

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)

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APPELLANTS' REPLY BRIEF

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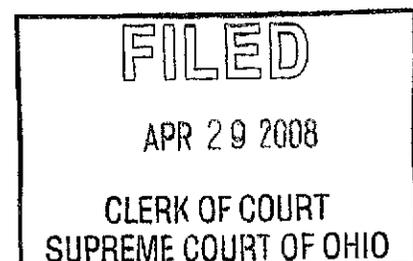
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## INTRODUCTION

Dombroski asks this Court to abandon the second *Belvedere* element and permit veil piercing whenever “control is used to commit [a] tort.” [Appellee Br. at 23] Dombroski thus advocates a rule that would permit veil piercing whenever a plaintiff claims a wrong at the hands of a corporate entity under the control of a parent or sole shareholder. Dombroski’s broad vision of veil piercing is untenable because it would eliminate limited liability for shareholders of thousands of Ohio corporations. Because the second *Belvedere* element is the key to retaining legitimate limited liability for Ohio shareholders, the Court needs to reiterate what it said in *Belvedere* and make an unambiguous statement that veil piercing is not permitted unless the shareholders misuse the corporate form.

Carefully read, *Belvedere* and other authorities hold that a plaintiff may not pierce the corporate veil without pleading and proving that those controlling the corporation exercised that control “in such a manner” as to *misuse* the corporate form and harm a plaintiff. The Seventh District did not require Dombroski to plead misuse of the corporate form. Therefore, this Court should reverse the decision below and direct judgment in favor of WellPoint and AICI on their motions to dismiss.

Dombroski also criticizes Appellants for straying from the certified question. Then — with audacity — she fills nine pages of her brief with an argument regarding insurer bad faith and advances a theory of direct liability that is clearly far outside the scope of the certified question. The Court of Appeals rejected that argument and Dombroski did not cross appeal that decision. Her failure to appeal the Seventh District’s judgment rejecting the theory forecloses that argument before this Court.

**I. Appellants' Brief Answers the Certified Question Because It Explains Why Misuse of the Corporate Form Is an Integral Part of This Court's *Belvedere* Test.**

Dombroski first accuses WellPoint and AICI of straying from the scope of the question certified by this Court. That accusation is groundless. The certified question seeks to clarify the meaning of the second element of the *Belvedere* test for piercing the corporate veil. The initial brief of WellPoint and AICI is devoted exclusively to that issue. *Belvedere*, and cases properly applying it, require (1) control (2) that is exercised “in such a manner” that the control could be called fraudulent or illegal and (3) unjust loss or injury to plaintiff as a result of such improper control. Although this test is explicitly stated in *Belvedere*, the application of the *Belvedere* formulation has led to some confusion — a point that even Dombroski concedes. [See Appellee Br. at 6, 11] To resolve this confusion, this Court should reaffirm the second prong of *Belvedere* and make clear that a plaintiff may not pierce the corporate veil without pleading and proving misuse or abuse of the corporate form by the shareholder sought to be held liable.

Dombroski sets up a strawman at pages 2 and 15 of her brief, declaring that Appellants argue for the old *North v. Higbee* rule that permitted veil piercing only if a corporation was formed for the “purposes of perpetrating a fraud.” 131 Ohio St. 507, 3 N.E.2d 391, syllabus. That assertion is incorrect. *Belvedere* plainly rejected *North*, and Appellants' merit brief clearly recognizes this. What Appellants do argue is that veil piercing is appropriate only when a corporation is *used* fraudulently by the controlling shareholders. This articulation not only encompasses forming a corporation for improper purposes, but also extends to later misuse of a corporation that was formed for legitimate reasons.

Despite Dombroski's protests that Appellants have strayed from the certified question, she implicitly recognizes that Appellants' brief answers the certified question. Indeed, she opens her brief by describing the certified question this way: "This Court asked the parties to brief the kind or categories of actions that would satisfy the second prong" of the *Belvedere* test. [Appellee Br. at 1] This is exactly what Appellants have done — explaining why veil piercing is only appropriate when the "kind of action" taken by the shareholders involves misuse of the corporate form.

**II. Dombroski's Proposed Rule Allows Veil Piercing in Almost Any Case Involving a Subsidiary or a Close Corporation and Would Vitiating Limited Shareholder Liability in Ohio.**

Putting aside the false light Dombroski shines on Appellants' arguments, her own position withers in the sunshine of careful analysis. In Dombroski's view, a plaintiff can hold shareholders liable whenever there is complete control of a corporation and the *controlled corporation* commits an injustice against a plaintiff. Because wholly owned subsidiaries and close corporations are by definition controlled by the parent or a limited number of shareholders, under Dombroski's approach *any* allegation of a tort or similar claim against a subsidiary or close corporation would necessarily state a claim for veil piercing. In Dombroski's world, the sole shareholder of an accounting business facing professional negligence claims, or the family shareholders of a restaurant facing food-poisoning claims, would be personally liable for any judgment. This is plainly not the law and indeed should not be the law of Ohio.

Dombroski defends her reinterpretation of Ohio veil-piercing law through two avenues: (1) a claim that Appellants' focus on shareholder misuse of the corporate form

misstates the second prong of *Belvedere* and (2) an assertion that there is no real difference between “illegal” or “unjust” conduct. Both claims lack merit.

**A. *Belvedere* and other authorities embrace the corporate-misuse standard.**

Dombroski contends that the corporate-misuse standard cannot be found in *Belvedere*. [Appellee Br. at 23] Although the words “corporate misuse” do not appear in the opinion, the *idea* certainly does. As Appellants detailed in their merit brief, the language and holding of *Belvedere* show that, although the Court did reject the *North* test requiring that a corporation be *formed* for an improper purpose, it retained the requirement that the corporation to be pierced be *used* for an improper purpose. Three aspects of *Belvedere* confirm the Court’s retention of the misuse requirement.

The first confirmation is the syllabus language itself, which states that the corporation to be pierced must be controlled “in such a manner” as to commit fraud against the plaintiff. This key language differentiates the second part of the test from the third prong (that injury or unjust loss results). Under Dombroski’s reading, there is no separate significance to the second part of the test because both the second and third parts would look only at whether the plaintiff suffered a wrong or injustice. What *Belvedere* says, however, is that, in addition to suffering an injustice, the plaintiff must show that the controlled corporation was “used” in a manner akin to fraud. This corporate-misuse element has a long lineage in Ohio, as Appellants’ initial brief demonstrates, and is part of any sensible rule of veil piercing.

The second confirmation is the language *Belvedere* used to describe the holding. Reversing the decision of the lower court because the second required element for veil piercing was missing, the Court said: “We have found that evidence supporting one

essential element of the test for piercing the corporate veil is not to be found in the record. The missing element was a showing that [the shareholder] *controlled* the corporation *in order to defraud* the Association.” *Belvedere Condo. Unit Owners’ Assn. v. R.E Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 289 n.9, 617 N.E.2d 1075 (emphasis added). The Court did not — as Dombroski claims — look only at whether the plaintiffs suffered an injustice.

Thirdly, the *Belvedere* opinion carefully distinguished between *corporate* acts and controlling *shareholder* acts when it directed a verdict in favor of the shareholder, but remanded for the trial court to consider whether the corporation would be liable for breach of duty. This focus on wrongful shareholder misuse or abuse of the corporate form is highlighted by the language in *Belvedere* that Dombroski herself quotes [Appellee Br. at 9]: “We feel the Sixth Circuit’s approach to piercing the corporate veil strikes 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.*” *Belvedere* at 289 (emphasis added). Indeed, if the Court had ruled according to the principles Dombroski claims it did, the Court would not have directed judgment for the shareholder while remanding to reconsider the liability of the corporation.

In addition to the hollow argument that the phrase “corporate misuse” cannot be found in *Belvedere*, Dombroski contends that veil piercing should occur in cases where a parent uses a subsidiary to “commit the wrongful act.” [Appellee Br. at 25] This formulation persists in conflating the three-pronged test into two. If the only elements are control and a wrongful act, all wrongful acts of a subsidiary or a close corporation

would result in liability of the parent or shareholders, thereby rendering meaningless the concept of limited shareholder liability. Indeed, many of the cases Dombroski cites to support this twisted interpretation implicitly reject that interpretation. [See Appellee Br. at 10]

For example, *Cent. Benefits Mut. Ins. Co. v. RIS Adm'rs Agency, Inc.* (1994), 93 Ohio App.3d 397, 638 N.E.2d 1049, involved allegations of misuse or abuse of the corporate entity sought to be pierced. As the appellate court related, the plaintiff alleged that those controlling the entity sought to be pierced used corporate funds for “unauthorized purposes,” such as loans “for the purchase of a Lotus automobile” and for “marketing replicas of vintage Mercedes Benz automobiles.” *Id.* at 401. The facts of *Central Benefits* thus stand in marked contrast with this case. Dombroski has never alleged that WellPoint or AICI misused corporate funds, misused its subsidiaries, or otherwise perverted the corporate form. Instead, she alleges only WellPoint and AICI developed a written medical policy that Dombroski disagrees with, and that CIC then applied that policy to Dombroski’s claim. Such conduct cannot be viewed as misuse or abuse of the corporate form of CIC.

*Taverns for Tots* similarly recognized what Dombroski does not — that a proper claim for piercing the corporate veil requires a showing of misuse of the corporate form. The federal court in *Taverns* put it this way: “There is nothing, therefore, unusual or unfamiliar about disregarding the corporate form where that form has been created or is being implemented to *abuse* the protections or privileges that form provides.” (emphasis added). *Taverns for Tots, Inc. v. City of Toledo* (N.D. Ohio 2004), 307 F.Supp.2d 933,

941. The *Taverns* court ultimately pierced the corporate veil after finding that the corporate entity had a “manifestly unlawful basic purpose.” *Id.* at 943.

*LeRoux’s* also offers no aid to Dombroski’s argument because the court based its refusal to pierce on the absence of evidence of misuse. The court summarized its holding with a sentence that should have been written by the Seventh District in this case:

“Therefore, even though [plaintiff’s] inability to collect on a contract for work performed may appear ‘unjust’ or ‘inequitable,’ it is not the *kind of inequity or injustice* which merits the imposition of liability for a corporate debt on a shareholder.” *LeRoux’s Bilyyle Supper Club v. Ma* (6th Dist. 1991), 77 Ohio App.3d 417, 425, 602 N.E.2d 685 (emphasis added).

Even the Sixth Circuit’s opinion in *Taylor Steel*, from which Dombroski quotes extensively [Appellee Br. at 12-13], found corporate misuse before it upheld a decision piercing a corporate veil. The court observed that the shareholder held liable via piercing “abuse[d] the corporate form when she use[d] it in this suit to shield herself from liability for the debts she, and she alone, caused her company to incur.” *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 606 (C.A.6, 2005).

Only by eschewing a careful reading of *Belvedere* and other authority can Dombroski argue that merely the controlled corporation’s commission of an unjust act is the touchstone of veil piercing. The concept of misuse of the corporate form as a necessary predicate for veil piercing runs throughout Ohio cases and serves to distinguish legitimate and illegitimate instances of limited shareholder liability. The misuse standard is the basic principle that tethers veil piercing to its intellectual foundation as a *narrow* exception to limited shareholder liability.

Dombroski’s argument dispenses with that part of *Belvedere* that identifies shareholders who are not entitled to limited liability. It therefore is inconsistent with *Belvedere* and the countless authorities — including those she cites — that recognize that most limited liability arrangements are legitimate. Her argument leaves no room for legitimate limited liability and it is no “harangue” [Appellee Br. at 1] to point out that Dombroski’s view of veil piercing would strip thousands of Ohio shareholders of limited liability and would, in turn, deprive Ohio of the vast benefits of the limited liability doctrine. Indeed, other than label it a “harangue,” Dombroski never disputes Appellants’ (and amici’s) description of the substantial and widely recognized benefits that limited shareholder liability confers on Ohioans and the Ohio economy.

**B. Dombroski’s suggestion that “illegal” and “unjust” are congruent misconstrues the certified question.**

Switching gears, Dombroski next defends the Seventh District’s decision by claiming that there is no difference between an “illegal” act and an “unjust” act. [Appellee Brief at 11] This claim undermines her principal argument that Ohio’s appellate courts disagree about when to pierce the corporate veil based on the nature of the wrong to the plaintiff. If unjust conduct can be described interchangeably as illegal conduct, the courts of appeals have no disagreement.<sup>1</sup> This point underscores Appellants’ thesis that the real disagreement is whether a plaintiff must plead and prove corporate misuse by the shareholder before piercing the corporate veil or whether piercing is

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<sup>1</sup> *Belvedere* necessarily recognized that there is some difference between controlling a corporation “in such a manner” as to commit a fraudulent or illegal act and controlling a corporation so as to commit an unjust act because *Belvedere*’s restatement of the *Bucyrus-Erie* test deliberately omitted the “dishonest or unjust act” language that appears in the *Bucyrus-Erie* formulation. See *Belvedere* at 288-89 (citing *Bucyrus-Erie Co. v. Gen. Products Corp.* (C.A.6, 1981), 643 F.2d 413).

permitted merely by pleading and proving both control and an underlying wrongful act by the controlled corporation.

The cases Dombroski lists on pages 11 and 12 of her brief show that the certified question is not about the hopelessly metaphysical task of distinguishing the illegal from the unjust, but about whether corporate misuse is part of the veil-piercing test. Dombroski's list includes three opinions Appellants highlighted in their merit brief as examples of proper veil-piercing analysis.

In *Willoway Nurseries v. Curdes* (Oct. 13, 1999), 9th Dist. No. 98CA007190, 1999 WL 820784, the court focused on the shareholders' act of converting corporate assets to personal use. The deceptive or illegal act was not the act of the corporation, but the act of the shareholders in *misusing* the corporation.

In *Schudel v. Kathie's Quality Care, Inc.* (Oct. 29, 1999), 11th Dist. No. 98-L-168, 1999 WL 1073832, the court based its decision on its holding that the shareholder had "intentionally manipulated" the corporate entity to avoid paying employees. As in *Willoway*, the court looked at shareholder *misuse* of the corporation, not the corporation's misdeeds against the plaintiff.

In *Imperial Const., Inc. v. Precision Cut, Inc.* (Nov. 21, 2001), 8th Dist. No. 79290, 2001 WL 1479236, Judge Kilbane concurred to emphasize that the second and third element of *Belvedere* "require more than some general injustice and harm" because the harm must flow from the "*subversive*" use of the corporate form.

Dombroski brushes aside the actual analysis in these cases and insists that they support her answer to the certified question — that piercing is allowed if the plaintiff proves only control and injustice. As with *Belvedere* and the theoretical underpinning of

veil piercing, Dombroski misunderstands these cases. Dombroski prefers to cloak her argument in the confusion of some courts that believe the pivotal question is about what label attaches to the controlled corporation's conduct, rather than focus on whether the shareholders had misused the corporate form of the controlled corporation. That confusion reached a nadir in the Seventh District because that court permitted Dombroski to proceed with a veil-piercing claim against WellPoint and AICI despite the fact that Dombroski does not allege that WellPoint or AICI used those subsidiaries in a fashion inconsistent with the doctrine of limited shareholder liability. This Court should reiterate what it said in *Belvedere* and leave no doubt that veil piercing is only available on pleading and proof of misuse of the corporate form.

**III. Dombroski's Insistence That a Civil Rule 12(B)(6) Judgment Is Inappropriate Rests on the Mistaken Belief That the Trial Court Dismissed for the Failure To Plead the Veil-Piercing Theory by Name.**

At the close of her brief, Dombroski maintains that a 12(B)(6) motion is never appropriate to decide a *Belvedere* question. That argument is mistaken for a few reasons. First, it is in tension with her earlier statement that "it is the facts of each case that control whether the prongs of *Belvedere* can be met." [Appellee Br. at 14] Her earlier statement is correct — it is the facts of a case that determine whether a veil-piercing remedy is appropriate. When the complaint is completely devoid of any such allegations, as is true here, a motion to dismiss is appropriate. In fact, Dombroski amended her complaint *for the explicit purpose* of alleging facts that would support piercing the corporate veil — and, as the trial court properly found, she failed to do so.

Second, courts routinely dismiss complaints seeking to pierce the corporate veil, and they do so on precisely the rationale WellPoint and AICI advance here — no

allegation of abuse of the corporate form. See, e.g., *Penn National Gaming, Inc. v. Ratliff*, (Miss.2007), 954 So.2d 427, 432 (dismissing because plaintiff had not alleged that the parent had “disregarded corporate formalities or ha[d] used the corporate form to commit misfeasance”); *Crosse v. BCBSD, Inc.* (Del.2003), 836 A.2d 492, 497 (plaintiff “failed to allege any facts” that the parent entity, “through its alter-ego, has created a sham entity designed to defraud investors and creditors”). When, as here, a plaintiff fails to plead facts indicating that a parent company has misused a subsidiary, a motion to dismiss is the proper antidote to wasteful litigation over a question that need not be pursued further.

Dombroski offers no reason why veil piercing should be the only theory of liability *not* subject to Rule 12(B)(6) scrutiny. Indeed, veil piercing should top the list of theories subject to 12(B)(6) dismissal because the benefits of limited liability are eroded each time a shareholder is forced to litigate a case where veil piercing cannot be justified by the pleaded facts. This case exemplifies why veil piercing may be challenged by a motion to dismiss. WellPoint and AICI have been involved in this litigation for more than two years even though Dombroski pleaded no facts that would permit a court to pierce the veil of AUMSI and CIC. If Dombroski is right, no Ohio shareholder — no matter what is alleged in the complaint — will ever successfully avoid litigating at least through the summary judgment stage. It is hard to dream up a more insidious inversion of *limited* liability.

**IV. This Court Is Without Jurisdiction To Review Dombroski's Novel Management-Liability Theory of Insurer "Bad Faith" Because She Did Not Appeal the Lower Court's Adverse Judgment on That Theory.**

Dombroski expends considerable energy arguing that WellPoint and AICI are directly liable for insurer bad faith, despite the absence of any contractual relationship between Dombroski and those entities. Dombroski also pressed this separate direct-liability theory in the Seventh District, but that court held that she had not pleaded facts that would support such a theory. *Dombroski v. WellPoint, Inc.*, 173 Ohio App.3d 508, 2007-Ohio-5054, 879 N.E.2d 225, at ¶65 ("Therefore, Dombroski has not alleged sufficient facts to show that she can pursue WellPoint and AICI under the management theory.")

The Seventh District recognized that Dombroski's management-liability theory was distinct from her veil-piercing theory because the court held that she had failed to plead sufficient facts to support a management theory, but had pleaded sufficient facts to sustain a veil-piercing claim. See *id.* at ¶¶ 37, 65. Dombroski did not appeal or cross-appeal the Seventh District's adverse ruling. Dombroski's decision not to appeal divests this Court of jurisdiction to consider her arguments about a management-liability theory. See R. Prac. S. Ct. of Oh. II, § 2(A)(1)(b) (time for filing notice of appeal is mandatory and failure to comply "shall divest the Supreme Court of jurisdiction"); R. Prac. S. Ct. of Oh. IV § 3(B) (parties shall brief only the issues identified in Supreme Court's order accepting certified conflict); *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 187, 729 N.E.2d 726 ("This argument was the substance of an assignment of error raised below that the court of appeals overruled. Having failed to file a cross-appeal on that issue, appellees are precluded from raising the argument here."). Additionally, this Court accepted this case on a very specific certified question.

Appellee's novel management theory of direct liability in insurer "bad faith" cases is in no way encompassed by the certified question.<sup>2</sup>

### CONCLUSION

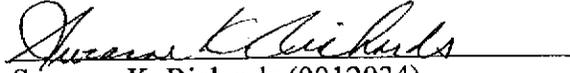
The history of veil piercing in Ohio, the holding and text of *Belvedere*, and the critical commentary on veil piercing all point to an error in the Seventh District's analysis because that court excised the critical second prong of *Belvedere*, the corporate-misuse requirement. Dombroski's response to this authority is to read the second prong out of *Belvedere* and to argue an issue she abandoned on appeal. Appellants submit that neither of these arguments properly answers the certified question.

Dombroski and Appellants can agree on one thing: Ohio veil-piercing doctrine would benefit from clarification. Dombroski's proposed clarification would effectively expand potential shareholder liability to all parents of subsidiaries and all close corporations because she contends that control plus an injustice, standing alone, are sufficient. Appellants' clarification, in contrast, proposes nothing more than a reaffirmation of *Belvedere's* teaching that a corporate-misuse requirement keeps exceptions to limited liability limited.

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<sup>2</sup> If the Court decides that this case is somehow an appropriate vehicle to consider whether Ohio will adopt a management-liability theory for insurer "bad faith" claims, Appellants request leave to submit a supplemental brief on a question that they deliberately omitted from their opening brief as beyond the limited scope of this appeal.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, this 29th day of April, 2008, upon the following:

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