**COURT OF APPEALS DECISION DATED AND FILED**

**January 21, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**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. 02-2578** **Cir. Ct. No. 00CV167**

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

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**KIETH J. VAN DYKE,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DCI, INC., DCH, INC., RICHARD J. GIESLER, AND LEWIS H. KRUEGER,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. DCI, Inc., DCH, Inc., Richard Giesler and Lewis Krueger (collectively DCI) appeal a money judgment in favor of Kieth Van Dyke based on Van Dyke's employment contract. DCI argues the trial court erred in interpreting the contract by (1) failing to consider DCI's liabilities as well as its assets and (2) failing to deduct actual construction costs from the value of the

assets. DCI also argues the trial court erred by holding Giesler and Krueger personally liable. We disagree and affirm the judgment.

## BACKGROUND

¶2 DCH, LLC, and the Sturgeon Bay Waterfront Redevelopment Authority entered into an agreement for DCH, LLC, to develop Stone Harbor Resort Condominiums. Van Dyke was employed by the Redevelopment Authority and participated in the negotiations. The property on which Stone Harbor was to be built was owned by DCI, Inc. Giesler and Krueger are officers, directors and shareholders of DCI, Inc.

¶3 Stone Harbor consists of several condominium units that can be rented as hotel rooms, as well as a restaurant, bar and conference center. DCH, Inc., operates the restaurant, bar and conference center and provides management services to the hotel. Giesler and Krueger are also officers, directors and shareholders of DCH, Inc.

¶4 In the fall of 1997, Van Dyke and Giesler discussed the possibility of Van Dyke becoming the general manager of the restaurant, bar and conference center. Van Dyke stated he wanted an employment contract, which he prepared. The agreement names DCI, Inc., and DCH, Inc., as his employers. However, DCH, Inc., was not incorporated at that time. Van Dyke was not aware of this fact when he drafted the agreement. Additionally, Giesler and Krueger were unsure which corporation would actually employ Van Dyke.

¶5 Section seven of the agreement, discussing Van Dyke's compensation, is entitled "Profit Sharing" and states:

> (1) The Employee shall be entitled to one third (1/3) of the annual net profits before tax and depreciation of the operating company, initially referred to as DCH INC. This annual period shall be the operating company's taxable year. Payment is to be made to Employee within ninety (90) days of the end of the operating company's taxable year.
>
> (2) The Employee shall be entitled to receive and accumulate five percent (5%) per year of the ownership, or it's [sic] equivalent value, of the real estate/business referred to as the restaurant, bar, and meeting facility, with a total accumulated ownership, or it's [sic] equivalent value, not to exceed twenty-five percent (25%) of the above real estate/business. *Value to be determined by real estate/business appraisal or third party purchase of the real estate/business less the cost of the real estate/business. Cost to be determined by actual construction expenses for the restaurant and bar areas only less annual depreciation based on a 15 year life.* Land value and City of Sturgeon Bay participation and infrastructure expenses are not to be included in the determination of cost. This value to be paid to employee within ninety (90) days of employee's termination. (Emphasis added.)

¶6 Giesler and Krueger signed the agreement on September 26, 1997. They did not designate that they were signing on behalf of any corporation. The Stone Harbor Resort opened in June 1999. Van Dyke worked there a total of two years and nine months, until May 2000. His salary and benefits were paid by DCH, LLC, and DCH, Inc.

¶7 Upon leaving, Van Dyke asserted entitlement to compensation under section seven of the employment contract, arguing the amount should be based on the value of the business assets less their cost. At trial, he relied on an analysis by business valuation expert Richard Johnson. Johnson testified that he performed the analysis laid out in the contract and determined that Van Dyke was entitled to $449,307.

¶8 DCI argued the contract was ambiguous because section seven was entitled "Profit Sharing" but section 7(2) never used the word "profit." Further, it argued the contract was ambiguous because, while requiring a valuation of assets, it also uses the word "ownership," which should include not only assets but liabilities as well. DCI contended Van Dyke was not entitled to any further compensation because liabilities exceeded assets for both DCH, Inc., and DCI, Inc. By November 2001, DCH, Inc., had significant losses. On December 31, 2000, DCI, Inc., had a negative equity.

¶9 DCI's valuation expert was Timothy Muehler. Muehler testified that a valuation had to include both assets and liabilities. He stated that Johnson's analysis was incorrect because it did not take liabilities into account. Muehler stated that Van Dyke was not entitled to any additional compensation because there was no value from which to give him a percentage.

¶10 Beyond the issue of valuation, Van Dyke also asserted that Giesler and Krueger were individually liable. Giesler and Krueger did not sign as agents of a corporation and DCH, Inc., did not yet exist at the time Giesler and Krueger signed the agreement. Giesler and Kueger argued that DCH, Inc., was the one the parties intended to be, and in fact was, Van Dyke's employer and therefore they cannot be held personally liable.

¶11 The court determined the contract was unambiguous and required consideration only of assets and not liabilities. Accepting Johnson's valuation method rather than Muehler's, the court used Johnson's figures for most of its analysis and concluded that Van Dyke was entitled to $321,228.

## DISCUSSION

### A. Whether DCI's liabilities should be taken into account

¶12 DCI argues that the contract is ambiguous as to whether liabilities should be factored in when determining the value of its assets. Whether a contract is ambiguous is a question of law we decide independently of the circuit court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id.*** The primary goal of contract construction is to determine and give effect to the parties' intention at the time the contract was made. ***Farm Credit Servs. v. Wysocki***, 2001 WI 51, ¶12, 243 Wis. 2d 305, 627 N.W.2d 444. When the contract is unambiguous, we apply its literal meaning. ***Id.*** If we determine the language is ambiguous, we then consider extrinsic evidence to arrive at the parties' intent. ***Id.***

¶13 DCI maintains section 7(2) is reasonably susceptible to more than one meaning because it states that Van Dyke is entitled to "ownership, or its equivalent value, of the real estate/business." DCI argues that the words "real estate/business" could refer to more than simply the physical assets of the bar, restaurant and meeting facility. Further, the term "ownership" implies taking into account liabilities as well as assets.

¶14 The trial court determined that the contract was unambiguous. However, the court also stated that even if the contract was ambiguous, it agreed with Van Dyke's interpretation that it was not necessary to take liabilities into account. The court looked to the parties' intent when they entered into the contract. Both Giesler and Krueger testified that when Van Dyke presented it to them, they only quickly scanned the contract before signing. They remembered

little about the contract negotiations. Van Dyke testified, however, that the parties discussed the agreement over a period of weeks and that section 7(2) was drafted at Giesler's and Krueger's direction. The court concluded that Van Dyke had a better recollection of the circumstances surrounding the contract's formation.

¶15 We agree with DCI that the contract was ambiguous because it is not clear on its face whether liabilities should be taken into account. The question then becomes what was the parties' intent. ***Farm Credit Servs.***, 142 Wis. 2d at 322. The court heard conflicting testimony and made a judgment based on the credibility of the witnesses. When the trial court acts as a finder of fact, it is the ultimate arbiter of the witness's credibility and the weight to be given to each witness's testimony and an appellate court must give due regard to the trial court's opportunity to make an assessment of credibility. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 385-86, 515 N.W.2d 539 (Ct. App. 1994). We do not overturn the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2).[1] Here, the court gave greater weight and credibility to Van Dyke's witnesses. In other words, the court found that the parties intended valuation to be based on assets without consideration of liabilities. This was not clearly erroneous.

¶16 Regarding valuation, the court accepted much of Johnson's analysis, while rejecting Muehler's. On appeal, DCI mainly argues that this was error. The court made a credibility determination that, in most cases, Johnson's valuation more closely followed the contract language than did Muehler's. However, it did

[1] All statutory references are to the 2001-02 version unless otherwise noted.

not simply accept Johnson's valuation wholesale. For example, Johnson had assigned a value to the event bookings at the hotel. The court found this to be speculative and eliminated that figure from its valuation. The court carefully considered the testimony of both Van Dyke's and DCI's witnesses. The court's findings are not clearly erroneous.

¶17 The only specific element of the court's valuation that DCI takes issue with is the construction costs, which we discuss in the next section. Beyond that, DCI's argument consists only of a recital of the facts and statements that liabilities ought to be taken into account. We have already determined that liabilities are not contemplated by the contract.

**B. Construction Costs**

¶18 DCI argues that the court did not properly consider actual construction costs when determining the amount of compensation Van Dyke was due. Johnson used the figure that DCI reported to the IRS, while Muehler used a figure from a spreadsheet Giesler used to track construction costs. The court concluded that Johnson's figure was more appropriate because "[t]here is simply no adequate explanation as to why the figures given to the IRS are not reliable."

¶19 DCI argues that there is no evidence that Giesler's spreadsheet is unreliable either. Muehler testified that additional costs were incurred after DCI filed its taxes. However, the court's decision to use the figure DCI submitted to the IRS is a credibility determination. It was not clearly erroneous.

**C. Whether Giesler and Krueger are personally liable**

¶20 Giesler and Krueger argue that the contract's terms and the circumstances of Van Dyke's employment relieve them of personal liability.

First, Geisler and Krueger argue they were acting as promoters of the as yet unincorporated DCH, Inc. While they note that promoters can be held liable for pre-incorporation contracts, they argue that exceptions to promoter liability apply in this case. They maintain they cannot be held personally liable because Van Dyke understood he was to look to the corporations for performance and not to Giesler and Krueger personally. Further, they argue that the parties' post-contract conduct shows that the parties did not intend Giesler and Krueger to be personally liable.

¶21 Generally, a promoter is personally liable on a contract unless the parties have agreed otherwise. *See, e.g.,* ***Clinton Invs. Co. v. Watkins***, 146 A.D.2d 861, 862 (N.Y. App. Div. 1989). A corporation may become liable after the fact if it adopts the contract. ***Id.*** at 863. However, the promoter remains personally liable unless there is a novation of the contract. In order for there to be a novation, the third party must agree that the promoter is discharged from any obligation and the corporation takes the place of the promoter. *See* ***Isle of Thye Land Co. v. Whisman***, 279 A.2d 484, 496 (Md. 1971). There was no novation in this case because there was no express agreement to discharge Giesler and Krueger from liability.

¶22 As Giesler and Krueger point out, a promoter may also be relieved of liability if the third party knew it was to look to the corporation for performance under the contract. *See* ***id.*** at 496. Giesler and Krueger maintain that Van Dyke did in fact look to DCH, Inc., and DCI, Inc., for performance. They argue that the contract stated that DCH, Inc., and DCI, Inc., were Van Dyke's employers. Further, they note that the contract contained a provision regarding the parties' obligations in the event of a merger, consolidation or reorganization. Giesler and Krueger contend this language can only refer to a corporate entity and not an

individual. Finally, they point out that Van Dyke's salary and benefits were paid by DCH, Inc.

¶23 However, when the parties signed the contract, Giesler and Krueger did not know which entity–DCH, Inc. or DCI, Inc.–would in fact be responsible for Van Dyke's compensation. In fact, DCH, LLC, a company not even mentioned in the contract, paid Van Dyke for a portion of his term of employment. Thus, we cannot conclude that Van Dyke was looking only to the corporation for performance when he did not even know at the time who would in fact be performing.

¶24 Further, general concepts of agency also hold Giesler and Krueger personally liable. It is undisputed that DCH, Inc., did not exist at the time the contract was signed. Where an agent signs on behalf of a nonexistent principal, the agent is personally liable unless the parties agree otherwise either expressly or by the circumstances. *See* ***Fredendall v. Taylor***, 23 Wis. 538 (1868). We have already concluded that the parties here neither expressly nor otherwise agreed to release Giesler and Krueger from personal liability.

¶25 Additionally, Giesler and Krueger signed the contract without indicating that they were signing on behalf of a corporation. Generally, an agent must affirmatively express that he or she is signing on behalf of a corporation. *See* RESTATEMENT (SECOND) OF AGENCY § 156 ("an unsealed written instrument is interpreted as the instrument of the principal and not of the agent if, in the signature or description of the parties, the name of the principal and agent both appear."). Failing to do so, Giesler and Krueger remain personally liable.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.