Case No. 2007-2162

IN THE SUPREME COURT OF OHIO

Certified Question From The Court of Appeals
For Belmont County, Ohio,
Seventh Appellate Judicial District
Case No. 06 BE 60

KIMBERLY J. DOMBROSKI
Plaintiff-Appellee (Respondent)
v.
WELLPOINT, INC., et al.
Defendants-Appellants (Petitioners)

FILED
APR 09 2008
CLERK OF COURT
SUPREME COURT OF OHIO

MERIT BRIEF OF PLAINTIFF-APPELLEE (Respondent)

Robert G. Palmer (0022152)
(Counsel of Record)
Robert Gray Palmer Co., LPA
140 East Town Street
Suite 1200
Columbus, Ohio 43215
(614) 484-1200
(614) 484-1201 Fax
bob@rgpalmerlaw.com
Attorney for Plaintiff-Appellee
Kimberly J. Dombroski

Suzanne K. Richards (0012034)
(Counsel of Record)
Robert N. Webner (0029984)
Michael J. Hendershot (0081842)
Vorys, Sater, Seymour & Pease LLP
52 East Gay Street
Columbus, Ohio 43215
(614) 464-6458
(614) 719-4920 Fax
skrichards@vorys.com

Charles H. Bean (0007199)
Thornburg, Bean& Glick
113 West Main Street
P.O. Box 96
St. Clairsville, Ohio 43950
(740) 695-0532
(740) 695-8039 Fax
cbean_tbg@sbcglobal.net
Attorneys for Defendants-Appellees
WellPoint, Inc. and
Anthem Insurance Companies, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. INTRODUCTION AND OVERVIEW 1

Certified Question:

Does the second prong of *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Co., Inc.* (1993), 67 Ohio St.3d 274, 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? 1

II. COUNTERSTATEMENT OF FACTS 2

III. ARGUMENT 5

Proposition of Law:

Under the second prong of the *Belvedere* test, a corporate entity may be disregarded when those who control that corporation exercise their control to commit fraud, an illegal act, or an unjust or inequitable act against those seeking to disregard corporation entity 5

A. The corporate veil can be pierced where the control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an legal act 5

1. Purpose of piercing the corporate veil doctrine......................... 8
2. Does the phrase "an illegal act" include "wrong or other dishonest or unjust act"? Or, as the certified question asks, does it include "unjust or inequitable acts that do not rise to the level of fraud or an illegal act?" 11
3. Tort of Insurer Bad Faith is both an "Illegal act" and an "unjust or inequitable" act under the second prong of *Belvedere* 14

4. Applying the tort of insurer bad faith in the modern corporate insurance reality 18
5. Insurer corporate reality and Dombroski 21

IV. PETITIONERS' ARGUMENT 23

A. Petitioners' proposed Proposition of Law, that the shareholder of parent corporation must misuse the corporate form to satisfy *Belvedere's* second prong, is incorrect 23

B. *Belvedere* test improper for Civil Rule 12(B)(6) Motions to Dismiss 26

C. Standard of Review 27

CONCLUSION 27

CERTIFICATE OF SERVICE 28

APPENDIX 29

R.C. 1301.09 Obligation of good faith – UCC 1-203 .... A1
R.C. 5809.01 Trustee duty to comply with act. A2
R.C. 5809.02 Standard of care – portfolio strategy – risk and return objectives . A3
R.C. 5809.03 Investment authority – diversification A4

TABLE OF AUTHORITIES

Page

Cases

Am. Hardware Supply v. Alan Supply, Inc., 63 Ohio App. 3d 838, 843-44, 580 N.E.2d 473, 476 (10th Dist. 1989) 24

Battista v. Lebanon Trotting Ass'n, 538 F.2d 111, 118 (6th Cir. 1976) 16

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Co., Inc. (1993), 67 Ohio St.3d 274, 617 N.E.2d 1075 .... 1, 5-15, 23, 24, 26, 27

Bucyrus-Erie Co. v. General Products Corp. (C.A.6, 1981), 643 F.2d 413 .... 9, 10

Campbell v. Am. Int'l Group, Inc., 976 P. 2d 1102 (Okla. Civ App. 1999) 19

Cent. Benefits Mut. Ins. Co. v. RIS Admrs. Agency, Inc. (1994), 93 Ohio App.3d 397, 638 N.E.2d 1049 10

Collum v. Perlman, 1999 WL 252725 (Ohio Ct. App. 6th Dist. 1999) 6, 14

Dalicandro v. Morrison Road Dev. Co., 2001 WL 379893 (Ohio Ct. App. 10th Dist. 2001) 6, 12, 27

Dardinger v. Anthem Blue Cross & Blue Shield (2002), 98 Ohio St. 3d 77, 2002-Ohio 7113 4

Delos v. Farmers Ins. Group, Inc., 93 Cal. App. 3d 642, 155 Cal Rptr. 843 (Cal. App. 4th Dist. 1979) 18, 19

Dirksing v. Blue Chip Architectural Prods., Inc. (1994), 100 Ohio App.3d 213, 653 N.E.2d 718 10

Dombroski v. WellPoint, Inc., 116 Ohio St. 3d 1472, 2008-Ohio-153, 879 N.E.2d 781 1

Farmers Group, Inc. v. Trimble, 768 P.2d 1243, 1247 (Colo. App. 1988) 18, 19

Gatecliff v. Great Republic Life Ins. Co., 821 P.2d 725 (Ariz. 1991) 19

Page

Geier v. Nat'l. GG Industries, Inc., 1999 Ohio App. LEXIS 6263 27

Hart v. The Republic Mutual Ins. Co. (1949), 152 Ohio St. 185, 87 N.E.2d 347 ..... 16, 17

Hoskins v. Aetna Life Ins. Co. (1983), 6 Ohio St. 3d 272, 452 N.E.2d 1315 .... 15, 16, 17, 21

Imperial Const., Inc. v. Precision Cut, Inc., 2001 WL 1479236 (8th App. Dist. 2001), Nov. 21, 2001 (No. 79290) 12

LeRoux's Billyle Supper Club v. Ma (1991), 77 Ohio App.3d 417, 602 N.E.2d 685 10

McEvoy v. Group Health Cooperative of Eau Claire, 570 N.W.2d 397 (Wis. 1997) 19

Minno v. Pro-Fab, 2007 WL 4292625, 2007-Ohio-6565, (11th App. Dist. 2007) 10, 14, 25, 26

Music Express Broadcasting Corp. v. Aloha Sports, Inc., 161 Ohio App.3d 737 (11th App. Dist. 2005) 12, 24

North v. Higbee Co. (1936), 131 Ohio St. 507 .... 9, 15

Pikewood Manor, Inc. v. Monterrey Concrete Const., 2004 WL 200146, 2004-Ohio-440, (9th App. Dist. 2004), Feb. 04, 2004 (NO. 03CA008289) 12

Pritchard v. Algis Sirvaitis & Assocs., 2000 Ohio 3153; 2006 Ohio App. LEXIS 3038 26

Pritchett, Dlusky & Saxe v. Pingue, 1997 WL 578952 (Ohio Ct. App. 10th Dist. 1997) 7

Republic Steel Corp. v. Bd. of Revision of Cuyahoga Cty., 175 Ohio St. 179; 193 N.E.2d 47; 1963 Ohio LEXIS 589; 23 Ohio Op. 2d 462 16

Robert A. Saurber Gen. Contractor v. McAndrews, 2004 WL 2937627, (Ohio Ct. App. 12th Dist. 2004) 6, 8, 12

Page

Rogers v. Targot Telemarketing Services, 70 Ohio App. 3d 689; 591 N.E.2d 1332; 1990 Ohio App. LEXIS 5744 26

Sanderson Farms, Inc. v. Gasbarro, 2004 WL 583849, at *8 (Ohio Ct. App. 10th Dist. 2004) 6, 12

Scardina v. Ghannam, No. 04-MA-81, 2005 Ohio App. LEXIS 3075 (Ohio Ct. App. 7th Dist., June 29, 2005) 26

Schudel v. Kathie's Quality Care, Inc., 1999 WL 1073832 (11th App. Dist.), Oct. 29, 1999 (NO. 98-L-168) 11

Siva v. 1138 LLC, 2007 WL 2634007, 2007-Ohio-4667 (10th App. Dist. 2007), Sept. 11, 2007 (Case NO. 06AP-959) 12

State v. Tri-State Group, Inc., 2004 WL 1882567 (Ohio Ct. App. 7th Dist. 2004)... 6, 12, 24

State ex rel. Atty. Gen. v. Standard Oil Co. (1892), 49 Ohio St. 137, 30 N.E. 279 ... 7, 8, 10

Stypula v. Chandler, 2003 WL 22844296 (Ohio Ct. App. 11th Dist. 2003) 6, 7, 12

Suver v. Pers. Serv. Ins. Co. (1984), 11 Ohio St. 3d 6, 462 N.E.2d 415 .... 17, 21, 22

Taverns for Tots, Inc. v. City of Toledo, 307 F.Supp.2d 933, 941, N.D.Ohio (NO. 3:03 CV 7030) 10, 26

Taylor Steel, Inc. v. Keeton, 417 F.3d 598, 610 (6th Cir. 2005) 12, 13

Upperman v. Grange Indem. Ins. Co., 135 Ohio Misc. 2d 8, 2005-Ohio-6227, 842 N.E.2d 132 (C.P. 2005) 25

Wallace v. Shelly and Sands, Inc., 2005 Ohio 1345; 2005 Ohio App. LEXIS 1297 . 27

Waste Conversion Techs., Inc. v. Warren Recycling, Inc., 191 F. App'x 429, 433 (6th Cir. 2006) 25

Widlar v. Young, 2006 WL 456724 (Ohio Ct. App. 6th Dist. 2006) 6

Wiencek v. Atcole Co., 109 Ohio App. 3d 240, 671 N.E.2d 1339, 1342 (3d Dist. 1996) 7, 11, 13

Page

Willoway Nurseries v. Curdes, 1999 WL 820784 (9th App. Dist. 1999), Oct.13, 1999 (NO. 98CV007109) 11

Zoppo v. Homestead, Ins. Co. (1994), 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397 14

Statutes

R.C. 1301.09 15
R.C. 5809.01-.03 15

Other Authorities

Black's Law Dictionary, 5th Edition 11

Rules

Civil Rule 12(B)(6) 26,27
SCt. R. VI Sec. 2(B) 1
SCt. R. VI Sec. 3(A) 2

I. INTRODUCTION AND OVERVIEW

This Court asked the parties to brief the kind or categories of actions that would satisfy the second prong of the piercing the corporate veil doctrine set forth in *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Co., Inc.* (1993), 67 Ohio St.3d 274, 617 N.E.2d 1075. Pursuant to SCt. R. VI Sec. 2(B), the parties were to brief only this issue as specified in the certified question:

> Does the second prong of *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Co., Inc.* (1993), 67 Ohio St.3d 274 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?

Dombroski v. WellPoint, Inc., 116 Ohio St. 3d 1472, 2008-Ohio-153, 879 N.E.2d 781. Instead, Petitioners WellPoint, Inc. (WellPoint) and Anthem Insurance Companies, Inc. (AICI) launched a harangue about the sanctity of the notion of limited liability. They claim that Ohio "enshrines" this notion, which will be undermined and thwarted if the doctrine of piercing the corporate veil is not drastically reigned in. Thus, rather than addressing the certified question, they assert that the second prong of *Belvedere* requires "misuse of the corporate form" for which they rewrite that element as follows:

> The second element of the *Belvedere* test for piercing the corporate veil requires allegation and proof of facts showing that a shareholder misused the corporate form to commit fraud or an illegal act against the plaintiff.

(Brief at 6.) This proposed proposition of law — whether a court may pierce the corporate veil only if the shareholders (or in this case the parent company) have abused or misused the corporate form to perpetrate a fraud or an illegal act — seeks this Court to return to the "good old days" of requiring that the corporate entity be formed to defraud others. Essentially, Petitioners chose to forego briefing the issue before the Court in favor of proselytizing for a standard that requires pleading and proving the "misuse of the corporate form."

Although the parties were to brief only the issue at hand, SCt. R. VI Sec. 3(A) requires Appellee/Respondent Dombroski (Dombroski) also to answer their arguments.

II. COUNTERSTATEMENT OF FACTS

In 2000, Dombroski was diagnosed with a profound sensorineural hearing loss in both ears for which she received a cochlear implant on her left side. (S. 8) [1]. In 2005, her treating physician determined it was medically necessary and appropriate for her to be implanted on the right side as well. She thus would have bilateral cochlear implants. (S. 8).

Dombroski had an individual health care policy that was designed, sold, administered, and handled by WellPoint, through its subsidiaries, AICI, defendant below Anthem UM Services, Inc. (AUMSI), and defendant below Community Insurance Co. (CIC). (S.2 ¶3 and 4, 5, and 13-99). WellPoint benefits financially from the operations of each of its subsidiaries. (S. 2 and 3). Its purpose was to make money in which each of these entities had a stake and, indeed, the very same purpose. (S. 2 and 3, ¶¶ 3, 4, 5).

In 2006, WellPoint reported in its 8K to the United States Government, its investors, and its members (such as Dombroski) that:

[1] Reference to the Supplement ("S.") are to the Second Supplement filed with this brief.

- It is the largest health benefits company in terms of membership in the United States. (S. 3).

- It has the most local market presence in the most geographic areas of the United States. (S. 3).

- It accomplished its all time high operating revenue of $44.5 billion dollars in 2005 "by focusing on profitable enrollment growth with innovative product offerings, pricing with discipline, implementing initiatives to optimize the cost of care, continuing to leverage administrative costs over a larger membership base, further penetrating our specialty businesses and by using our cash flow effectively." (S. 3).

- Its health care segment "includes strategic business units delineated primarily by geographical areas within which we offer similar products and services including commercial accounts, individual, ... (S. 3).

- It works to keep health care coverage "affordable by improving health, healthcare quality and by leveraging WellPoint's national scale to enhance service, improve operations and better achieve efficiency." (S. 4).

- It believes that its consistent, steady performance provides customers, like Dombroski, "the security of knowing that our health plans will be there to finance their health care expenses." This strategy is one that "yields tangible value for all our constituents – members, employers, health care professionals, associates and shareholders. (S. 4 and 5).

WellPoint itself and through its subsidiaries in fact functions as an insurance company for its members throughout the United States, including Ohio, because it creates the insurance products/policies which are sold in Ohio, establishes the operating policies and procedures for its subsidiaries, sets the rates or premiums to be charged for its policies, benefits from the premiums charged for the policy, establishes policies and procedures for processing, handling and compromising the settlement of lawsuits, and determines when a policy will be cancelled. (S. 5).

WellPoint is the only publicly traded stock company of this conglomerate health benefits company. WellPoint owns either directly or indirectly through other subsidiaries 100% of the stock of all of its subsidiaries, including AISI, CIC and AUMSI. (S. 6). Moreover, WellPoint and AICI are operated and controlled by the same officers out of the same office headquarters in Indianapolis, Indiana. (S. 6).

Dombroski was sold a WellPoint product by CIC, its issuer of Ohio insurance policies. CIC is so dominated and controlled by AICI that "it is no more than a paper existence." *Dardinger v. Anthem Blue Cross & Blue Shield* (2002), 98 Ohio St. 3d 77, 2002-Ohio 7113. (S. 6, ¶10). Dombroski's policy was signed by one of WellPoint's officers. (S. 7). Her policy, attached to the Amended Complaint as Exhibit A (S. 13-99), is rife with references to the WellPoint systems and procedures established by it and through its subsidiaries. Dombroski's policy specifically included her with the millions of other WellPoint insureds throughout Ohio and the entire United States. (S. 7, ¶12; 13–99). That policy instructed Dombroski to contact WellPoint's and AICI's website anthem.com for any claims or administration of the policy. (S. 15, 16, 21, 22, 25, 26, 56, 70 and 71).

WellPoint required AICI to establish corporate medical policies and required AUMSI to apply and utilize those corporate medical policies to administering, handling and processing claims under its contracts, such as that sold to Dombroski, and, in this case, to deny benefits under its insurance product sold to Dombroski. (S. 5-7, ¶¶ 8, 9, 13, 14). The corporate medical policy used to deny Dombroski was AICI's medical policy SURG. 00014 (S.100 -107). Each of the denials refer to this specific corporate medical policy as the basis for the repeated denials of Dombroski's request for her right-side cochlear implant. (S. 5, 6 and 9). Each of the denials specifically refers to the AICI Corporate Medical Policy which decreed that bilateral cochlear implantation was "experimental" and "investigative." (S.105) It was AUMSI, not CIC, that dealt with Dombroski. AUMSI sent Dombroski letters stating that "Anthem" denied her claim and her appeals. (S. 108 -111).

WellPoint through its own operations and through actions by AICI and its other subsidiaries, specifically CIC and AUMSI, denied without reasonable justification Dombroski's requests for the cochlear implant on her right side. (S. 8 and 9).

III. ARGUMENT

Proposition of law: Under the second prong of the *Belvedere* test, a corporate entity may be disregarded when those who control that corporation exercise their control to commit fraud, an illegal act, or an unjust or inequitable act against those seeking to disregard corporation entity.

A. The corporate veil can be pierced where the control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an legal act.

In *Belvedere* at 289, this Court held that:

> [T]he corporate form may be disregarded and individual shareholders held liable for corporate misdeeds 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. [Emphasis added.]

The issue here is whether the second prong can be satisfied by "unjust" or "inequitable" acts not amounting to or not "rising to the level of" an illegal act.

There is some conflict between Ohio appellate courts on this issue. Only the Court of Appeals for the Sixth District has consistently takes the approach that the second prong of the *Belvedere* test can be satisfied only with actual fraud or an illegal act. *See Collum v. Perlman*, 1999 WL 252725 (Ohio Ct. App. 6th Dist. 1999); *Widlar v. Young*, 2006 WL 456724 (Ohio Ct. App. 6th Dist. 2006). On the other hand, all other Ohio appellate districts that have considered this issue concluded that actual fraud or an illegal act is not always necessary, but that an unjust or inequitable act can satisfy the second prong. See, for example, *Robert A. Saurber Gen. Contractor v. McAndrews*, 2004 WL 2937627, at *5 (Ohio Ct. App. 12th Dist. 2004) ("McAndrews argues the second prong of the *Belvedere* test was not met in this case because he did not commit fraud or engage in criminal activity. We find this argument to be without merit. Other Ohio courts have recognized that although the *Belvedere* court used 'fraud' and 'criminal activity' in defining the second prong, the true question to be asked is whether it would be unjust under the circumstances of each case to not pierce the corporate veil."); *State v. Tri-State Group, Inc.*, 2004 WL 1882567, at *14 (Ohio Ct. App. 7th Dist. 2004) (same analysis as in *Saurber*; *Sanderson Farms, Inc. v. Gasbarro*, 2004 WL 583849, at *8 (Ohio Ct. App. 10th Dist. 2004) ("While the court in *Belvedere* employed the words 'fraud or illegal act,' Ohio courts, including this court, have held that the second prong is satisfied when 'unjust or inequitable' consequences occur."); *Stypula v. Chandler*, 2003 WL 22844296, at *3 (Ohio Ct. App. 11th Dist. 2003) ("[T]he corporate veil may be pierced when the acts would lead to unfair or inequitable consequences."); *Dalicandro v. Morrison Road Dev. Co.*, 2001 WL 379893, at * 7 (Ohio Ct. App. 10th Dist. 2001) (same analysis as in

Stypula; *Pritchett, Dlusky & Saxe v. Pingue*, 1997 WL 578952 (Ohio Ct. App. 10th Dist. 1997) (same analysis as in *Stypula*); *Wiencek v. Atcole Co.*, 109 Ohio App. 3d 240, 671 N.E.2d 1339, 1342 (3d Dist. 1996). ("Based upon a reading of *Belvedere*, the purpose of the theory 'piercing the corporate veil,' and Ohio case law prior to and subsequent to *Belvedere*, we hold that one seeking to disregard the corporate entity may present evidence that the shareholder exercised his control over the corporation in such a manner as to commit a fraud, illegal, or other unjust or inequitable act upon the person seeking to disregard the corporate entity in order to satisfy the second prong of the test enunciated in *Belvedere*.").

One really need look no further than the discussion in *Belvedere* to ascertain whether the court intended the second prong to embrace acts other than fraud or illegal acts, namely unjust or inequitable acts not rising to the level of fraud or an illegal act. In that case, this Court, in formulating its three-pronged test for piercing the corporate veil, enunciated the purpose behind the piercing the corporate veil doctrine. There, the court commented that:

> . . . the "veil" of the corporation can be "pierced" and individual shareholders held liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity.

Belvedere at 287. This language alone is telling. The Court, relying on earlier cases such as *State ex rel. Atty. Gen. v. Standard Oil Co.* (1892), 49 Ohio St. 137, 30 N.E. 279, correctly indicated that the veil should be pierced when it would be unjust for the shareholder (and in this case the parent corporation) to hide behind the corporation (and in this case the subsidiary corporation). The court specifically used the term "unjust."

Clearly, the purpose behind the piercing doctrine, which purpose was reaffirmed in *Belvedere*, would be very limited if it only applied to fraud or criminal acts. As the *Belvedere* court itself even commented, the doctrine's purpose is to prevent a shareholder or parent corporation from shielding itself from liability for its unjust acts. These unjust acts could amount to fraud or an illegal act, but this is not always the case.

> [A]lthough the Belvedere court used "fraud" and "criminal activity" in defining the second prong, the true question to be asked is whether it would be unjust under the circumstances of each case to not pierce the corporate veil.

Robert A. Saurber Gen. Contractor, 2004 WL 2937627, at *5.

1. Purpose of Piercing the Corporate Veil Doctrine

"Piercing the corporate veil" is an exception. It is an exception to the basic corporate law that shareholders, officers and directors are not liable for the obligations of the corporation. *Belvedere* at 287. Disregarding the corporate entity to hold a shareholder "liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity." *Id.* citing *State ex rel. Atty. Gen. v. Standard Oil Co., supra*. The corporate form as a mere fiction of the law may be disregarded "when urged to an intent and purpose not within its reason and policy: . . ." *Standard Oil Co.*, ¶1 of the syllabus. The court in *Belvedere* erased the law from its focus on the purpose for forming the corporation. *Belvedere* at 288. It moved the law of piercing the corporate veil along "in light of the realities of modern corporate life", noting "[T]he ease with which close corporations and corporate subsidiaries can be created and the ability to transfer ownership of an existing corporation lead us to believe that corporations formed for legitimate purposes can easily be later used to commit fraud or other wrongs." *Id.* at 288.

Thus, it eschewed the requirement in *North v. Higbee Co.* (1936), 131 Ohio St. 507 that the corporation had to be formed to commit a fraud for the approach taken by the United States Court of Appeals for the Sixth District in *Bucyrus-Erie Co. v. General Products Corp.* (C.A.6, 1981), 643 F.2d 413. In *Bucyrus-Erie*, that court held that a corporate veil may be pierced when "(1) domination and control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will or existence of its own; (2) that domination and control was used to commit fraud or wrong or other dishonest or unjust act; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Id.* at 418.

It was this approach that this Court adopted in *Belvedere* when it stated:

> "We feel the Sixth Circuit's approach to piercing the corporate veil strikes the correct balance between the principal of limited shareholder liability and the reality that the corporation fiction is sometimes used by shareholders to protect themselves from liability for their own misdeeds."

Belvedere at 289. It then proceeded to clarify this approach by holding that:

> "The corporate form may be disregarded and individual shareholders held liable for corporate misdeeds, 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." [Emphasis added.]

Id. It is the substitution of the phrase "an illegal act" for "wrong or other dishonest or unjust act" that is the heart of the certified question.

The doctrine of piercing the corporation veil in Ohio has always served to remedy corporate misdeeds committed by acts other than fraud. It remedied unjust results. *Standard Oil Co., supra*; *LeRoux's Billyle Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 602 N.E.2d 685. After *Belvedere,* Ohio courts of appeal began to apply it while taking into consideration its adoption of the approach in *Bucyrus-Erie* and the equitable roots from which the doctrine grew. In *Cent. Benefits Mut. Ins. Co. v. RIS Admrs. Agency, Inc.* (1994), 93 Ohio App.3d 397, 638 N.E.2d 1049, the Tenth Appellate District allowed piercing the corporate veil to remedy misuse by a corporation to prevent collection of a judgment against it. In *Dirksing v. Blue Chip Architectural Prods., Inc.* (1994), 100 Ohio App.3d 213, 653 N.E.2d 718, the Twelve Appellate District reversed summary judgment since the lower court had not allowed the plaintiff opportunity to discover evidence to prove the elements announced in *Belvedere*. *Id.* at 226, 228. As the Eleventh Appellate District recently held in *Minno v. Pro-Fab,* 2007 WL 4292625, 2007-Ohio-6565, (11th App. Dist. 2007) "piercing of the corporate veil has been implemented to remedy precisely the situation that is evident here, i.e., to allow a 'parent corporation, as the alter ego of the subsidiary company * * * to avoid liability for the subsidiary's misdeeds * * * or its obligations'." at ¶47 citing *Taverns for Tots, Inc. v. City of Toledo*, 307 F.Supp.2d 933, 941, N.D.Ohio (NO. 3:03 CV 7030).

2. Does the phrase "an illegal act" include "wrong or other dishonest or unjust act"? Or, as the certified question asks, does it include "unjust or inequitable acts that do not rise to the level of fraud or an illegal act?"

What is an "illegal act"? Black's Law Dictionary, 5th Edition, defines "illegal" simply as "against or not authorized by law." That definition would seem to encompass a "wrong" which Black's defines as "a violation of the legal rights of another; an invasion of right to the damage of the parties who suffer it, especially a tort." A dishonest act, according to Black's, refers "to lie, cheat or defraud." It defines "unjust" as "contrary to right and justice, or to the enjoyment of his rights by another, or to the standards of conduct furnished by the laws." "Illegal" seems to encompass "wrong," "dishonest," and "unjust."

Over the years since *Belvedere* was decided, Ohio courts of appeal, save the Sixth Appellate District, have applied *Belvedere* in allowing piercing the corporate veil to remedy corporate misdeeds caused by "illegal" or "unjust or inequitable" acts involving the following:

> Where shareholders of a close corporation use corporate funds for personal purposes in order to avoid paying a commission to an employee. *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 671 N.E.2d 1339,
>
> Where a close corporation "illegally" withheld employee compensation. *Schudel v. Kathie's Quality Care, Inc.*, 1999 WL 1073832 (11th App. Dist.), Oct. 29, 1999 (NO. 98-L-168)
>
> Where shareholder inverted corporate monies for personal use and failed to file tax return. *Willoway Nurseries v. Curdes*, 1999 WL 820784 (9th App. Dist. 1999), Oct.13, 1999 (NO. 98CV007109).

Where there was conversion of personal property and breach of contract. *Dalicandro v. Morrison Rd. Dev. Co., Inc.*, (10th App. Dist. 2001), April 17, 2001 (NOS. 00AP-619 & 00AP-656).

Fraudulent inducement not to sue to collect a debt. *Imperial Const., Inc. v. Precision Cut, Inc.*, 2001 WL 1479236 (8th App. Dist. 2001), Nov. 21, 2001 (No. 79290).

Where a shareholder used a corporation to avoid a judgment. *Stypula v. Chandler*, 2003 WL 22844296, 2003-Ohio-6413, (11th App. Dist. 2003), Nov. 26, 2003 (Case NO. 2002-G-2468).

Construction case where funds were not available to pay persons due. *Pikewood Manor, Inc. v. Monterrey Concrete Const.*, 2004 WL 200146, 2004-Ohio-440, (9th App. Dist. 2004), Feb. 04, 2004 (NO. 03CA008289).

Construction case where shareholder transferred corporate money to his personal account after confirming that there were no mechanic liens. *Robert A. Saurber Gen. Contractor, Inc. v. McAndrews*, 2004 WL 2937627, 2004-Ohio-6927, (12th App. Dist. 2004), Dec. 20, 2004 (NO. CA2003-09-239).

Where a nonshareholder was deemed the "controlling party" for purposes of piercing the corporate veil for ordering product when he knew the corporation had no money *Sanderson Farms, Inc. v. Gasbarro*, 2004 WL 583849, 2004-Ohio-1460, (10th App. Dist. 2004), March 25, 2004 (Case NO. 01AP-461).

For a violation of EPA permit. *State v. Tri-State Group, Inc.*, 2004 WL 1882567, 2004-Ohio-4441, (7th App. Dist. 2004), Aug. 20, 2004 (Case NO. 03 BE 61).

Where improper accounting of monies and misrepresentations of ability to perform a contract was an "unjust result". *Music Express Broadcasting Corp. v. Aloha Sports, Inc.*, 161 Ohio App.3d 737 (11th App. Dist. 2005).

Breach of contract alone is insufficient for piercing the corporate veil. *Siva v. 1138 LLC*, 2007 WL 2634007, 2007-Ohio-4667 (10th App. Dist. 2007), Sept. 11, 2007 (Case NO. 06AP-959).

Significantly, the Sixth Circuit Court of Appeals interpreted *Belvedere* recently in *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 610 (6th Cir. 2005). Pointing out that an overwhelming majority of Ohio's appellate courts have adopted the more expansive approach of including inequitable and unjust acts within the second prong, and adopting the reasoning of the court in *Wiencek*, that court held:

> Faced with this series of interpretations, the Ohio Supreme Court has neither clarified its test nor corrected the expansion initiated by the courts of appeals. We believe that the *Wiencek* court was correct to hold, based on the totality of the language in *Belvedere*, that the Supreme Court intended the veil piercing remedy to be available when the misdeeds of an individual, acting through her company, have caused serious civil, as well as criminal, injustice. Coupling that with the near-unanimity of the courts of appeals and the Supreme Court's failure to express disagreement with their interpretation, we find that the meaning of "illegal act" is unsettled and anticipate that the Supreme Court would agree with the overwhelming majority of courts of appeals and interpret the second requirement of the *Belvedere* test to cover unjust acts more broadly.

The *Taylor Steel* court, borrowing from *Wiencek*, also aptly observed that prior to *Belvedere*, Ohio courts, including the supreme court, have allowed piercing the corporate veil to avoid injustices and not only in situations where fraud or an illegal act is present. Quoting *Wiencek*, the *Taylor Steel* court commented:

> Moreover, we note that prior to its ruling in *Belvedere*, the Ohio Supreme Court had never specifically addressed the issue of what was encompassed in the definition of "fraud" in determining when to disregard corporate formalities and allow the corporate veil to be pierced. However, as noted in *LeRoux's*, 602 N.E.2d at 688-689, the Ohio Supreme Court had (prior to its decision in *Belvedere*) endorsed the notion that fraud or an illegal act need not be the only determinant of whether a corporate veil can be pierced, but indicated that the corporate veil could be pierced if an injustice would result.
>
> *Wiencek*, 671 N.E.2d at 1342.

Id. at 609-10.

As discussed above, it appears that the Court of Appeals for the Sixth District is the only Ohio appellate district to limit the *Belvedere* test to only fraud or an illegal act while noting that the point behind piercing the corporate veil is 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." *Collum*, 1999 WL 252725, at *3. If one were to accept the approach taken in *Collum*, then a shareholder or a parent corporation could still unjustly hide behind the corporation or subsidiary so long as a specific fraudulent or illegal act is not involved.

The vast majority of Ohio Court of Appeals as well as the Sixth Circuit interpret *Belvedere* to permit piercing the corporate veil for a variety of wrongful acts ranging from manipulation of corporate funds to avoid a liability, to the tort of conversion, to violating licensing or permits rules. These cases follow the well-developed approach that piercing the corporate veil is a doctrine that must be applied *sui generis*, i.e., it is the facts of each case that control whether the prongs of *Belvedere* can be met in determining whether to remedy the corporate misdeed that leads to an unjust result. *Minno* at ¶41; *Tri-State* at ¶70.

3. Tort of Insurer Bad Faith is both an "Illegal act" and an "unjust or inequitable" act under the second prong of *Belvedere*.

The instant case involves the tort of insurer bad faith. *Zoppo v. Homestead, Ins. Co.* (1994), 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397. It is an established tort, similar to that of conversion. It fits within the definition of "an illegal act" because it is clearly against and not authorized by law. It seems similar to an alleged breach of fiduciary duty by a trustee for failing to follow the prudent investor rule as recently codified in R.C. 5809.01-03. Similarly, it may include a breach of the covenant of good faith that is inherent in every contract for goods sold in Ohio. R.C. 1301.09. To suggest, as Petitioners do, that "illegal" only embraces criminal acts defies a fair reading of *Belvedere.* Petitioners seek to have this Court return to the days of *North* to focus on "misuse of the corporate form" which would of necessity have this Court return to the pre-insurer bad faith era when an insurer's obligations were governed strictly and solely by the express terms of the insurance contract. That would defy the "modern reality" of the insurance industry and vitiate the tort of insurer bad faith.

As this Court held in *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St. 3d 272, 452 N.E.2d 1315, the *tort* of bad faith derives not from any precise contractual obligation, but from the nature of the *relationship* that exists between the plaintiff and the defendant. *Hoskins*, 6 Ohio St. 3d at 272 (Syllabus 1). ("Based upon the *relationship* between an insurer and its insured, an insurer has a duty to act in good faith in the handling and payment of the claims of its insured".)

Hoskins arose when Aetna Life Insurance Company refused to pay certain of Hoskins' medical bills. In holding that a claim of bad faith existed in the context of that case, the court placed special emphasis on the relationship between the parties:

> The imposition of the duty of good faith upon the insurer is justified "because of the relationship between the *** [insurer and the insured] and the fact that in the insurance field the insured usually has no voice in the preparation of the insurance policy and because of the great disparity between the economic positions of the parties to a contract of insurance; and, furthermore, at the time an

> insured party makes a claim he may be in dire financial straits and therefore may be especially vulnerable to oppressive tactics by an insurer seeking a settlement or a release…."

6 Ohio St. 3d at 275. The court continued:

> The liability of the insurer in such cases does not arise from its mere omission to perform a contract obligation, for it is well established in Ohio that it is no tort to breach a contract, regardless of motive. *Rather, the liability arises from the breach of the positive legal duty imposed by law due to the relationships of the parties.*

6 Ohio St.3d at 276.

However, the path of the law of bad faith in Ohio actually began earlier with *Hart v. The Republic Mutual Ins. Co.* (1949), 152 Ohio St. 185, 87 N.E.2d 347, where the court addressed the liability of an insurer that refuses to settle a claim within the limits of its policy when a jury returns a verdict in excess of those limits. In a case of first impression, that court held that, technical contract language notwithstanding, an insurer was obligated to safeguard the interests of its insured and, where it failed to do so, it could be liable in tort.[2]

Following *Hart* and *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111, 118 (6th Cir. 1976), the Supreme Court, in a unanimous decision in *Hoskins*,[3] journeyed further down the path, extending the doctrine of bad faith to embrace an insurer who failed to pay for

---

[2] Two justices dissented on grounds similar to the formalistic arguments WellPoint and AICI advance in this case: "Even if the defendant's failure to settle that claim did cause a loss to plaintiff, plaintiff should not recover unless defendant owed plaintiff some obligation to settle that claim. Apart from the insurance contract, defendant obviously had no obligation to settle that claim. Any obligation to do so must arise from the insurance contract." *Hart*, 152 Ohio St. at 190 (Taft, J., dissenting).

[3] Justice Brown concurred in the syllabus but dissented on an unrelated issue.

necessary medical care. Then in *Suver v. Pers. Serv. Ins. Co.* (1984), 11 Ohio St. 3d 6, 462 N.E.2d 415, this Court went a short step further, extending the law of bad faith outside the insurance context to a claim brought by a third party against the company that issued a financial responsibility bond to the individual who harmed the third party.

The reason for that extension was that the issuer of a financial responsibility bond acts toward an injured third party, in many respects, like an insurer acts toward its insured. In other words, liability in bad faith was founded upon the *relationship* between the parties to the action:

> Personal Service Insurance Company also [asserts] that when the amount of the bond has been paid the surety's entire duty has been discharged. This same sort of argument was made in *Hoskins*. However, in *Hoskins* it was explained that *the liability of the insurer does not arise from its omission to perform a contractual obligation. Instead, it arises from the breach of a positive legal duty founded upon the relationship of the parties.* The relationship between an injured party and a surety, in the context of a financial responsibility bond, and that between a policy holder and insurance company, in the traditional insurance context, are virtually identical. The major difference lies in the identity of the party claiming the benefit of the financial protection. Because a liability insurance policy is designed to protect the insured, he benefits from a duty owed by the insurer. So, too, logic compels, since a financial responsibility bond is designed to protect one who may be injured by the principal, the same duty should be owed that individual by the issuer of the bond.

11 Ohio St. 3d at 8 (emphasis added).[4]

---

[4] Like the dissent in *Hart*, Justice Holmes' dissent in the *Suver* case centered on contractual formalities: "[T]he imposition of the duty of good faith upon the insurer [in *Hoskins*] was justified because of the relationship between the insurer and the insured. There was obvious privity of contract and consideration flowing from both sides. In my view, the contractual

Thus, the tort of bad faith springs from the relationship arising out of the insurance contract between the insurer and the insured. But, that relationship includes all facets of issuing and administering an insurance policy regardless of the particular entity involved in doing so.

4. Applying the tort of insurer bad faith in the modern corporate insurance reality

The issue implicit in the certified question is whether the dealings and relationships between Dombroski, CIC, AICI, AUMSI and WellPoint are of such a nature so as to impose the duty of good faith upon AICI and WellPoint by piercing the corporate veil of AUMSI and CIC. Although this precise issue appears to be one of first impression in Ohio, how courts in other states have addressed applying the tort of bad faith to non-insurance company entities is instructive on why an Ohio insured needs the remedy of piercing the corporate veil for redress of unjustified denial or benefits or improper handling of their claims.

Many courts have simply found in insurance company organizations similar to WellPoint's that one who undertakes to perform the duties of an insurer can be held liable for bad faith if it fails in its undertaking. For example, *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d 642, 155 Cal Rptr. 843 (Cal. App. 4th Dist. 1979), which held:

> If we were to accept 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

---

relationship between the parties was vital in establishing the duty on the insurer to act in good faith." 11 Ohio St. 3d at 9 (Holmes, J., dissenting).

> we would also deprive a plaintiff from redress against the party primarily responsible for damages.

155 Cal. Rptr. at 849.

A decade later, in another case involving the same Exchange and Group, a Colorado court of appeals followed *Delos* in holding Group liable for bad faith under Colorado law, even though Group was not the insurer:

> Under these circumstances, strict adherence to the general rule that liability for bad faith may be imposed only against a party to an insurance contract would permit Farmers [Group] to shield itself from liability through the device of a management company and would deny [the insured] recovery from the party primarily responsible for his damages.

Farmers Group, Inc. v. Trimble, 768 P.2d 1243, 1247 (Colo. App. 1988). See also, *Campbell v. Am. Int'l Group, Inc.*, 976 P. 2d 1102 (Okla. Civ App. 1999) regarding holding a parent company liable for bad faith, and *Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725 (Ariz. 1991) holding a parent corporation liable where it had managed the claims for its subsidiary issuing company.

In the context of managed care, the Wisconsin Supreme Court's decision in *McEvoy v. Group Health Cooperative of Eau Claire*, 570 N.W.2d 397 (Wis. 1997) is also instructive. McEvoy sued the Group Health Coop. ("GHC"), not an insurer but a health maintenance organization, for breach of contract and bad faith arising out of GHC's refusal to pay for medical treatment. The trial court entered summary judgment for GHC, holding that the tort of bad faith was limited to insurance companies. The Wisconsin court of appeals reversed, and the Supreme Court of Wisconsin affirmed.

After canvassing both the law of bad faith and the law applicable to HMOs, the court concluded that, due to the relationship between an HMO and its subscribers, the tort of bad faith would apply:

> Through contractual arrangements with physicians and patients, HMOs are able to exert significant influence on, if not outright control over, the costs of treatment regimens administered to patients, thereby limiting waste. The fears attendant with such arrangements, however, revolve around the economic model of health care financiers focusing on reducing aggregate costs while failing to recognize and to protect adequately the medical needs of individual subscribers.
>
> ...This fear is particularly acute in the present high-cost medical economy where an adverse benefits ruling means not just that the financier will not provide payment, but also that the medical care itself is effectively denied. The tort of bad faith was created to protect the insured from such harm.... [T]he application of bad faith tort is a means of leveling the playing field when a dispute between an insurer and a subscriber arises.... Because HMO subscribers are in an inferior position for enforcing their contractual health care rights, application of the tort of bad faith is an additional means of ensuring that HMOs do not give cost containment and utilization review such significant weight so as to disregard the legitimate medical needs of subscribers.

570 N.W.2d at 403.

Although these cases arose in a variety of contexts and jurisdictions, they have several threads in common. In each case, the party alleged to have acted in bad faith was not an insurer. In each case, the party had not issued a policy of insurance. In each case, the party to be held accountable was, in a narrow sense, a "stranger" to the insurance contract as Petitioners have argued here. Yet in each case, each party acted like an insurer by paying – or refusing to pay – claims. And in each case, there was an imbalance in the relationship between the people seeking payment of claims and the companies who refused to make the payments.

5. Insurer Corporate Reality and Dombroski

As in the cases set forth immediately above, these same elements are present in this case. Neither WellPoint nor AICI is a formal party to Dombroski's insurance contract. Yet WellPoint and AICI assumed many of CIC's responsibilities or directed CIC and AUMSI in the performance of the responsibilities that WellPoint and AICI did not assume. It is noteworthy that AUMSI is neither an insurer or signatory to Dombroski's insurance contract.

As WellPoint's and AICI's own acts and documents demonstrate, the insurance industry, particularly that portion of the industry devoted to health care, has changed dramatically since *Hoskins*. Administration of health coverage has been *consolidated* and *integrated*, and large insurance conglomerates, while nominally operating through a series of subsidiaries, are nonetheless running their business from a centralized hub. To hold that only the subsidiary that issued the policy could be liable for bad faith – when policies, procedures, and even the coverage decisions themselves, are made at headquarters – would provide an incentive for these conglomerates to act in bad faith. What this Court noted in *Suver* applies with equal force to the distinction between the misconduct by AUMSI and CIC, on one hand, and WellPoint/AICI on the other:

> These differences are not so pronounced as to require the creation of a cause of action in one case and its denial in the other. Precisely the same policy arguments

> and rationale hold true in both settings. In both cases there is a great disparity of financial resources. Additionally, issuers of financial responsibility bonds are companies clearly affected with a public interest. Moreover, to insulate the issuer of a financial responsibility bond from liability for the deliberate refusal to pay its obligations arising from the bond is to encourage the routine denial of payment of claims for as long as possible. This court should not provide an incentive to act in bad faith.

Suver, 11 Ohio St. 3d at 7-8.

The facts in *Dombroski* present the challenge of how the doctrine of piercing the corporate veil is to be applied in the reality of today's insurance organizations, which frequently includes a parent corporation that does business through many subsidiaries. Here, WellPoint owns directly AICI, which is an insurance company. WellPoint and AICI indirectly own 100 percent of CIC, an Ohio insurance company created to sell the products developed by WellPoint to people such as Dombroski. CIC did just that. It sold the policy to her and it collected her premiums. But, it did not participate in denying benefits for a cochlear implant that she sought under her policy. The denial was done by AUMSI another wholly owned subsidiary of WellPoint and AICI. AUMSI is not an insurance company. It decides what claims to pay and what claims to deny. Presumably, CIC would have paid Dombroski's claim had AUMSI not denied it pursuant to a medical policy foisted upon it by AICI.

Multi-state insurers, such as WellPoint or "Anthem", which run its insurance business through affiliates while utilizing an integrated and centralized web of policies and procedures seek to return to the "good old days" when they were free to refuse or pay claims – for good reasons, for bad reasons, for no reason at all – safe in the knowledge that regardless of the unjust results their decisions bring to their insured, who could only seek payment the benefit under the contract, and then only after judicial order. It is this conglomeration of corporate fictions that Petitioners seek to effectively immunize themselves from the tort of bad faith. If an integrated or conglomerate insurance company such as WellPoint is permitted with impunity to act in bad faith through a calculated corporate maze in order to avoid liability for insurer bad faith, that tort is rendered meaningless. That would truly be an unjust result. The doctrine of piercing the corporate veil should apply when the control is used to commit the tort of insurer bad faith.

IV. PETITIONERS' ARGUMENTS

A. Petitioners' Proposed Proposition of Law, that the shareholder of parent corporation must misuse the corporate form to satisfy *Belvedere's* second prong, is incorrect.

Petitioners' proposed proposition of law that "the second element of the *Belvedere* test for piercing the corporate veil requires allegations and proof of facts showing that a shareholder "misused the corporate form" to commit fraud or an illegal act is simply wrong. It is a faulty construct of what this Court held in *Belvedere*. The word "misuse" or the phrase "misused the corporate form" do not appear in that opinion.

Petitioners entire main argument is based on the faulty premise that Ohio appellate courts and the Sixth Circuit have misread and misapplied the second prong of *Belvedere* since it was decided in 1993. For example, Petitioners make statements such as "a court may pierce the corporate veil only if the shareholders have abused the corporate form to perpetrate a fraud or an illegal act that caused harm to the plaintiff" (Brief at 7), that "the key to the second prong of the veil piercing test is whether the shareholder misused the corporate form, and not the nature of the underlying wrong allegedly committed by the corporation sought to be pierced" (Brief at 11), that "the corporate veil may be pierced only when the controlling shareholder commits its own wrong, by misusing the corporate form" (Brief at 15), and that "piercing the corporate veil may not occur without a showing of misuse of the corporate form" (Brief at 19).

Although not the issue presented for briefing by the certified question, the second prong of *Belvedere* clearly does require that the control of the corporation by the one to be held liable was used to commit the act. "The presence of fraud in a closely held corporation is not, standing alone, a basis to pierce the corporate veil.". *Central Benefits* at 404. Even before *Belvedere,* Ohio courts understood that "there must be a demonstration that the domination and control of the corporation was used to commit fraud [or an illegal, unjust, or inequitable act]." *Am. Hardware Supply v. Alan Supply, Inc.*, 63 Ohio App. 3d 838, 843-44, 580 N.E.2d 473, 476 (10th Dist. 1989); *Belvedere* at 287-288. The question to ask is was control "exercised in such a manner to do a wrongful act?" *Tri-State Group* at *14; *see also Music Express Broad. Corp. v. Aloha Sports, Inc.*, 161 Ohio App. 3d 737, 2005-Ohio-3401, 831 N.E.2d 1087 (company demonstrated that control of corporation was exercised in such a manner as to commit illegal act against person seeking to pierce the corporate veil, as element of *Belvedere* test to pierce corporate veil and to impose liability on majority shareholder; majority shareholder benefited from trades that were made with company's stations, deposited funds in his personal account without proper accounting, misrepresented corporation's ability to perform terms of contract entered into with company, and ceased operations without notice to company). See also, *Waste Conversion Techs., Inc. v. Warren Recycling, Inc.*, 191 F. Appx 429, 433 (6^{th} Cir. 2006), (second prong "asks whether the control was exercised to commit fraud [or illegal, inequitable, and/or unjust act]."); *Upperman v. Grange Indem. Ins. Co.*, 135 Ohio Misc. 2d 8, 2005-Ohio-6227, 842 N.E.2d 132 (C.P. 2005) (insureds could pierce the corporate veil to hold parent corporation liable for automobile insurers' alleged fraud and failure to refund overcharged premiums where the parent exercised so much control over the subsidiary that it could be reasonably inferred that parent was directing its subsidiary's decisions).

As set forth in the Counterstatement of Facts, the facts pled clearly demonstrate that WellPoint and AICI as the direct or indirect owners of CIC and AUMSI controlled the content of the insurance policy itself, how it was to be administered, and how claims were to be handled and adjudicated. They exercised and used their control to commit the illegal and unjust acts constituting the tort of insurer bad faith.

Moreover, not only did WellPoint and AICI use their control of CIC and AUMSI to commit the wrongful act, it was done through these subsidiaries in order to shield themselves from any liability for their own misdeeds as well as the misdeeds of its subsidiaries. The purpose of the doctrine of piercing the corporate veil is to prevent just that type of conduct. As the court in *Minno* stated:

> Piercing of the corporate veil has been implemented to remedy precisely the situation that is evident here, i.e. to disallow a "parent corporation, as the alter ego of the subsidiary company, * * * to avoid liability for the

> subsidiary's misdeeds * * * or its obligations." *Taverns for Tots, Inc. v. City of Toledo*, N. Dist. Ohio Case No. 3:04CV7030, 307 F. Supp.2d 933, at 941.

Minno at ¶47 .

Contrary to Petitioner's Chicken Little-like assertions, the three prong test in Belvedere does a very good job of protecting the doctrine or limited shareholder liability. It is only those shareholders (whether individuals or other corporations) who use their control to commit misdeeds that cause an unjust result that are subject to liability under the Belvedere test. That test properly balances limited shareholder liability with corporate malfeasance, which *Belvedere* described as "the reality that the corporation fiction is sometimes used by shareholders to protect themselves from liability for their own misdeeds." *Belvedere* at 289.

B. *Belvedere* test improper for Civil Rule 12(B)(6) Motions to Dismiss

Under Civil Rule 12(B)(6), a trial court must examine a complaint to determine whether the defendant could possibly be held liable under any legal theory on the facts alleged. The legal theory does not need to be specifically identified or plead. *Scardina v. Ghannam*, No. 04-MA-81, 2005 Ohio App. LEXIS 3075 (Ohio Ct. App. 7th Dist., June 29, 2005); accord, *Rogers v. Targot Telemarketing Services,* 70 Ohio App. 3d 689; 591 N.E.2d 1332; 1990 Ohio App. LEXIS 5744 and *Pritchard v. Algis Sirvaitis & Assocs.*, 2000 Ohio 3153; 2006 Ohio App. LEXIS 3038. Here, Dombroski clearly put WellPoint and AICI on notice that she was alleging that each of them had committed the tort of insurer bad faith. (S.2-11, ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 33, 34, 35).

Respectfully submitted,

Robert G. Palmer (0022152)
ROBERT GRAY PALMER CO., LPA
140 E. Town Street, Suite 1200
Columbus, Ohio 43215
(614) 484-1200
(614) 484-1201 Fax
bob@rgpalmerlaw.com
Attorney for Plaintiff-Appellee
Kimberly Dombroski

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served by regular U.S. Mail, postage prepaid, this 9th day of April, 2008, to:

Charles H. Bean
Thornburg, Bean & Glick
113 West Main Street
P.O. Box 96
St. Clairsville, Ohio 43950

Suzanne K. Richards
Robert N. Webner
Michael J. Hendershot
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Attorneys for Defendants-Appellants

Robert G. Palmer

APPENDIX

1301.09 Obligation of good faith - UCC 1-203.

Every contract or duty within Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code imposes an obligation of good faith in its performance or enforcement.

Effective Date: 08-15-1996

5809.01 Trustee duty to comply with act.

(A)(1) As used in the Revised Code, the "Ohio Uniform Prudent Investor Act" means sections 5809.01 to 5809.08, 5808.03, 5808.05, and 5808.06, division (A) of section 5808.02, and division (B) of section 5808.07 of the Revised Code, and those sections may be cited as the "Ohio Uniform Prudent Investor Act."

(2) As used in the Ohio Uniform Prudent Investor Act, "trustee" means a trustee under any testamentary, inter vivos, or other trust.

(B) Except as provided in division (C) or (D) of this section, a trustee who invests and manages trust assets under the Ohio Uniform Prudent Investor Act owes a duty to the beneficiaries of the trust to comply with the Ohio Uniform Prudent Investor Act.

(C) The Ohio Uniform Prudent Investor Act may be expanded, restricted, eliminated, or otherwise altered, without express reference by the instrument creating a trust to the Ohio Uniform Prudent Investor Act or any section of the Revised Code that is part of that act.

(D) A trustee is not liable to a beneficiary of a trust to the extent the trustee acted in reasonable reliance on the provisions of the trust.

Effective Date: 01-01-2007

5809.02 Standard of care - portfolio strategy - risk and return objectives.

(A) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this requirement, the trustee shall exercise reasonable care, skill, and caution.

(B) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(C) A trustee's investment and management decisions respecting individual trust assets shall not be evaluated in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(D) Among circumstances that a trustee shall consider in investing and managing trust assets are the following as are relevant to the trust or its beneficiaries:

(1) The general economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and appreciation of capital;

(6) Other resources of the beneficiaries;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital;

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Effective Date: 01-01-2007

5809.03 Investment authority - diversification.

(A) A trustee may invest in any kind of property or type of investment provided that the investment is consistent with the requirements and standards of the Ohio Uniform Prudent Investor Act.

(B) A trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Effective Date: 01-01-2007