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we affirm in part, and in part reverse and remand for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DARLENE HOWSDEN, APPELLANT, V. ROPER'S REAL ESTATE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

805 N.W.2d 640

Filed October 28, 2011. No. S-11-174.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Workers' Compensation.** If an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.
3. **Corporations: Fraud.** A court will disregard a corporation's identity, or pierce the corporate veil, only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
4. **Corporations: Courts: Equity.** A court exercises its equitable power when it disregards the corporate form.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Jefferson Downing and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

James A. Snowden and Joseph M. Aldridge, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The plaintiff in this case was injured on premises that were leased to her employer by a legally distinct entity that is owned

and operated by the same shareholders as her employer. The question presented in this appeal is whether the plaintiff can go to district court and sue the entity that owns the premises for negligence, or whether her exclusive remedy is under the Nebraska Workers' Compensation Act (the Act).[1] We conclude that the plaintiff is not barred by the Act from bringing her third-party claim against the entity that owns the premises.

BACKGROUND

Roper & Sons, Inc., is a funeral home that was incorporated in Lincoln, Nebraska, in 1914. It operates from real property owned by Roper's Real Estate Company, Inc. (Roper's Real Estate). Roper's Real Estate was incorporated in Lincoln in 2003. Roper's Real Estate was created to separate Roper & Sons' real property from its funeral home business, for tax and other business purposes. The stock ownership of Roper & Sons and Roper's Real Estate is identical, both in the shareholders and the distribution of their stock, and most of the directors and officers are the same, although their roles and titles differ between the two entities. Tom Roper, director and president of Roper & Sons, testified that the two businesses were not run separately and that without the funeral home business engaged in by Roper & Sons, Roper's Real Estate would not exist.

In 2003, Roper & Sons purchased the Metcalf/Nelson Funeral Home, LLC (Metcalf). In 2005, Roper's Real Estate completed the purchase of what had been Metcalf's real property. Although Metcalf still exists as a business entity, the only member of its limited liability company is Roper & Sons. The Metcalf funeral home business operates from property owned by Roper's Real Estate, which is leased by Roper & Sons pursuant to an oral lease. The taxes on the property were paid by Metcalf. But neither Roper's Real Estate nor Metcalf have any employees of their own, and Tom Roper averred that Roper's Real Estate does not maintain, repair, or manage the property it owns—Roper & Sons is solely responsible for it.

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[1] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2008).

The plaintiff in this case, Darlene Howsden, was an employee of Roper & Sons who worked at a former Metcalf property. There is an old elevator in the building that connects to two hallways: one running to the south, and the other running to the east. The elevator is rarely used to travel between floors, but employees apparently use it as a makeshift passageway between the hallways abutting it. Nonetheless, on some occasions, it was used to travel between floors. One day, when Howsden was leaving work, she went down one of the hallways and opened the elevator door to pass through. Unknown to her, the elevator was upstairs, so she fell down the elevator shaft into the basement and was seriously injured. She received workers' compensation disability and medical benefits under an insurance policy issued to Roper & Sons and expressly providing coverage for Roper & Sons, Roper's Real Estate, and Metcalf.

Howsden filed a complaint in district court against Roper's Real Estate, alleging that Roper's Real Estate's negligence caused her injuries. In response, Roper's Real Estate alleged among other things that Howsden's exclusive remedy was under the Act. Howsden and Roper's Real Estate filed cross-motions for summary judgment on the exclusive remedy issue, and the district court, citing our decision in *Millard v. Hyplains Dressed Beef*,[2] granted Roper's Real Estate's motion. Howsden appeals.

ASSIGNMENTS OF ERROR

Howsden assigns that the court erred in (1) concluding that the exclusive remedy rule extended to Roper's Real Estate, an entity legally distinct from Howsden's employer, Roper & Sons, and (2) concluding it was bound by *Millard*.[3]

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence

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[2] *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991), *disapproved on other grounds, Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[3] *Id.*

offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

ANALYSIS

[2] We have held that if an injury arises out of and in the course of employment, the Act is the injured employee's exclusive remedy against his or her employer.[5] In this case, however, Howsden's employer was Roper & Sons, and she is trying to sue Roper's Real Estate. Roper's Real Estate, on the other hand, contends that for these purposes, it and Roper & Sons should be considered the same entity. We disagree.

The issue presented to the district court was a disagreement about whether the "dual persona" or "dual capacity" doctrines should apply. We have discussed these doctrines in the past, although we have had no occasion to adopt or reject them. We have explained that under the "dual capacity" doctrine, an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer.[6] But, we noted, the dual capacity doctrine has been discredited.[7] Under the narrower "dual persona" doctrine, "'[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—it possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person.'"[8]

But those doctrines are not precisely applicable here, because the question in this case is not whether Roper & Sons had

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[4] *Britton v. City of Crawford, ante* p. 374, 803 N.W.2d 508 (2011).

[5] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008). See, also, *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007); *Millard, supra* note 2.

[6] *Bennett, supra* note 5.

[7] See *id.* See, also, 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 113.01[4] (2000).

[8] *Bennett, supra* note 5, 273 Neb. at 308, 729 N.W.2d at 86. See, also, 6 Larson & Larson, *supra* note 7, § 113.01[1].

another capacity, separate from its capacity as Howsden's employer, or even whether Roper & Sons had a second "persona" that was completely independent. The dual capacity and dual persona doctrines, to the extent they have any vitality, are implicated when there is one business entity that an employee nonetheless tries to sue as a "third party" because of an injury caused by a function of the employer that is separate from the employment relationship. For instance, the paradigmatic example is that of a truckdriver employed by a tire manufacturer, who was injured when one of the tires on his truck blew out.[9] The tire had been manufactured by the employer, but the truckdriver was still permitted to recover for product liability.[10]

In other words, the dual capacity and dual persona doctrines were intended to address situations in which the plaintiff alleges that his or her employer should nonetheless be considered a "third party" for purposes of workers' compensation exclusivity. There is no need to resort to such doctrines, however, when the defendant is *actually* a legally separate entity. In such a case, resorting to a legal fiction is unnecessary, because the separate existence of the defendant is a legal fact.[11] And under such circumstances, courts have refused to disregard the corporate form to apply the exclusive remedy rule.[12]

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[9] *Mercer v. Uniroyal*, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976), *disapproved, Schump v. Firestone Co.*, 44 Ohio St. 3d 148, 541 N.E.2d 1040 (1989).

[10] See *id.*

[11] See Larson & Larson, *supra* note 7, § 113.01[3].

[12] See, e.g., *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979); *Matter of Johns-Manville/Asbestosis Cases*, 511 F. Supp. 1229 (N.D. Ill. 1981); *Great Atlantic Tea v. Imbraguglio*, 346 Md. 573, 697 A.2d 885 (1997); *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016 (Ind. 1995) (superseded by statute as stated in *Hayes Lemmerz Intern., Inc. v. Ace American Ins.*, 619 F.3d 777 (7th Cir. 2010)); *LaBelle v. Crepeau*, 593 A.2d 653 (Me. 1991); *Smith v. Cotton's Fleet Service, Inc.*, 500 So. 2d 759 (La. 1987); *Wodogaza v H & R Terminals*, 161 Mich. App. 746, 411 N.W.2d 848 (1987); *Searcy v. Paul*, 20 Mass. App. 134, 478 N.E.2d 1275 (1985); *Gaber v. Franchise Services, Inc.*, 680 P.2d 1345 (Colo. App. 1984); *Mingin v. Continental Can Company*, 171 N.J. Super. 148, 408 A.2d 146 (1979).

Those courts have based their reasoning upon the principle that a business enterprise has a range of choices when determining how to organize itself into a corporate structure.[13] But, as the Sixth Circuit explained, "reciprocal obligations arise as a result of the choice it makes."[14] While the "owners [of the business] may take advantage of the benefits of dividing the business into separate corporate parts," the court said, "principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee."[15]

Many considerations may move a business entity to diversify its structure through the creation of other entities, but those considerations should include the obligations which arise as a consequence of such diversification.[16] One cannot claim the benefits of incorporation without the burdens.[17] So, when two companies are corporations which benefit from legally recognized identities separate and apart from one another, they must also bear the responsibility and liability of such separation.[18]

[3,4] Those courts have also reasoned that the separate identity of different corporate entities should be pierced only in cases of fraud.[19] We have explained that a corporation's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears and that "[a] court will disregard a corporation's identity," or pierce the corporate veil, "*only* where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest

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[13] See *Boggs, supra* note 12.

[14] *Id*. at 662.

[15] *Id*. Accord, *McQuade, supra* note 12; *Wodogaza, supra* note 12.

[16] See *Wodogaza, supra* note 12.

[17] See *LaBelle, supra* note 12.

[18] See *Gaber, supra* note 12.

[19] See, *Matter of Johns-Manville/Asbestosis Cases, supra* note 12; *McQuade, supra* note 12; *LaBelle, supra* note 12; *Smith, supra* note 12; *Searcy, supra* note 12; *Mingin, supra* note 12.

or unjust act in contravention of the rights of another."[20] And there is no allegation of fraud here. A court exercises its equitable power when it disregards the corporate form,[21] but there is "little likelihood that equity will ever require [a court] to pierce the corporate veil to protect the same party that erected it. It was, after all, [the] defendant that chose to structure itself in its present multi-corporate form."[22] In short, defendants have uniformly been denied the opportunity to pierce their own corporate veil in order to avoid liability.[23]

LaBelle v. Crepeau[24] presents a good example of that reasoning being applied to facts comparable to those of the instant appeal. In *LaBelle*, the plaintiff was injured at his place of employment, allegedly due to inhaling paint fumes in an improperly vented paint and body shop. The plaintiff's corporate employer leased the building from the defendant, who owned the building in his individual capacity, but also owned 98 percent of the stock in the corporation, and managed and controlled it. The Supreme Judicial Court of Maine held that it was improper to ignore the corporate entity in order to allow a shareholder to avoid the burden of incorporation.[25] The court held that the plaintiff could not sue the corporation, nor could he sue the defendant in any capacity related to the defendant's employment or association with the corporation as an employee or officer. But, the court reasoned, the defendant had been sued "as the owner of premises he leased to a separate corporate entity, solely for failure to conform to an alleged legal duty on the part of a landlord to [en]sure the safety of the premises."[26] So, the court concluded, the

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[20] *Christian v. Smith*, 276 Neb. 867, 883, 759 N.W.2d 447, 462 (2008) (emphasis supplied). See, also, *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

[21] See *Medlock, supra* note 20.

[22] *McQuade, supra* note 12, 659 N.E.2d at 1020.

[23] See *Matter of Johns-Manville/Asbestosis Cases, supra* note 12.

[24] See *LaBelle, supra* note 12.

[25] See *id.*

[26] *Id.* at 655.

plaintiff's claim was not barred by his acceptance of workers' compensation.[27]

We agree with that reasoning. In this case, Roper & Sons chose to diversify its corporate form, presumably because of the business advantages of such diversity. But that choice has legal consequences. We are not at liberty to disregard the corporate form in the absence of circumstances that would justify invoking equitable power. But there are no such allegations here. Therefore, there is no basis in this record to set aside the corporate structure that Roper & Sons and Roper's Real Estate decided to form. We find merit to Howsden's first assignment of error.

We also find merit to Howsden's second assignment of error. Howsden argues that the court erred in finding that our decision in *Millard* was controlling here. We agree with Howsden that *Millard* is distinguishable.

As context, we note that several courts have held that an employee's third-party claim may be barred by the exclusive remedy rule based upon factors such as the third party's control of the employee's duties, payment of wages, and right to hire and fire.[28] But the reasoning of those cases is based on the recognition that sometimes, an employee can work for two employers at the same time.[29] For instance, in *Saf-T-Cab Service v. Terry*,[30] a taxicab driver was employed by the owner of the cab he was driving when he was injured, but a separate entity was responsible for directing the cab's operation and the driver's duties. The driver's third-party action against the operating entity was barred because the court found the evidence sufficient to show that both entities were functionally employing the driver at the time of the injury.[31]

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[27] See *id.*

[28] See, e.g., *Clark v United Technologies*, 459 Mich. 681, 594 N.W.2d 447 (1999); *Imbraguglio, supra* note 12, citing *Saf-T-Cab Service v. Terry*, 167 Md. 46, 172 A. 608 (1934); *Ramnarine v. Memorial Center for Cancer*, 281 A.D.2d 218, 722 N.Y.S.2d 493 (2001).

[29] See, *Clark, supra* note 28; *Ramnarine, supra* note 28.

[30] *Terry, supra* note 28.

[31] See *id.*

Millard was such a case.[32] In *Millard*, the pilot of a small airplane was also the owner of three related companies, and when the airplane crashed, two employees of one of those companies were killed. Their estates sued the pilot and the other two companies that he owned and controlled. But we found that their exclusive remedy was under the Act, because their deaths arose out of and in the course of their employment with the pilot and his corporations. We found that the evidence would have been insufficient to show that the pilot had a second "persona" unrelated to his status as employer. And we explained that the decedents "were employees whose professional expertise led them to be asked to provide their opinions, and [that] those opinions were offered in the course and scope of their employment."[33] So, we concluded that "[w]hether the purpose [of the trip] was to benefit the decedents' employer . . . or to benefit one of the other entities does not alter [the pilot's] liability."[34]

In this case, however, as explained above, the separate legal existence of Roper's Real Estate is established as a matter of law. And there is no basis in the record to conclude that Howsden was employed by *both* Roper & Sons and Roper's Real Estate. The evidence establishes beyond reasonable dispute that Howsden was hired and controlled exclusively by Roper & Sons. Neither *Millard* nor any other dual-employer case is pertinent here.

Roper's Real Estate also argues that even if it is a third party against which a tort claim can be maintained, there are other grounds upon which the district court's judgment can be affirmed. Roper's Real Estate argues that as a landlord, it has no direct liability for an allegedly dangerous condition on the premises[35] and that it cannot be held vicariously liable for any

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[32] See *Millard, supra* note 2.

[33] *Id.* at 912, 237 N.W.2d at 128.

[34] *Id.*

[35] See, generally, *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

torts of Roper & Sons.[36] But these arguments would depend on evidence of the terms of the lease agreement and any specific acts of negligence that occurred. And, we note, it is far from clear from the record that these arguments were raised below. They were not specifically presented by the pleadings, and the cross-motions for summary judgment were specifically directed only at Roper's Real Estate's exclusive remedy defense. In other words, there is nothing in this record to suggest that Howsden had notice that she was expected to present evidence at the summary judgment hearing on the other issues raised by Roper's Real Estate on appeal. Therefore, we decline to reach those issues at this point in the proceedings.

CONCLUSION

Roper's Real Estate is a legally separate entity from Roper & Sons, despite their corporate kinship, and there is no equitable basis in this record to justify piercing the corporate veil between the two entities. Roper's Real Estate is a third party to the employment relationship between Howsden and Roper & Sons, so Howsden's third-party claim against Roper's Real Estate is not barred by the exclusive remedy provisions of the Act. And Roper's Real Estate's other asserted defenses are not ripe for adjudication in this appeal. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[36] See, generally, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997), and *disapproved on other grounds, Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).