IN THE COURT OF APPEALS OF IOWA

No. 0-304 / 09-0168
Filed June 16, 2010

IN THE MATTER OF THE
TIMBERLINE BUILDERS, INC.,
Plaintiff-Appellant,

vs.

DONALD D. JAYNE TRUST,
DONALD D. JAYNE and LINDA K. JAYNE, Trustees,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Timberline Builders, Inc. appeals from the district court's ruling, which required Timberline to dissolve its mechanic's lien. In compliance with the order of the supreme court, both parties filed statements addressing whether Timberline, a corporation, may be represented on appeal by a non-lawyer. **APPELLANT'S BRIEF STRICKEN, ADDITIONAL TIME ALLOWED FOR APPEARANCE OF COUNSEL.**

Michael Foust as president of Timberline Builders, Inc., Windsor Heights, appellant.

Kathryn S. Barnhill of Barnhill & Associates, West Des Moines, for appellees.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

Timberline Builders, Inc. (Timberline) appeals from the district court's ruling that disallowed Timberline's foreclosure of its mechanic's lien and directed Timberline to dissolve the lien. The corporation was represented by counsel in the district court, but filed its notice of appeal and briefs in the supreme court through its president, a non-lawyer.

After briefing was completed, the supreme court *sua sponte* noted its concern that the individual purporting to represent appellant Timberline, Michael Foust, "may not be licensed to practice law in the State of Iowa." The court noted the general rule that a corporation may not represent itself through nonlawyer employees, officers, or shareholders, ordered the parties to address the question of whether Foust could legally represent Timberline, and submitted the issue with the appeal. The appeal was transferred to this court.

In his statement, Foust does not claim to be an attorney. Foust's statement contends that as president of the corporation, Foust has a fiduciary duty to protect the assets of the corporation and that "[n]owhere in the rules of civil procedure or appellate procedure is it disclosed that a corporation cannot select the representative to prepare and file documents on its behalf." He asserts the general rule noted in *Hawkeye Bank & Trust, National Ass'n v. Baugh*, 463 N.W.2d 22, 25 (Iowa 1990), should be void as against public policy. He writes that as the sole shareholder[1] of Timberline, denying him the ability to prosecute an appeal for the corporation denies the corporation's constitutional

[1] While the district court's ruling finds Foust to be the "owner and president of Timberline Builders, Inc.," we only have his statement to establish that Foust is the sole shareholder.

rights of due process and free speech; any objection to his representation should have been raised earlier; and the concerns expressed by some courts about the potential adverse interests of shareholders are not present here because he is the sole shareholder.

Because Timberline cannot represent itself through a nonlawyer officer, employee, or shareholder, we strike Timberline's appellate brief and allow thirty days for appearance of counsel on the corporation's behalf.

In Iowa, business corporations are created under Iowa Code chapter 490 (2009) and may be incorporated for the "purpose of engaging in any lawful business." Iowa Code § 490.301(1). A corporation has statutorily enumerated powers, unless the articles of incorporation provide otherwise, which include the power to "[s]ue and be sued, complain, and defend in its corporate name." *Id*. § 490.302(1).

> The possession of these powers, together with the right to carry on the business for which the corporation is created, and the right to exercise all the incidental powers essential to a proper enjoyment of the powers specifically conferred, constitute the franchise of the corporation, which exists in virtue of contract between the state and the corporation and may not be essentially abridged or impaired by the legislature. In the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, Chief Justice Marshall says "a corporation is an artificial being, the mere creature of the law; it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its existence." And in *Providence Bank v. Billings*, 4 Peters, 514, the same judge says: "The great object of an incorporation is to bestow the character and properties of individuals on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." This must be especially true under our general incorporation law, which enacts that, except as otherwise provided, an article of incorporation confers no power or privilege not possessed by natural persons.

Rodemacher v. Milwaukee & St. Paul Railway Co., 41 Iowa 297, 300 (1875).

A corporation is a legal entity, separate and distinct from its stockholders. *Majestic Co. v. Orpheum Circuit*, 21 F.2d 720, 724 (8th Cir. 1927); *Charles Weitz's Sons v. U.S. Fidelity & Guaranty Co.*, 206 Iowa 1025, 1030-31, 219 N.W. 411, 413-14 (1928). The courts will ignore the fiction of the corporate entity "cautiously and only when circumstances justify it." *Majestic Co.*, 21 F.2d at 724; *see also Charles Weitz's Sons*, 206 Iowa at 1030, 219 N.W. at 413 (noting that "legal rules which regard a corporation as an artificial person and limit the interest of the stockholder in the property of the corporation to his shares in the corporation will not stand in the way of a court of equity when it is attempting to use the same as an instrument of fraud").

> A corporation is treated as an entity separate from its stockholder or stockholders under all ordinary circumstances. Although courts have made exceptions under some circumstances, this has been done where applying the corporate fiction 'would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim . . . .' Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result. In the present case, those who created the corporation in order to enjoy advantages flowing from its existence as a separate entity are asking that such existence be disregarded where it works a disadvantage to them. We do not consider it good policy to do so.

Inn Operations, Inc. v. River Hills Motor Inn Co., 261 Iowa 72, 84-85, 152 N.W.2d 808, 815–16 (1967) (internal quotations and citations omitted).

In *Hawkeye Bank & Trust*, 463 N.W.2d at 25, our supreme court rejected the "reverse pierce" doctrine used by a few courts to enable certain shareholders to pierce the corporate veil from within in order to reach individual benefits in cases involving insurance, probate, and real property.

> None of the "reverse pierce" cases cited by Baugh involve corporate self-representation in court. Further, we note that even the proponents of the doctrine admit its limitations:
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> > We are aware of the danger of a debtor being able to raise or lower his corporate shield, depending on which position best protects his property. Consequently, a reverse pierce should be permitted in only the most carefully limited circumstances.
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> *Cargill* [*Inc. v. Hedge*], 375 N.W.2d [477, 480 (Minn. 1985) (noting important policy reason for reverse pierce found in "furtherance of the purpose of the homestead exemption")].

Id.

The *Hawkeye Bank & Trust* court acknowledged that exceptions to the general rule that corporations must be represented by attorneys have been made by other courts on a case-by-case basis, "motivated principally by findings that the corporation and its representative are so closely related that their identities are virtually indistinguishable." *Id.* at 24. The court cites three cases from other jurisdictions, all of which involved closely-held corporations, but each of which also involved another reason to affirm the decision of the trial court to permit a non-lawyer representative to act in court on behalf of the corporation. *Id*. (citing as an example *Margaret Maunder Assocs., Inc. v. A-Copy, Inc.*, 499 A.2d 1172, 1174 (Conn. Super. Ct. 1985), which allowed a sole shareholder, who filed a small claims action on behalf of her corporation according to statute, to continue to represent the corporation after defendant removed case to the regular docket). The *Hawkeye Bank & Trust* court also cited two cases in which the corporation contended on appeal that the request of its representative to be permitted to act on behalf of the corporation should *not* have been granted. 463 N.W.2d at 24 (citing *Willapa Trading Co. v. Muscanto, Inc.*, 727 P.2d 687, 692 (Wash. Ct. App. 1986) (involving corporation president's request for permission to represent

corporation of which he was sole shareholder and director, and then complained on appeal that the court granted his request) and *Phoenix Mut. Life Ins. Co. v. Radcliffe on the Del., Inc.*, 266 A.2d 698, 702 (Pa. 1970) (involving the request of one of three shareholders in defendant corporation for permission to represent the corporation, and then complained on appeal that his request was granted)). After noting these cases, however, the *Hawkeye Bank & Trust* court adopted the general rule that "a corporation may not represent itself through non-lawyer employees, officers, or shareholders." *See generally* Jay M. Zitter, Annotation, *Propriety and Effect of Corporation's Appearance Pro Se Through Agent Who Is Not Attorney*, 8 A.L.R. 5th 653 (1992).

It is thus the rule in Iowa that absent statutory authority such as is found in Iowa Code section 631.14 (allowing a corporation to be represented by an officer or employee in small claims actions), or compelling reasons not yet identified, a corporation may not represent itself through non-lawyer employees, officers, or shareholders. Assuming without deciding that Foust is the sole shareholder of Timberline and that no other financial interests are at stake and/or that he is authorized by officers of the corporation to act on its behalf, there is no extraordinary circumstance here that would justify a departure from the general rule that corporations must be represented by counsel.

Constitutional rights. Foust contends the recent United States Supreme Court's ruling in *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), holds that a corporation has the same constitutional rights as an individual, with the exception of the ability to vote.

Even were that true,[2] "[i]t has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts *only through licensed counsel*." *Rowland v. California Mens' Colony*, 506 U.S. 194, 201–02, 113 S. Ct. 716, 721, 121 L. Ed. 2d 656, 666 (1993) (emphasis added). This rule is also true in most state courts. *See Hawkeye Bank & Trust*, 463 N.W.2d at 23-24, and cases cited therein.

Our supreme court has rejected a claim that this requirement denies a corporation due process.

> We recognize that due process requires the court system to be accessible to those who are aggrieved. We are cited to no authority that suggests, however, that requiring a corporation to appear through counsel deprives it of its right to due process of law. To the contrary, other courts appear unanimous in their rejection of such a constitutional claim.
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> In conclusion, we subscribe to the Colorado court's observation that "[w]hen a business accepts the advantages of incorporation, it must also bear the burdens, including the need to hire counsel to sue or defend in court." We therefore adopt the general rule that a corporation may not represent itself through nonlawyer employees, officers, or shareholders. For the reasons cited, no basis for departure from the general rule can be seen in the case before us.

Id. at 25 (citations omitted).

Circumstances warrant "*reverse pierce*." Foust also argues that because he is the sole shareholder, the concerns expressed by some courts about the potential adverse interests of shareholders are not present here. *See, e.g.*,

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[2] Foust reads *Citizens United* through the lens of his own situation, claiming the Court's First Amendment ruling involved the representation of corporations in court. In *Citizens United* the Court held that while the government could regulate corporate political speech through disclaimer and disclosure requirements without infringing on corporate First Amendment rights, it may not suppress that speech altogether. *See Citizens United*, ____ U.S. at ___, 130 S. Ct. at 886, 175 L. Ed. 2d at 769. The majority noted "[t]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Id.* at ___, 130 S. Ct. at 907, 175 L. Ed. 2d at 792.

United States v. Priority Products, Inc., 615 F. Supp. 593, 596 (Ct. Int'l Trade 1985) (concluding closely-held corporate defendant's pro se answer demanding jury trial would be recognized as timely, reasoning that there is a narrow exception to the almost absolute rule requiring attorney representation of a corporation in litigation when a corporation is the alter ego of an individual or is closely held, as well as an exception where the agent appearing for the corporation is a party to the action along with the corporation). *But see Mid-Central/Sysco Food Servs., Inc. v. Regional Food Servs., Inc.*, 755 F. Supp. 367, 368 (D. Kan. 1991) (limiting *Priority Products* to the situation where a corporation seeks to benefit from the fact it appeared improperly by a non-lawyer, and rejecting claim that a corporation could appear pro se where it was alleged that there should be an exception for pro se representation of a corporation which is the alter ego of an individual); *Cary & Co. v F. E. Satterlee & Co.*, 208. N.W. 408, 409 (Minn. 1926) (stating, "the right of a party to a suit in court to appear in person therein does not entitle him to appear for a corporation, even if he owns all of its capital stock for the corporation is a distinct legal entity").

Foust states, "To deny Foust the individual right to litigate his business claims simply because he made the business decision to incorporate is inconsistent when identically situated sole proprietors can proceed to litigate their claims pro se." We disagree. As noted in *Hawkeye Bank & Trust*, "'[w]hen a business accepts the advantages of incorporation, it must also bear the burdens, including the need to hire counsel to sue or defend in court.'" 463 N.W.2d at 25 (quoting *Woodford Mfg. Co. v. A.O.Q., Inc.*, 772 P.2d 652, 654 (Colo. Ct. App. 1988)). Moreover, we note that in his appellate brief Foust emphasizes the

separate corporate identity of Timberline when it is to his advantage ("The court refused to hold Michael Foust personally liable for corporate debts."). Yet, he would like us to disregard the corporate identity when it is to his disadvantage. "We reject this attempt by [Foust] to 'have his cake and eat it too.'" *Hawkeye Bank & Trust*, 463 N.W.2d at 25.

Timing. Foust contends any objection to his representation should have been raised earlier and, in essence, because there was no objection, the matter cannot now be raised. We acknowledge that opposing counsel did not raise the issue and our supreme court raised the issue only after the filing of final briefs. Foust argues he has the right to represent the corporation. The Iowa Supreme Court has held otherwise in *Hawkeye Bank & Trust* and it is not in this court's power to reverse that holding.

The question remains, however, what is the consequence of Timberline's lack of representation by counsel? *Compare Joseph Sansone Co. v. Bay View Golf Course*, 97 S.W.3d 531, 531 (Mo. Ct. App. 2003) (dismissing appeal because unrepresented corporation's notice of appeal was void), *and Jadair Inc. v. U.S. Fire Ins. Co.*, 562 N.W.2d 401, 411 (Wis. 1997), *with CLD Constr. Inc. v. City of San Ramon*, 16 Cal. Rptr. 3d 555, 1147–48 (Cal. Ct. App. 2004) (noting state courts are divided—some find all actions taken by a non-attorney on behalf of a corporate party have no effect and are a "nullity"; others find a correctable defect and permit a reasonable time to obtain an attorney; in federal court, trend is that corporation is given a reasonable time to secure counsel—and holding, "Given the weight of nationwide authority and this state's increasing acceptance of the view that representation of the corporation by an attorney is *not* an

absolute prerequisite to the court's fundamental power to hear or determine a case, we are persuaded it is more appropriate and just to treat a corporation's failure to be represented by an attorney as a defect that may be corrected, on such terms as are just in the sound discretion of the court").

Appellees assert that any documents filed by Foust after the notice of appeal must be stricken. We believe this action is appropriate in this case.

However, we also believe Timberline should be granted a brief time within which to secure an attorney. *See Hawkeye Bank & Trust*, 463 N.W.2d at 26 (finding it was an abuse of discretion for the trial court not to have granted the shareholder a brief continuance to secure an attorney).

Therefore, we strike Timberline's appellate brief and grant thirty days from the date this order is filed within which counsel may file an appearance on behalf of Timberline. Thirty days from the date this order is filed will be deemed the date from which appellate timelines will run. If no attorney files an appearance on behalf of Timberline Builders, Inc. within the time allowed, this appeal shall be dismissed without further order of this court.

APPELLANT'S BRIEF STRICKEN, ADDITIONAL TIME ALLOWED FOR APPEARANCE OF COUNSEL.