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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEAN GERSON, Plaintiff and Appellant, v. DEPARTMENT OF PESTICIDE REGULATION, Defendant and Respondent.	G039171 (Super. Ct. No. 06CC07594) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed.

Julander, Brown & Bollard and Dirk O. Julander for Plaintiff and Appellant.

Edmund G. Brown Jr., Attorney General, Janet Gaard, Chief Assistant Attorney General, Mary E. Hackenbracht, Assistant Attorney General, Carol A. Squire, and Deborah Fletcher, Deputy Attorneys General for Defendant and Respondent.

* * *

Sean Gerson appeals the trial court's denial of his petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5. Gerson is the sole director, chief executive officer, and chief financial officer of Vaccination Services, Inc. (VSI), a company operating out of his home. VSI sells various pet medications by phone, facsimile, and at the website http://fleastuff.com. Gerson, and occasionally his brother, are the only individuals involved in VSI's operations — there are no employees.

It is uncontested on appeal that VSI sold pet medications obtained from Australia and England to buyers in California from 2003 to 2004.[1] It is further uncontested on appeal that such sales violated Food & Agriculture Code sections 12992 and 12993.[2] Following notice and a hearing, the Department of Pesticide Regulation (Department) adopted the proposed decision of an administrative law judge finding Gerson and VSI liable for 108 separate violations of sections 12992 and 12993 and recommending a fine of $374,000. In this appeal of the trial court's denial of his petition for writ of mandate, Gerson asserts error solely in the Department holding him personally liable for the fine imposed. According to Gerson, VSI is responsible for the violations, as VSI (not Gerson individually) completed the necessary sales of misbranded and/or unregistered pesticides implicating the regulatory statutes. Gerson claims only a finding of alter ego liability (which was not made or addressed at the administrative hearing) could result in his individual liability. Hence, Gerson requests a writ of mandate issue

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[1] Gerson characterizes such products as "gray market" goods. A "gray market" is "a market employing irregular but not illegal methods; *esp*: a market that legally circumvents authorized channels of distribution to sell goods at prices lower than those intended by the manufacturer." (Merriam Webster's Collegiate Dict. (10th ed. 1999) p. 510.) As Gerson and VSI were found to have illegally sold pet medications obtained in foreign markets, the products at issue here are more aptly described as "black market" goods.

[2] All further statutory references are to the Food & Agriculture Code unless otherwise indicated.

directing the Department to set aside its decision ordering Gerson individually to pay the $374,000 fine.

We affirm the court's denial of Gerson's petition for writ of mandate. Gerson's fundamental premise — that the corporate form protects officers and other agents of a corporation from liability absent a finding of alter ego — represents a fundamental misunderstanding of the law. There is substantial evidence in the record supporting Gerson's liability for the regulatory violations at issue as a result of his actual conduct and the control he exercised over VSI.

FACTS

Background

California, through the Department, regulates the manufacture, distribution, and use of "pesticides." "Pesticides" are defined to include "[a]ny substance, or mixture of substances which is intended to be used for . . . preventing, destroying, repelling, or mitigating any pest, as defined in Section 12754.5, which may infest or be detrimental to vegetation, man, animals, or households, or be present in any agricultural or nonagricultural environment whatsoever." (§ 12753, subd. (b).) "Pest" is broadly defined to include any form of life "that is, or is liable to become, dangerous or detrimental to the agricultural or nonagricultural environment of the state" (§ 12754.5), and specifically includes "[a]ny insect" and anything designated as a pest in regulations issued pursuant to the Food & Agriculture Code. (§ 12754.5, subds. (a), (c).)

Merial Limited, under the brand name "Frontline," and Bayer Animal Health, under the brand name "Advantage," manufacture and distribute flea and tick control products for dogs and cats.[3] Merial and Bayer have registered their respective

[3] Although fleas and ticks are both bloodsucking parasites, fleas are classified as insects and ticks are classified as arachnids.

lines of products with the Department pursuant to section 12811 et seq. Gerson concedes on appeal that Frontline and Advantage products are "pesticides" subject to the requirements of section 12751 et seq.

All Department registered flea and tick control products include (on the box or on an Environmental Protection Agency (EPA) approved sticker) an EPA registration number, manufacturing facility information, and the weight (in pounds and ounces) of the dogs and cats for which the product is intended for use. Flea and tick control products not intended for sale in the United States will not typically imprint on the outside of its packaging an EPA registration number or manufacturing facility information. Further, product intended for non-domestic markets utilize the metric system to identify the proper weights of dogs and cats for which the product is applicable.

The Enforcement Action

On February 5, 2004, the Department notified Gerson in writing regarding inspections of pet stores in Los Angeles County, which revealed illegal Frontline and Advantage product on the store shelves. The letter alleged Gerson's company, identified as "Vaccination Services," sold the misbranded and unlawful products into these California stores, and was therefore liable under various provisions of the Food & Agriculture Code. The letter requested Gerson to provide all relevant documents for its review, and warned Gerson to "immediately cease selling any and all misbranded and/or unregistered pesticide products."

Ultimately, the Department initiated a proposed action under section 12999.4, which authorizes the levy of civil penalties "against a person violating Sections . . . 12992 [or] 12993 . . . of not more than five thousand dollars ($5,000) for each violation." (§ 12999.4, subd (a).) The Department complied with its notification requirements under section 12999.4, subdivision (b), by serving several notices of proposed action. In its operative notice, the Department alleged in count 1 that Gerson

and VSI sold "foreign Advantage and Frontline flea control pesticide products into and within California that were not DPR-registered." The Department further alleged such actions violated sections 12992 ("It is unlawful for any person to sell any adulterated or misbranded pesticide") and 12993 ("It is unlawful for any person to manufacture, deliver, or sell any pesticide . . . which is not registered pursuant to this chapter").[4] Also included in the notice was an allegation that Gerson and VSI "have among and between themselves such a business relationship that they each can be held jointly and severally responsible for the acts resulting in the violations alleged here." The Department sought to fine Gerson and VSI $795,000.

Gerson contested the proposed action, and a hearing before an administrative law judge occurred over the course of 11 days. Citing his inability to afford legal representation, Gerson represented himself and VSI at the hearing. The crux of his defense was the Department did not meet its burden of demonstrating illegal sales occurred. Gerson did not argue in the alternative he could not be held liable on an individual basis for violations committed by VSI. Gerson did not challenge the legal standard for holding him individually liable for the sales alleged in count 1 of the Department's notice. Nor did Gerson argue an alter ego finding was required to hold him individually liable.

The administrative law judge issued a proposed decision on May 24, 2006. The proposed decision indicated "between March 26, 2003 through October 26, 2004, Vaccination Services, Inc. and Sean Gerson, as an individual, are jointly and severally liable for [108] violations of . . . sections 12992 and 12993. Mr. Gerson is found to be

[4] Gerson and VSI were named as "Respondents" to five additional counts in the Department's operative notice; these counts relate to alleged eBay and internet sales by Gerson and VSI. The administrative law judge found Gerson and VSI to be jointly and severally liable for only one eBay sale related to these allegations, and recommended a fine of $5,000 for that single violation. The Department adopted all of the findings of the administrative law judge. Gerson does not challenge his liability of $5,000 for the eBay sale.

individually liable based upon his positions as chief executive officer, secretary, and chief financial officer of Vaccination Services, Inc. In these capacities, he held full operational control of the corporation, purchased foreign, non-registered flea and tick control product from overseas markets, and sold such product as un-registered, misbranded product to California pet supply retailers. In sum, Mr. Gerson had exclusive control over the practices that were found to be in violation of . . . sections 12992 and 12993." The administrative law judge cited *People v. Toomey* (1984) 157 Cal.App.3d 1, 16 (*Toomey*), in support of its proposed decision.

The proposed decision recommended a fine of $374,000 for the 108 violations found in count 1 (along with $5,000 for a separate violation discussed above in footnote 4). The recommended fine was $3,000 for each of the 83 violations that occurred prior to Gerson's receipt of the Department's cease and desist letter, and $5,000 for each of the 25 violations that occurred after February 9. The Department adopted the proposed decision without modification.

Gerson immediately thereafter filed a petition for writ of mandate in the superior court pursuant to Code of Civil Procedure section 1094.5. The court rejected his petition, thereby approving the Department's finding that Gerson was "liable on the theory that he personally participated in and directed the transactions that gave rise to the statutory violations." This appeal ensued.

DISCUSSION

Code of Civil Procedure section 1094.5 authorizes writ of mandate petitions "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (Code Civ. Proc., § 1094.5, subd.

(a).) "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) On appeal, we review de novo the trial court's legal determinations and we review factual findings for substantial evidence. (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443-1444.)

Gerson claims the court erred in finding the Department did not abuse its discretion through legal and factual error. First, he argues the administrative law judge (and the court below) improperly relied on *Toomey*, *supra*, 157 Cal.App.3d 1, to support the proposition that Gerson could be held civilly liable for violation of the regulatory statutes at issue. Gerson further contends the only way he could be held liable individually for the fines imposed would be an alter ego determination, and the Department failed to present evidence sufficient to establish alter ego liability. Finally, Gerson claims the Department failed to provide notice as required by due process that Gerson would be subject to alter ego liability. Gerson explicitly challenges only two findings of fact made at the administrative level for lack of substantial evidence — that he owned VSI and that he "'influenced and controlled the corporation to such an extent that a common unity of interest existed between him and the corporation and the two cannot be distinguished.'"[5]

Exhaustion of Administrative Remedies and Waiver

As a preliminary matter, the Department asserts this court lacks jurisdiction due to Gerson's alleged failure to exhaust his administrative remedies. "The exhaustion

[5] Thus, we assume the accuracy of the remainder of the factual findings, and rely on relevant portions of those factual findings in setting forth the facts.

doctrine applies generally whenever judicial relief is sought where a remedy is available at the administrative level. It applies to *any* action for judicial relief, whether it be a writ or not." (*Lopez v. Civil Service Com.* (1991) 232 Cal.App.3d 307, 315.) "The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes; allowing an agency to develop the necessary factual background of the case; letting the agency apply its expertise and exercise its statutory discretion; and administrative efficiency and judicial economy." (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489.) Lack of legal representation does not excuse a failure to exhaust administrative remedies. (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1444, 1450.)

The Department put Gerson's individual liability at issue at the regulatory hearing in its notices of proposed action. Gerson invoked his right to an administrative hearing, thereby denying the allegations made by the Department in its notice of proposed action. The Department thereafter developed evidence at the hearing implicating Gerson and argued in its closing statement that the evidence established Gerson "operated and controlled the daily operations by himself." The administrative law judge, citing *Toomey*, *supra*, 157 Cal.App.3d 1, recommended Gerson be held individually liable because of his personal involvement in the sales process and full operational control of VSI. The issue of Gerson's individual liability was raised and decided at the administrative level. As provided in section 12999.4, subdivision (c), Gerson has the right to seek review of that decision pursuant to Code of Civil Procedure section 1094.5. He was not required to first seek reconsideration by the Department. (Gov. Code, § 11523 ["The right to petition shall not be affected by the failure to seek reconsideration before the agency"].) Thus, judicial review was open to Gerson. He has not failed to exhaust his administrative remedies. Review of the administrative decision is within the jurisdiction of both the trial court and the Court of Appeal.

However, the legal arguments made by Gerson in his administrative mandate petition and in this appeal were not presented to the administrative law judge.[6] A failure to present legal arguments at the administrative level waives (or forfeits) such arguments in ensuing writ of mandate actions. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 791 [refusing to consider statutory argument not made at administrative level].) As such, Gerson waived the legal arguments in his writ of mandate petition and in this appeal.

We nevertheless have discretion to consider new legal arguments or theories when "the issue posed is purely a question of law based on undisputed facts." (*Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1344 [court exercised discretion to consider legal argument not made in administrative hearing].) The basic legal issue presented by this appeal — whether an officer or director of a corporation can be found liable under sections 12992 and 12993 — without an alter ego finding, does not depend on the particular facts of this case. Accordingly, we exercise our discretion to consider that legal issue.

Individual Liability for Regulatory Violations

Violations of pesticide regulatory statutes are considered "'public welfare' offenses . . . requir[ing] neither guilty knowledge nor intent." (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 702.) Gerson submits he cannot be held liable for "strict liability" violations of sections 12992 and 12993, which he contends were committed solely by VSI. The relevant statutory provisions make it illegal to sell (not to import or possess) misbranded or unregistered pesticide. (§ 12992 ["It is unlawful for any person to sell any adulterated or misbranded pesticide"]; § 12993

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[6] Gerson relied on the same arguments in his writ of mandate petition to the trial court that he espouses on appeal. Gerson has been represented by counsel here and at the trial court, whereas he represented himself at the administrative hearing.

["It is unlawful for any person to manufacture, deliver, or sell any pesticide . . . which is not registered pursuant to this chapter"].) The purchase orders documenting sales to customers in California list "Vaccination Services" (not Gerson) as the seller. Thus, according to Gerson, he cannot be held liable for the illegal sales of pesticide. Gerson contends the only case explicitly relied on by the administrative law judge and the trial court, *Toomey*, *supra*, 157 Cal.App.3d 1, is distinguishable. *Toomey* applies, according to Gerson, only to cases in which fraud or unfair business practices are alleged against the individual. [7]

It is a bedrock principle of law that an individual is liable for his or her tortious or criminal behavior, regardless of whether the individual acts on another's behalf. (Civ. Code, § 2343, subd. (3); 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 199, p. 252 ["An agent or employee is always liable for his or her own torts, whether the principal is liable or not, and in spite of the fact that the agent acts in accordance with the principal's directions"]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 95, p. 147 ["An agent or employee is liable for his own crimes, just as he is for his own torts [Citation]; i.e., he has no defense that he acted on behalf of a principal or employer"].)

A corporate officer's liability for acts committed by a corporation is dependent upon the officer's participation and/or control of the wrongdoing at issue. "Corporate director or officer status neither immunizes a person from personal liability for tortious conduct nor subjects him or her to vicarious liability for such acts." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1379.) "'[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes,

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[7] Gerson does not provide any legal authority for the distinction offered, referring to his presentation of the issue as a "question of first impression."

directs, or in some meaningful sense actively participates in the wrongful conduct.'" (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503-504 (*Frances T.*).)

Toomey, supra, 157 Cal.App.3d 1, is simply one example of this principle: corporate officers may be held liable for their own actions taken on behalf of a corporation. In *Toomey*, the president and managing officer (Toomey) of a discount coupon company was sued individually (along with the company) for unfair business practices under Business & Professions Code sections 17200 and 17500. (*Toomey, supra*, 157 Cal.App.3d at pp. 14-15.) The coupon company defrauded its customers by misrepresenting the value and utility of the coupons, and by refusing to provide refunds to unsatisfied customers. The court explained that unlike the company, which could be held vicariously liable for the actions of employees, "Toomey's individual liability must be predicated on his personal participation in the unlawful practices." (*Id*. at p. 14.) The *Toomey* court found "[o]verwhelming evidence show[ing] that [Toomey] prepared the solicitation scripts, determined the content of coupon packages to be sold, and directed the refund policy which the company followed." (*Id*. at p. 15.) By both controlling the business practices of his employees and by direct participation in the distribution of the coupons, Toomey subjected himself to personal liability for unfair and fraudulent business practices. (*Id*. at pp. 15-16.)

Courts have imposed fines on corporate officers in circumstances analogous to the instant case. (See, e.g., *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1349-1350 [affirming separate civil fines against president and corporation for violations of laws against selling new vehicles not certified for California emissions].) Indeed, the United States Supreme Court, in *United States v. Dotterweich* (1943) 320 U.S. 277 (*Dotterweich*), endorsed holding the president of a company liable for his company's misbranding violations under the Federal Food, Drug, and Cosmetic Act. The *Dotterweich* Court noted "the only way in which a corporation can act is through the individuals who act on its behalf." (*Dotterweich*, at p. 281.)

Rejecting the argument that only the corporation could be held liable for regulatory violations, the Court explained, "The [regulatory] offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs." (*Id*. at 284.)

Gerson points to no authority supporting his position that individuals may not be held jointly liable for a corporation's violations of sections 12992 and 12993. Gerson is obviously a "person," subject to sections 12992 and 12993 — the statutes do not limit their reach to companies. Gerson concedes the illegality of the sales of misbranded and unregistered pesticides at issue. Gerson only challenges his joint liability for "sales" completed by VSI. The applicable definition of "sell" is to "offer for sale, expose for sale, possess for sale, exchange, barter, or trade." (§ 44.)

Gerson's discussion of alter ego liability is a red herring. Courts may impose alter ego liability against a corporation's shareholders if: (1) there is a unity of interest between the shareholders and the corporation; and (2) failing to pierce the corporate veil would sanction a fraud or promote injustice. (*Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 837-840.) The liability of officers or directors "does not depend on the same grounds as 'piercing the corporate veil,' . . . but rather on the officer or director's personal participation or specific authorization of the tortious act." (*Frances T., supra*, 42 Cal.3d at p. 504.) The Department was not required to demonstrate Gerson was the alter ego of VSI. The administrative law judge found Gerson liable based on his individual participation in and control of illegal sales of pesticides to California customers.[8]

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[8] Gerson appears to be correct in contending there is nothing in the record directly evidencing his ownership of VSI, although his role as sole director, officer, and (along with his brother) the only individual involved in VSI's operations indicates that he likely does own VSI. Regardless, the factual findings contested by Gerson do not affect the outcome of the case. Assuming Gerson does not own VSI, or assuming there is

The Finding of Gerson's Individual Participation and Control Is Supported by Substantial Evidence

As to the application of the above principles of law to this case, the record is replete with evidence supporting the conclusion that Gerson controlled and completed the illegal sales for which he has been fined. As an initial matter, VSI was not incorporated until October 6, 2003. By then, Gerson (doing business as "Vaccination Services") had completed at least 53 of the 108 violations at issue on this appeal.[9] With regard to the other 55 violations, Gerson was the sole director, chief executive officer, and chief financial officer of VSI. Gerson maintained the executive office of VSI at his home. Gerson, and occasionally his brother, were the only individuals involved in VSI's operations. From 2002 to 2004, Gerson received price quotes in his name and placed orders in his name with overseas providers of Frontline and Advantage. Gerson bragged in an October 4, 2002 letter that he imported over $250,000 in products per month from the United Kingdom, Germany, and Australia. The Department's cease and desist letter was addressed to Gerson; nevertheless, Gerson and VSI completed at least 25 more illegal sales after receipt of the letter. There is substantial evidence supporting the administrative law judge's findings: Gerson operated and controlled VSI, made all purchasing and sales decisions, and was therefore properly held liable for the fines imposed by the Department.

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insufficient evidence in the record to make an alter ego finding, Gerson is still liable for his participation in and control of the illegal sales.

[9] VSI did not file a petition for writ of mandate to overturn the Department's decision to fine it for these 53 violations that occurred prior to its corporate existence, so it is unnecessary to consider the propriety of the fine vis-à-vis VSI. Moreover, this issue was not raised at the administrative level.

DISPOSITION

For the foregoing reasons, the judgment is affirmed. Respondent shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.