

THE SUPREME COURT OF OHIO

KIMBERLY DOMBROSKI,)
)
 Appellee,)
 v.)
 WELLPOINT, INC., et al.,)
)
 Appellants.)

CASE NO. 07-2162
On Appeal from the Court of
Appeals for Belmont
County, Ohio, Seventh Appellate
Judicial District (No. 06 BE 60)

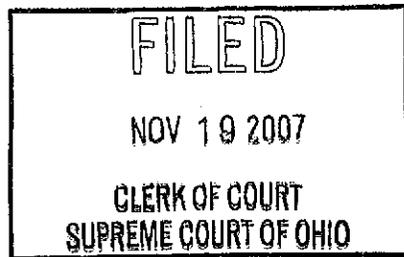
APPELLANTS' NOTICE OF CERTIFIED CONFLICT

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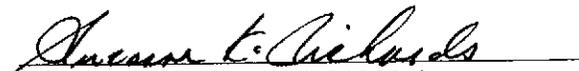
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NOTICE

Appellants submit this notice in compliance with Supreme Court Practice Rule IV. On October 1, 2007, appellants filed a motion in the Seventh District Court of Appeals to certify a conflict between its decision in *Dombroski v. Wellpoint, Inc.*, 7th Dist. No. 06 BE 60, 2007-Ohio-5054 (attached at A), and the decisions of the Sixth District Court of Appeals in *Collum v. Perlman* (April 30, 1999), 6th Dist. No. L-98-1292 (attached at B), and *Widlar v. Young*, 6th Dist. No. L-05-1184, 2006-Ohio-0868 (attached at C). On November 13, 2007, the Seventh District granted appellants' motion and certified a conflict (attached at D). Specifically, the Seventh District certified the following issue: "Does the second prong of *Belvedere*, which states that the corporate veil can be pierced when control of the corporation 'was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity,' also allow the corporate veil to be pierced in cases where control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an illegal act?"

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, this 4th day of November, 2007, upon the following:

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A

[Cite as *Dombroski v. Wellpoint, Inc.*, 2007-Ohio-5054.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

KIMBERLY DOMBROSKI,)	
)	CASE NO. 06 BE 60
PLAINTIFF-APPELLANT,)	
)	
- VS -)	OPINION
)	
WELLPOINT, INC., et al.,)	
)	
DEFENDANTS-APPELLEES.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 06CV0114.

JUDGMENT: Reversed and Remanded.

JUDGES:
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Gene Donofrio

Dated: September 20, 2007

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VUKOVICH, J.

{¶1} Plaintiff-appellant Kimberly Dombroski appeals from the decision of the Belmont County Common Pleas Court dismissing her complaint for failure to state a claim against defendants-appellees WellPoint, Inc. and Anthem Insurance Companies Inc. The issue in this appeal is whether the trial court erred in dismissing the complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the complaint stated sufficient facts to overcome a Civ.R. 12(B)(6) motion to dismiss. Thus, the trial court's decision is hereby reversed and this case is remanded for further proceedings.

STATEMENT OF CASE

{¶2} In 2000, Dombroski successfully had a cochlear implant implanted in her left ear. In 2005, her doctor determined that she needed a cochlear implant placed in her right ear. At the time of her doctor's 2005 determination, Dombroski was insured by Community Insurance Company (referred to as CIC), who underwrote the policy. CIC, through Anthem UM Services, Inc. (referred to as AUMSI), denied coverage for the implantation of the right cochlear implant on the grounds that a bilateral implant was investigational.

{¶3} On May 22, 2006, Dombroski filed an amended complaint against CIC and AUMSI. She also sued WellPoint, Inc., and Anthem Insurance Companies, Inc. (referred to as AICI). (When referring to all of the insurance companies as a group, they are referred to as Anthem.) She set forth claims for breach of the insurance contract, promissory estoppel and the tort of bad faith. Amended Complaint ¶1.¹

{¶4} The complaint alleges that CIC, AUMSI, and AICI are subsidiaries of WellPoint, who controls those subsidiaries so that they have no separate mind, will or existence of their own. The complaint states that this control over the subsidiaries was exercised in such a manner as to violate the duty of good faith and fair dealings to its Ohio insureds, specifically Dombroski. Amended Complaint ¶10.

{¶5} Attached to the complaint was the insurance policy stating that covered services must be medically necessary and not investigational. (Health Certificate M-15 and M-35). The policy then defines the terms medically necessary and investigational. (Health Certificate M-16-17 and M-18-19). The complaint asserts that the insurance benefits are administered pursuant to the "medical policies and claims administration policies" that are adopted by Anthem appellees.

{¶6} The "corporate medical policy declares that a bilateral cochlear implant is investigational. Thus, the complaint contends that "WellPoint through AICI establishes certain 'corporate medical policies', which it directs its subsidiaries to utilize in the administering, handling and processing of claims under its insurance products throughout the United States." Amended Complaint ¶9. AICI's corporate medical

¹The promissory estoppel claim was later dismissed by Dombroski and thus is not at issue in this appeal.

policy was the basis for the denial of the right ear cochlear implant. Amended Complaint ¶9.

{¶7} In response to the complaint, WellPoint and AICI filed very similar Civ.R. 12(B)(6) motions to dismiss claiming that the complaint failed to state a claim upon which relief could be granted. Specifically, they argued that Dombroski could not prevail on the claim of breach of duty to act in good faith under the insurance contract. They reasoned that without privity of contract between WellPoint, AICI and Dombroski, Dombroski could not prevail on the breach of the duty to act in good faith under the insurance contract. Secondly, WellPoint and AICI contended that Dombroski failed to allege a basis for piercing the corporate veil.

{¶8} Dombroski countered alleging that she pled sufficient facts for a breach of duty to act in good faith and to pierce the corporate veil. However, the trial court determined that Dombroski failed to state a claim upon which relief could be granted. The court dismissed the complaint against WellPoint and AICI. Notably, both CIC and AUMSI are still parties. Dombroski timely appeals.

ASSIGNMENT OF ERROR

{¶9} “LOWER COURT ERRED IN GRANTING APPELLEES WELLPOINT’S AND AICI’S RESPECTIVE MOTIONS TO DISMISS PURSUANT TO CIVIL RULE 12(B)(6).”

{¶10} To dismiss a complaint for failure to state a claim upon which relief may be granted pursuant to Civ.R. 12, it must be shown beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144. Factual allegations in the complaint will be presumed as true, and inferences will be made in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. The trial court is not permitted to resort to evidence outside the complaint to support dismissal under Civ.R. 12(B)(6). Attachments to the complaint are not considered to be outside the complaint. *Adlaka v. Giannini*, 7th Dist. No. 05MA105, 2006-Ohio-4611, ¶34. See Civ.R. 10(C) and (D).

{¶11} Appellate review of a trial court’s decision to dismiss a complaint on the basis of Civ.R. 12(B)(6) is de novo. *Woods v. Oak Hill Community Med. Ctr.* (1999),

134 Ohio App.3d 261, 267. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 711. Thus, this court must review the complaint and determine whether Dombroski has stated any claim for which relief could be granted.

{¶12} As stated above, the two issues that were raised to the trial court in the motions to dismiss and oppositional memorandum were: (1) whether CIC's corporate veil could be pierced to get to WellPoint and AICI, and (2) whether the complaint asserted an actionable bad faith claim against WellPoint and AICI (which is hereinafter deciphered as a management theory argument). We will address those two arguments, taking each in turn.

Piercing the Corporate Veil

{¶13} As stated above, Dombroski's amended complaint indicates that her insurance contract was underwritten by CIC. The contract states that it is solely between CIC and Dombroski. Dombroski admits that neither WellPoint nor AICI are a party to the insurance contract. She claims that while WellPoint and AICI are not formal parties to the contract, they can be liable for the denial of coverage for the right cochlear implant, if she can pierce CIC's corporate veil.

{¶14} "Generally, a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation." *Wallce v. Shelly and Sands, Inc.*, 7th Dist. No. 04BE11, 2005-Ohio-1345, quoting *Starnier v. Guardian Industries* (2001), 143 Ohio App.3d 461, 468. The reason for this is:

{¶15} "That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it; but like every other fiction of the law, when urged to an intent and purpose not within its reason and policy, may be disregarded." *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287, quoting *State ex rel. Atty. Gen. v. Standard Oil Co.* (1982), 49 Ohio St. 137, paragraph one of the syllabus.

{¶16} Thus, the corporate entity may be disregarded and a parent corporation and its subsidiary may be treated as a single entity when the three-prong test set forth

in *Belvedere* is established. *Wallace*, 7th Dist. No. 04BE11, 2005-Ohio-1345, ¶37. The tripartite test is that:

{¶17} “(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.” *Belvedere*, at paragraph 3 of the syllabus.

{¶18} Therefore, the *Belvedere* test is equally applicable to piercing a corporation to reach an individual shareholder or owner as it is to piercing a corporation to reach another corporation. *Belvedere Condominium Unit Owners’ Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287-288, 1993-Ohio-119 citing *North v. Higbee Co.* (1936), 131 Ohio St. 507 (a parent/subsidiary case which the *Belvedere* Court cited for two of the *Belvedere* prongs).

{¶19} The trial court held, and WellPoint and AICI maintain, that Dombroski did not set forth facts in her complaint that would entitle her to pierce CIC’s corporate veil. Civ.R. 8(A) is the relevant rule for pleading requirements, and it merely requires “a short and plain statement of the claim showing that the party is entitled to relief.”

{¶20} “* * * [T]he complaint and other relief-claiming pleading need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided. However, the complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.” 5 Wright & Miller, *Federal Practice & Procedure: Civil* (12969), at 120-123, Section 1216.” *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 83.

{¶21} A party seeking to pierce the corporate veil is not required to relate the specific intention in the complaint in order to proceed under the doctrine of piercing the corporate veil. *Geier v. National GG Industries, Inc.* (Dec. 23, 1999), 11th Dist. No. 98-L-172 (explaining that “piercing the corporate veil is not a claim, it is a remedy

encompassed within a claim. It is a doctrine wherein liability for an underlying tort may be imposed upon a particular individual.”). In other words, there is no requirement that one must state in their complaint that they are “piercing the corporate veil”. *Id.* All that is required is that the complaint contain sufficient information to indicate a desire to proceed under the doctrine of piercing the corporate veil. *Dalicandro v. Morrison Road Dev. Co., Inc.* (Apr. 17, 2001), 10th Dist. Nos. 00AP-619, 00AP-656.

{¶22} For example, the Tenth Appellate District found that the pleadings were sufficient when the plaintiff was named in his individual capacity and was described as using his company to engage in the alleged conversion and breach of contract. *Id.* Likewise, the Eleventh Appellate District found that a plaintiff’s allegation intending to hold the defendant personally liable for the transfer of property, which was allegedly in violation of the Ohio Uniform Fraudulent Transfer Act, was sufficient to put the defendant on notice that the plaintiff intended to pierce the corporate veil. *Geier*, 11th Dist. No. 98-L-172.

{¶23} Thus, Dombroski was not required to state the words “pierce the corporate veil” in her complaint. Still, the complaint must contain sufficient information to show the desire to proceed under the theory. As the ability to pierce the corporate veil is defined by *Belvedere*, we will review the complaint to determine what, if any, prongs of *Belvedere* were addressed in the complaint.

{¶24} Both parties agree that the complaint clearly alleges that WellPoint controls its subsidiaries to the point that they have no separate mind, will or existence of their own. The first prong of *Belvedere* is undisputedly established.

{¶25} The second prong of *Belvedere* is that control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity. Dombroski does not specifically claim that there was an illegal act or an actual act of fraud. Rather, she maintains that certain acts were unjust or inequitable. Many appellate districts, including ours, have defined the second prong of *Belvedere* as including unjust or inequitable acts. *State v. Tri-State Group, Inc.*, 7th Dist. No. 03BE61, 2004-Ohio-4441; *Robert A. Saurber General Contractor, Inc. v. McAndrews*, 12th Dist. No. CA2003-09-239, 2004-Ohio-6927; *Dalicandro*, 10th Dist. Nos. 00AP-619, 00AP-656;

Wiencek v. Atcole., Inc. (1996), 109 Ohio App.3d 240, 245 (3d Dist.). But, see, *Collum v. Perman* (Apr. 30, 1999), 6th Dist. No. L-98-1291; *Widlar v. Young*, 6th Dist. No. L-05-1184, 2006-Ohio-868 (describing these holdings as too expansive).

{¶26} WellPoint and AICI argue that the allegations contained within the complaint only asserted a breach of contract and that a breach of contract alone is not a sufficient unjust or inequitable act to pierce the corporate veil. The trial court agreed with WellPoint and AICI's argument, and thus, found the second prong of *Belvedere* could not be established. It based its decision on *Connolly v. Malkamaki*, 11th Dist. No. 2001-L-124, 2002-Ohio-6933.

{¶27} The *Connolly* court stated that breach of contract alone is not sufficient to bring a corporation's conduct within the scope of *Belvedere*. *Id.* The *Connolly* case did not involve a motion to dismiss for failure to state a claim upon which relief could be granted. Rather, in *Connolly*, prior to the issues being submitted to the jury, defendant moved for directed verdict claiming that sufficient evidence was not submitted to pierce the corporate veil. The trial court denied the motion and the jury returned a verdict in favor of the plaintiff. On appeal, the appellate court held that the directed verdict should have been granted because there was not sufficient evidence to meet the second prong of *Belvedere*. It specifically stated:

{¶28} "A simple breach of contract, in absence of a more substantial factual predicate indicative of some corporate malfeasance, with direct bearing on the plaintiff's injury, is insufficient to meet the second prong of the *Belvedere* test. To decide otherwise, would completely vitiate the holding in *Belvedere*. Therefore, having construed the evidence in the light most favorable to appellee, we conclude that she has failed to identify any portion of the second prong of the *Belvedere* test for piercing the corporate veil." *Id.* at ¶34.

{¶29} While *Connolly's* analysis and holding may be sound, it has no application in the case at hand. Reading the complaint in the light most favorable to Dombroski, we must conclude that she is raising more than just a breach of contract claim. Dombroski asserts that WellPoint controlled AICI, CIC, and AUMSI to the point that they had no will of their own and that this control violated the duty to act in good faith in handling claims. She contends that WellPoint, AICI, and CIC through AUMSI

denied coverage of the right cochlear implant by unjustly claiming that bilateral (but not unilateral) implantation is experimental and investigational. She then discloses that there was an appeal of this ruling, but that Anthem's appeal panel consisted of no person with training or expertise in bilateral cochlear implants. Amended Complaint ¶¶23. She discusses that she went through Anthem's appeal process and states that coverage was still denied because bilateral implants were considered experimental and investigative under the corporate medical policy despite her having satisfied the medically necessary criteria. She concludes, "Defendants' conduct was oppressive, insulting and was undertaken knowingly, intentionally, willfully, with malice, and in conscious disregard of her rights knowing there was a great probability of harm to her." Amended Complaint ¶¶35.

{¶30} While the complaint's allegations do sound in breach of contract, it is also clear that Dombroski is asserting that Anthem (WellPoint, AICI, AUMSI, and CIC) failed to act in good faith in handling her claims and thus acted in bad faith. Most specifically, she claims that WellPoint's control over its subsidiaries was "exercised in such a manner as to violate an insurers' duty of good faith and fair dealing to its Ohio insureds." Amended Complaint ¶¶10.

{¶31} It has been held by the Ohio Supreme Court that the breach of the duty to act in good faith in handling claims is a cause of action sounding in tort:

{¶32} "Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer." *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, paragraph one of the syllabus. See, also, *Motorists Mut. Co. v. Said*, 63 Ohio St.3d 690, 694, 1992-Ohio-94.

{¶33} Consequently, the complaint asserts more than a breach of contract claim; it also asserts the tort of a duty to act in good faith as defined by the Ohio Supreme Court. The failure of the duty to act in good faith in handling claims constitutes an unjust or inequitable act for purposes of pleading piercing the corporate veil. As such, the second prong of *Belvedere* was sufficiently pled.

{¶34} In order to meet the third prong of *Belvedere*, Dombroski must allege that an injury or unjust loss resulted from the aforementioned “control and wrong.” *Belvedere*, 67 Ohio St.3d 274, paragraph 3 of the syllabus. In the complaint, she alleges that she has suffered physical loss, pecuniary loss, emotional distress, impaired earning capacity, and lessened likelihood of a successful working implantation of a future right side cochlear implant. She alleges that these injuries have resulted from the “control and wrong” by WellPoint through its subsidiaries due to the corporate medical policy. This is sufficient to meet the third prong of *Belvedere*.

{¶35} Despite WellPoint and AICI’s arguments, Dombroski did not need to assert that CIC was undercapitalized (underfunded) to sufficiently plead facts for piercing the corporate veil. Undercapitalization is just one of the factors that a court can consider in deciding whether the corporate fiction should be disregarded. *Lewis v. DR Sawmill Sales Inc.*, 10th Dist. No. 04AP-1096, 2006-Ohio-1297 (using underfunding to address the second element of *Belvedere*); *Cremeans v. Robbins* (June 12, 2000), 4th Dist. No. 99CA2520; *Willoway Nurseries v. Curdes* (Oct. 13, 1999), 9th Dist. No. 98CA007109; *State ex rel. Montgomery v. Fisher Acquisition and Development Corp.* (July 24, 1998), 6th Dist. No. L-97-1411; *Wiencek*, 109 Ohio App.3d at 245 (use of the factor for determination of the *Belvedere* test); *Fesman v. Berger* (Dec. 6, 1995), 1st Dist. No. C-940400 (factors used to determine all principles of *Belvedere*); *Dirksing v. Blue Chip Architectural Products Inc.* (1994), 100 Ohio App.3d 213, 226; *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 744. In other words, it is one factor the court may consider when determining whether the *Belvedere* tripartite test is met. Other factors include but are not limited to the observance of corporate formalities or lack thereof, the presence of fraud, and the existence of any unjust or inequitable consequences arising from the retention of the corporate fiction. *Link*, 79 Ohio App.3d at 744; *Fesman*, 1st Dist. No. C-940400.

{¶36} Therefore, Anthem’s recitation of the *Belvedere* test which places underfunding as an element of the tripartite test is incorrect. Contrary to Anthem’s contentions, Dombroski was not required to plead undercapitalization to show any one element of the *Belvedere* test. All Dombroski was required to do was to plead facts

sufficient to put Anthem defendants on notice that she was attempting to pierce the corporate veil.

{¶37} In conclusion, after reviewing the complaint in the light most favorable to Dombroski, the nonmoving party, we find that she pled sufficient facts to put the Anthem defendants on fair notice that she was attempting to pierce the corporate veil. Whether or not she can prove the elements of piercing the veil to the requisite degree, is a wholly different question that is not at issue at this stage. The trial court erred in dismissing the complaint on that basis.

{¶38} Having found that, we acknowledge that Dombroski's argument for reversal of the trial court's decision also focuses on a request for relaxation of the privity doctrine. As aforementioned, Dombroski admits that neither WellPoint nor AICI is a formal party to the insurance contract. Furthermore, she acknowledges that in order to pursue the breach of duty to act in good faith in handling claims there must be privity of contract. *Hoskins*, 6 Ohio St.3d 272, paragraph one of the syllabus (stating that the tort is based upon the relationship between the insurer and insured). It appears, based on her argument, that Dombroski believes that her claim for the failure to act in good faith in handling claims cannot be pursued unless the doctrine of privity is relaxed.

{¶39} Dombroski's belief is mistaken. Privity does not need to be relaxed in order to find that the complaint stated a claim upon which relief could be granted. Privity between Dombroski, WellPoint and AICI will be established if CIC's corporate veil is pierced. As stated above, the complaint asserts that WellPoint controlled its subsidiaries to the point that they had no mind or control of their own and that WellPoint functions as an insurance company for its subsidiaries. Furthermore, it is also asserted that the handling, processing and denying of Dombroski's claims was not reasonably justified and was not handled in good faith. Thus, if she can prove as she claims that WellPoint controls CIC to the point it has no separate mind, that the denial of her claim was in bad faith, which was an unjust act, and that she was damaged by this, then she could pierce the veil and show that it is really WellPoint that acted in bad faith. In other words, there could be privity with WellPoint if it is dictating

every decision it's subsidiaries are issuing since it would be the one actually fulfilling or failing to fulfill the duties under the insurance contract.

{¶40} The Ohio Supreme Court has implicitly indicated that when a lack of privity is asserted as a defense by a parent company, the way to establish privity is through piercing the corporate veil. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113. In *Dardinger*, AICI and CIC dba Anthem Blue Cross & Blue Shield were sued for, among other things, breach of contract and bad faith in handling the claims. A jury found them liable. AICI filed a motion for judgment notwithstanding the verdict. In the motion, AICI attempted for the first time to distinguish itself from CIC and argue that there was no contract between itself and the insured. The trial court found that the argument was waived. Additionally, it concluded that AICI could be found liable under an alter-ego theory because of its domination and control of its subsidiary. However, the appellate court reversed and found that AICI had no contractual obligations with the insured and thus, it could not be liable. The appellate court also rejected the trial court's finding that AICI could be found liable under an alter-ego theory.

{¶41} On review, the Ohio Supreme Court agreed with the trial court and found that AICI waived its argument that there was no contract between itself and the insured. It stated that in the trial court proceedings, prior to the motion for judgment notwithstanding the verdict, AICI made no attempt to distinguish itself from CIC. It further added:

{¶42} "Had AICI raised its defense [lack of privity] in a timely manner, Dardinger could have introduced evidence opposing it. The trial court, in addition to finding waiver, also found that Anthem was 'so dominated and controlled [by AICI] that it is no more than a paper existence.' Dardinger could have sought to pierce the corporate veil in the prosecution of his case had the issue been in play." *Id.* at ¶147.

{¶43} Consequently, when the parent corporation is not a party to the insurance contract, privity is established when the subsidiary's corporate veil is pierced. The doctrine of privity does not need to be relaxed in this situation. Dombroski's assertion to the contrary is incorrect. Regardless, as explained above,

the trial court's decision requires reversal; the complaint did state a claim upon which relief could be granted.

{¶44} Although our analysis requires reversal, in fairness, we will address Dombroski's remaining argument due to its likelihood of being raised at the trial court upon remand.

Management Theory

{¶45} Dombroski's second argument is that she can pursue an action for failure to act in good faith in handling her claim against WellPoint and AICI even if no privity of contract can be established through piercing the corporate veil. She acknowledges that the issue is one of first impression in Ohio, and she cites this court to cases from other states that she interprets as having extended the bad faith claim when there is no privity of contract or piercing of a veil. She coins the doctrine a "bad faith" theory of recovery.

{¶46} As we have explained above, the breach of duty to act in good faith (i.e. bad faith) in handling claims can be pursued under a piercing the corporate veil theory. In order to avoid confusion with the lack of good faith theory, we use the terms management theory or delegation theory hereinafter. As will be shown below, these terms are more accurate.

{¶47} The first case she points this court to is *Delos v. Farmers Ins. Group, Inc.* (1979), 93 Cal.App.3d 642. In this case, there were two insurance companies, Farmers Insurance Exchange (referred to as Exchange) and Farmers Group, Inc. (referred to as Group). Group described itself as the management organization for Exchange. It further explained in simple terms that for legitimate business consideration, Group was formed to render management services for Exchange for which it received a percentage of premiums paid by Exchange's policyholders. In order for this relationship to work, every policyholder of Exchange was required to appoint Group as attorney-in-fact.

{¶48} This type of relationship was described as an inter-insurance exchange and its attorney-in-fact. A formal description of this type of relationship is:

{¶49} "A reciprocal insurance exchange * * * is an unincorporated business organization of a special character in which the participants, called subscribers (or

underwriters) are both insurers and insureds; for their mutual protection, they exchange insurance contracts through the medium of an attorney-in-fact, empowered in each underwriters agreement not only to exchange insurance contracts for the subscribers, but also to exercise all other functions of an insurer, e.g., to set rates, to settle losses, to compromise claims, to cancel contracts. The subscribers furnish by their premium deposits, the means required for losses and costs, reserves and surpluses of the reciprocal insurance of them all, and therefore are entitled to the equity in the assets of the Exchange subject to the purpose for which they have furnished said means. If the amount of premiums deposited is not fully required for the purposes mentioned, the excess, called savings, is returned in whole or in part as dividends. The attorney-in-fact receives a sizable percentage of the premiums deposited in consideration of which he does not only provide his own services, but also has to defray many of the costs of the business." Id. at 652.

{¶50} The vice-president of Group explained the relationship of Group and Exchange in simpler terms than the above definition:

{¶51} "[I]f it were small enough, they [the policyholders] would just get together from time to time and put money in a big barrel and take the money out of the big barrel for claims purposes. Since it is three and a half, four million people, it is not practical. A management company or an attorney-in-fact is appointed to handle all of those monetary and other affairs to see that the property is properly accepted and properly disbursed and properly accounted for." Id. at 652-653.

{¶52} One of Exchange's policy holders, Delos, was injured in an automobile accident caused by an uninsured motorist. Delos sought uninsured motorist coverage from Exchange. After it denied coverage, Delos sued both Exchange and Group for the breach of the implied covenant of good faith and fair dealing in handling the claim. Group asserted that they were not a party to the insurance contract and thus could not be sued because of lack of privity. The California Appellate Court disagreed with their argument. It stated:

{¶53} "If we were to accept the Group's argument and adhere to the general rule that 'bad faith' liability may be imposed only against a party to an insurance contract, we would not only permit the insurer to insulate itself from liability by the

simple technique of forming a management company, but we would also deprive a plaintiff from redress against the party primarily responsible for damages. We conclude the Group is liable for the breach of the implied covenant of good faith and fair dealing." *Id.*

{¶154} Thus, in *Delos*, while there was no privity of contract between Group and the injured party, Group managed Exchange's "monetary and other affairs". On that basis, the court allowed the bad faith claim. This is management theory. Or in other words, when one insurance company hires or forms another company to manage it, the management company can be held liable because it is assuming the duties of the insurance company. In all actuality, the insurance company is delegating its rights under the contract to the company it hires/forms to manage it. It was this delegation that created the right to sue.

{¶155} *Delos* was later limited by a California Appellate Court. *Filippo Industries, Inc. v. Sun Ins. Co. of New York* (1999), 74 Cal.App.4th 1429. Part of the reason for limiting the *Delos* holding was because the California Supreme Court made a ruling that there was no right of private action under a section of the California insurance code. The appellate court then stated it is "questionable if the basis for *Delos* still exists." *Id.* Thus, the appellate court limited the holding in *Delos* to its specific facts and the situation where "the insured would be without redress unless it could sue the Group." *Id.*; *Salido v. Allstate Ins. Co.* (N.D.Cal. 1999), No. C98-04616CRB, 1999 WL 977944.

{¶156} Regardless, other states have also recognized this management theory as a basis for liability when there is no privity of contract and as an alternative to using the doctrine of piercing the corporate veil. See *Dellaira v. Farmers Ins. Exchange* (2004), 136 N.M. 552, 102 P.3d 111 (stating "we conclude that Plaintiff stated a claim for breach of duty to act in good faith, and that, under some state of facts, relief might possibly be granted. Because the matter before us is one of first impression, we do not fault the district court in following the usual doctrine of lack of contractual privity."); *Gatecliff v. Great Republic Life Ins.* (1991), 170 Ariz. 34, 821 P.2d 725 (recognizing a direct liability/management theory and explaining that "[u]nder these circumstances strict adherence to the general rule that liability for bad faith breach may be imposed

only against a party to an insurance contract would permit Farmers to shield itself from liability through the device of a management company."); *Williams v. Farmers Ins. Group, Inc.* (Colo.App.1989), 781 P.2d 156.

{¶157} All of these cases represent a recognition of the management or delegation theory. As aforementioned, management theory works when one company forms another company to manage it or its claims, or it hires another company to manage it or its claims. When these actions are taken, the above cited courts hold that the manager is undertaking the duties and liabilities of the insurer under the insurance contract.

{¶158} The New Mexico *Dellaira* opinion concisely explains the idea of holding a party that is not in privity to the contract liable for failing to fulfill the duty of good faith and fair dealing to the insured. *Dellaira*, 102 P.3d 1111. It held that an entity owes a duty of good faith and fair dealing to the insured, even where no privity of contract existed between the two, because the entity 'had primary control over benefit determinations, assumed some of the insurance risk loss, undertook many of the obligations and risks of an insurer, and had the power, motive and opportunity to act unscrupulously in the investigation and serving of insurance claims." *Id.* It further stated that many other cases have had similar results under analogous circumstances.

{¶159} The *Dellaira* court also outlined its reasoning for allowing such an action to go forth even when there is no privity. The court recognized the special and unique relationship between insurer and insured, which includes "the inherent lack of balance in and adhesive nature of the relationship as well as the quasi-public nature of insurance and the potential for the insurer to unscrupulously exert its unequal bargaining power at a time when the insured is particularly vulnerable." *Id.* The court then pointed out that an entity that controls the claim determination process, such as a parent corporation or a managing corporation, may have an incentive similar to that of an unscrupulous insurer to delay payment or coerce an insured into a diminished settlement. Since the entity acts as insurer, it should be bound within the special relationship created through the insurance contract. It then clarified that "an insured's expectations of good faith handling and ultimate determination of his or her claim for

benefits by the insurer extends no less to an entity that both handles and determines the claim than to the insurer issuing the policy." Id.

{¶60} We find the above reasoning logical and persuasive. Thus, if the allegations of the complaint allege a management theory scenario, then the action could be pursued **against the defendants for whom the theory applies**.

{¶61} That said, the allegations in the complaint do not attribute to WellPoint and AICI the actions associated with the management theory. First, addressing AICI, the complaint alleges that "WellPoint through AICI establishes certain 'medical policies'". The corporate medical policy dealing with cochlear implants is attached to the complaint. It provides criteria for determining whether cochlear implants are medically necessary. The policy provides rationale, overview, background information and citations. At the end, it opines that bilateral implants are investigational. The insurance contract underwritten by CIC states that investigational procedures are not covered.

{¶62} AICI is not asserted to be a managing company. It is merely providing definitions, criteria, etc., and generally determines whether a particular medical procedure should be defined as investigational. It does not determine specific coverage or review individual claims for CIC or otherwise manage their operations or claims process. Thus, it has not been alleged to fit under the management theory.

{¶63} An easier way to explain why it cannot be sued for making definitions is by example. An insurance company could hire an outside source to come up with its medical policy, such as the American Medical Association (AMA). However, the AMA could not be liable for merely providing the insurance company a medical opinion, which the insurance company uses, on what is investigational.

{¶64} As to WellPoint, the complaint alleges that it is the parent and that it controls its subsidiaries to the point that they have no separate mind or will of their own. These types of allegations are typical piercing the corporate veil allegations. There is no allegation that CIC hired or formed WellPoint to manage it or its claims, or that CIC delegated such responsibility to WellPoint. The allegations are that WellPoint is the one who controlled the others to the point that it is claimed that they are really

one entity. Thus, the allegations do not fit in the typical management theory; rather, it fits under piercing the corporate veil theory.

{¶65} Therefore, Dombroski has not alleged sufficient facts to show that she can pursue WellPoint and AICI under the management theory. The trial court, however, held that "delegation theory is superseded by the test for piercing the corporate veil." We cannot allow this statement to stand. Although we held that the management/delegation theory has not been alleged to apply to WellPoint or AICI, it may apply in proper cases or against proper parties. AUMSI issued the denial here, and thus plays a direct part in managing CIC's claims. However, since AUMSI is not a party before us, we refrain from passing further judgment on AUMSI's status at this time.

{¶66} We also note that Dombroski makes what she sees as a separate contention under her "bad faith" argument that privity can be established due to a delegation of duties. She cites to the following example in the Restatement for support:

{¶67} "A, corporation, contracts with B to build a building. A delegates the entire performance to X and Y, the sole stockholders of A. Performance by X and Y in accordance with specifications discharges A's duty, since the supervision is not materially changed." 3 Restatement (Second of Contracts) §318, Illustration 8.

{¶68} As set forth supra, the management theory cases are synonymous with her delegation argument. For instance, when a corporation hires or forms a company to manage it or its claims, it in actuality is delegating its rights under the contract to the managing company. Thus, delegation is similar to the management theory that other state courts are using. Both companies, the managing company and the company being managed, would both be liable. Thus, her second argument is merely a reiteration of the first argument.

{¶69} Lastly, we forgo discussion of Dombroski's alternative theories that are merely listed in her brief without citation or argument. The "arguments" as to these alternative theories fail to comply with App.R. 16(A)(7). The record further discloses that none of these arguments were raised to the trial court. Moreover, we have

already determined that the complaint states a claim upon which relief could be granted.

CONCLUSION

{¶170} In conclusion, when viewed in the light most favorable to Dombroski, the complaint contains sufficient facts for pleading the doctrine of piercing the corporate veil and the establishment of privity. Each of the three prongs of *Belvedere* were alleged. Thus, the trial court's decision to dismiss the complaint is reversed and this case is remanded to the trial court for further proceedings. As to Dombroski's "bad faith" argument, which is better labeled as management theory, she cannot pursue these claims against WellPoint and AICI.

DeGenaro, P.J., concurs.

Donofrio, J., concurs.

B

(Cite as: Not Reported in N.E.2d)

C

Collum v. Perlman

Ohio App. 6 Dist.,1999.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District,
Lucas County.

Joan COLLUM, Appellee,

v.

Phillip PERLMAN, et al. Appellants.

No. L-98-1291.

April 30, 1999.

Clint M. McBee, for appellee.

William R. Lindsley, for appellants.

PIETRYKOWSKI.

*1 This is an appeal from a judgment of the Toledo Municipal Court which granted plaintiff-appellee, Joan Collum, a monetary judgment of \$9,325 against defendants-appellants, Wholesale Lighting & Supply Co. (" Wholesale Lighting") and Philip Perlman, jointly and severally, and in so doing held Perlman liable for a debt of Wholesale Lighting. From that judgment, appellants raise the following assignment of error:

" THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST THE DEFENDANT PHILIP PERLMAN."

At all times relevant to this case, Wholesale Lighting was a Subchapter S corporation solely owned by Philip Perlman. Perlman was the president and treasurer of Wholesale Lighting and his wife, Lynda Perlman, was

the vice president. There was no board of directors and Perlman made all of the management decisions for the company, with occasional advice from his accountant, Jim Weber, and employees. By November 1993, Perlman was having trouble managing the financial affairs of the company. In particular, the company was undercapitalized and Perlman often had to put his personal funds into the company to meet expenses. Weber suggested Perlman talk to appellee Joan Collum. Collum markets herself as an individual with accounting and business management expertise who can help businesses organize their finances and become more profitable. In November 1993, Perlman hired Collum on behalf of Wholesale Lighting to help with the company's financial difficulties.

Initially, Collum made a number of suggestions that were set forth in a document titled " RECOMMENDED ACCOUNTING AND OFFICE PROCEDURES FOR WHOLESALE LIGHTING AND SUPPLY CO." Ultimately, however, Collum became responsible for the corporate records and books, and regularly performed a number of finance related services for Wholesale Lighting. She always billed Wholesale Lighting for those services and, in helping to prepare Wholesale Lighting's tax returns, she included the cost of her services as a business expense. In addition, Collum recommended ways in which Perlman could infuse capital into the company and assisted Perlman in completing business loan applications. However, no bank would give Wholesale Lighting a business loan. Collum then assisted Perlman in taking out a home

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equity line of credit/ home refinancing loan for cash to put into the company.

In June 1995, Perlman remortgaged his home for \$136,000. To obtain that loan, however, the bank required Perlman to pay off his previous mortgage as well as some credit cards. Ultimately, Perlman cleared \$30,000 in cash which he used to pay vendors and other company expenses. His business, however, continued to flounder. Until April 1995, Wholesale Lighting paid Collum regularly for her services. Starting in May 1995, however, the invoices which Collum submitted to Wholesale Lighting for her services went unpaid. In September 1995, Collum ceased working for Wholesale Lighting. At that time, the invoices for work Collum performed for Wholesale Lighting from May 1995 to September 1995 totaled \$9,325.

*2 In August 1996, Perlman began the process of officially closing Wholesale Lighting. He liquidated the company by paying off one vendor with inventory and selling the remaining inventory to his current employer. He used the proceeds of that sale to pay payroll taxes and Michigan and Ohio sales taxes. He was not, however, able to pay all of the company's debts. In particular, he was not able to pay the \$9,325 owed to appellee nor was he able to pay approximately \$40,000 owed to vendors. Moreover, when he finally canceled his state of Ohio vendor's license on January 31, 1997, the company owed him approximately \$100,000 to \$120,000.

On November 20, 1995, Collum filed a complaint in the court below against both Wholesale Lighting and Perlman, seeking to recover the \$9,325 due her for services rendered. The case proceeded to a trial to the

bench at which Perlman, Collum and several other witnesses testified. On June 18, 1998, the court filed findings of fact, conclusions of law and a judgment entry awarding Collum \$9,325 against Wholesale Lighting and Perlman, jointly and severally. The court's findings of fact read:

" 1. Plaintiff was retained by Wholesale Lighting and Supply Co., hereinafter referred to as ' Co.,' by oral agreement, to work as a business consultant for ' Co.' for ten dollars per hour, in December, 1993.

" 2. Plaintiff submitted invoices to ' Co.' from December, 1993 through April, 1995 under the terms of the oral contract, and was paid for those services by corporate check of Defendant, ' Co.'

" 3. Plaintiff submitted invoices to ' Co.' from May, 1995 through August, 1995. Plaintiff submitted invoices to Defendant ' Co.' for \$9,325.00 for services under the oral contract during that period (Plaintiff's Exhibit # 4).

" 4. Defendant ' Co.' did not pay the invoices referenced in Finding of Fact # 3, nor did Defendant Perlman pay the invoices referenced in Findings of Fact # 3 and evidenced by Plaintiff's Exhibit # 3 and remained unpaid.

" 5. Wholesale Lighting and Supply Co. was a Subchapter S corporation during the time of Plaintiff's invoices (Tr. 14).

" 6. Defendant Perlman was President and Treasurer of ' Co.' and his wife was Vice President, but she had little or no involvement in the operation of ' Co.' (Tr. 13-15).

" 7. Defendant ' Co.' had no Board of Directors and was ' undercapitalized' (Testimony of Perlman).

" 8. Defendant Perlman began terminating the Defendant ' Co.' in 1996, but there was no formal dissolution of the Corporation.

" 9. Defendant Perlman had complete

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control of Defendant ' Co.' and answered to no one as to its day-to-day operations."

Based on these findings of fact, the court determined that the corporate veil of Wholesale Lighting should be pierced and that Perlman should be held individually liable for the debt to Collum. In making this determination, however, the court expressly stated: " Philip Perlman did not commit fraud through his control, however and [sic] unjust act was the result." It is from that judgment that appellants now appeal.

*3 In their sole assignment of error, appellants contend that the trial court erred in holding Philip Perlman individually liable for a debt of Wholesale Lighting, because Collum did not meet her burden of proving the grounds for piercing the corporate veil.

A well-established principle of corporate law is that where a valid corporation exists, a corporate officer will not be held personally responsible for the liabilities of that corporation. Centennial Ins. Co. v. Tanny Internatl.(1975), 46 Ohio App.2d 137, 141-142, 346 N.E.2d 330. " An exception to this rule was developed in equity to protect creditors of a corporation from shareholders who use the corporate entity for criminal or fraudulent purposes." Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc. (1993), 67 Ohio St.3d 274, 287, 617 N.E.2d 1075. Pursuant to this exception:

" The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was

exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Id.* at paragraph three of the syllabus.

In the present case, the evidence is clear that Philip Perlman exercised complete and total control over Wholesale Lighting such that Wholesale Lighting had no separate existence of its own. The evidence is equally clear, however, and the lower court so held, that Perlman did not commit fraud or an illegal act through his control of Wholesale Lighting. Nevertheless, the lower court found that because the company was undercapitalized and because Perlman did not follow adequate formalities when liquidating the corporate assets, the improper control and use of the corporation resulted in an unusual loss to Collum. The court therefore held that a grave injustice would occur if the corporate entity were not disregarded in this case.

Appellee cites an opinion from the Third District Court of Appeals in support of the trial court's decision. In that case, the court expanded upon the *Belvedere* standard and concluded that where shareholders exercise their control over a corporation in such a manner as to commit an unjust or inequitable act upon the person seeking to disregard the corporate entity, the second prong of the *Belvedere* test will be satisfied. Wiencek v. Atcole Co., Inc. (1996), 109 Ohio App.3d 240, 245, 671 N.E.2d 1339. In our view, however, that conclusion goes too far. In *Belvedere* the court recognized that the principal behind piercing the corporate veil was to hold " * * * individual shareholders liable for corporate misdeeds when it would be unjust to allow the shareholders to hide

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behind the fiction of the corporate entity.” *Id.* at 287, 617 N.E.2d 1075. However, in setting forth the three prong test as it did in paragraph three of the syllabus, the court appears to have limited the application of the doctrine to those situations in which “control over the corporation by those to be held liable was exercised in such a manner as to commit *fraud or an illegal act* against the person seeking to disregard the corporate entity[.]” (Emphasis added.) Nothing in the record before us supports a conclusion that Perlman exercised control over Wholesale Lighting in such a manner as to commit fraud or an illegal act against Collum.

*4 Accordingly, we find that the trial court erred in awarding Collum a judgment against Perlman and the sole assignment of error is well-taken.

On consideration whereof, the court finds substantial justice has not been done the parties complaining and the judgment of the Toledo Municipal Court is reversed as to its judgment against Perlman and affirmed as to its judgment against Wholesale Lighting. Court costs of this appeal are assessed to appellee.

JUDGMENT AFFIRMED, IN PART, AND REVERSED, IN PART.

HANDWORK, P.J. KNEPPER, and PIETRYKOWSKI, JJ. concur.

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C

[Cite as *Widlar v. Young*, 2006-Ohio-868.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Katherine M. Widlar

Court of Appeals No. L-05-1184

Appellant

Trial Court No. CVI-04-02619

v.

Randy Young, et al.

DECISION AND JUDGMENT ENTRY

Appellee

Decided: February 24, 2006

* * * * *

Katherine M. Widlar, pro se.

Stuart J. Goldberg, for appellee.

* * * * *

SKOW, J.

{¶ 1} Pro se appellant, Katherine M. Widlar, appeals from a judgment entry by the Toledo Municipal Court granting appellee Rudolph ("Randy") Young's motion for summary judgment. For the reasons that follow, the order of the trial court is affirmed.

{¶ 2} This case arises from a contract for dating referral services that was entered into between appellant, Katherine Widlar, and Second Mark of Ohio, dba MatchMaker International ("Matchmaker"). The contract was executed on December 26, 2000.

{¶ 3} On May 2, 2001, Widlar filed a pro se complaint in an earlier case against MatchMaker, wherein she sought rescission of the contract and a refund of her money. The trial court denied Widlar's claim and awarded judgment in favor of MatchMaker. On June 7, 2002, this court, in *Widlar v. MatchMaker Internatl.*, 6th Dist. No. L-01-1433, 2002-Ohio-2836, affirmed the trial court's decision.

{¶ 4} On October 21, 2002, Widlar finally began utilizing the MatchMaker services. A month later, she voluntarily put herself on "hold" status. She did not return to "active" status until May 23, 2003. Unfortunately for Widlar, on June 14, 2003, Second Mark of Ohio dba MatchMaker International ceased doing business.

{¶ 5} On February 14, 2004, Widlar brought the instant action for breach of contract against Young, individually, as the "proprietor of MatchMaker International." Young filed an answer to the complaint denying liability.

{¶ 6} On or about March 16, 2004, Widlar filed an amended complaint adding Second Mark of Ohio, Inc. dba MatchMaker International as a party, and asking the court "to pierce the corporate veil due to fraud." Young, through his counsel, filed an answer denying the allegations against him and a motion to transfer the case from small claims to the regular docket of the Toledo Municipal Court.

{¶ 7} On May 10, 2004, the case was transferred to the regular docket of the Toledo Municipal Court, and on December 22, 2004, Young moved for summary judgment. Widlar opposed the motion.

{¶ 8} On April 22, 2005, a hearing was held on the motion for summary judgment. The trial court ruled from the bench that the motion would be granted in favor of Young. At the court's request, defense counsel prepared and submitted a proposed judgment entry. On May 6, 2005, the trial court granted summary judgment in favor of Young and against Widlar.

{¶ 9} On May 25, 2005, Widlar filed a notice of appeal from the judgment entry. In this appeal, she asserts the following assignments of error:

{¶ 10} I. "THE MUNICIPAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE YOUNG'S MOTION FOR SUMMARY JUDGMENT."

{¶ 11} II. "THE MUNICIPAL COURT ERRED WHEN IT PASSED ITS VERDICT IN FAVOR OF DEFENDANT-APPELLEE YOUNG'S SUMMARY JUDGMENT MOTION DURING THE APRIL 22, 2005 HEARING WITHOUT GIVING BOTH SIDES EQUAL OPPORTUNITY TO PRESENT AND ARGUE THEIR EVIDENCE. THE COURT DID NOT ALLOW PLAINTIFF-APPELLANT PRO SE WIDLAR TO SHOW HOW THE EVIDENCE ATTACHED TO HER MOTION IN OPPOSITION PRESENTED A GENUINE ISSUE OF MATERIAL FACT, OR ENTER INTO EVIDENCE ADDITIONAL MATERIAL, REFERENCED IN HER MOTION IN OPPOSITION, WHICH WAS NOT GIVEN TO HER BY COUNSEL FOR DEFENDANT UNTIL AFTER THE DEADLINE TO FILE HER MOTION IN OPPOSITION HAD PASSED.

{¶ 12} "THE MUNICIPAL COURT REPEATED THE ERROR DURING THE MOTION HEARING ON JULY 15, 2005, AT WHICH PLAINTIFF-APPELLANT'S MOTION TO RECONSIDER THE ABOVE-MENTIONED RULING, AS WELL AS TWO OTHER MOTIONS, WAS TO BE CONSIDERED. THE COURT AGAIN DID NOT ALLOW PLAINTIFF-APPELLANT TO SPEAK TO THE EVIDENCE IN SUPPORT OF HER MOTION, OR PRESENT THE ADDITIONAL EVIDENCE, DESPITE REPEATED REQUESTS.

{¶ 13} "THE TRIAL COURT ERRED WHEN IT ACCEPTED AS FACT STATEMENTS MADE BY ATTORNEY GOLDBERG REGARDING THE NATURE AND CURRENT LEGAL STATUS OF THE COMPANY CONTROLLED BY HIS CLIENT, DEFENDANT-APPELLANT YOUNG, WITHOUT REQUIRING HIM TO PRESENT EVIDENCE IN SUPPORT OF HIS STATEMENTS."

{¶ 14} First, we examine Widlar's second assignment of error, wherein she states that the trial court erred: (1) in denying her an opportunity to present and argue her evidence; and (2) in accepting as fact, without supporting evidence, defense counsel's statements regarding the nature and current legal status of the company with which his client was involved.

{¶ 15} The transcript of the April 22, 2005 summary judgment hearing begins with the trial court asking defense counsel, Stuart J. Goldberg, to tell the court what the case is all about *in order to save the court the trouble of having to read the file*. In response, Goldberg obligingly provides the court with a brief description of the case, complete with

legal conclusions that (naturally) favor his client's point of view. For instance, in describing Young's involvement with the corporation, Goldberg states that Young "certainly was not an alter ego" for the corporation. And when the court asks, "And the corporation, I would guess, the organization of it was probably all totally valid and solid," Goldberg, without offering any evidentiary support, answers in the affirmative.

{¶ 16} After Goldberg, Widlar is given her turn to speak, such as it was. The following colloquy reflects the entirety of the proceedings that occur after the court asks Widlar to "talk" about the summary judgment:

{¶ 17} "MS. WIDLAR: The summary judgment relies upon – the argument here relies upon the fact that Mr. Young was not in the office with me when I signed the contract and cites North vs. Higby – no, it's not that – oh, here. This is James Smith and Associates vs. Everett, stating that there is not personal liability while conducting business with the third person on behalf of a corporation if the third person is aware that is the corporation with which he is dealing.

{¶ 18} "I was not aware that I was dealing with Second Mark; but that's not even relevant because that particular case refers to a situation in which a man was doing business with another man –

{¶ 19} "THE COURT: Okay.

{¶ 20} "MS. WIDLAR: -- who was --

{¶ 21} "THE COURT: I'm finding for the Defendant on summary judgment.

{¶ 22} "If you would like to get me a judgment entry, it would be of benefit for any future proceedings.

{¶ 23} "MR. GOLDBERG: Well, Your Honor –

{¶ 24} "THE COURT: And I strongly suggest that if you have thousands of dollars to spend on a dating service, you have that right; but I would suggest if you do this again, that you spend a small sum of money and hire an attorney to read your contracts for you and advise you before you sign them. Okay? So that's what we're doing now.

{¶ 25} "Could I expect that within 30 days?

{¶ 26} "MR. GOLDBERG: Yes, Your Honor, probably within a week.

{¶ 27} "THE COURT: Is that reasonable?

{¶ 28} "MR. GOLDBERG: Yes.

{¶ 29} "MS. WIDLAR: So, Your Honor, the evidence for a case against Second Mark –

{¶ 30} "THE COURT: I'm not answering any more questions about this case.

{¶ 31} "MS. WIDLAR: Sorry, Your Honor.

{¶ 32} "THE COURT: I've granted his motion for summary judgment. I would strongly suggest you get legal counsel, please.

{¶ 33} "MS. WIDLAR: Thank you, Your Honor.

{¶ 34} "(Proceedings concluded.)"

{¶ 35} Review of the transcript reveals not just a lack of preparedness and thoughtfulness on the part of the trial court, but also a flagrant and unexplained bias in

favor of Young and his counsel and against Widlar.¹ Not only did the court rely on defense counsel to educate it about the case, it accepted, apparently on faith, all that defense counsel had to say. It even asked defense counsel to draft the judgment entry in the case.²

{¶ 36} Widlar, on the other hand, was given almost no chance to speak, and no opportunity whatsoever to proffer evidence she had gathered in support of her opposition. She had barely begun her remarks when the trial court abruptly cut her off with a pronouncement that summary judgment was granted in favor of defendant. This was error as Widlar urged in her assignments of error; but, as will be seen below, it was harmless error.³

¹The transcript of the July 15, 2005 reconsideration hearing, although not relevant to a determination of this appeal (see this court's October 17, 2005 decision and judgment entry), can be similarly described. In that hearing, immediately after Widlar informed the court that she would like to present evidence in support of her opposition to the summary judgment motion --specifically, evidence concerning the issue of piercing the corporate veil -- the court stated: "I'll tell you what. I've reconsidered; I deny your motion. *I have pierced the veil before and was overturned.* I'm telling you you're going to have to find a better way of doing it because I'm not going to pierce this veil. * * *The corporation is in place; it's the way the law is." (Emphasis added.)

Apparently, the court's decision not to pierce the corporate veil in this case was based not on the facts before it, but on the fact that in a separate and unrelated case its decision to do so was reversed.

²The four-sentence judgment entry granting the motion is noteworthy in that it is devoid of meaningful analysis and contains no findings of fact. Its conclusions of law are set forth in a single sentence wherein the court states simply that there is no genuine issue of material fact, and that, as a matter of law, there is no basis to pierce the corporate veil of Second Mark of Ohio, Inc.

³Normally, this court would not comment on a trial court's conduct. Here, however, the issue of trial court's conduct was specifically raised in appellant's second assignment of error, and it was egregious.

{¶ 37} This court is well aware that, under Civ.R. 56(C), Widlar's attempted proffer on the day of the summary judgment hearing was untimely made. (Civ.R. 56(C) relevantly provides that "[t]he adverse party, *prior to the day of the hearing*, may serve and file opposing affidavits. * * *" Id. (Emphasis added.)) Caselaw makes clear, however, that the question of whether to consider an untimely filed affidavit is within the discretion of the trial court. *Clodgo v. Kroger Pharmacy* (Mar. 18, 1999), 10th Dist. No. 98AP-569, citing *Stanger v. Waterford Tower Co.* (Aug. 25, 1994), Franklin App. No. 94APE03-371, unreported; *Ryan v. Jones* (Oct. 26, 1993), Franklin App. No. 93AP-892, unreported; *Powell v. Consolidated Rail Corp.* (1986), 31 Ohio App.3d 219, 220. Where there is an abuse of that discretion, a trial court's decision is subject to reversal. Id.

{¶ 38} Here, Widlar states that documentary evidence she would like to have had admitted -- evidence that she had long sought from opposing counsel and had notified the court months earlier had not been produced -- was not provided to her by defendant until two weeks after her filing deadline.⁴

{¶ 39} We find that under the circumstances of the instant case, where defense counsel's delay in producing the requested documents made it impossible for Widlar to comply with the rules in a timely fashion, the trial court, in refusing to allow the admission, or even the proffering, of Widlar's evidence, clearly abused its discretion.

⁴She states that other evidence she would like to have had admitted was simply "too voluminous" to attach to her opposition document.

{¶ 40} The question now becomes whether such abuse of discretion resulted in unfair prejudice or, instead, amounted only to harmless error. To answer this question, we must consider the merits of Widlar's first assignment of error, wherein she claims that it was error for the trial court to grant Young's motion for summary judgment.

{¶ 41} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 42} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *"

{¶ 43} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 44} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial.

{¶ 45} According to Widlar, the trial court erred in this case when it denied Widlar's request to pierce the corporate veil in order to expose Young to personal liability.

{¶ 46} A well-established principle of corporate law provides that where a valid corporation exists, a corporate officer will not be held personally responsible for the liabilities of that corporation. *Collum v. Perlman* (April 30, 1999), 6th Dist. No. CVF 95-16341, citing *Centennial Ins. Co. v. Tanny Internatl.* (1975), 46 Ohio App.2d 137, 141-142. There is an exception to this rule, however, developed in equity to protect creditors of a corporation from shareholders who use the corporate entity for criminal or fraudulent purposes. *Id.*, citing *Belvedere Condominium Unit Owners' Assn. v. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287. Under this exception:

{¶ 47} "The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was

exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere*, supra, at paragraph three of the syllabus.

{¶ 48} Here, Widlar's proposed evidence, in the form of Second Mark of Ohio, Inc. documentation, shows: (1) that appellee Young was the sole shareholder and sole director of Second Mark of Ohio, Inc.; and (2) that it was Young, alone, who made the decision to close the business and terminate its employees.

{¶ 49} Although "[a] corporation is a separate legal entity from its shareholder even where there is only one shareholder in the corporation," some courts have held that this fact alone is sufficient to meet the first prong of the *Belvedere* test." *Stypula v. Chandler*, 11th Dist. No. 2002-G-2468, 2003-Ohio-6413 (citations omitted); see, e.g., *Zimmerman v. Eagle Mtge. Corp.* (1996), 110 Ohio App.3d 762, at 772 (stating, "The record is uncontroverted that Musgrave was the sole stockholder and director of Eagle and, as such, exercised complete control over Eagle's corporate affairs.")

{¶ 50} Here, where the proposed evidence demonstrates not just that Young was the sole shareholder and director of Second Mark of Ohio, Inc., but also that he single-handedly made the decision to close the business and terminate its employees, we find that reasonable minds could conclude that Young exercised complete control over the corporation such that the corporation had no separate mind, will, or existence of its own. Thus, the proposed evidence was sufficient to establish the first prong of the *Belvedere* test.

{¶ 51} As indicated above, the second prong of the *Belvedere* test requires that control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity. *Belvedere*, supra, at paragraph three of the syllabus. Widlar frankly states in her brief that she does not contend that defendant-appellee committed any outright fraud. Instead, citing *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 245, she argues that the "*unfairness and inequity*" that Young exhibited "by concealing from MatchMaker customers the true corporate name⁵, Second Mark of Ohio, Inc., by closing the MatchMaker office suddenly and without notice, and by making the corporation unservable⁶" are sufficient to satisfy the second prong of the *Belvedere* test.

{¶ 52} This court in *Collum*, supra, specifically addressed the *Wiencek* decision and stated as follows:

{¶ 53} "In that case, the court expanded upon the *Belvedere* standard and concluded that where shareholders exercise their control over a corporation in such a manner as to commit an unjust or inequitable act upon the person seeking to disregard the

⁵We note that Widlar does not dispute that the corporate name of Second Mark of Ohio, Inc. appears in large, bold print in the top of right-hand corner of the subject contract.

⁶With respect to her claim that the corporation was unservable, Widlar argues in her September 26, 2005 appellate brief that "[n]o representative of the corporation has responded to Plaintiff-Appellant's suit." Assuming the truth of this allegation, the evidence is uncontroverted that Young ultimately consented to judgment against Second Mark of Ohio, Inc. and, further, made no objection when the trial court granted Widlar's motion for default judgment in favor of Widlar and against the corporation.

corporate entity, the second prong of the *Belvedere* test will be satisfied. [Citation omitted.] In our view, however, that conclusion goes too far. In *Belvedere* the court recognized that the principal behind piercing the corporate veil was to hold * * * individual shareholders liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity.¹ [Citation omitted.] However, in setting forth the three prong test as it did in paragraph three of the syllabus, the court appears to have limited the application of the doctrine to those situations in which "control over the corporation by those to be held liable was exercised in such a manner as to commit *fraud or an illegal act* against the person seeking to disregard the corporate entity[.] (Emphasis added.)"

{¶ 54} Here, even assuming, arguendo, that Widlar's allegations are true, nothing in the record before us supports a conclusion that Young exercised control over Second Mark of Ohio, Inc. in such a manner as to commit fraud or an illegal act against Widlar.⁷ Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 55} In light of our determination that Widlar has failed to establish facts that would support relief from judgment (even with her proposed evidence), we are constrained to find that neither the trial court's failure to admit or consider the proposed evidence nor the trial court's uniquely poor handling of this case resulted in unfair

⁷To the extent that Widlar asserts in other portions of her brief that Young failed to follow proper formalities in dissolving the corporation, we find that such deficiencies, even if shown to be true, are likewise insufficient to satisfy the second prong of the *Belvedere* test. See *Collum*, supra, (corporate owner's failure to follow adequate

prejudice to Widlar. Indeed, the correct result was reached in this case, in spite of that poor handling. As a result, appellant's second assignment of error is found not well-taken.

{¶ 56} Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J.

JUDGE

William J. Skow, J.
CONCUR.

JUDGE

Dennis M. Parish, J.
CONCURS IN JUDGMENT ONLY.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

formalities when liquidating corporate assets did not satisfy second prong of *Belvedere* test.)

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STATE OF OHIO)	IN THE COURT OF APPEALS OF OHIO
)	
BELMONT COUNTY) SS:	SEVENTH DISTRICT
KIMBERLY DOMBROSKI,)	
)	CASE NO. 06 BE 60
PLAINTIFF-APPELLANT,)	
)	
VS.)	JOURNAL ENTRY
)	
WELLPOINT, INC., et al.,)	
)	
DEFENDANTS-APPELLEES.)	

Pursuant to App.R. 25, on October 1, 2007, appellees WellPoint, Inc. and Anthem Insurance Companies (Anthem) moved this court to certify a conflict between its decision in *Dombroski v. Wellpoint, Inc.*, 7th Dist. No. 06BE60, 2007-Ohio-5054, and the decisions of the Sixth District Court of Appeals in *Collum v. Perlman* (Apr. 30, 1999), 6th Dist. No. L-98-1292 and *Widlar v. Young*, 6th Dist. No. L-05-1184, 2005-Ohio-0868. On October 9, 2007, appellant Dombroski filed a timely memorandum opposing the motion to certify. Anthem filed a reply in support of certification the following day.

In *Dombroski*, this court found that the complaint pled sufficient facts to put the Anthem defendants on fair notice that Dombroski was attempting to pierce the corporate veil. In so holding, we looked to the three prong test for piercing the corporate veil that was set forth in *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274.

The second prong of *Belvedere* requires that "control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity." *Id* at paragraph 3 of the syllabus. We acknowledged that Dombroski was not alleging that there was an illegal act or an actual act of fraud. Rather, Dombroski maintained that certain acts were unjust or inequitable. This court stated:

"Many appellate districts, including ours, have defined the second prong of *Belvedere* as including unjust or inequitable acts. *State v. Tri-state Group, Inc.*, 7th Dist. No. 03BE61, 2004-Ohio-4441; *Robert A. Saurber General Contractor, Inc. v. McAndrews*, 12th Dist No. CA2003-09-239, 2004-Ohio-6927; *Dalicandro*, 10th Dist. Nos. 00AP-619, 00AP-656; *Wiencek v. Atcole, Inc.* (1996), 109 Ohio App.3d 240, 245 (3d Dist). But see, *Collum v. Perman* (Apr. 30, 1999), 6th Dist. No. L-98-1291; *Widlar v. Young*, 6th Dist. No. L-05-1184, 2006-Ohio-868 (describing these holdings as too expansive)." *Id.* at ¶29.

We then went on to hold that the complaint pled unjust or inequitable acts. *Id.* at ¶33. Thus, we found that if those acts were proven, the second prong of *Belvedere* could be established. Consequently, after viewing the pleadings in their entirety, we determined that it did state a claim upon which relief could be granted.

As stated above, Anthem contends that such a holding is in conflict with the Sixth Appellate Districts holdings in *Collum* and *Widlar*.

Collum was decided following a bench trial; the trial court granted judgment in favor of *Collum*. It found that *Collum* pierced the corporate veil and thus held the owner of the corporation personally liable. The trial court found that the owner did not commit fraud through the control of his corporation, however, an unjust act was the result of that control. Thus, the trial court found that an unjust act would satisfy the second prong of *Belvedere*. The Sixth Appellate District, however, disagreed. *Collum*, 6th Dist. No. L-98-1291. It explained:

"Appellee cites an opinion from the Third District Court of Appeals in support of the trial court's decision. In that case, the court expanded upon the *Belvedere* standard and concluded that where shareholders exercise their control over a corporation in such a manner as to commit an unjust or inequitable act upon the person seeking to disregard the corporate entity, the second prong of the *Belvedere* test will be satisfied. *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 245, 671 N.E.2d 1339. In our view, however, that conclusion goes too far. In *Belvedere* the court recognized that the principle behind piercing the corporate veil was to hold '* * * individual shareholders liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity.' *Id.* at 287,

617 N.E.2d 1075. However, in setting forth the three prong test as it did in paragraph three of the syllabus, the court appears to have limited the application of the doctrine to those situations in which 'control over the corporation by those to be held liable was exercised in such a manner as to commit *fraud or an illegal* act against the person seeking to disregard the corporate entity[.]' (Emphasis added.) Nothing in the record before us supports a conclusion that Perlman [the owner of the corporation] exercised control over Wholesale Lighting [Perlman's corporation] in such a manner as to commit fraud or an illegal act against Collum." *Collum*, 6th Dist. No. L-98-1291.

In *Widlar*, the owner of the corporation was granted summary judgment; the trial court found that the corporation could not be pierced. On appeal, the Sixth District found that the first element of *Belvedere* could be satisfied. *Widlar*, L-05-1184, 2006-Ohio-868, ¶50. As to the second prong, it recognized that *Widlar* did not contend any fraud, but rather sought to establish the second prong through a showing of "unfairness and inequity." *Id.* at ¶51. The Sixth District, relying on its prior decision in *Collum*, found that the second element required fraud or an illegal act. *Id.* at ¶52-53. Thus, it found that the second prong could not be satisfied and, as such, affirmed the trial court's grant of summary judgment for the corporation. *Id.* at ¶54-55.

As can be seen by those case synopses, the *Widlar* and *Collum* cases are procedurally different from the *Dombroski* case. Both of those cases were decided after some evidence was submitted to the court. In *Dombroski*, this court was reviewing whether the pleadings stated a claim upon which relief could be granted, Civ.R. 12(b)(6).

Section 3(B)(4), Article IV of the Ohio Constitution gives the courts of appeals of this state the power to certify the record of a case to the Supreme Court of Ohio "[w]henever * * * a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other Court of Appeals." Before certifying a case to the Supreme Court of Ohio, an appellate court must satisfy three conditions: (1) the court must find that the asserted conflict is "upon the same question;" (2) the alleged conflict must be on a rule of law--not facts; (3) in its journal entry or opinion, the court must clearly set forth the rule of law that it contends is in conflict with the judgment on the same question by another district court of appeals.

Whitelock v. Gilbane Bldg. Co. (1993), 66 Ohio St.3d 594, 596. The Tenth Appellate District has stated that the asserted conflict "must be over a question which is so material to both judgments as to be dispositive of the cases." *Lyons v. Lyons* (Oct. 4, 1983), 10th Dist. No. 82AP-949.

Despite the procedural differences between the cases, we find that there is an actual conflict "upon the same question." The decision in *Dombroski* would have been different if this court was of the opinion that an unjust or inequitable act could not satisfy the second prong of *Belvedere*. Likewise, the decisions in *Collum* and *Widlar* would have been different if the Sixth District was of the opinion that an unjust or inequitable result could satisfy the second prong of *Belvedere*. The dispositive question in all these cases is whether an unjust or inequitable action can satisfy the second prong of *Belvedere*.

Consequently, we certify the record in this case for review and final determination to the Ohio Supreme Court for the following issue:

"Does the second prong of *Belvedere*, which states that the corporate veil can be pierced when control of the corporation 'was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity,' also allow the corporate veil to be pierced in cases where control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an illegal act?" See, *Taylor Steel, Inc. v. Keeton* (2005), 417 F.3d 598, 611 (Dissenting Judge Gilman would have certified a similar question to the Ohio Supreme Court pursuant to S.Ct.Prac.R. XVIII).

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 NO. 06-BE-60
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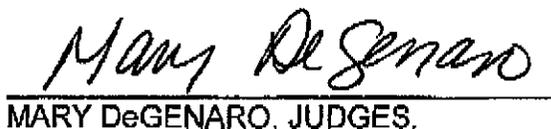
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 JOSEPH J. VUKOVICH,


 GENE DONOFRIO,


 MARY DeGENARO, JUDGES.