

IN THE SUPREME COURT OF OHIO

KIMBERLY DOMBROSKI,)
)
 Appellee,)
 v.)
)
 WELLPOINT, INC. and)
 ANTHEM INSURANCE)
 COMPANIES, INC.)
)
 Appellants.)

CASE NO. 2007-2162

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

MERIT BRIEF OF AMICI CURIAE OHIO COUNCIL OF RETAIL MERCHANTS, OHIO CHAMBER OF COMMERCE, THE OHIO CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE OHIO FARM BUREAU FEDERATION IN SUPPORT OF APPELLANTS

Linda S. Woggon (0059082)
230 E. Town Street
P. O. Box 15159
Columbus, OH 43215
(614) 228-4201
(614) 228-6403
lwoggon@ohiochamber.com

ATTORNEY FOR AMICI CURIAE OHIO CHAMBER OF COMMERCE, OHIO COUNSEL OF RETAIL MERCHANTS, THE OHIO CHAPTER OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND THE OHIO FARM BUREAU FEDERATION

Robert G. Palmer (0022152)
(Counsel of Record)
Robert Gray Palmer Co., LPA
Suite 1200
Columbus, OH 43215
(614) 484-1200
(614) 484-1201 facsimile
bob@rgpalmerlaw.com

ATTORNEY FOR APPELLEE
KIMBERLY J. DOMBROSKI

Suzanne K. Richards (0012034)
(Counsel of Record)
Robert N. Webner (0029984)
VORYS, SATER, SEYMOUR AND PEASE
LLP
52 East Gay Street
Columbus, OH 43215
(614) 464-6458
(614) 719-4920 facsimile
skrichards@vorys.com

ATTORNEYS FOR APPELLANTS
WELLPOINT, INC. AND
ANTHEM INSURANCE COMPANIES, INC.

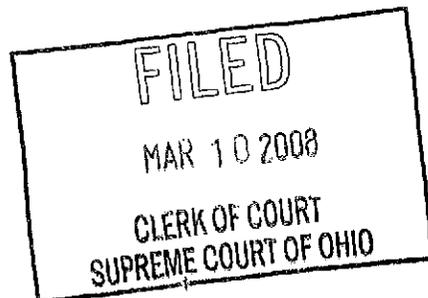


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
STATEMENT OF FACTS	3
ARGUMENT.....	3
I. Development of a Policy of Limited Shareholder Liability.....	3
II. Development of Ohio Law Regarding Shareholder Liability for Corporate Obligations.....	5
A. The Early Years: Recognizing the Value of the Corporate Form.....	5
B. The <i>Belvedere</i> Decision	7
C. Post- <i>Belvedere</i> Appellate Court Developments: Opening the Floodgates to Individual Shareholder Liability	9
III. Ramifications of Expansive Approaches To Piercing The Corporate Veil.....	14
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Page

CASES

Belvedere Condo. Owners' Assn. v. R.E. Roark Companies, Inc. (1993), 67 Ohio St.3d 274..... passim

Bucyrus-Erie Co. v. General Products Corp. (6th Cir. 1981), 643 F.2d 413 8, 9

Cincinnati Volksblatt Co. v. Hoffmeister (1900), 62 Ohio St. 189 5

Connolly v. Malkamaki (Dec. 13, 2002), 11th Dist. No. 2001-L-124, 2002 WL 31813040, 2002-Ohio-6933..... 10

Dalicandro v. Morrison Road Develop. Co., Inc. (Apr. 17, 2001), 10th Dist. Nos. 00AP-619; 00AP-656, 2001 WL 379893 12, 13

Dombroski v. WellPoint, Inc. (2007), 173 Ohio App.3d 508, 2007-Ohio-5054..... 13, 14

First Natl. Bank of Chicago v. F.C. Trebein Co. (1898), 59 Ohio St. 316 6

Music Express Broadcasting Corp. v. Aloha Sports, Inc. (2005), 161 Ohio App.3d 737, 2005-Ohio-3401..... 10

North v. Higbee Co. (1936), 131 Ohio St. 507 passim

Nursing Home Group Rehab. Serv., LLC v. Suncrest Health Care, Inc. (2005), 162 Ohio App.3d 577, 2005-Ohio-3945..... 10, 11

Parkside Cemetery Assn. v. Cleveland, Bedford & Geauga Lake Traction Co. (1915), 93 Ohio St. 161 5

Siva v. 1138 LLC (Sept. 11, 2007), 10th Dist. No. 89115, 2007 WL 2634007, 2007-Ohio-4677..... 10

State ex rel. Attorney General v. Standard Oil Co. (1892), 49 Ohio St. 137 5, 6

Widlar v. Young (Feb. 24, 2006), 6th Dist. No. L-05-1184, 2006 WL 456724, 2006-Ohio-868..... 9

Wiencek v. Atcole Co., Inc. (1996), 109 Ohio App.3d 240..... 11, 12

OTHER AUTHORITIES

Bainbridge, Abolishing Veil Piercing, 26 J. CORP. L. 479 (2001)..... 5

Manne, Our Two Corporation Systems: Law and Economics, 53 Va.L.Rev. 259
(1967)..... 5

Presser, Thwarting the Killing of the Corporation: Limited Liability, Democracy,
and Economics, 87 N.W. U.L.REV. 148 (1992) 4

STATEMENT OF INTEREST OF AMICI CURIAE

More than 90,000 of Ohio's businesses are incorporated. See Ohio Department of Taxation, Tax Date Series, Number of Corporations and Reported Tax Liability by Tax Base, Tax Year 2006 (released Aug. 16, 2007). Moreover, many of Ohio's corporate businesses are small. In fact, more than half – 61 percent – of the full-time businesses in Ohio are operated by the business owner himself or herself, working full-time without any paid employees. See Ohio Small Business Facts (released Jan. 26, 2001), available at www.nfib.com, last visited Feb. 27, 2008. Likewise, among “employer businesses,” which are defined as businesses providing full-time jobs to people other than the owners, 95 percent have fewer than 100 employees, 75 percent have fewer than 10 employees, and approximately half have fewer than 5 employees. *Id.*

Ohio's small business owners provide more than half of all wage-and-salary jobs in the state's private sector. *Id.* In Ohio, and in the nation as a whole, small businesses lead the way in job creation. From 1991 to 1995, businesses employing fewer than 100 people accounted for 3 out of every 5 new jobs in Ohio. *Id.* During that same period, Ohio's smallest businesses, those with fewer than 20 employees, logged the highest growth rate, expanding their work force by 9.3 percent. *Id.*; see also Why we need small businesses (May 29, 2003), available at www.nfib.com, last visited Feb. 27, 2008. In contrast, during that same time period, the work forces employed by the largest private employers in Ohio (those with 5,000 or more employees) shrank by 1.6 percent. See Ohio Small Business Facts (released Jan. 26, 2001). Moreover, according to a U.S. Small Business Administration report, small businesses with 500 or fewer employees “produce *half* the goods and services in the [U.S.] economy.” Debunking Small-Business Myths (released Sept. 26, 2007), available at www.nfib.com, last visited Feb. 27, 2008 (emphasis added.) For all of these reasons, small businesses are a very important part of the economy, both nationally and in Ohio.

Amici curiae represent these vitally important businesses. The Ohio Chapter of the National Federation of Independent Business, an association of more than 36,000 members, is dedicated exclusively to the interests of small and independent business owners. Its business members are diverse, and include construction, manufacturing, retail, transportation, professional, and agricultural businesses. Its individual members typically employ fewer than 10 people and record annual gross sales of less than \$250,000.

The Ohio Council of Retail Merchants is a state-wide trade association representing more than 3,000 businesses, many of which are independently owned retail businesses. Founded in 1922, it has served as the voice of retailing in Ohio for more than 85 years.

The Ohio Chamber of Commerce (the “Chamber”) promotes and protects the interests of its 4,000 business members, while working to create a more favorable climate for business in Ohio. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber focuses on initiatives that encourage a strong pro-jobs environment in Ohio and a business climate that invites expansion and growth.

The Ohio Farm Bureau Federation (the “Farm Bureau”) is the state’s largest general farm organization and advocacy group with over 220,000 members. Founded nearly 80 years ago in 1919, the Farm Bureau represents farmers, growers, producers, processors, family farms and others in a \$9.3 billion annual industry. The Farm Bureau advocates for private property rights, equitable taxation and fiscally sound government, and against any and all developments that might inhibit agricultural production in our state.

Small business owners in Ohio, like those throughout the country, depend on the protection of incorporation – with its promise of limited shareholder liability – to shield their personal assets from the creditors of their businesses. These business owners are greatly troubled by the

decisions of Ohio appellate courts, such as the decision of the court below, which have eroded the protections afforded by the limited liability doctrine and which have strayed from the strict “veil-piercing” test articulated by this Court in *Belvedere Condo. Owners’ Assn. v. R.E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274.

These Ohio appellate court decisions increasingly are exposing Ohio’s small business owners to personal liability for the standard business activities of the corporations which they have formed and in which they have invested their time, their efforts, and their money. These decisions also will encourage plaintiffs to name shareholders as separate defendants in lawsuits that challenge corporate actions, and thereby will impose increasing costs and burdens on small business owners. For all of those reasons, such judicial decisions undercut the value of incorporation and inevitably will deter the business risk-taking that is an essential element of economic growth.

Amici curiae therefore urge this Court to adhere to its decision in *Belvedere*, to reaffirm the principles of limited shareholder liability that accompany incorporation under Ohio law, and to hold that the corporate veil may only be pierced – and shareholders held personally liable to corporate creditors – when the corporate form has been used to commit “fraud or an illegal act.”

STATEMENT OF FACTS

Amici curiae adopt the factual recitations of the Appellants.

ARGUMENT

I. Development of a Policy of Limited Shareholder Liability

The doctrine of “piercing the corporate veil” is inextricably linked with the predicate principle of limited shareholder liability. Although limited shareholder liability is now accepted

as a fundamental tenet of American corporate law, see *Belvedere*, 67 Ohio St.3d at 287, that was not always the case.

At the beginning of the nineteenth century, unlimited shareholder liability was the general rule in most states. See Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 N.W. U.L.REV. 148, 156 (1992). State legislatures imposed unlimited liability upon corporate shareholders, apparently based on the belief that without such security for corporate creditors, manufacturing and industrial concerns would find it impossible to operate and expand their businesses. *Id.*

By the fourth decade of the nineteenth century, however, the vast majority of states had concluded that economic growth could best be fostered by implementing limited shareholder liability. *Id.* That is, encouraging the accumulation of funds within the corporate structure, which could then be invested in emerging technologies, expanding markets, and other new opportunities, became the preferred method for fueling economic growth. *Id.* Moreover, this economic justification for limited shareholder liability was matched by a democratic justification. *Id.* Without limits on shareholder liability, it was thought that only the wealthiest citizens could invest in corporations; yet, without the investments of those in the middle and working classes, widespread economic progress could not be achieved. *Id.* Furthermore, by limiting shareholder liability, states could encourage the small-scale entrepreneur and keep entry into business markets competitive and democratic. *Id.* Limited shareholder liability, therefore, “is of a piece with other nineteenth-century manifestations of rugged individualism, and reflects a traditional American policy to favor the small-scale entrepreneur.” *Id.* at 163.

The economic and democratic justifications for limited shareholder liability continue to ring true today. Limited liability affords small business owners the protection they need to

operate, and to expand, their businesses. Limited liability also allows for and encourages widespread participation in corporate investing. See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479, 495-96 (2001) (“One of the great advantages of the large corporate system is that it allows individuals to use small fractions of their savings for various purposes, without risking a disastrous loss if any corporation in which they have invested becomes insolvent.”), quoting Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va.L.Rev. 259, 262 (1967)).

The doctrine of limited shareholder liability has paid handsome dividends for Ohio. As noted above, the state’s economy continues to benefit both from the growth, and job generation, of small corporate businesses and from the participation of all investors in those businesses.

II. Development of Ohio Law Regarding Shareholder Liability for Corporate Obligations

A. The Early Years: Recognizing the Value of the Corporate Form

This Court has long recognized the propriety of organizing one’s business affairs through the use of the corporate form. Nearly a century ago, this Court touted its record of “giv[ing] full recognition to the important part [corporations] have played in the development of our resources and business, and to the necessity of protecting them in the exercise of their legitimate functions.” *Parkside Cemetery Assn. v. Cleveland, Bedford & Geauga Lake Traction Co.* (1915), 93 Ohio St. 161, 168. Those legitimate functions include making contracts, acquiring property for corporate purposes, suing and being sued, perpetuating the organization, and, perhaps most importantly, preserving the limited liability of the shareholders by distinguishing between the debts and property of the company and those of the shareholders in their capacities as individuals. See *State ex rel. Attorney General v. Standard Oil Co.* (1892), 49 Ohio St. 137, 179; *Cincinnati Volksblatt Co. v. Hoffmeister* (1900), 62 Ohio St. 189, 200-01.

To be sure, this Court has also recognized that the benefits derived from incorporation are not limitless, and that the corporate legal entity may be disregarded when it is used for “an intent and purpose not within the reason and policy of the fiction” of the corporate form. *State ex rel. Attorney General v. Standard Oil Co.* (1892), 49 Ohio St. 137. This Court has consistently emphasized, however, that the circumstances in which the legal fiction of the separate corporate form may be disregarded, so as to hold the shareholders individually liable for the corporation’s obligations, are and must be both *limited* and *narrow*.

In *First Natl. Bank of Chicago v. F.C. Trebein Co.* (1898), 59 Ohio St. 316, a bank obtained judgment against an individual and sought to collect on that judgment from the individual’s newly formed corporation, to which he had conveyed certain real estate. Finding that the corporation and its shareholder were separate legal entities, the lower court entered judgment in favor of the defendants. This Court reversed, holding that the fiction of a corporation as an entity distinct from its shareholders “is limited to the uses and purposes for which [the corporate form] was adopted – convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members.” *Id.* at syllabus ¶1. Thus, when a corporation is “*formed* for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction,” the Court held that the corporate fiction should be disregarded. *Id.* (emphasis added).

Nearly 40 years later, this Court reaffirmed the vitality of these principles in the context of a corporate parent’s potential liability for debts of its wholly owned subsidiary. In *North v. Higbee Co.* (1936), 131 Ohio St. 507, the Court reversed a judgment against a parent and subsidiary, holding that “[t]he separate corporate entities of parent and subsidiary corporation will not be disregarded . . . in the absence of proof [1] that the subsidiary was *formed* for the

purpose of perpetrating a fraud, and [2] that the domination by the parent corporation over its subsidiary was *exercised* in such manner as to *defraud* [a] complainant.” *Id.* at syllabus ¶1 (emphasis added). Moreover, this Court noted that organizing as a corporation in order to avoid personal liability – the reason most people incorporate their businesses – does not, in itself, constitute fraud sufficient to justify disregarding the corporate form. *Id.* at 518 (“A subsidiary may be formed for the very reason that prompts individuals to form corporations, *to protect themselves from personal liability*, to make only its capital liable”) (emphasis added).

Thus, prior to the *Belvedere* decision, this Court had routinely instructed Ohio courts to refrain from imposing liability on shareholders for the corporation’s obligations in the absence of evidence both that the corporation was formed to perpetuate a fraud *and* that the shareholders exercised their control over the corporation in order to defraud the complainant.

B. The Belvedere Decision

In *Belvedere Condo. Unit Owners’ Assn. v. R.E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274, a condominium owners’ association brought an action for breach of fiduciary duty against the condominium developer. The developer was a limited partnership in which a corporation was both the general partner and the owner of a minority interest in the limited partnership. *Id.* at 275. The owners’ association sought to impose personal liability upon the majority shareholder of the corporate general partner. After hearing evidence, the trial court entered judgment for the owners’ association and against both the corporate general partner and the majority shareholder, jointly and severally. *Id.* at 277. The court of appeals affirmed.

In reversing that decision, this Court considered the proper standard under Ohio law for piercing the corporate veil so as to hold individual shareholders personally liable for the corporation’s obligations. This Court noted that it had not addressed the appropriate standard for

piercing the corporate veil since *North v. Higbee*, in which it had “required a party seeking to pierce a corporate veil to prove two essential facts: (1) that the corporation was formed in order to perpetuate a fraud, and (2) that the shareholder’s control of the corporation was exercised to defraud the party.” *Id.* at 287. The *Belvedere* Court then concluded that the first prong of the *North* test “no longer reflects the realities of modern corporate life.” *Id.* The Court reasoned that corporations formed for legitimate purposes “can easily be later used to commit fraud or other wrongs” and that “in practice it would be unreasonably difficult to prove that any corporation was actually formed in order to perpetrate a fraud.” *Id.*

Following the lead of the *Belvedere* appellate court, this Court also reviewed the opinion of the United States Court of Appeals for the Sixth Circuit in *Bucyrus-Erie Co. v. General Products Corp.* (6th Cir. 1981), 643 F.2d 413. In that case, the Sixth Circuit had suggested a three-pronged test for determining when the corporate form should be disregarded under Ohio law. This Court explained the parallels between its test in *North* and the Sixth Circuit’s test in *Bucyrus-Erie* as follows:

One factor recognized by the Sixth Circuit, that the shareholder’s domination of the corporation was used to commit fraud or another wrong, was part of the *North* test. The Sixth Circuit also explicitly articulated two elements that we believe were implicit in *North*: the plaintiff must show that [1] the corporation is so dominated by the shareholder that it has no separate mind, will, or existence of its own, and [2] that injury or unjust loss resulted from the shareholder’s control of the corporation. The first element is a concise statement of the alter ego doctrine; to succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable. The second element is the requirement that the shareholder’s control of the corporation proximately caused the plaintiff’s injury or loss. Both are fairly obvious, but necessary, preconditions to recovery under the alter ego doctrine.

Id. at 288-89 (citations omitted).

Desiring to strike “the correct balance between the principle of limited shareholder liability and the reality that the corporate fiction is sometimes used by shareholders to protect

themselves from liability for their own misdeeds,” this Court then articulated its own three-pronged test. *Id.* at 289. That test holds that the corporate form may be disregarded only when (1) the shareholders so completely control the corporation that it has “no separate mind, will, or existence of its own”; (2) control over the corporation “was exercised in such a manner as to commit fraud or an illegal act” against the party seeking to disregard the corporate entity; and (3) “injury or unjust loss resulted to the plaintiff from such control and wrong.” *Id.* In applying this newly articulated test to the factual record, the Court found that the owners’ association failed to introduce evidence that the shareholder “used his control over [the corporate general partner] in such a manner as to defraud the Association.” *Id.* at 289.

Thus, this Court’s “modern” approach in *Belvedere* carefully – and narrowly – expanded the circumstances in which the corporate veil piercing test could be applied to include situations, other than formation, where the corporate form was abused. The other elements of the traditional *North* test, however, remained materially the same. As this Court explained, the first prong of its test corresponded with the “concise statement of the alter ego doctrine” outlined in *Bucyrus-Erie*, *id.* at 288; the second prong of the test corresponded with the second part of the *North* test, *i.e.*, the corporate form must be used to commit fraud or illegal acts, *id.*; and the third prong corresponded with the “obvious” requirement of proximate cause, *id.* at 289.

C. Post-Belvedere Appellate Court Developments: Opening the Floodgates to Individual Shareholder Liability

Since 1993, several Ohio appellate courts have adhered to this Court’s teachings and carefully applied *Belvedere*. For instance, in *Widlar v. Young* (Feb. 24, 2006), 6th Dist. No. L-05-1184, 2006 WL 456724, 2006-Ohio-868, a customer of a dating referral company sued the company for breach of contract and also sought to hold the shareholder individually liable. The customer argued that the shareholder concealed the company’s true corporate name, closed the

company's office suddenly and without notice, and thereby made the company incapable of being served with legal process. *Id.* at ¶51. Even assuming these allegations were true, the appellate court found no evidence in the record to support a conclusion that the shareholder "exercised control over Second Mark of Ohio, Inc. in such a manner as to commit fraud or an illegal act against Widlar." *Id.* at ¶54.

Similarly, in *Nursing Home Group Rehab. Serv., LLC v. Suncrest Health Care, Inc.* (2005), 162 Ohio App.3d 577, 2005-Ohio-3945, the appellate court reversed a jury verdict finding the sole shareholder personally liable for the contractual obligations of a corporate nursing home owner. The nursing home company admittedly failed to pay the plaintiff for therapy services, paid secured creditors at the expense of unsecured creditors including the plaintiff, and ultimately failed as a going concern. Although the unpaid invoices represented an "injustice" to the plaintiff, the appellate court found no evidence that the shareholder used the company to commit a fraud or an illegal act, as required by *Belvedere's* second prong. *Id.* at 584; see also *Siva v. 1138 LLC* (Sept. 11, 2007), 10th Dist. No. 89115, 2007 WL 2634007, 2007-Ohio-4677, at ¶19 (business' "fail[ure] to fulfill financial commitments," lack of profitability, and "poor business judgment" did not rise to fraud or illegal act required by *Belvedere*); *Connolly v. Malkamaki* (Dec. 13, 2002), 11th Dist. No. 2001-L-124, 2002 WL 31813040, 2002-Ohio-6933, at ¶34 ("A simple breach of contract, in the 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.").

Other Ohio appellate courts, unfortunately, have been less constrained by the clear language and limitations of the *Belvedere* test. See, e.g., *Music Express Broadcasting Corp. v. Aloha Sports, Inc.* (2005), 161 Ohio App.3d 737, 2005-Ohio-3401, 742 ("The test set forth in

Belvedere is open-ended and versatile -- *i.e.*, it permits and encourages flexibility by its very definition.”). These courts have broadly read the second prong of the *Belvedere* test to expand individual shareholder liability to situations far beyond the formation of the corporate entity and for activities unrelated to fraudulent use of the corporate form.

For instance, in *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, the Third District considered whether the majority shareholders of a close corporation could be held personally liable for unpaid sales commissions allegedly owed a former employee. As in *Nursing Home*, the former employee argued that the majority shareholders took steps to reduce the corporation’s profits, so that the company would not have to pay him the sales commissions. *Id.* at 244.

In considering *Belvedere*’s second prong, the *Wiencek* Court construed this Court’s language expansively, and incorrectly, in two different ways. First, the *Wiencek* Court noted that this Court’s use of the phrase “in such a manner as to” indicates that the Court “meant *not* that the fraud or illegal act complained of must have been specifically directed at the person seeking to disregard the corporate entity, *but only* that a fraud or illegal act was committed by virtue of the control exercised by those held to be liable. . . .” *Id.* at 244 (emphasis added). That formulation, however, expressly contradicts this Court’s statements in both *Belvedere*, 67 Ohio St.3d 274, at ¶3 of syllabus (“control . . . 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), and *North*, 131 Ohio St. 507, at ¶1 of syllabus (“domination . . . exercised in such manner as to defraud complainant”).

Second, the *Wiencek* Court asked whether, by using the words “fraud or illegal act” in its formulation of the second prong, this Court intended “to restrict attempts to pierce the corporate

veil to only those acts which were fraudulent or illegal or did it intend to encompass a *broader range of actions*, namely those acts which would lead to unfair or inequitable consequences?” *Id.* at 244 (emphasis added). The *Wiencek* Court then read *Belvedere* as supporting the view that the corporate veil may be pierced whenever “inequitable or unfair consequences had resulted.” *Id.* Thus, the Court held that a party seeking to disregard the corporate form could satisfy the second prong by “present[ing] evidence that the shareholders exercised their control over the corporation in such a manner as to commit a fraud, illegal, or other unjust or inequitable act.” *Id.* at 245.

Reviewing the evidentiary record before it, the *Wiencek* Court noted that the shareholders gave themselves large bonuses as officers of the corporation, used the corporation to pay for labor and material at their personal residence, and bought a recreational vehicle in the company’s name that was used by them personally. *Id.* at 245-46. Although *none* of these activities were directed at the former employee, the *Wiencek* Court concluded that the shareholders were individually liable for the unpaid sales commissions because those expenditures “may have [] so depleted” the company’s profits that it could not pay the employee’s sales commissions. *Id.*

Another expansive approach is found in *Dalicandro v. Morrison Road Develop. Co., Inc.* (Apr. 17, 2001), 10th Dist. Nos. 00AP-619; 00AP-656, 2001 WL 379893. In that case, a corporation and its shareholder appealed a jury verdict finding them liable for breach of contract and conversion and holding the shareholder personally liable for the corporation’s obligations. The *Dalicandro* Court affirmed, stating that the second *Belvedere* prong “is satisfied when the record establishes that a corporate shareholder, officer or manager caused a corporation to commit some unjust or inequitable act against the person seeking to pierce the corporate veil.” *Id.* at *7.

The *Dalicandro* Court's approach thus eliminates the fundamental concept of misuse of the corporate form from the *Belvedere* test. Under the *Dalicandro* approach, a plaintiff need not show that the shareholder misused the corporate form in order to commit fraud or an illegal act against the plaintiff. Instead, it is sufficient that the shareholder – or even a corporate “officer or manager” – caused the corporation to commit *any* “unjust or inequitable act” against the plaintiff. *Dalicandro*, 2001 WL 379893, at *7. In effect, *Dalicandro* has developed a *new* formulation of the *Belvedere/North* standard that has vastly expanded the circumstances under which a shareholder may be held individually liable for corporate activities.

The opinion below also incorrectly construes the second prong of *Belvedere*. In *Dombroski v. WellPoint, Inc.* (2007), 173 Ohio App.3d 508, 2007-Ohio-5054, Ms. Dombroski had a health insurance policy with Community Insurance Company (“CIC”). *Id.* at 512. Anthem UM Services, Inc. (“AUMSI”), an affiliate of CIC, also participated in administration of Ms. Dombroski's policy. *Id.* Ms. Dombroski sought coverage under her health insurance policy for a bilateral cochlear implant. CIC and AUMSI denied coverage pursuant to the terms of a written medical policy established by CIC's ultimate corporate parent, WellPoint, Inc. (“WellPoint”), because the written policy deemed such implants “investigational” under the insurance policy. *Id.*

Ms. Dombroski sued CIC and AUMSI for breach of the insurance contract and for the tort of insurer “bad faith.” *Id.* Although her contract was solely with CIC, she also sued the direct and indirect corporate parents of CIC and AUMSI at the time: Anthem Insurance Companies, Inc. (“AIC”) and WellPoint. *Id.* Ms. Dombroski alleged only that these parent companies owned all of the stock in CIC and AUMSI and controlled the subsidiaries. Importantly, she did *not* allege that WellPoint or AIC misused or abused the corporate forms of

CIC or AUMSI in order to commit “fraud or an illegal act” against her – which is what this Court’s holding in *Belvedere* requires.

Because WellPoint and AIC had no contract with Ms. Dombroski, they moved to dismiss her claims. *Id.* at 513. WellPoint and AIC argued that they are corporate entities distinct from CIC and AUMSI, and that Ms. Dombroski had alleged no facts that would permit a court to disregard the separate corporate existence of the four companies and hold WellPoint and AIC liable for the acts of CIC and AUMSI. The trial court agreed and dismissed all claims against WellPoint and AIC, holding that Ms. Dombroski had failed to allege facts that satisfied the second and third prongs of the *Belvedere* test. *Id.*

Ms. Dombroski appealed, contending that she had pleaded sufficient facts to pierce the corporate veil. The Seventh District agreed. It noted that the complaint “asserts the tort of a duty to act in good faith as defined by the Ohio Supreme Court” and concluded that 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,” so that “the second prong of *Belvedere* was sufficiently pled.” *Id.* at 517-18. Conspicuously absent from the appellate court’s opinion, however, is any consideration of *Belvedere*’s requirement that WellPoint or AIC misused the corporate form of the subsidiary corporations to commit fraud or illegal acts against Ms. Dombroski.

III. Ramifications of Expansive Approaches To Piercing The Corporate Veil

As the cases discussed above indicate, Ohio appellate courts have strayed considerably from this Court’s strict dictates in *Belvedere*. In so doing, those courts have exposed corporate shareholders and the owners of small businesses in Ohio to potentially ruinous personal liability for a wide variety of corporate actions – including straightforward business activities, such as the

interpretation of insurance contracts – that in no way involve misuse of the corporate form to perpetrate “fraud or illegal acts.”

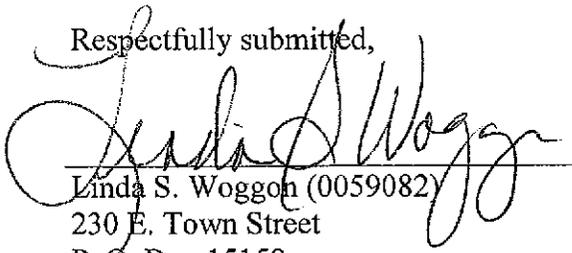
If the opinion below is upheld by this Court, shareholders of Ohio corporations would face being haled into court and held personally liable whenever a tort claim is asserted against the corporation, or the corporation is alleged to have violated a regulatory statute, or the corporation is portrayed as having engaged in conduct that is characterized by the plaintiff as “unjust or inequitable.” Such a result would have devastating consequences for the concept of limited shareholder liability and for the ability of small business owners to use the corporate form as a successful engine for economic growth, job creation, and social progress.

Amici curiae submit that such a result is plainly at odds with *Belvedere* and with the policy considerations that first gave rise to the concept of limited shareholder liability more than a century ago. The corporate form, and the protections afforded by proper recognition of the doctrine of limited shareholder liability for corporate acts, have served an important economic purpose, by allowing small businesses to thrive in Ohio and to contribute significantly to the growth of Ohio’s economy. Equally important, the doctrine of limited shareholder liability has furthered democratic principles and encouraged thousands of individuals, of all socio-economic groups and classes, to form corporations and conduct business, secure in the knowledge that their homes, savings, and other personal assets are not at risk in the event of a business reversal.

Amici curiae therefore urge this Court to reaffirm its decision in *Belvedere*, to halt the erosion in the doctrine of limited shareholder liability found in the appellate court decisions discussed above, and to ensure that Ohio law continues to provide meaningful protection to those individuals who own and operate corporate businesses in this state. This Court should reverse the decision of the court below and hold that the corporate veil may be pierced only when the

shareholder has misused or abused the corporate form to commit “fraud or an illegal act” against the plaintiff.

Respectfully submitted,



Linda S. Woggon (0059082)

230 E. Town Street

P.O. Box 15159

Columbus, OH 43215

(614) 228-4201

(614) 228-6403

lwoggon@ohiochamber.com

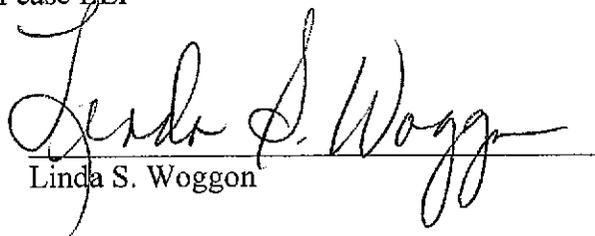
COUNSEL FOR AMICI CURIAE OHIO
CHAMBER OF COMMERCE, OHIO COUNSEL
OF RETAIL MERCHANTS, THE OHIO
CHAPTER OF THE NATIONAL FEDERATION
OF INDEPENDENT BUSINESS, AND THE
OHIO FARM BUREAU FEDERATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. mail, postage prepaid this 10th day of March, 2008, upon the following:

Robert G. Palmer, Esq.
Robert Gray Palmer Co., LPA
140 East Town Street
Suite 1200
Columbus, OH 43215

Suzanne K. Richards, Esq.
Robert N. Webner, Esq.
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, OH 43215


Linda S. Woggon