5,733.32. Grafft has not claimed that amount as damages on appeal.

[2] The record is unclear as to the process through which Grafft took possession of ITI's assets. The parties agree, however, that after the January 2000 transaction with Johnson Bank, Grafft was a secured creditor of ITI, and that Grafft thereafter took possession of the assets of ITI. Wisconsin's version of the UCC provides that a creditor may take possession of a debtor's assets and satisfy the debt. WIS. STAT. § 409.620 (2005-06).

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 EMS is owned and operated by Donald Jensen. Jensen and other employees of EMS provided non-CPA accounting services to ITI. Grafft testified that in the course of his involvement with ITI, he reviewed financial statements issued by Jensen and relied on them in making financial decisions. Jensen did not notify Grafft that Schoville was taking multiple paychecks, either through the financial statements EMS issued to Grafft or by any other means. Grafft brought this negligence action against Jensen and EMS, claiming as damages his lost investment in ITI of $35,625; the $117,276 balance still owing on his personal loan to ITI; and the $58,444.86 he had to pay on his guaranty to the bank. These damages total $211,345.86.[3]

¶8 Jensen's expert witness, accountant David Bagley, testified that he calculated Grafft's damages due to Jensen's negligence as zero. Bagley reached that figure by totaling Grafft's losses on his investment in ITI, his personal loan to ITI, and his guaranty to Johnson Bank, as claimed (totaling $211,346) reduced by the amount Bagley calculated Grafft gained through acquiring ITI assets in the form of accounts receivable, inventory, and fixed assets (ranging from $122,495 to $160,164); first year profits generated by Pro Plastics ($145,368); and Grafft's estimated tax savings from his bad debt deduction (ranging from $17,591 to $41,047). This resulted in a net gain to Grafft ranging from $74,108 to $135,233.

¶9 The court found that Schoville had embezzled from ITI by taking unauthorized duplicate checks, and that Jensen knew of the embezzlement and was negligent in failing to notify Grafft. The court also found that Grafft was fifty

[3] In his brief, Grafft totals his damages as $175,721. We note that this is a mathematical error.

percent negligent based on his knowledge of Schoville's past misconduct and Grafft's failure to act over the course of Schoville's embezzlement. The court found that Grafft's initial investment in ITI and his personal loan to ITI were not recoverable based on public policy factors. It found that Grafft's second purchase of stock for $25,000 and Grafft's payment of $58,444.86 on his guaranty were recoverable damages, for a total of $83,444.86. However, the court found that any damages Grafft suffered as a result of Jensen's negligence were offset by his acquiring the assets of ITI, which the court valued at the average of the range offered by Bagley: $141,329.50. Grafft appeals from the damages award, and Jensen cross-appeals from the judgment finding him negligent.

Discussion

¶10 Grafft argues that the circuit court erred in determining the amount of his recoverable damages. The parties dispute the standard of review we should apply to determine whether the court properly awarded damages. Grafft asserts our review is de novo, because it involves the application of legal doctrines to undisputed facts. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980). Jensen, in turn, asserts that we may only review a damages award to determine if the award is within reasonable limits, viewing the evidence in the light most favorable to support the award. *See* ***Cords v. Anderson***, 80 Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977). We agree with both contentions, and conclude that our review of the circuit court's damages award involves a mixed question of fact and law. We will uphold the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). We will uphold the court's determination of the damages Grafft suffered due to Jensen's negligence unless it is unreasonable. *See* ***Cords***, 80 Wis. 2d at 552-53. However, we independently

determine whether the disputed legal doctrines apply to the facts of this case. *See* ***Nottelson***, 94 Wis. 2d at 115-16.

¶11 Grafft contends that the circuit court erred in denying two of his claimed items of damages: his initial investment in ITI, and his personal loan to ITI. He argues that the court erroneously denied those items of damages on public policy grounds. We agree.

¶12 The circuit court found that Grafft's losses of his $10,275 initial investment in ITI and the $117,276 remaining owing on his personal loan to ITI were not recoverable based on public policy factors, relying on ***Citizens State Bank v. Timm, Schmidt & Co.***, 113 Wis. 2d 376, 386, 335 N.W.2d 361 (1983). In ***Timm***, Clintonville Fire Apparatus, Inc. (CFA) hired Timm, an accounting firm, to prepare its financial statements. ***Id.*** at 378. During the time that Timm was providing financial services to CFA, Citizens State Bank loaned CFA a total of $380,000, after reviewing the financial statements prepared by Timm. ***Id.*** Subsequently, Timm discovered an error in its financial statements provided to CFA totaling over $400,000. ***Id.*** Timm informed Citizens of the errors, and as a result, Citizens called its loans due; CFA went into receivership, and was liquidated and dissolved. Citizens' loans to CFA remained outstanding in the amount of $152,214.44. ***Id.*** at 378-79. Citizens brought a negligence action against Timm. ***Id.*** at 379.

¶13 The supreme court concluded that Timm was not shielded from liability to Citizens for negligently preparing CFA's audit reports because Citizens was a third party not in privity. ***Id.*** at 385. The court then turned to the question of "the extent of an accountant's liability to injured third parties." ***Id.*** The court reiterated that "[t]he fundamental principle of Wisconsin negligence law is that a

tortfeasor is fully liable for all foreseeable consequences of his act except as those consequences are limited by policy factors." ***Id.*** at 386. Thus, the court examined an accountant's liability to third parties "under the accepted principles of Wisconsin negligence law," which provide that "a finding of non-liability will be made only if there is a strong public policy requiring such a finding." ***Id.*** The court has enumerated six public policy reasons to preclude liability despite negligent conduct that caused injury:

> (1) The injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

Id. at 387 (citation omitted). The ***Timm*** court concluded that the circuit court had improperly granted summary judgment because "[t]he question of the proper scope of these accountants' liabilities to the third party bank cannot be determined upon the information contained in the record." ***Id.*** Instead, "[a] full factual resolution [was] necessary before it [could] be said that public policy precludes Timm's liability for its allegedly negligent conduct." ***Id.***

¶14 Here, the circuit court determined that the first, second, third, and sixth public policy factors precluded recovery after the facts were fully explored at trial. We independently review whether public policy factors preclude liability for negligent conduct in a particular case. ***Kessel ex rel. Swenson v. Stansfield Vending, Inc.***, 2006 WI App 68, ¶35, 291 Wis. 2d 504, 714 N.W.2d 206. "Liability may be denied solely on the basis of one of these factors." ***Id.*** (citation omitted). We conclude that none of the public policy factors outlined by the

supreme court in ***Timm*** preclude liability for the two items of damages the circuit court disallowed.

¶15 First, we do not agree that Grafft's loss of his initial investment in ITI and the balance on his personal loan to ITI were too remote from Jensen's negligence in failing to notify Grafft that Schoville was embezzling from the corporation.[4] There is a direct connection between Jensen's negligence and Grafft's loss of his initial investment and loan, indistinguishable from the connection between Jensen's negligence and Grafft's other claimed losses of his second investment and his guaranty to the bank. All four claimed items of damages resulted from ITI's financial ruin. We see no reason to differentiate between the money Grafft put into the corporation before Schoville began embezzling from ITI and the money he invested and guaranteed after Schoville began embezzling; either way, Grafft's financial losses were due to ITI's demise following Schoville's embezzlement.[5] Jensen's negligence in failing to notify Grafft that the embezzlement was occurring is not too remote from those losses to allow recovery.

¶16 Similarly, Grafft's losses of his initial investment and personal loan to ITI were not too wholly out of proportion to Jensen's culpability in negligently providing accounting services. Instead, they were directly related. An accountant

[4] For purposes of our discussion of the public policy factors, we assume the existence of all the factors of a negligence claim. ***Kessel ex rel Swenson v. Stansfield Vending, Inc.***, 2006 WI App 68, ¶15, 291 Wis. 2d 504, 714 N.W.2d 206.

[5] The circuit court differentiated the first two items of damages from the latter two by its reasoning that ITI was performing so poorly that even if Grafft had learned of the embezzlement, he would have lost his first investment and loan anyway. This reasoning goes to causation rather than the public policy factors. We discuss cause later in this opinion.

who fails to notify a fifty-percent shareholder that the other fifty-percent shareholder is embezzling from the company may expect that the innocent shareholder will suffer some financial loss of that shareholder's interest in the corporation. For the same reasons, it does not appear in retrospect too highly extraordinary that Jensen's negligence brought about the harm that it did, and allowing Grafft recovery in this case does not place too unreasonable a burden on Jensen.

¶17 We also conclude that allowing recovery would not open the way to fraudulent claims. Our conclusion in this case is limited to the facts: that an accountant who negligently fails to notify a fifty-percent shareholder that the other fifty-percent shareholder is embezzling money from the corporation may be held liable for the financial losses of the innocent shareholder that result when the embezzlement causes the corporation's collapse. Thus, allowing recovery does not enter a field with no sensible or just stopping point. We therefore conclude that none of Grafft's claimed items of damages are shielded from recovery by public policy factors.

¶18 Having determined the recoverable items of Grafft's claimed damages, we turn to Grafft's argument that the circuit court erred in reducing his damages award to zero. Grafft advances two alternative arguments that the circuit court erred in its damages computation: (1) that the circuit court erred in failing to apply the collateral source rule to prevent reducing Grafft's damages by the value of the property Grafft recovered from the bank and ITI; and (2) that the circuit court erred in applying the mitigation of damages doctrine to reduce the amount Grafft could recover from Jensen. We conclude that neither doctrine provides grounds to disturb the court's award.

¶19 First, Grafft argues that the collateral source rule prevents the court from reducing his damages award by the amount he recovered in assets from ITI. Jensen responds that the bank's assignment of its security interest in ITI to Grafft was not a gratuitous payment from a third party to trigger the collateral source rule.[6] Jensen also argues that the collateral source rule does not apply here because it was Grafft's own actions that would create a windfall for him, citing ***Oliver v. Heritage Mutual Insurance Co.***, 179 Wis. 2d 1, 23-24, 505 N.W.2d 452 (Ct. App. 1993). In reply, Grafft asserts that payments need not be gratuitous to trigger the collateral source rule. Instead, Grafft asserts, the collateral source rule was triggered because the assignment of the bank's assets to him was akin to payment on an insurance policy, since Grafft arranged the payment to cover his losses. Because the assignment served the same function as a payment on an insurance contract, Grafft contends, the policy behind the collateral source rule precludes the court from reducing Grafft's recoverable damages by the amount Grafft recovered through acquiring ITI assets. We conclude that the collateral source rule did not prevent the court from determining Grafft's damages based on his actual losses after his January 2000 transaction with the bank.

¶20 The collateral source rule provides that "a plaintiff's recovery cannot be reduced by payments or benefits from other sources." ***Koffman v. Leichtfuss***, 2001 WI 111, ¶29, 246 Wis. 2d 31, 630 N.W.2d 201. Thus, it "prevents any payments made on the plaintiff's behalf or gratuitous benefits received by the plaintiff from inuring to the benefit of a defendant tort-feasor." ***Id.*** The rule

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[6] Jensen also argues that several of Grafft's other claimed losses do not fall within the collateral source rule. However, the only item Grafft argues falls within the collateral source rule is the bank's assignment of its interest in ITI to Grafft. We therefore decline to address Jensen's other arguments.

reflects "the long-standing policy decision that should a windfall arise as a consequence of an outside payment, the party to profit from that collateral source is the person who has been injured, not the one whose wrongful acts caused the injury." ***Id.*** (citation omitted).

¶21 Whether the collateral source rule applies to a given scenario is a question of law that we review independently. ***Ellsworth v. Schelbrock***, 2000 WI 63, ¶6, 235 Wis. 2d 678, 611 N.W.2d 764. In ***Ellsworth***, the supreme court considered whether the collateral source rule applied to Medical Assistance benefits. ***Id.*** The court explained that "[o]ur tort law applies the collateral source rule as part of a policy seeking to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor." ***Id.***, ¶7 (citation omitted). Thus, the court concluded that "Schelbrock is not entitled to reap the benefit of Ellsworth's eligibility for public assistance or from the government's economic clout in the health care market place." ***Id.***, ¶17.

¶22 In reaching its decision, the ***Ellsworth*** court rejected Schelbrock's argument that our decision in ***Oliver***, 179 Wis. 2d 1, required a plaintiff to personally incur liability for medical expenses before the collateral source rule applies. ***Ellsworth***, 235 Wis. 2d 678, ¶¶12-14. In ***Oliver***, we held that a personal injury plaintiff who filed a petition in bankruptcy and discharged his medical bills was not entitled to invoke the collateral source rule. ***Ellsworth***, 235 Wis. 2d 678, ¶¶13-14. The ***Ellsworth*** court noted that we said in ***Oliver*** that "'Wisconsin law mandates that medical bills be 'incurred' by a plaintiff in order to be the subject of compensation,'" but explained that "the primary basis for the decision in ***Oliver*** was that the collateral source rule is invoked when a third party pays or gratuitously provides or pays for benefits to the injured party." ***Ellsworth***, 235 Wis.2d 678, ¶¶13-14 (quoting ***Oliver***, 179 Wis. 2d at 24). Because no benefits or

payments were bestowed following Oliver's bankruptcy, the collateral source rule did not apply. ***Id.***

¶23 Thus, the court explained, "the test is the reasonable value, not the actual charge, and therefore there need be no actual charge." ***Id.***, ¶15 (citation omitted). The court also cited the RESTATEMENT (SECOND) OF TORTS § 920A cmt. b (1979), which provides that "it is the tortfeasor's responsibility to compensate for all harm that he [or she] causes, not confined to the net loss that the injured party receives." ***Id.***, ¶8. On remand, the court directed that Ellsworth, as the party seeking damages, carried the burden to prove her damages to a reasonable degree of certainty, by the greater weight of credible evidence. ***Id.***, ¶17. Thus, the collateral source rule prevents reducing a plaintiff's award based on payments or benefits from third parties, so that a tortfeasor remains liable for the actual amount of harm that his or her negligence caused, and the plaintiff bears the burden to prove the amount of that harm.

¶24 We are unconvinced by Grafft's argument that the bank's assignment of its secured interest in ITI to Grafft fits within the collateral source rule. While Grafft correctly asserts that the payment or benefit by the third party need not be gratuitous to trigger the collateral source rule, the rule nevertheless requires a payment or benefit from a third party, gratuitous or otherwise. *See* ***id.***, ¶14. We conclude that the item Grafft claims as protected by the collateral source rule—the amount Grafft obtained in assets from ITI through acquiring the bank's secured interest in ITI in exchange for his full payment on his guaranty—cannot be construed as a benefit or payment from a third party for purposes of the

collateral source rule.[7] Indeed, Grafft cites no case applying the collateral source rule in this context. Instead, Grafft argues that the collateral source rule applies because Grafft's acquiring the bank's security interest in ITI's assets is analogous to an insurance payment. We conclude that the two are distinguishable. When faced with ITI's failure, Grafft chose to enter into a financial arrangement with the bank that allowed him to pay off his guaranty on ITI's behalf in exchange for the bank's security interest in ITI's property, so that he could obtain all of ITI's assets. As Grafft himself points out, the bank was under no obligation to make the assignment prior to that transaction.

¶25 Thus, Grafft did not receive benefits or payments from a third party to pay for injuries created by Jensen's negligence; instead, Grafft's claimed loss is the amount he elected to pay on his guaranty in order to obtain ITI's assets. Grafft's payment on his guaranty and his acquiring ITI's assets were part of the same transaction that resulted from ITI's failure. We do not agree that this transaction was analogous to a plaintiff who has purchased an insurance contract and seeks to recover medical damages from a negligent tortfeasor after the insurance policy pays the plaintiff's medical bills. Because we conclude that the collateral source rule does not apply in this context, we affirm this portion of the court's judgment.

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[7] We recognize that in ***Koffman v. Leichtfuss***, 2001 WI 111, ¶29 & n.7, 246 Wis. 2d 31, 630 N.W.2d 201, the supreme court reiterated that a negligent defendant is not relieved of liability where the plaintiff had the foresight to arrange benefits from a collateral source, while noting without comment that we limited the collateral source rule where the plaintiff's acts caused the windfall in ***Oliver v. Heritage Mutual Insurance Co.***, 179 Wis. 2d 1, 23, 505 N.W.2d 452 (Ct. App. 1993). We need not delineate the full scope of the collateral source rule for purposes of this opinion. Here, our conclusion that Grafft's January 2000 transaction with the bank was not a payment or benefit from a third party is sufficient to affirm the court's decision that the collateral source rule did not apply. Thus, we need not address Jensen's argument that the collateral source rule does not apply where the plaintiff's own acts cause the windfall.

¶26 Next, Grafft argues that the court erred in reducing his damages by the amount he obtained from the bank and ITI and the amount he benefited from successfully running his successor corporation, Pro Plastics. Grafft contends that his extraordinary efforts to mitigate his damages cannot reduce the amount he can recover from Jensen. Jensen responds that Grafft's efforts were consistent with his legal duty to mitigate his damages, and that Grafft fully and successfully mitigated any damages he incurred due to Jensen's negligence. Jensen also argues that the circuit court was entitled to deduct the value of the betterment to Grafft resulting from Jensen's negligence from the damages Grafft could recover, citing ***Chapleau v. Manhattan Oil Co.***, 178 Wis. 545, 190 N.W.2d 361 (1922), and ***Kramer v. Board of Education***, 2000 WI App 244, 248 Wis. 2d 333, 635 N.W.2d 857. We conclude that Grafft's efforts in running a new company from the assets he received from ITI went beyond his duty to mitigate his damages, but that the court's determination of Grafft's damages after the January 2000 transaction was a reasonable determination of Grafft's damages and we therefore will not disturb it on appeal.

¶27 A plaintiff in a tort action has a duty to act reasonably to mitigate his or her damages. ***Langreck v. Wisconsin Lawyers Mut. Ins. Co.***, 226 Wis. 2d 520, 524, 594 N.W.2d 818 (Ct. App. 1999). Whether a person acted reasonably in mitigating his or her damages presents a mixed question of fact and law; the legal standard of reasonableness is a question of law we review de novo, while a conclusion that a person acted reasonably may be intertwined with factual findings surrounding that conclusion, in which case we give weight to the circuit court's decision. ***Id.*** While an injured party must act reasonably under the circumstances to mitigate his or her damages, "if the effort, risk, sacrifice or expense which the injured person must incur to avoid or minimize the loss or injury is such that a

reasonable person under the circumstances might decline to incur it, the injured party's failure to act will not bar recovery of full damages." ***Id.*** (citations omitted).

¶28 Here, the circuit court found that Grafft's damages were entirely offset by the value of the assets Grafft obtained from ITI, which the court valued at $140,000.[8] As the circuit court said:

> This isn't a question of what his duty was in regard to minimizing damages. He did it. It isn't a question of not doing something and saying in hindsight, I should have done this or that. He did it. He, in fact, mitigated the damages.
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> ….
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> So the court, whether you want to call it—if there was, in fact, a loss or mitigated damages, I'm going to find that the value that was received from the corporation, based upon Mr. Grafft's security interest ….
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> ….
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> So I'm going to find that … whatever damages I found that Mr. Grafft has suffered is mitigated by the sum of the average of 122,495 and 160,164. I think all of those assets are attributable to his realizing on his security interest. He made an election….
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> ….
>
> So I've found there's a duty. I've found there's a breach. I've found what Mr. Grafft's damages are, minus the assets that he received.

¶29 Thus, the court held that the amount Grafft realized on his security interest ($141,329.50) was more than the amount the court found Grafft claimed in

[8] The value of the ITI assets was a factual determination by the circuit court and is supported by the record, and we therefore will not disturb that finding on appeal.

recoverable damages ($83,444.86). We agree with the court that the question of the amount Grafft recovered in assets from ITI in exchange for paying on his personal guaranty to the bank is not a question of whether Grafft had a duty to enter into that transaction with the bank; instead, the inquiry is what harm was caused by Jensen's negligence, measured by the result of Grafft's dealings with the bank when faced with ITI's failure. Because the court's determination of the amount of harm caused by Jensen's negligence was reasonable and supported by the record, we will not disturb its finding. *See **Cords***, 80 Wis. 2d at 552-53.

¶30 Further, contrary to Grafft's assertions, the only item of benefit the court considered in determining Grafft's damages was the amount Grafft recovered in ITI assets. Because the court declined to offset Grafft's damages by the amount Grafft earned in first-year profits from Pro Plastics, we need not address Grafft's argument that doing so was improper. We also need not consider Jensen's argument that the court was entitled to consider the subsequent financial gain Grafft realized from Pro Plastics, since the court did not do so. Finally, the court found that Grafft enjoyed a tax benefit from writing off his loan to ITI, although it did not find the value of that benefit. Because the record does not reflect the court's valuation of Grafft's tax benefit—which Jensen's expert valued at $17,591 to $41,047—we are unable to determine the actual benefit Grafft accrued or whether that amount offsets Grafft's damages.[9] We therefore remand to the circuit court for its factual determination as to Grafft's total damages.

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[9] The circuit court did not need to address the amount of the tax benefit to Grafft because the court allowed only $83,444.86 of Grafft's damages, and then found Grafft had recovered $141,329.50 in assets from ITI. The issue is now relevant because we have concluded that all $211,345.86 of Grafft's damages are potentially recoverable. Reducing by the amount the court found Grafft recovered in ITI assets, the amount is $70,016.36. The court on remand shall make any remaining factual determinations necessary to determine Grafft's damages.

¶31 Thus, we reverse the circuit court's finding that public policy precludes Grafft's recovery of his initial investment in ITI and his personal loan to ITI. The entire amount of Grafft's claimed damages are eligible for recovery. We affirm the circuit court's finding that the amount Grafft recovered from ITI in assets was not a subsequent profit but was rather part of the outcome of Grafft's election as to how to deal with ITI's financial failure. As such, they were properly considered by the circuit court in calculating Grafft's damages. Because the circuit court did not make a finding as to the amount Grafft would reasonably benefit from the lost loan as a bad debt on his taxes, and whether that or any other amount should also be considered in calculating Grafft's damages, we remand for proceedings consistent with this opinion.[10]

¶32 Turning to Jensen's cross-appeal, Jensen argues: (1) that the statute of limitations barred Grafft's negligence action; (2) that neither Jensen nor EMS owed Grafft a duty of care in providing financial services to ITI; (3) that neither Jensen nor EMS breached a duty of care that caused damages to Grafft; (4) that the trial court erred by failing to allocate negligence between Jensen and other parties; and (5) that Jensen may not be held personally liable for the claimed negligence. We disagree with each of Jensen's contentions.

¶33 Jensen first argues that the circuit court erred in finding that Grafft commenced this action within the six-year statute of limitations under WIS. STAT. § 893.52.[11] Jensen argues that, under the discovery rule, Grafft's cause of action

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[10] Grafft has not challenged the court's fifty/fifty apportionment of negligence on appeal.

[11] WISCONSIN STAT. § 893.52 provides:

> **Action for damages for injury to property**. An action, not arising on contract, to recover damages for an injury to real

(continued)

accrued when Schoville took his first unauthorized paycheck on March 6, 1996, because that is when Grafft would have discovered the injury if Grafft had exercised reasonable diligence. *See* ***Spitler v. Dean***, 148 Wis. 2d 630, 637-38, 436 N.W.2d 308 (1989). Because Grafft did not commence this action until June 22, 2004, Jensen asserts, the circuit court erred in failing to bar the action by the six-year statute of limitations.

¶34 Grafft replies that, under the discovery rule, the negligence claim accrues on the date the injury is discovered. *See* ***Hansen v. A.H. Robins Co.***, 113 Wis. 2d 550, 554, 335 N.W.2d 578 (1983). Grafft asserts that his injuries did not occur until ITI's collapse in December 1999 to January 2000, so he could not have discovered them until that time. Grafft advances that, alternatively, the circuit court had a second valid ground for finding Grafft commenced this action within the statute of limitations: that Jensen's conduct was a continuing course of negligence that fell within the required six years. *See* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 554, 327 N.W.2d 55 (1982). Jensen does not reply to Grafft's continuing course of negligence argument, but replies to Grafft's first argument by claiming any asserted injury due to Jensen's negligence occurred when Schoville began embezzling from ITI, and could have then been discovered through reasonable diligence. We agree with Grafft and the circuit court that the statute of limitations did not begin to run until Jensen's continuing course of negligence was complete. Thus, Grafft's action was commenced within the required six-year period.

> or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed.

¶35 Whether the statute of limitations applies to the facts is a question of law we decide independently. ***Kolpin v. Pioneer & Light Co.***, 162 Wis. 2d 1, 18, 469 N.W.2d 595 (1991). However, the circuit court's factual determinations will not be disturbed unless clearly erroneous. WIS. STAT. § 805.17(2). Here, the circuit court found that Jensen was negligent in failing to notify Grafft that Schoville was taking unauthorized paychecks, and that Jensen continued to act negligently through the time when Schoville took his last duplicate paycheck, in December 1999.

¶36 The supreme court clarified the interaction between the discovery rule and the continuing course of negligence theory in ***Kolpin***, 162 Wis. 2d at 18-25. The Kolpins brought a negligence claim against their electric company, claiming the company negligently allowed stray voltage to damage the Kolpins' dairy herd. ***Id.*** at 7-8. A jury found that the Kolpins knew, or with reasonable care should have known, that the company's negligence was a cause of damage to their herd over six years before they commenced their action, and thus were barred by the statute of limitations. ***Id.*** at 8. On motions after verdict, the court found that the company's negligence was continuing, preventing the statute of limitations from barring the action. ***Id.*** We upheld the jury's verdict and concluded that the Kolpins' claim was time-barred based on the discovery rule. ***Id.***

¶37 The supreme court reversed, concluding that the Kolpins' claims were not time-barred under the discovery rule. ***Id.*** at 10. The court rejected the parties' arguments that the discovery rule and the "continuum of negligent acts" doctrine were two alternative theories, and that the court's adoption of one or the other controlled the outcome of the case. ***Id.*** at 23-24. Instead, the court explained:

> This court, in setting forth the "discovery rule" and the "continuum of negligent acts" doctrine did not create two distinct theories of accrual of a cause of action…. [I]f a defendant engages in a continuum of separate negligent acts which cause the plaintiff damage, the cause of action is not complete until the last act of negligence occurs. Once the cause of action is complete, then the cause of action accrues.
>
> [I]f a defendant engages in a negligent act (or a continuum of negligent acts …) which causes the plaintiff damage, the cause of action is not complete until the plaintiff knows, objectively, the cause of the injury and the defendant's part in that cause. Once the cause of action is complete, then the cause of action accrues.
>
> [I]n order for a cause of action to accrue, it must be complete. It is complete when the negligent act occurs, or the last act occurs in a continuum of negligent acts, *and* when the plaintiff has a basis for objectively concluding that the defendant was the cause of the plaintiff's injuries and damages.

Id. at 24. Because the Kolpins only alleged one act of negligence—the company's use of a distribution system which allowed stray voltage to harm the Kolpins' cows—there was no continuum of negligence. ***Id.*** at 25. However, the action did not accrue until the Kolpins discovered, or with reasonable diligence would have discovered, injury due to that negligence. ***Id.*** at 24-25. Because, as a matter of law, the Kolpins could not have reasonably discovered the cause of the harm to their cows until within six years before commencing their action, the discovery rule did not bar their claim. ***Id.*** at 26-27.

¶38 Thus, a negligence action is only barred by the statute of limitations if the last negligent act in a continuum of negligent acts occurs, *and* the plaintiff discovered or should have discovered the negligence through reasonable diligence, prior to six years before the running of the statute. Here, the circuit court found that Jensen was negligent in providing financial services to ITI while Schoville was embezzling from ITI, and that the embezzlement and negligent accounting

was a continuing course of negligence. The court found that the last negligent act in that series of negligent acts was the issuing of an unauthorized check to Schoville without notifying Grafft, in December 1999. That finding is supported by the record and we will not disturb it on appeal. We therefore need not address the parties' arguments over the other requirement for an action to accrue, Grafft's objectively reasonable discovery of the cause of his injuries. Regardless of when Grafft discovered or should reasonably have discovered the negligence, the action did not accrue until the last act in the series of Jensen's negligence, in December 1999.

¶39 Jensen next argues that neither Jensen nor EMS owed a duty of care to Grafft, because Jensen was not a certified public accountant and EMS and Jensen did not provide CPA services. Jensen asserts that the circuit court erroneously held him to the same standard of care as applied to CPA accountants under ***Timm***, 113 Wis. 2d 376. Jensen argues that the duty recognized in ***Timm*** was limited to the facts of that case, and is inapplicable to his actions as a non-CPA accountant. Grafft responds that the holding in ***Timm*** is not narrow, and that it provides the standard of care non-CPA accountants owe to third parties. We conclude that under Wisconsin negligence law, as articulated in ***Timm***, Jensen owed a duty to provide accounting services using ordinary care under the circumstances.

¶40 While Jensen is correct that ***Timm*** involved the negligent conduct of a CPA, he is not correct in asserting that the circuit court held him to the standard of a CPA in this case. The court specifically recognized that Jensen was not a CPA, and referenced ***Timm***, 113 Wis. 2d at 386, for the proposition that "accountants' liability to third parties should be determined under the accepted principles of Wisconsin negligence law." Thus, the court concluded, while "[n]o

one has specifically indicated what the duty of an accountant is in Wisconsin," our decision in ***Zastrow v. Journal Communications, Inc.***, 2005 WI App 178, ¶25, 286 Wis. 2d 416, 703 N.W.2d 673, reiterated that

> the duty that underpins negligence claims may be generally described as the duty to act reasonably under the circumstances. In the "ordinary negligence" case, the duty of ordinary care is the care that a reasonable person would use in similar circumstances. In the professional negligence case, the duty is defined with reference to the standards of the profession, but, generally speaking, is still based on what a reasonable professional would do in the same or similar circumstances.

(Citation omitted.)

¶41 Thus, the court explained, while Jensen was not held to the standards of a CPA,

> an accountant is a professional, [and] they are bound by standards. The question always is in theses cases if there's a nonlicensed person, what standard are we talking about.
>
> And here, the court wants to make it perfectly clear that what the court is basing its decision on is when an accountant or other professional sees evidence of wrongdoing, theft, embezzlement, that they have a duty to speak, much as in the misrepresentation cases. It isn't only what you say. It often can be what you don't say. If you have a duty to inform and to speak, which I find that the [defendant] did here, [then] you have a duty in some way to inform someone who can do something about the wrongdoing. And in this case, the only person who could do that would be Mr. Grafft.
>
> Mr. Jensen and EMS had that duty.

¶42 The first element of a negligence action, duty, presents a question of law, which we review de novo. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶23 & n.12, 291 Wis. 2d 283, 717 N.W.2d 17. A duty analysis involves "(1) the existence of a duty of ordinary care; and, (2) an assessment of what ordinary care

requires under the circumstances." ***Id.***, ¶27. In Wisconsin, one always has a duty to exercise ordinary care under the circumstances. ***Id.***, ¶30. Ordinary care, in turn, "involves the concept of foreseeability, in that a reasonable person exercising ordinary care would have foreseen injury as a consequence of his [or her] act." ***Id.*** Thus,

> [i]f a person, without intending to do harm, acts, or fails to do an act, that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property, he or she is not exercising ordinary care under the circumstances, and is therefore negligent.

Id. (citation omitted).

¶43 We conclude that Jensen's duty to act reasonably under the circumstances included a duty to notify Grafft that Schoville was taking unauthorized paychecks from ITI. It is foreseeable that if one fifty-percent shareholder in a corporation embezzles money from the corporation, the corporation and the other shareholder will suffer damages.[12] A reasonable professional non-CPA accountant providing financial statements and advice to the

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[12] Jensen argues that he owed no duty to Grafft because ITI hired EMS; thus, Grafft did not personally hire EMS, and Jensen was not hired in his personal capacity by anyone. As for Jensen's argument that Grafft did not personally hire EMS or Jensen, the supreme court's decision in ***Citizens State Bank v. Timm, Schmidt & Co.***, 113 Wis. 2d 376, 385, 335 N.W.2d 361 (1983), established that "the absence of privity alone should not bar negligence actions by relying third parties against accountants." The court further explained that "[t]he fundamental principle of Wisconsin negligence law is that a tortfeasor is fully liable for all foreseeable consequences of his act except as those consequences are limited by policy factors." ***Id.*** at 386. ***Hoida v. M&I Midstate Bank***, 2006 WI 69, ¶30, 291 Wis. 2d 283, 717 N.W.2d 17, explains that Wisconsin negligence law concerning duty requires only that a potential tortfeasor foresee some injury to someone as a result of the tortfeasor's action or inaction. Thus, we are unconvinced that Jensen cannot be negligent for failing to notify Grafft of Schoville's embezzlement because Grafft did not hire EMS or Jensen. That view is contrary to Wisconsin negligence law. We discuss Jensen's personal liability later in this opinion.

corporation would foresee that harm would arise from his or her failure to notify the other shareholder of the embezzlement.

¶44 Having determined Jensen's duty, we turn to Jensen's argument that his failure to notify Grafft of Schoville's embezzlement was not a breach that caused injury to Grafft. The second element of a negligence claim, breach, involves a question of "what is reasonable to require a person to do, or to refrain from doing, under the circumstances." ***Id.***, ¶31. We have concluded that a reasonable accountant under the circumstances would have notified Grafft of the embezzlement, and the circuit court determined that Jensen did not do so.[13] Jensen therefore breached his duty of care.

¶45 Thus, we turn to the third element of a negligence claim, "a causal connection between the defendant's breach of the duty of care and the plaintiff's injury." ***Id.***, ¶23. Jensen argues that even if he breached a duty, there were many factors in causing the collapse of ITI. However, "in Wisconsin, a defendant's negligence need not be the only, or even the primary, cause of a plaintiff's injury in order for the plaintiff to recover damages. Rather, a plaintiff may recover if the defendant's negligence was a substantial factor in producing the injury." ***Hicks v. Nunnery***, 2002 WI App 87, ¶34, 253 Wis. 2d 721, 643 N.W.2d 809 (citation omitted). "The phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable

[13] Jensen argues that his actions conformed to his duty of care, if one existed, because he notified Grafft of the unauthorized paychecks when he issued payroll statements to ITI, which Grafft could have (but did not) review. He does not contend, however, that he personally notified Grafft of the unauthorized paychecks, only that the information was available to Grafft if he chose to review it. We note that this was one basis for the circuit court's finding that Grafft was fifty percent negligent. It does not go to the issue of whether Jensen was negligent in failing to inform Grafft of the embezzlement.

person, to regard it as a cause, using the word in the popular sense." ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617-18, 292 N.W.2d 630 (1980). Cause is a question of fact as long as reasonable people could differ as to whether the negligent conduct was a substantial factor in causing the injury. ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 735-36, 275 N.W.2d 660 (1979). Here, the court found Jensen's negligence was a substantial factor in causing Grafft's injuries, at least as to Grafft's second investment in ITI and his guaranty on the loan from the bank; to the extent that the court's finding as to cause relating to Grafft's initial investment in ITI and his personal loan to ITI is unclear, we conclude that reasonable minds could not differ as to whether Jensen's negligence was a substantial factor in causing those losses. Because Jensen's failure to notify Grafft that Schoville was embezzling from ITI was a substantial factor in causing ITI to fail, resulting in Grafft's losses, Jensen's negligence caused Grafft's damages.

¶46 Next, Jensen argues that the court erred in apportioning negligence fifty percent to Jensen and fifty percent to Grafft, without apportioning any negligence to (1) ITI employees, (2) Virchow Krause, the CPA firm ITI hired to finalize its year-end statements and prepare its tax returns, and (3) Johnson Bank. Jensen contends the evidence establishes that each of these parties knew of Schoville's embezzlement and did not inform Grafft, and that the court was therefore required to apportion negligence among all negligent parties. Grafft replies that the evidence does not establish that any of the other parties knew of the unauthorized paychecks, and therefore the court was entitled to make an implicit finding that they were not negligent. We conclude that there was enough conflicting evidence in the record for the trial court to reach either determination

as to the negligence of the other parties, and we therefore defer to the court's findings.[14]

¶47 Jensen cites ***Martz v. Trecker***, 193 Wis. 2d 588, 596-98, 535 N.W.2d 57 (Ct. App. 1995), and ***Connar v. West Shore Equipment of Milwaukee, Inc.***, 68 Wis. 2d 42, 44-45, 227 N.W.2d 660 (1975), for the proposition that a fact-finder must consider the evidence relating to the negligence of all parties to the transaction when apportioning negligence.[15] We agree with that proposition. However, it does not follow, as Jensen implies, that once there is evidence of another party's negligence, the trial court must apportion negligence to that party. The supreme court has explained:

> The apportionment of comparative negligence is a matter left to the trier of fact. Where more than one reasonable inference can be drawn from the evidence, appellate courts will accept the inference drawn by the trier of fact. Appellate courts will sustain the apportionment of comparative negligence unless the circuit court's determination was clearly erroneous.

Phelps v. Physicians Ins. Co. of Wisconsin, 2005 WI 85, ¶45, 282 Wis. 2d 69, 698 N.W.2d 643 (citations omitted).

¶48 The evidence presented at trial supported more than one inference as to the negligence of the other parties. Jensen cites testimony by an ITI employee

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[14] We do not agree with Jensen that the circuit court's failure to discuss the negligence of the other parties on the record renders its fifty-fifty apportionment of negligence erroneous. On review, we may assume the circuit court made the necessary factual findings to support its decision. ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

[15] Jensen does not argue that he was not allowed to present evidence of the negligence of the other parties, only that the evidence he presented established that negligence and thus the court was required to apportion negligence accordingly.

who said she was aware that Schoville took multiple paychecks within a given pay period and did not inform Grafft. She also testified that other employees knew of the multiple paychecks as well, and that it was common knowledge among ITI employees. She also testified, however, that she did not know Schoville's salary. Another employee also testified that although she knew that Schoville was taking multiple paychecks and did not report it to Grafft, she did not recognize anything wrong with the multiple paychecks and did not know what Schoville's salary was. We do not agree that this testimony establishes the ITI employees' negligence as a matter of law.

¶49 As to Virchow Krause, Jensen cites the testimony of a Virchow Krause employee who stated that the company finalized ITI's year-end statements and prepared its tax returns, and that it did not disclose the amount of compensation Schoville was taking from ITI to Grafft. The employee also testified that the company received a payroll register at the end of the year for total compensations ITI paid, without details of payrolls. The employee stated he was never informed that Schoville took duplicate payments of salary. This testimony does not establish that Virchow Krause was negligent as a matter of law.

¶50 Finally, Jensen cites testimony from the president of Johnson Bank in Racine, Scott Kelly. Kelly testified that Schoville disclosed his salary to the bank as $40,000, that he knew Schoville took over $58,000 in compensation in 1997, and that he did not disclose that fact to Grafft. Kelly also testified that he was not aware of Grafft placing any limitation on Schoville's salary, and the only information he had on that point came from Schoville himself. He stated that the bank never reviewed ITI payroll information, and did not review any checks written by the company until the end of their relationship. Again, we do not agree that this testimony establishes that the bank was negligent as a matter of law.

¶51 Lastly, Jensen argues that the circuit court erred in holding him personally liable for the negligence that caused damages to Grafft. Jensen casts the issue as one of piercing the corporate veil, and claims the evidence shows EMS, not Jensen, was retained by ITI, and thus he is not personally liable. Jensen cites ***Consumer's Co-Op of Walworth County v. Olsen***, 142 Wis. 2d 465, 476, 419 N.W.2d 211 (1988), for the proposition that his liability is limited by the incorporation of EMS and that the corporate shield may not be lightly disregarded. Grafft replies that because Jensen personally acted negligently, he is liable for those acts, citing ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 692, 273 N.W.2d 285 (1979). We agree that Jensen may be held personally liable for his own tortious conduct.

¶52 ***Consumer's Co-op***, 142 Wis. 2d at 470, was an action by a corporate creditor to impose personal liability on two shareholders for a judgment against the corporation. It was not a negligence action, and thus did not address a shareholder's responsibility for his or her personal torts. ***Oxmans***,' 86 Wis. 2d at 692, provides the rule for a shareholder's personal liability for torts:

> An individual is personally responsible for his own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.[16]

[16] Jensen argues that ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 273 N.W.2d 285 (1979), does not apply because the issue there was the personal jurisdiction of a nonresident officer of a corporation. We disagree. Despite the different issue presented, in its discussion of personal jurisdiction, the court clearly explained the personal liability of an individual for torts committed while acting for a corporation.

¶53 Thus, the issue is not one of piercing the corporate veil, but of Jensen's personal liability for his own tortious conduct.[17] The circuit court found that Jensen knew that Schoville was not authorized to take paychecks above his agreed salary and that he provided financial statements and financial advising services to ITI without notifying Grafft of Schoville's embezzlement.[18] These findings are not clearly erroneous, and we will not disturb them on appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

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[17] No party disputes EMS' liability on appeal.

[18] Jensen does not assert that he did not provide services to ITI, only that he did so through EMS, and that other employees did so as well. This does not alleviate Jensen's liability.