

IN THE SUPREME COURT OF OHIO

JAMES MINNO, et al.

Case No. 2008-0170

Plaintiff-Appellant

vs.

PRO-FAB, INC., et al.

On Appeal from the Trumbull County Court
of Appeals. Eleventh Appellate District,
Case No. 2007 T 0021

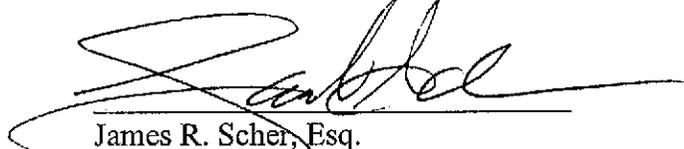
Defendant-Appellee

APPELLANTS' MEMORANDUM IN RESPONSE TO APPELLEE'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

Appellee is absolutely correct when it cites *Belvedere* as the authority to use for the purposes of piercing the corporate veil. As set forth by this Honorable Court, *Belvedere* uses a three prong test for a party seeking redress by piercing the corporate veil:

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 Condominium Unit Owners' Assn. vs. R.E. Roark, 67 Ohio St.3d 274.

Interestingly, *Belvedere* was also the test used by the Eleventh District in its opinion of this matter. As a matter of fact, the Court below relied heavily on the test set forth in *Belvedere* in making its determination, only referencing other case law to further support their decision as is common practice of all Appellate Courts.

Simply because Appellee in this matter is not satisfied with the outcome in how *Belvedere* was used, does not make this case a matter of public or great general interest. Appellee has failed to establish an issue of the within matter that would be of interest outside of the parties at hand. Appellee has not given reference to any authority in direct conflict with *Belvedere* or even cited any case law in their favor that even remotely resembles this matter.

Rather, Appellee cites *In Re Newtowne, Inc.* (S.D. Ohio 1993), 157 B.R. 374 and *North vs. Higbee Co.* (1936), 131 Ohio St. 507 in support of its argument. In both of those cases, the only common element between the corporations was the identity of the shareholders

of each corporation. It has been established in this matter that the corporations not only share corporate officers and employees, but also engage in the same business enterprise, have the same address and phone line, and complete the same jobs interchangeably, not to mention the continuous control of Pro-Fab over See-Ann and their involvement through every aspect of the job, i.e. the contract, the safety, the supervision, See-Ann's employees, and day to day operations, including the decision to not provide an aerial lift for the employees or fall protective equipment. Thus, the instant action is in no way similar to the *North* or *Newtowne* cases.

Appellee also attempts to turn the table by fabricating an example far removed from the case at hand. Appellee compares this matter to a corporation that operates a dry cleaner and one that owns and operates a strip mall, which has absolutely no comparison to the inherently risky and dangerous nature of steel erection of the facts presented in this matter. Even if the facts regarding the type of corporations at issue were in fair comparison, Appellee merely denotes the two having common shareholders, corporate office, phone line and employees. Appellee has forgotten to mention the identical management and supervision having control over one another, the sharing of equipment, engaging in the same industry, and the commingling of services and safety on the same exact jobs.

After establishing both corporations' unity of interest, if in Appellee's example, one corporation misrepresents its services to not only another corporation, but also the State of Ohio, fails to provide the required contracted services and obligated safety measures to the employees of its subsidiary, comingles its employees, supervisors and services with that of its subsidiary, and an injury results from an inherently dangerous activity, then both corporations should absolutely be held accountable after applying *Belvedere*. In that instance, Appellee's example would compare with the instant action, otherwise, Appellee's example barely even

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begins to scratch the surface as to the facts of this matter, much less give rise to the public or great general interest standard of review by the Supreme Court.

Appellee also goes through great lengths in its brief to make an issue out of the mentioning by Appellants of See-Ann's lack of liability insurance as somehow dispositive of this matter. However, the lack of insurance on the part of See-Ann was not the defining reason the Court below found a genuine issue of material fact for a jury. If anything, that diminutive fact added to the verification of control that is exerted by Appellee, Pro-Fab, over See-Ann, and in that instance, the introduction of evidence of insurance against liability is permitted pursuant to Ohio R. Evid. 411. Therefore, the exclusion encompassed in Evidence Rule 411 has not been disturbed in this instance, which also precludes any great public or general interest.

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STATEMENT OF THE CASE AND FACTS

On September 24, 2003, Appellant was an employee of See-Ann as an ironworker at the Newton Falls 3-6 Elementary school construction project (hereinafter "Newton Falls Project"). This was the first day that the crane was onsite for steel erection work.

Donald Fisher, interestingly, an employee of Appellee, Pro-Fab, Inc. (hereinafter Pro-Fab or Appellee), was the foreman onsite for See-Ann. As foreman, Mr. Fisher, a Pro-Fab employee, was specifically responsible for the safety of the workers for See-Ann onsite at the Newton Falls Project. Thus, Pro-Fab, through Mr. Fisher, was at all times in control of the employees and the work performed by See-Ann at the Newton Falls Project.

On September 24, 2003, Mr. Fisher instructed Appellant to get up onto a cement block wall with a fall hazard of approximately nineteen (19) feet without any personal protective equipment, fall protective equipment, or *the means to be able to tie off* and begin setting beams of steel into place, which Safety Resources, See-Ann and Pro-Fab's safety expert, later found to be contributing factors to Appellant's fall. Moreover, neither See-Ann, nor Pro-Fab, provided a lift for the Newton Falls Project despite the fact that See-Ann provided a lift for Appellant on all other past jobs.

Appellant subsequently lost his balance and fell off the wall to the outside of the building and landed on a two course footer with capped rebar sticking up. Appellant was seriously injured resulting in paraplegia.

Appellants contend that Pro-Fab is liable for the actions of Defendant, See-Ann, Inc. which caused severe and permanent injury to Plaintiff, James Minno, on the theory of "alter ego" as shown by particular commonalities and facts. For example, See-Ann and Pro-Fab are owned by the same individuals, namely Anna Cornelia Anke Verboom Myers (hereinafter Anna C. Myers) and Monroe Townsend, each of whom hold the same corporate interest in See-Ann

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and Pro-Fab. Also, See-Ann and Pro-Fab have the same officers; Anna C. Myers is the President and Treasurer for both companies and Monroe Townsend is the Vice President and Secretary for both companies.

Moreover, See-Ann and Pro-Fab have the same employees; Ginger Townsend is the controller for both companies; Donald Fisher is a foreman for both companies; and Michael Firth is a foreman for both companies. Additionally, major decisions to ensure safety on the jobsite are made by representatives and/or employees who work for both companies such as the decision to order a lift and require fall protection equipment to be worn, and specifically, the safety on the Newton Falls Project.

On May 9, 2005, Pro-Fab filed a Motion for Summary Judgment denying their direct involvement in Appellant, James Minno's, injuries.

On January 25, 2007, Defendant, See Ann's, Motion for Summary Judgment was denied and the case against them was to proceed. On the same day, Defendants, Hummel Construction and Pro-Fab's Motions for Summary Judgment were granted, and subsequently, on February 23, 2007, Appellants filed a Notice of Appeal seeking to reverse the decision of the trial court concerning the granting of judgment in favor of the Appellee, Pro-Fab.

On December 10, 2007, the Eleventh District Court of Appeals reversed and remanded the case, finding that there was a genuine issue of material fact when applying the *Belvedere* test to determine whether See-Ann was the alter ego of Pro-Fab.

On December 20, 2007, Appellee filed a Motion to Certify a Conflict, and on February 5, 2008, the Eleventh District Court of Appeals filed a Judgment Entry overruling Appellee's Motion. The Court stated that the cases cited by Appellee, *Newtowne* and *Higbee*, were not from other appellate districts, and even if they had been, there are merely factual distinctions and not an actual conflict of a rule of law.

Response to Proposition of Law No. I: The *Belvedere* test for piercing the corporate veil is applicable to this case, and Appellant has established a prima facie showing that all elements of the test were satisfied, and thus, the ruling of the Eleventh District Court of Appeals should stand, and the case must be remanded to the trial court for further proceedings.

Appellee asserts in its first Proposition of Law that the *Belvedere* test for piercing the corporate veil is not applicable in this case, and yet, a few short paragraphs into its argument, it cites *Belvedere* as the test to be used to disregard the corporate form. Obviously, Appellee acknowledges that *Belvedere* is the controlling authority in Ohio for those seeking to pierce the corporate veil, which was the test that was thoroughly applied in the Eleventh District's opinion in this matter.

In trying to differentiate between the use of *Belvedere* in most other cases as opposed to this case, Appellee has ineffectively attempted to argue the point that Appellant is seeking to pierce the corporate veil and hold the domineering shareholders, owners, and officers liable, but that Appellant cannot do so because he has not asserted a claim against those individuals. However, as stated by the Honorable Mary Jane Trapp, J. in her opinion of this matter:

Mr. Minno does not seek to hold the individual shareholders personally liable. However, whether one is attempting to pierce the corporate veil by holding individual shareholders liable or by holding a related company liable under alter-ego principles is a distinction without a difference.

Moreover, Appellee continues to argue that Appellant must show that Pro-Fab holds an "ownership interest" in See-Ann before they can pierce the corporate veil. This issue was also addressed by the Honorable Mary Jane Trapp, J. in her opinion in this matter as follows:

In either case, the question of control is not dependant upon ownership. As the Court stated in *Labadie Coal Co. vs. Black* (U.S. App. D.C. 1982), 672 F.2d 92, 97, a case in which private shareholders were alleged to control the corporation, the question is "whether the corporation, rather than being a distinct, responsible entity, is in fact the alter ego or business conduit of the person in control. In many instances, the person 'controlling' a close corporation is also the sole, or at least dominant shareholder. In other cases the controlling person may seek to avoid personal liability by not formally becoming a shareholder in the corporation. *The question is one of control, not merely*

paper ownership." (Emphasis added.) Thus, since we have determined that there was sufficient showing of control to overcome summary judgment, we reject Pro-Fab's arguments.

In support of the same, the Sixth Circuit noted in *Flynn v. Greg Anthony Constr. Co.*, 95 Fed. Appx. 726, that when attempting to show alter ego liability, "it is true that control, not ownership, is the determinative factor." Also, the United States Supreme Court has stated, "it is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders * * * will not create liability beyond the assets of the subsidiary. That "control" includes the election of directors, the making of by-laws * * * and the doing of all other acts incident to the legal status of stockholders.'" *United States v. Bestfoods*, 524 U.S. 51; 118 S. Ct. 1876; 141 L. Ed. 2d 43. Thus, there is a distinction between corporate control due to stock ownership and control of day-to-day operations of a subsidiary's business.

In the instant matter, Appellant has unequivocally shown the control by Pro-Fab of See-Ann's "day-to-day operations" as Donald Fisher, a Pro-Fab employee, was the foreman on site for See-Ann, was responsible for the safety of the workers for See-Ann at the Newton Falls Project, and was at all times in control of the employees and the "day-to-day" work performed by See-Ann at the Newton Falls Project.

Furthermore, according to the Subcontractors Agreements, Pro-Fab was responsible for furnishing all of the labor, materials, equipment, competent supervision, tools, and scaffolding for proper performance of the steel work for the Newton Falls Project, and in fact See-Ann, not Pro-Fab, performed the dangerous work without the knowledge or approval of the General Contractor or the State of Ohio, as required.

In support of its argument, Appellee cites *Enwotwen Industries, Inc. vs. Brookstone Limited Partnership*, 157 B.R. 374, in which the only common element between the two corporations of that case was the identity of the shareholders of each corporation. In contrast

to *Enwotwen*, it has been established throughout this matter that the corporations not only share corporate officers and employees, but also engage in the same business enterprise, have the same address and phone line, and complete the same jobs. Moreover, Appellee, through discovery, admitted their involvement through every aspect of the job, i.e. the contract, the safety, the supervision, See-Ann's employees, and day to day operations, including the decision to not provide an aerial lift for the employees or fall protective equipment. Thus, the instant action is in no way similar to the *Enwotwen* case.

In support of the same, the Honorable Mary Jane Trapp, J. acknowledged in her opinion in this matter as follows:

The evidence in this case establishes that the two entities shared more than common ownership and officers. They also shared the same business address and had the same corporate business and purpose, i.e. "to perform structural and miscellaneous steel erection." The fact that the two entities were incorporated on different dates does not mean that they are separate and distinct entities as a matter of law. Of particular significance is the history behind the ownership of the two companies. Initially, under prior ownership, Pro-Fab was engaged in the steel erection and fabrication business. However, current vice-president and secretary of both businesses, Monroe Townsend, testified that he was working for Pro-Fab when he founded See-Ann at the time Pro-Fab decided to get out of the steel erection business. Subsequently, Mr. Townsend purchased Pro-Fab and decided to have Pro-Fab get back into the erection business. Thus, at some point after there was common ownership of both companies, their functions became more indistinguishable.

This is also reflected in the fact that some of the companies' employees, such as foremen, commonly work for both entities depending on the particular job. Moreover, safety training is combined for both entities and both companies share a similar written safety and loss control program. Tools and supplies are also shared, and according to Mike Firth, who was employed as a foreman for both companies, Pro-Fab provides the welding equipment used on the jobs for both Pro-Fab and See-Ann.

Also in its Opinion, the Court in this matter cited *Flynn vs. Greg Anthony Construction Co.*, 6th Cir. No. 01-3391, 2003 U.S. App. LEXIS 23024, as a case very similar to the instant action. In *Flynn*, the companies in question shared the same management and supervision by sharing the same President and Treasurer; they operated from the same location; used the same phone lines and office materials; they had shared assets; engaged in

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the same business industry; and had interchanged services on the same job. In light of the foregoing, the Court in *Flynn* held that the facts “established the first requirement of the alter-ego test – complete ‘unity of interest and ownership’ such that the corporations do not have ‘separate personalities.’”

Other cases similar to that of *Flynn* and the present matter include *Music Express Broad. Corp. v. Aloha Sports, Inc.*, 161 Ohio App. 3d 737, in which the court held that “*Belvedere* does not preclude nonparties to the litigation from exercising managerial or decision making authority. Rather, the alter ego element of *Belvedere* requires a demonstration of control that would indicate the corporation has no ‘separate mind, will, or existence of its own.’ A corporation may still be functionally ‘indistinguishable’ from its shareholder(s) even where the shareholder(s) delegate certain managerial or operative decision making authority to other individuals.” (Emphasis added).

Also, in *State v. Tri-State Group, Inc.*, 2004 Ohio 4441, the Court held that “in applying the ‘instrumentality’ or ‘alter ego’ doctrine, the courts are concerned with reality and not form, with how the corporation operated and the individual defendant’s relationship to that operation.”

In *Microsys Computing, Inc. v. Dynamic Data Sys., LLC*, 2006 U.S. Dist. LEXIS 53397, the Court acknowledged that “the Sixth Circuit has extended application of the alter ego theory of personal jurisdiction beyond the parent-subsidary context and concluded that assessing whether one company is the alter ego of another company involves the application of a test identical to determine whether a subsidiary is the alter ego of the parent. The Court, therefore, concludes that it may exercise personal jurisdiction over a corporate entity premised on its corporate contacts with the forum state where a plaintiff alleges facts sufficient to prove that another corporation served as an alter ego for the corporate entity’s benefit.”

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However, in *Microsys* the Court ruled against the Appellant, finding that there was not sufficient evidence to support the finding of an alter ego relationship in order to impose the Ohio long-arm statute for specific jurisdiction. A determining factor that set *Microsys* apart from *Flynn* and the current action is the fact that the corporations to be disregarded in *Microsys* had never commingled work projects by interchanging their services on the same job and by using the same equipment and employees. *Microsys* at 23. As articulated throughout, and further proven through discovery, Pro-Fab and See-Ann commingled their work on the Newton Falls Project by interchanging their services on the same job and by using the same equipment and employees, and have undoubtedly done the same on other projects. Therefore, in light of the foregoing facts and commonalities to other cases of its stature, Pro-Fab is undoubtedly the alter ego of See-Ann, and Pro-Fab must be held liable as such.

Response to Proposition of Law No. II: Ohio R. Evid. 411 does not require the exclusion of evidence of insurance against liability when offered to show ownership or control. The lack of liability insurance on the part of See-Ann further demonstrates Pro-Fab's control over See-Ann, and moreover, regardless of the lack of insurance, Pro-Fab committed a fraud, wrong, or inequitable result by contracting with Hummel under false pretenses, satisfying the second prong of the *Belevedere* test.

Pursuant to the test set forth by *Belevedere* in piercing the corporate veil, the second prong requires the showing that Appellee used the control established under the first prong to commit a fraud or wrong. In support of the same, Appellants, in their brief, mentioned the fact that See-Ann, Inc., the alter ego of Appellee, who performs inherently dangerous work, has been without proper liability insurance to cover injuries of its employees that could potentially result from frequent hazardous and unsafe conditions that their employees are subject to, and that lack of insurance causes it to be substantially undercapitalized. Appellants also argued that it was done so as to relieve the alter ego of the expensive nature of adequately protecting its employees, thereby committing a fraud or wrong. The dual owners and officers

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conveniently picked which company to insure and which to perform inherently dangerous work for that company while being uninsured, further demonstrating that control.

However, See-Ann's lack of insurance was not the only issue raised by Appellants in illustrating the second prong of the Belvedere test. Appellants also demonstrated facts in support of the second prong by indicating how Pro-Fab had entered into a Subcontract with Defendant, Hummel Construction Company, to complete the steel erection work on the Newton Falls Project. Nonetheless, See-Ann completed the work on behalf of Pro-Fab. Pro-Fab did not disclose to Hummel that See-Ann was the company responsible for completing the steel erection work on the Newton Falls Project as it was requested to do. Furthermore, all the representatives for See-Ann held themselves out to be representatives of Pro-Fab to Hummel. Therefore, Pro-Fab fraudulently, wrongfully and inequitably represented to Hummel that it would be responsible for completing the steel erection work, carry liability insurance on the Newton Falls Project, and be responsible for the safety of its employees, when truthfully See-Ann would be the company responsible for the same, without any coverage.

In its opinion, the Eleventh District did take See-Ann's lack of insurance into account, however, it was noted that "the lack of liability insurance, *at the least*, raises a genuine issue of fact on this second prong, especially in light of the fact that the Subcontract for Building Construction between Hummel and Pro-Fab required insurance at Article 13 and it would appear that this requirement was circumvented by the subsequent subcontract to See-Ann." (Emphasis added).

If anything, the fact that Pro-Fab did not place insurance with See-Ann further demonstrates Pro-Fab's control over See-Ann, which Ohio R. Evid. 411 provides no exclusion of evidence of insurance against liability when offered to show ownership or

control. Therefore, it is within Appellants' right to demonstrate how See-Ann was and is substantially undercapitalized due to the control and planning exerted by Pro-Fab.

Regardless of the facts surrounding insurance or the lack thereof, a fraud, wrong, and injustice was committed by Appellee when it wrongfully contracted with Hummel by making false representations about the work to be performed at the Newton Falls Project in which Hummel relied to the detriment of all involved.

Additionally, in *Music Express Broad*, the Court noted that the law announced in *E.S. Preston Assoc., Inc. vs. Preston*, 24 Ohio St.3d 7, 11, 24 Ohio B. 5, 492 N.E. 2d 441 (1986), with regard to the fraud element is in no way inconsistent with *Belvedere*. The Court in *Preston* stated that "although the Supreme Court of Ohio has not expressly addressed this issue, it appears to agree that the perpetuation of a fraud or illegality is not the sole ground for disregarding the corporate entity." Moreover, other appellate courts in Ohio have disregarded the corporate entity in instances where there is evidence of harm, injustice, or fundamental unfairness. *LeRoux's Billye Supper Club vs. Ma*, 77 Ohio App. 3d 417 (Ohio Ct. App. 1991).

Moreover, "the test set forth in *Belvedere* is open-ended and versatile, i.e., it permits and encourages flexibility by its very definition." *Music Express Broad. Supra*. In referencing this for the second prong of the *Belvedere* test, the United States Sixth Circuit Court of Appeals has specifically held that fraud, as an element of this test is not essential. Rather, the corporate fiction would be disregarded when its retention would produce injustice or inequitable consequences. *Bucyrus-Erie Co. vs. Gen Prod* (C.A. 6, 1981), 643 F.2d 413.

It has also been stated that the corporate entity should be disregarded only when justice cannot be served in any other way. *Supra. Preston*. It is an injustice to Appellant, James Minno, that a Pro-Fab employee was at all times during the Newton Falls Project the person in control of the work performed that day. It is an injustice to James Minno that a Pro-

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Fab employee was in control of the safety, supervision, and decision to not provide an aerial lift or fall protective equipment that day. Furthermore, it is an injustice to James Minno that he is forever condemned to a wheelchair for doing the work he was instructed to do by a Pro-Fab employee, not to mention, the continuing injustices to James Minno's family, who will no longer have the companionship of an active and able father or husband. It would be an injustice not to hold those who are responsible, accountable.

CONCLUSION

For the reasons discussed above, this case does not involve matters of public or great general interest. Appellants respectfully request that this Court not accept jurisdiction in this case because Appellee has failed to establish an issue of the within matter that would be of interest outside of the parties at hand, as the issues and authorities presented are not in direct conflict with *Belvedere* as the controlling authority in Ohio for cases of this nature.

Respectfully submitted,



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