

IN THE SUPREME COURT OF OHIO

JAMES MINNO, et al.) CASE NO. 2008-0170
)
Plaintiffs-Appellees,)
)
v.) *On Appeal from the Trumbull*
) *County Court of Appeals,*
) *Eleventh Appellate District,*
) *Case No. 2007-T-0021*
PRO-FAB, INC., et al.)
)
Defendants-Appellants.)

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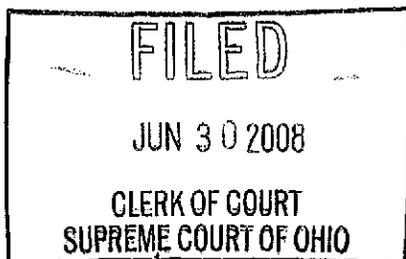


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STATEMENT OF FACTS

On or about September 24, 2003, Appellee James Minno was working for See-Ann, Inc. ("See-Ann") on a project for the Newton Falls High School located in Newton Falls, Trumbull County, Ohio. Mr. Minno fell to the ground from a wall approximately 19-30 feet in height and suffered injuries.

Appellee has alleged that Defendant See-Ann failed to take reasonably adequate measures and/or implement certain policies and/or procedures in order to ensure the safety of Appellee. Appellee further alleges that Defendant See-Ann is essentially liable to Appellee for an intentional tort. Appellee's wife and daughter also bring claims for loss of consortium. In the complaint, Appellee admits that he was an employee of See-Ann at the time of the incident.

Pro-Fab, Inc. ("Pro-Fab") is a legal corporation organized and existing under the laws of the State of Ohio. Pro-Fab was involved as a subcontractor on the Newtown Falls High School project. At no point does Appellee make the claim that he was ever employed by Appellant Pro-Fab. The only claim advanced by Appellee against Pro-Fab is that the corporate veil of See-Ann should be pierced and liability should be imposed on Pro-Fab, as See-Ann is allegedly a "mere instrumentality" of Pro-Fab.

STATEMENT OF THE CASE

On May 9, 2005, Pro-Fab filed a motion for summary judgment at the trial court level denying any direct involvement in Appellee's accident. Shortly thereafter, Appellees sought leave to amend their complaint and admitted that Pro-Fab and See-Ann were separate and distinct legal entities. However,

Appellees then attempted to proceed under a theory of “alter ego”, claiming that See-Ann was a “mere instrumentality” of Pro-Fab. It should be noted that Appellees did not attempt to pierce See-Ann’s corporate veil and hold the individual shareholders of See-Ann liable in this case. Instead, Appellees have advanced the theory that See-Ann, a legal corporation, is somehow controlled by Pro-Fab, an admittedly separate and distinct legal entity. In addition, it should further be noted that the legal entity Pro-Fab has no ownership interest whatsoever in the legal entity that is See-Ann.

On January 25, 2007, the trial court granted Pro-Fab’s motion for summary judgment. Appellees appealed that decision to Ohio’s Eleventh Appellate District. The Eleventh Appellate District issued a judgment entry reversing the trial court on December 10, 2007, and this decision of the Eleventh District Court of Appeals contained a strong dissenting opinion drafted by the Honorable Diane V. Grendell, J. It is the majority decision of the Eleventh Appellate District that is appealed to Ohio’s Honorable Supreme Court in the instant matter.

**ARGUMENT IN SUPPORT OF
APPELLANT'S PROPOSITION OF LAW NO. 1**

Appellants' Proposition of Law No. 1:

The *Belvedere* test for piercing the corporate veil is not applicable to this case, and even if it were, the Appellee has failed to establish a *prima facie* showing that all of the elements of the test were satisfied. Thus, the trial court properly granted summary judgment in this case as Pro-Fab and See-Ann are and were separate and distinct legal entities, and Pro-Fab has in no way unjustly caused any injury to Appellees.

Appellees contend that Pro-Fab has liability for the actions of See-Ann, a completely separate and distinct company based on the theory of “alter ego”. While Appellees argue that there is some “alter ego” relationship between Pro-Fab and See-Ann, it is clear from the record that even Appellee himself understands that Pro-Fab and See-Ann are separate and distinct legal entities. For example, Appellees stated in their brief to the Eleventh Circuit that neither See-Ann nor Pro-Fab provided a “list” for the Newton Falls project, despite the fact that See-Ann provided a list for Appellee on all other past jobs. Appellee himself speaks in terms of the separate and distinct legal entities that are Pro-Fab and See-Ann throughout the briefing in this case. This is because Appellee himself understands that these are separate companies, and that one is not a mere instrumentality of another.

It should be noted at the outset that there is only one issue for this Honorable Court to review. That issue is whether or not See-Ann was a mere instrumentality of Pro-Fab. Nowhere in Appellees brief does Appellee speak to the issue of “active participation”. It is clear from a review of the trial court’s judgment entry that Pro-Fab did not exercise any dominion or control over Appellee in the performance of his job duties while working for See-Ann. In fact, the trial court stated as follows:

It is undisputed from the evidence presented to this Court that Plaintiff, James Minno, was an employee of See-Ann, Inc. (“See-Ann”) at all relevant times herein, and that Defendants Hummel and Pro-Fab did not exercise any dominion or control over Plaintiff in the performance of his job duties while working for See-Ann.

While this statement is dispositive of the active participation issues not on appeal, it also is dispositive of the issues with regard to “alter ego”. The trial court made a specific finding that Pro-Fab, as a company, did not exercise any dominion or control over Appellee in the performance of his job duties while he was working for See-Ann. (See Judgment Entry, p. 1.) The court went on to specifically find the following:

Specifically, this Court finds that neither Defendant Hummel nor Defendant Pro-Fab actively participated in the portion of the project which resulted in the injury to Plaintiff.

The trial court thus found there were no genuine issues as to any material facts and after construing the evidence most strongly in favor of the Appellee James Minno, reasonable minds could come to but one conclusion, and that conclusion was adverse to the Appellee James Minno. Therefore the trial court correctly granted Pro-Fab summary judgment.

A. Mere Instrumentality

With regard to the substantive issues presented to the Eleventh District Court of Appeals, the Honorable Diane V. Grendell, J. stated in a very well-reasoned dissenting opinion as follows:

Mr. Minno suffered terrible injuries as the result of his accident. It is natural to be sympathetic toward him. A jury has yet to decide to what extent, if any, See-Ann is liable to Mr. Minno for his injuries. However, this does not allow us, as a court, to misapply the *Belvedere* test in order to find Pro-Fab “fundamentally indistinguishable” from See-Ann, a separate corporate entity and Minno’s employer, when both the facts and the applicable law make it clear that *Belvedere* does not apply. Moreover, even if we were to assume, arguendo, the *Belvedere* test was applicable, Minno has failed to establish a prima facie showing that all of the elements of

the test were satisfied. Summary judgment was properly granted in this case. Accordingly, I respectfully dissent.

The Ohio Supreme Court has been very clear on the issue of when corporate formalities may be disregarded. Appellees in this case have cited to *Wallace v. Shelley & Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005 Ohio 1345 at 37, for the proposition that one corporation is not generally liable for the actions of its sister corporation. However, the *Wallace* case does not actually stand for that proposition. The *Wallace* court held that a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation. *Id.* This is because a corporation is a legal entity apart from those who compose it. *Id.*

What is important to note here is that Appellees have conveniently left out a very important distinction between the *Wallace* case and this case. Any piercing of the corporate veil issues, and any theories of “alter ego”, assume dominance or dominion and control and seek to hold the domineering party responsible for its acts.

The evidence before this Court is undisputed that Pro-Fab and See-Ann are separately incorporated entities, and that the Appellee was employed by See-Ann, and not Pro-Fab, at the time that his accident occurred. As stated by the dissent:

This court has held that, [p]iercing the corporate veil is not a claim, [but] a remedy encompassed within a claim.” *Geier v. Natl. GG Industries, Inc.* (Dec. 23, 1999), 11th Dist. No. 98-L-172, 1999 Ohio App. LEXIS 6263, at *10. However, that is precisely what Minno has attempted to do by arguing that the “corporate veil” of See-Ann should be pierced, i.e., he is attempting to state a claim against Pro-Fab, an undisputedly separate legal entity.

“Ohio Courts have treated the separate legal personality of a corporation as the norm and it remains clear that disregarding this norm is the exception and not the rule”. *Clinical Components, Inc. v. Leffler Industries, Inc.* (Jan 22, 1997), 9th Dist. No. 95CA0085, 1997 Ohio App. LEXIS 199, at *6 (citations omitted) (emphasis added). “This is because a corporation is a legal entity, apart from those who compose it.” *Wallace v. Shelly and Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005-Ohio-1345, at ¶37 (citation omitted).

“One of the purposes of incorporation is to limit the liability of individual shareholders. ***Thus, the burden of proof is upon the party seeking to impose liability on the shareholder or shareholders to demonstrate that one of the grounds for piercing the corporate veil exists.” *LeRoux’s Billyle Supper Club v. DVJ’s Plumbing* (1991), 77 Ohio App.3d 417, 423 (emphasis added). Mr. Minno, as the party seeking to impose liability in this case, bears the burden of proof.

Eleventh District Court of Appeals’ Judgment Entry, Case No. 2007-TR-0021.

Appellees have argued *ad nauseam* throughout the pendency of this case regarding the control allegedly exercised by individual owners and officers of Pro-Fab and See-Ann. However, in this particular context, their argument is misplaced. If Appellees seek to pierce the corporate veil and hold the domineering individual shareholders, owners and officers of either Pro-Fab or See-Ann responsible for their individual actions, they have failed to assert such allegations. Instead, Appellees have chosen to assert allegations against Pro-Fab as the “sister corporation” of See-Ann. Again, this claim is misplaced. Pro-Fab, as a separate and distinct legal entity, does not exercise any dominion and/or control over See-Ann. In fact, Appellees have introduced no evidence whatsoever that Pro-Fab as a corporate entity has any ownership interest whatsoever in See-Ann. An ownership interest would be required in order for Pro-Fab to control See-Ann’s actions.

Appellees have simply asserted an argument based upon a commonality of ownership and officers, and if that is their claim, they should have asserted a claim against those individuals and attempted to pierce See-Ann's corporate veil. It is clear from all of Appellees' arguments that the separate, distinct legal entity that is Pro-Fab exercised no dominion or control whatsoever, and could not legally exercise dominion or control in any manner, over the corporation that is See-Ann.

In fact, this very issue was litigated and decided in the United States Bankruptcy Court in the case of *Enwotwen Industries, Inc. v. Brookstone Limited Partnership*, 157 B.R. 374, U.S. Bankruptcy Court, 7th Dist. of Ohio, Eastern Division. There, the claimant argued that because two corporations had the same shareholder, shared office space, shared one telephone line and shared expenses, that genuine factual issues existed as to whether they should be treated as one legal entity. The court stated that "even if those allegations were true, merger of their corporate identities did not necessarily follow". The argument was that one corporation clearly possessed domination and control over the other. However, the court found there was no evidence to support that bare assertion, or even to raise a factual issue. The court stated as follows:

The relationship between Newtowne, Inc. and Enwotwen Industries, Inc. is not that of parent and subsidiary. Rather, the relationship is better characterized as that of sister corporations. Neither Newtowne nor Enwotwen hold any interest in the other. Thus, it is impossible for Newtowne, as a corporation, to exercise any control over Enwotwen. The only common element between the two is the identity of the shareholders of each corporation. The control asserted by Brookstone simply cannot exist under the existing structural relationship of Newtowne and Enwotwen. *Id.*

The *Enwotwen* court found that the law developed to pierce the corporate veil was developed to provide a basis to hold the domineering entity responsible. *Enwotwen Industries, Inc. v. Brookstone Limited Partnership*, 157 B.R. 374, U.S. Bankruptcy Court, 7th Dist. of Ohio, Eastern Division.

Much as in the *Enwotwen* case, in this particular case, it is not alleged by Appellees that Pro-Fab is the domineering entity at issue. There is no evidence in the record that Pro-Fab as a corporation, and a separate and distinct legal entity, operated in any manner to exercise control over See-Ann. In fact, from a legal perspective, this simply cannot be done. This is fatal to the Appellees' theory of "alter ego" and Appellees' attempt to pierce the corporate veil of See-Ann, and therefore Pro-Fab is entitled to judgment as a matter of law.

Appellees next argue that the corporate entity of See-Ann must be a mere instrumentality of Pro-Fab. Appellees' claims in this regard come down to the argument that there is shared management, business purpose, operation, equipment, customers, supervision and ownership. Appellees argue that because Pro-Fab and See-Ann were incorporated on different dates and are, by Appellees' own admission, different corporations, does not by itself relieve Pro-Fab from liability with respect to the incident at issue. Appellees forget, however, that it is Appellees' burden to prove that See-Ann is a mere instrumentality of Pro-Fab. It is unclear from Appellees' argument which corporation is believed to be the mere instrumentality of the other. Appellees simply argue that they are substantially similar in their ownership structure,

business address and business purpose, and therefore that they are one and the same.

It is black letter Ohio law that it requires more than a mere identity of shareholders between corporations to ignore their separate corporate entities. *Enwotwen Industries, Inc. v. Brookstone Limited Partnership*, 157 B.R. 374, U.S. Bankruptcy Court, 7th Dist. of Ohio, Eastern Division.

This Honorable Ohio Supreme Court has held that there is a three prong test to determine whether the corporate form should be disregarded as follows:

The corporate form may be disregarded and the individual shareholders held liable for wrongs committed by the corporation when:

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

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

The Ohio Supreme Court set forth this test to disregard the corporate form and hold individual shareholders liable for certain specified wrongs. It is clear that the Ohio Supreme Court has implemented this test to hold those who have exercised dominion and control over the corporation liable, which once again leads to the conclusion that, in this case, Pro-Fab cannot be held liable as it is not a parent company of See-Ann.

Pro-Fab and See-Ann were in fact incorporated on different dates with the Secretary of the State of Ohio. Pro-Fab, Inc. was incorporated on July 21, 1978. See-Ann, Inc. was incorporated on December 7, 1992. See-Ann is the entity that by Appellee James Minno's own admission employed Mr. Minno. See-Ann is the entity on James Minno's W-2's and payroll information. Those directing Mr. Minno's work were See-Ann employees. In fact, Mr. Minno testified as follows:

Q. Have you ever, to your knowledge, worked for Pro-Fab?

A. No.

Q. Okay. And I take it you're not here today to testify as to any relationship between Pro-Fab and See-Ann, you're not aware of any relationship, are you?

A. No.

James Minno Depo., p. 77.

By Mr. Minno's own admission, he has never worked for Pro-Fab, and is not aware of the relationship between Pro-Fab and See-Ann, if any.

In this case, the Honorable Diane V. Grendell, in her well reasoned dissenting opinion, stated as follows:

Here, the majority acknowledges that "Mr. Minno does not seek to hold the individual shareholders [Mr. Townsend and Ms. Myers] personally liable." It nevertheless concludes that "whether one is attempting to pierce the corporate veil by holding individual shareholders liable or by holding a related company liable under alter-ego principles is a distinction without a difference." I disagree.

While it is tempting to accept the majority's dictum at face value, its statement fails to acknowledge the very real distinction between a sister corporation and a parent corporation.

Based upon the undisputed evidence presented on summary judgment, reasonable minds can only conclude that Pro-Fab and See-Ann were sister corporations. A sister corporation is defined as "one of two or more corporations controlled by the same, or substantially the same, owners". Black's Law Dictionary (8 Ed. 2004), 368. In contrast, a parent corporation is defined as one that "has a controlling interest in another corporation *** usu[ally] through ownership of more than one-half the voting stock." *Id.* at 367. Here, there is no evidence whatsoever that Pro-Fab, Inc. was an owner of See-Ann, Inc., despite the fact that each corporation was owned by the same individuals and served a similar, but not identical, business purpose.

The *Belvedere* test applies to those situations where plaintiffs have sought to impose liability on individual shareholders or parent corporations, as the owners and holders of a corporation's stock. *Taverns for Tots, Inc. v. Toledo* (N.D. Ohio 2004), 307 F. Supp.2d 933, 941 (Piercing the corporate veil for clear abuses of corporate privilege and protections "occurs either where shareholders misuse the corporate structure for personal benefit or advantage, ***or where a parent corporation, as the alter ego of a subsidiary company, is not entitled to avoid liability for the subsidiary's misdeeds.") (emphasis added); see also, e.g., *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461, 466 (parent-subsidiary relationship examined); *Ohio City Orthopedics, Inc. v. Medical Billing and Receivables, Inc.*, 8th Dist. No. 81930, 2003-Ohio-1881, at ¶1 (presiding and sole shareholder relationship examined).

Even then, it is the general rule that "a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation." *Starner*, 143 Ohio App.3d at 468 (citations omitted); accord *Clinical Components*, 1997 Ohio App. LEXIS 199, at *8 ("Ohio law permits one corporation to own all of the stock of another corporation as well as to employ common officers and directors *** [and] other personnel, without risking shareholder liability") (citations omitted) (emphasis added).

Thus, the *Belvedere* test does not apply where neither corporation holds "any [ownership] interest in the other" and "[t]he only common element between the two is the shareholders of each corporation." *In re Newtowne, Inc.* ((S.D. Ohio 1993), 157 B.R. 374, 377. This is because "it is impossible for [the one sister corporation], as a corporation, to exercise any control over [the other sister

corporation].” Id. In other words, under the *Belvedere* analysis, the first element of the test, otherwise known as the “alter ego” test, cannot possibly be satisfied by Pro-Fab, since there is absolutely no evidence of “control” in the sense implied by that test. See *North v. Higbee Co.* (1936), 131 Ohio St. 507, 513-514 (“The fact that the stockholders in two corporations are the same ***, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one ***) (citation omitted).

B. Unjust Loss or Injury

Appellees argue that Pro-Fab had responsibility pursuant to its contract with Hummel Construction, Inc. (“Hummel”), the general contractor, to prevent accidents on or in the vicinity of its work. It is then argued that Pro-Fab was responsible for the proper performance of Appellee’s work, as well as the prevention of his accident.

Very simply, it is black letter Ohio law that where a subcontractor undertakes to do work for another, and the very doing of which there are elements of real or potential danger, and one of such contractor’s employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor. (See the Trial Court’s Judgment Entry, Case No. 2004-CV-02857, p. 1.) The Trial Court in this matter does a thorough job of addressing this issue. The Trial Court states that ordinarily a hiring party is not liable for injury sustained by such an employee when the independent contractor is engaged to perform an inherently dangerous task. *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103. In this situation, responsibility for protecting the

employee lies with the independent contractor itself. *Eicher v. United States Steel Corp.* (1987), 32 Ohio St.3d 248. The Trial Court stated:

There is an exception to the general rule of no responsibility. An employer may take on the risk of liability for injury or death of an independent contractor's employees if that employer actually participates in the job operation performed and, in doing so, fails to eliminate a hazard which could have been eliminated by using ordinary care. *Hirshbach v. Cincinnati Gas & Elec. Co.* (1986), 21 Ohio St.3d 110.

One who engages an independent contractor to do work for him ordinarily owed no duty of protection to the employees of such contractor, in connection with the execution of the work, who proceeds therewith knowing and appreciating that there is a condition of danger surrounding its performance. See *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103.

In *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, the Ohio Supreme Court stated in the Syllabus of the Court that:

For purposes of establishing liability to the injured employee of an independent subcontractor, "actively participated" means that the general contractor directed the activity which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project. (*Cafferkey v. Turner Constr. Co.* [1986], 21 Ohio St.3d 110, 21 OBR 416, 448 N.E.2d 189, construed and applied.)

In *Bond*, an independent subcontractor's employee brought action against general contractor and subcontractor to recover damages for injuries sustained when he fell through unguarded opening located on second floor of project. Also, the Court stated that:

In *Wellman v. East Ohio Gas Co.* (1953), 160 Ohio St. 103, paragraph one of the syllabus, this court held that "[w]here an independent contractor undertakes to do work for another in the very doing of which there are elements of danger, no liability

ordinarily attaches to the one who engaged the services of the independent contractor.”

Trial Court’s Judgment Entry, Case No. 2004-CV-02857, p. 2.

It is clear from the Trial Court’s judgment entry and the supporting Ohio Supreme Court case law cited therein that Pro-Fab does not incur a duty to protect See-Ann’s employee because of its contractual obligation to Hummel. In fact, that very issue was litigated and decided in the *Bond* case. The Supreme Court of Ohio in *Bond* rejected the injured plaintiff’s claims that contractual obligations between other entities gave rise to a new duty of care owed to employees of subcontractors. *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, at 333 and 334.

In addition, in *Reno v. Concrete Coring, Inc.* (June 17, 2005), 2005 WL 1415041, it was held that having contractual control over safety policies and procedures does not amount to active participation in order to hold another contractor liable for injury sustained by a contractor’s employee.

C. The Corporate Entity Must Be Used To Commit A Fraud Or Wrong.

Ohio law, as set forth by the Ohio Supreme Court, is clear. In order for the corporate form to be disregarded, control over the corporation by those to be held liable must be exercised to commit fraud or an illegal action against the person seeking to disregard the corporate entity. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark*, 67 Ohio St.3d 274. This is clear Ohio law, and it is the law of this case.

In this case, Appellees have made the argument that See-Ann is without proper liability insurance to cover the injuries of its employees. Appellees argue that this lack of insurance causes it to be substantially undercapitalized. This argument has no evidence whatsoever to substantiate it. Appellees put forth no evidence of the corporate assets of See-Ann. Appellees make a statement that Pro-Fab is the company holding most of “the assets”, and does not back that up with any evidence whatsoever. Appellees make the accusation that the bidding process was subverted, again without any evidence whatsoever to back it up.

Appellees further complain that Pro-Fab entered into a subcontract with Defendant Hummel, and that See-Ann completed the work. Appellees complain that Pro-Fab did not disclose to Hummel that See-Ann was the company responsible for completing the work. However, Hummel has made no complaints about this issue whatsoever. In addition, Appellees are claiming that Pro-Fab made fraudulent representations to Hummel. In order for the corporate form to be disregarded, control over the corporation by those to be held liable must be exercised to commit fraud or an illegal action against the person seeking to disregard the corporate entity. In this case, that person is the Appellee, James Minno, not Hummel Construction. Therefore, whatever representations were made between Pro-Fab and Hummel were and are irrelevant.

CONCLUSION

In Ohio, particularly in the construction industry, there are countless entities that have common shareholders. Certainly, many of these entities share no common ownership of one another. For purposes of piercing the corporate veil, an aggrieved party may seek redress against not only the entities themselves, but against the individual stockholders and/or owners of these entities by piercing the corporate veil pursuant to the *Belvedere* test set forth by this Honorable Court in *Belvedere Condominium Unit Owners Association v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 1993-Ohio-119.

What has not been endorsed by this Court is the route taken by the Appellees in this case. In the present case, it is undisputed that the Appellee was employed by the company See-Ann, Inc. Appellant Pro-Fab, Inc. is a separate and distinct legal entity from See-Ann. Pro-Fab and See-Ann have common shareholders. In this particular case, Appellee chose not to pursue any cause of action against these individual shareholders. Appellee did not attempt to pierce the corporate veil pursuant to the *Belvedere* test against these individual shareholders. Instead, Appellee has chosen the novel and unprecedented approach of attempting to “pierce the corporate veil” of See-Ann to impose liability against Pro-Fab, an entity that has no ownership interest in See-Ann whatsoever.

It is a well established general rule that a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation. *Starner v. Guardian Industries* (2001), 143 Ohio App.3d

461. It is also well established that the *Belvedere* test as set forth by this Honorable Court in the case of *Belvedere Condominium Unit Owners Association v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 1993-Ohio-119, does not apply where neither corporation holds “any ownership interest in the other” and “the only common element between the two is the shareholders of each corporation”. *In Re: Newtowne, Inc.* (S.D. Ohio 1993), 157 B.R. 374. This is because it is impossible for one sister corporation, as a corporation, to exercise any control over the other sister corporation. *Id.* In other words, under the *Belvedere* analysis, the first element of the test, otherwise known as the alter-ego test, cannot possibly be satisfied by a sister corporation, since there is absolutely no evidence of control in the sense implied by that test. See *North v. Higbee Co.* (1936), 131 Ohio St. 507.

In this case, what the Appellees have attempted to do, and what the majority in the appeals court has endorsed, is, as stated by the dissenting opinion from the Eleventh District, “unprecedented, and has been characterized by the one court which has discussed this theory of liability as ‘triangular piercing’.” *Nursing Home Consultants, Inc. v. Quantum Health Services, Inc.* (E.D. Ark. 1996), 926 F.Supp. 835.

Should Appellees’ cause of action against Pro-Fab be permitted to proceed, the law of liability with regard to corporations, and in particular construction company corporations, in the State of Ohio will be changed, turned upside down and thrust into uncertainty. Pursuant to Appellees’ arguments, any corporations with common shareholders would be at risk for the actions of other

distinct and separate legal entities simply by virtue of their commonality of shareholders.

This case presents the opportunity to squarely address when the application of the *Belvedere* case is appropriate as it relates to the piercing of the corporate veil, and to whom the *Belvedere* test may be applied.

This decision by the appellate majority greatly affects numerous corporations in the construction industry, as well as numerous other businesses and industries. It imposes potential liability due only to commonality of shareholders. It adds liability in an already difficult economic environment. In an uncertain and extremely difficult business environment, the decision of the majority puts Ohio corporations at a distinct disadvantage with regard to the law of liability. For example, according to the majority's position, if a corporation that operates a dry-cleaner and a corporation that owns and operates a strip mall had common shareholders, a common corporate office, a common corporate phone line, and common corporate employees, they would be put at risk. One corporation, having no actual controlling share in the other, would be forced to answer for the alleged torts or negligence of the other.

This is a situation that must be guarded against and prevented. To go down the Appellees' proposed path and impose liability against Pro-Fab would be to open up the proverbial Pandora's Box with regard to liability against the many, many corporations in Ohio with common shareholders.

For all of the above reasons, Pro-Fab would respectfully request that this Court reverse the decision of the Eleventh Appellate District and affirm the

decision of the trial court in this case granting Pro-Fab summary judgment in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief was sent by regular U.S. mail on the 27th day of June, 2008 to:

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Counsel for Appellee, See-Ann, Inc.

Eric J. Williams (#0072048)

IN THE SUPREME COURT OF OHIO

JAMES MINNO, et al.)
)
Plaintiffs-Appellants,)
)
v.)
)
PRO-FAB, INC., et al.)
)
Defendants-Appellees.)

CASE NO. 08-0170

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

NOTICE OF APPEAL OF
APPELLEE PRO-FAB, INC.

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FILED
JAN 23 2008
CLERK OF COURT
SUPREME COURT OF OHIO

EXHIBIT "A-1"

Notice of Appeal of Defendant-Appellee
Pro-Fab, Inc.

Defendant- Appellee, Pro-Fab, Inc., hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2007-T-0021 on December 10, 2007.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was mailed by regular U.S. mail this 22nd day of January 2008 to:

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STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JAMES MINNO, et al.,

Plaintiffs-Appellants,

- vs -

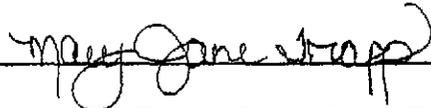
PRO-FAB, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2007-T-0021

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed, and this case is hereby remanded for further proceedings.



JUDGE MARY JANE TRAPP

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

FILED
COURT OF APPEALS

DEC 10 2007

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

EXHIBIT " A-2 " ¹⁰

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS
DEC 10 2007
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

JAMES MINNO, et al., : OPINION
Plaintiffs-Appellants, :
- vs - : CASE NO. 2007-T-0021
PRO-FAB, et al., :
Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 2004 CV 2857.

Judgment: Reversed and remanded.

James R. Scher, 200 Chestnut Avenue, N.E., Warren, OH 44483 (For Plaintiffs-Appellants).

Craig G. Pelini and Eric J. Williams, Pelini & Associates, L.L.C., Bretton Commons, #400, 8040 Cleveland Avenue, N.W., North Canton, OH (For Defendant-Appellee, Pro-Fab, Inc.).

Edward L. Lavelle, Letson, Griffith, Woodall, Lavelle & Rosenberg Co., 155 South Park Avenue, #250, P.O. Box 151, Warren, OH 44482-0151 (For Appellee, Hummel Construction Company).

MARY JANE TRAPP, J.

{¶1} Appellants, James Minno, et al. (hereinafter referred to as "Mr. Minno")¹, appeal from the Trumbull County Court of Common Pleas' judgment entry granting

1. Also named as plaintiffs were Mr. Minno's wife, Ruth Minno, and his two children, Amy Byrns, fka Minno and James Minno, Jr., a minor.

EXHIBIT "A-3"

appellee Pro-Fab, Inc.'s ("Pro-Fab") motion for summary judgment. For the reasons that follow, we reverse.

{¶2} This appeal stems from an accident that occurred on September 24, 2003, at the Newton Falls Elementary School Project ("Newton Falls Project") when Mr. Minno, while performing his duties as an ironworker, fell from a nineteen foot wall and sustained serious injuries, which rendered him paraplegic.

{¶3} **The Parties**

{¶4} Hummel Construction Company ("Hummel") was the general contractor for the Newton Falls Project. Because Hummel filed and was granted summary judgment in its favor, Hummel is not a party to this appeal.

{¶5} Pro-Fab was awarded the subcontract work for the steel erection portion of the project. Pro-Fab in turn subcontracted this steel work to defendant See-Ann, Inc. ("See-Ann") who shares corporate ownership and offices with Pro-Fab. The exact relationship between Pro-Fab and See-Ann is disputed and is at issue in this appeal. Mr. Minno contends that Pro-Fab is the "alter-ego" of See-Ann and is vicariously liable for his injuries. However, Pro-Fab considers the two companies to be separate legal entities, akin to a "brother-sister" relationship. Mr. Minno was paid by See-Ann and was considered by See-Ann to be its employee.

{¶6} **The Underlying Accident**

{¶7} Mr. Minno had been working on the job site for three weeks prior to his accident doing prep work, which involved welding pieces of steel onto joists. On the day of the accident, Mr. Minno's responsibility was to weld I-beams brought in by a crane onto the east block wall of the newly built structure. While doing this work Mr.

Minno was sitting on the east wall and was using a welding stinger that was connected to a welding unit attached to a truck on the north side of the building. The stinger was attached to a cable and cable connectors so that it could operate a distance from the welding unit. Mr. Minno said that the welding leads, or copper cables that were connected to the welding machine, kept coming apart. Mr. Minno described the leads as being cheaply made and smaller than those he usually used on a construction site.

{¶8} Mr. Minno had successfully welded two l-beams into their connection. As he moved to the third beam he repositioned the cable. The connector that attaches to the welding lead connection to the cable came apart, causing Mr. Minno to lose his balance. As a result, Mr. Minno fell off the nineteen foot high wall and landed face down onto a lower foundation wall. Mr. Minno was rendered paraplegic.

{¶9} **Lack of Safety Precautions**

{¶10} Mr. Minno was not wearing any fall protective equipment. Mr. Minno's foreman, Donald Fisher, conceded that he did not offer Mr. Minno any fall protection equipment because he did not believe it was necessary or that it was a safety violation. Mr. Fisher mistakenly thought that fall protection was only required while working at heights greater than twenty-five feet, when in fact 29 CFR 1926.760 requires such protection at heights greater than fifteen feet. Although lanyards and harnesses were kept in Mr. Fisher's truck, they were not brought out that day. Nor was an aerial lift used that day, although Mr. Minno felt there should have been one. Mr. Minno conceded that in 90% of his past jobs, he would have been tied off in order to prevent a fall. However, he felt that it was more dangerous to tie off during that job because of the proximity of

the crane. Mr. Fisher agreed that there was nowhere for Mr. Minno to tie himself off when he was sitting on the wall.

{¶11} Post-Accident Investigation

{¶12} The day following the accident, See-Ann hired Safety Resources Co. of Ohio, Inc. ("Safety Resources"), the company that also provides See-Ann with safety training, to investigate the accident. Safety Resources determined that Mr. Minno's fall was caused by his failure to wear fall protective equipment and due to the failure of the stinger lead connection, which did not allow for a secure connection and came apart too easily. Safety Resources recommended that workers be re-trained on hazard assessment techniques, on fall protection and welding connector use; that old welding components be maintained and removed if damaged; and that a written fall protection plan be devised.

{¶13} Procedural History

{¶14} Mr. Minno initially filed a complaint against Hummel, Pro-Fab and See-Ann. In the original complaint, Mr. Minno alleged that he was an employee of See-Ann and that See-Ann failed to take adequate safety measures to ensure his safety. He alleged negligence and intentional tort theories of recovery.

{¶15} Mr. Minno subsequently filed an amended complaint in which he alleged that he was working for See-Ann but under the direction and control of Pro-Fab. He also alleged *inter alia* that Pro-Fab was in control of the work vicinity, and that Pro-Fab was the "alter-ego" of See-Ann and was vicariously liable for his injuries.

{¶16} Both Pro-Fab and See-Ann filed motions for summary judgment. The trial court denied See-Ann's motion for summary judgment on the ground that genuine

issues of material fact remain as to whether See-Ann committed an intentional tort against Mr. Minno. Therefore, Mr. Minno's claim against See-Ann remains pending in the trial court. However, the trial court granted Pro-Fab's motion for summary judgment, finding that Pro-Fab was the "sister" corporation of See-Ann and that Mr. Minno worked for See-Ann, not Pro-Fab. As such, the court held that Pro-Fab was not liable for Mr. Minno's injuries because it did not actively participate in or exercise any dominion or control over Mr. Minno in the performance of his job duties.²

{¶17} Mr. Minno filed the instant appeal, raising one assignment of error for our review:

{¶18} "The trial court erred in granting appellee's motion for summary judgment because they are the "alter ego" company of See-Ann, Inc. whose motion for summary judgment was denied."

{¶19} **Standard of Review**

{¶20} Mr. Minno contends that the court erred in granting summary judgment for Pro-Fab. Summary judgment is appropriate under Civ.R. 56(C) when (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the nonmoving party, that conclusion favors the moving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶21} "This court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, ¶18, citing *Hagood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13. "A

2. The trial court also held that Hummel did not actively participate in Mr. Minno's work duties.

reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Id.*

{¶22} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112." *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40.

{¶23} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Misteff*. (Emphasis added.)" Id. at ¶41.

{¶24} The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, "and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶25} Piercing the Corporate Veil

{¶26} The issue presented in this appeal is whether Pro-Fab and See-Ann are separate entities as a matter of law or whether a fact issue remains as to whether Pro-Fab is essentially the alter-ego of See-Ann and subject to liability for Mr. Minno's injuries. Mr. Minno's argument is based upon the "piercing the corporate veil" theory of liability. It is Mr. Minno's position that Pro-Fab and See-Ann were for all intents and purposes acting as one entity and should be regarded as one.

{¶27} "Piercing the corporate veil is not a claim, it is a remedy encompassed within a claim." *Geier v. National GG Industries, Inc.* (Dec. 23, 1999), 11th Dist. No. 98-L-172, 1999 Ohio App. LEXIS 6263, at 10. Piercing the corporate veil has different types of application. The most common situation is where individual shareholders are

held liable for wrongs committed by the corporation. *Id.* at 7-8. In addition, the corporate veil may be pierced where two corporations are owned by the same shareholders but where the two corporations are "fundamentally indistinguishable" and are in effect deemed a single entity. *Clinical Components, Inc. v. Leffler*, 9th Dist. No. 95CA0085, 1997 Ohio App. LEXIS 199, at 8.

{¶28} The general rule is that "a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation." *Wallace v. Shelly and Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005-Ohio-1345, at ¶37, citing *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461, 468. "This is because a corporation is a legal entity, apart from those who compose it. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287." *Id.* However, "the corporate entity may be disregarded and its subsidiary may be treated as a single entity under certain circumstances." *Id.*, citing *Starner* at 468-469. The underlying rationale behind piercing the corporate veil is to prevent shareholders or parent and subsidiary corporations to hide behind the fictional entity of the corporation where evidence of harm, injustice or fundamental unfairness has been presented. *Clinical Components* at 7, citing *Belvedere* at 287.

{¶29} In order to "pierce the corporate veil," the Ohio Supreme Court in *Belvedere* set forth the factual considerations for determining whether a parent corporation is liable for the torts of its subsidiary. Under *Belvedere*, the corporate fiction is to be disregarded when there exists: "(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in

such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere* at 289. In determining whether the factors under *Belvedere* have been met or whether sufficient evidence has been presented to raise genuine issues of material fact, we are mindful that piercing the corporate veil is primarily a matter for the trier of fact. *Clinical Components* at 8.

{¶30} Mr. Minno contends that he has presented sufficient evidence to create a fact issue regarding whether the corporate veil should be pierced and whether he can attempt to impose liability on Pro-Fab. Each factor of the *Belvedere* three-pronged test will be addressed separately to determine whether a fact issue does indeed remain.

{¶31} Whether the two entities are separate or are a mere instrumentality of the other

{¶32} The first prong in *Belvedere* requires Mr. Minno to present sufficient evidence to show that Pro-Fab exerted such control over See-Ann so that See-Ann had "no separate mind, will, or existence of its own ***." *Belvedere* at 288. "The first prong of *Belvedere* has been referred to as the 'alter ego doctrine,' and, in order to succeed under this prong, 'a plaintiff must show that [the two corporations] are fundamentally indistinguishable.'" *Siva v. 1138 LLC*, 10th Dist. No. 06AP-959, 2007-Ohio-4667, at ¶10.

{¶33} To support his argument that the two entities are essentially one and the same, Mr. Minno points to the fact that they have substantially identical management, business, purpose, equipment, customers, supervision, operation and ownership. Pro-Fab, while conceding that the two entities share officers and have the same corporate address, nevertheless maintains that the two entities are separate, were incorporated

on different dates and that its relationship with See-Ann is akin to a "brother sister" relationship. Furthermore, Pro-Fab contends that it has no ownership interest in See-Ann and therefore cannot exert any control over See-Ann. For support, Pro-Fab relies on *Enwotwen Industries, Inc. v. Brookstone Ltd. Partnership*, S. Dist. Ohio No. 93-50475, 157 B.R. 374, which held that there could be no piercing of the corporate veil where there was no domineering entity and where the only common element between the two corporations was common ownership.

{¶34} We agree that whether both entities shared management and personnel does not in and of itself satisfy the first prong in *Belvedere*. "For purposes of disregarding the corporate form, Ohio law permits one corporation to own all the stock of another corporation as well as to employ common officers and directors, as well as other personnel, without risking *** liability." *Clinical Components* at 8. However, where there is other evidence showing that the two entities are not separate but share "unity of interest and ownership," then the first prong may be satisfied. *Flynn v. Greg Anthony Construction Co.*, 6th Cir. No. 01-3391, 2003 U.S. App. LEXIS 23024, at 32.

{¶35} In *Flynn*, the plaintiffs, trustees of a multiemployer benefit plan, sought to hold the defendant companies derivatively liable for the delinquent contributions by defendant, Greg Anthony Construction. The Sixth Circuit Court of Appeals, applying Ohio law, held that the plaintiffs established a prima facie case of alter-ego liability and found determinative the following factors in making its decision:

{¶36} "Viewing [defendant] Columbus Masonry operations in tandem with Greg Anthony Construction raises the suspicion that these two businesses are in fact one business, separated only in form. *** Anthony Construction and Columbus Masonry

share the same management and supervision -- as evidenced by sharing the same president and treasurer and by a Greg Anthony Construction manager's offer of Columbus Masonry services. They operate from the exact same location, using the same phone lines and office materials. At times, Columbus Masonry and Greg Anthony Construction have been known to share assets, including construction equipment and trucks. Further, they are engaged in the very same industry -- masonry subcontracting - - and on at least one occasion they interchanged their services on the same job. ***

[Defendant] Pezzo Builders, like Columbus Masonry, is commonly controlled by those officers who also control Greg Anthony Construction and Columbus Masonry. Moreover, Pezzo Builders shares a business location with Columbus Masonry and Greg Anthony Construction and is incorporated to engage in a similar construction business. *** Thus, the facts alleged for Pezzo Builders and Columbus Masonry established the first requirement of the alter-ego test -- complete 'unity of interest and ownership' such that the corporations do not have 'separate personalities.'"

{¶37} The evidence in this case establishes that the two entities shared more than common ownership and officers. They also shared the same business address and had the same corporate business and purpose, i.e. "to perform structural and miscellaneous steel erection." The fact that the two entities were incorporated on different dates does not mean that they are separate and distinct entities as a matter of law. Of particular significance is the history behind the ownership of the two companies. Initially, under prior ownership, Pro-Fab was engaged in the steel erection and fabrication business. However, current vice-president and secretary of both businesses, Monroe Townsend, testified that he was working for Pro-Fab when he

founded See-Ann at the time Pro-Fab decided to get out of the steel erection business. Subsequently, Mr. Townsend purchased Pro-Fab and decided to have Pro-Fab get back into the erection business. Thus, at some point after there was common ownership of both companies, their functions became more indistinguishable.

{¶38} This is also reflected in the fact that some of the companies' employees, such as foremen, commonly work for both entities depending on the particular job.³ Moreover, safety training is combined for both entities and both companies share a similar written safety and loss control program. Tools and supplies are also shared, and according to Mike Firth, who was employed as a foreman for both companies, Pro-Fab provides the welding equipment used on the jobs for both Pro-Fab and See-Ann.

{¶39} We find that the facts are similar to those present in the *Flynn* case. Because evidence was presented to show that the companies share common management and employees, and have common safety training and share welding equipment, we are unwilling to hold as a matter of law that the entities are separate, regardless of how the companies characterize themselves. When construing the evidence in a light most favorable to Mr. Minno, we find that sufficient evidence has been presented to raise a fact issue on the first prong of the *Belvedere* three-pronged test.

{¶40} **Whether dominion or control were used to commit a fraud or wrong**

{¶41} Under the second *Belvedere* prong, Mr. Minno must show that Pro-Fab "exercised the control established under the first prong of the test to commit fraud or

3. Pro-Fab does not however perform work in the jurisdiction of Local 207.

other wrongful conduct.”⁴ *Stypula v. Chandler*, 11th Dist. No. 2002-G-2468, 2003-Ohio-6413, at ¶19; *Siva*, at ¶10. (Citations omitted.) We have interpreted the language “fraud or illegal act” in the broader sense to mean that it also encompasses “those acts that would lead to unfair or inequitable consequences.” *Id.* We have also stressed that the test in *Belvedere*: “is open-ended and versatile, i.e., it permits and encourages flexibility by its very definition.” *Music Express Broadcasting Corp. v. Aloha Sports, Inc.*, 161 Ohio App.3d 737, 2005-Ohio-3401, at ¶19.

{¶42} This interpretation comports with the underlying rationale behind piercing the corporate veil. As we stressed in *Stypula*, a case involving piercing of the corporate veil with regard to individual shareholder liability: “[T]he ‘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.” *Id.* at ¶20, citing *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 287. Thus, in *Stypula*, we found that this prong was satisfied when the sole shareholder of a company made the decision to close the company after the plaintiff had received a judgment against the company. Under those circumstances, we held that depriving the plaintiff of the ability to enforce his judgment was “an inequitable result, and an intent and purpose for which the corporate fiction cannot be used.” *Id.* at ¶22.

{¶43} The same conclusion should be reached in this case. We have already determined under the first prong that there was sufficient evidence of control by Pro-Fab

4. Mr. Minno initially argues that he need not prove fraud or a wrong because this requirement only applies to contract cases, not to cases where the underlying claim sounds in tort. For support, Mr. Minno relies on the decision of *Southeast Tex. Inns. Inc. v. Prime Hospitality Corp.* (6th Cir. 2006), 462 F.3d 666. However, that case relied on Tennessee law, and consequently has little precedential value. Rather, we are bound by the Supreme Court of Ohio’s decision of *Belvedere*, which explicitly sets forth the necessity that there must be a wrongful act committed by the entity in control. The *Belvedere* decision does not differentiate between whether the underlying claim sounds in contract or tort law.

over See-Ann to withstand a motion for summary judgment. Nevertheless, Pro-Fab repeatedly argues, without any support, that "[a]n ownership interest would be required in order to control See-Ann's actions." Thus, according to Pro-Fab there can be no piercing of the corporate veil where it has no ownership interest in See-Ann. Furthermore, Pro-Fab contends that Mr. Minno was essentially trying to hold the individual shareholders responsible but cannot do so since he has not asserted a claim against the individual shareholders. Pro-Fab's arguments are completely without legal support or merit.

{¶44} Mr. Minno does not seek to hold the individual shareholders personally liable. However, whether one is attempting to pierce the corporate veil by holding individual shareholders liable or by holding a related company liable under alter-ego principles is a distinction without a difference. In either case, the question of control is not dependent upon ownership. As the court stated in *Labadie Coal Co. v. Black* (U.S. App. D.C. 1982), 672 F.2d 92, 97, a case in which private shareholders were alleged to control the corporation, the question is "whether the corporation, rather than being a distinct, responsible entity, is in fact the alter ego or business conduit of the person *in control*. In many instances, the person 'controlling' a close corporation is also the sole, or at least a dominant shareholder. In other cases the controlling person may seek to avoid personal liability by not formally becoming a shareholder in the corporation. *The question is one of control, not merely paper ownership.*" (Emphasis added.) Thus, since we have determined that there was a sufficient showing of control to overcome summary judgment, we reject Pro-Fab's arguments.

{¶45} With respect to whether Pro-Fab has used the corporate fiction to commit a fraud, wrong, or inequitable result, Mr. Minno claims that Pro-Fab has done so by subcontracting its work to See-Ann, an entity that admitted in its response to request for production of documents that it carried no liability insurance. In essence, Mr. Minno contends that Pro-Fab, which does carry insurance, is the company holding the most assets and subcontracted the job to See-Ann to relieve itself from liability. Pro-Fab, however, says there is no proof on this point, and furthermore that it did not have control over See-Ann.

{¶46} With respect to the allegation that See-Ann did not carry liability insurance, Pro-Fab attempts to argue that it committed no wrong because there was no evidence to show that the lack of insurance caused See-Ann to be undercapitalized nor was there proof that Pro-Fab was the company with the most assets. However, we believe that the lack of liability insurance, at the least, raises a genuine issue of fact on this second prong, especially in light of the fact that the Subcontract for Building Construction between Hummel and Pro-Fab required insurance at Article 13 and it would appear that this requirement was circumvented by the subsequent subcontract to See-Ann.

{¶47} 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 subsidiaries misdeeds *** or its obligations." *Tavern for Tots, Inc. v. City of Toledo*, N.Dist. Ohio Case No. 3:04CV7030, 307 F. Supp.2d 933, at 941. Here, the unfairness and injustice are obvious. The evidence, when construed in a light most favorable to Mr. Minno, shows that Pro-Fab, regardless of how it designates itself in relationship to See-Ann, knowingly

subcontracted dangerous work to See-Ann knowing full-well that See-Ann carries no liability insurance. In fact, the decision to subcontract this work was made by Pro-Fab's officers, the same officers for See-Ann. A logical conclusion is that Pro-Fab did this to insulate itself from liability. We find that a genuine issue of fact remains on this point.

{¶48} **Whether injury or unjust loss resulted from such control and wrong**

{¶49} The third prong of *Belvedere*, proof that injury or loss resulted, "is causal in nature; that is, it requires the claimant to demonstrate a causal connection between the [corporation's] control *** and the alleged injury or loss." *Music Express Broad. Corp. v. Aloha Sports, Inc.*, 161 Ohio App.3d 737, 2005-Ohio-3401, at ¶35. Again, we find there has been sufficient evidence to create a fact issue on this point. The evidence establishes that Pro-Fab intentionally awarded its subcontract work to See-Ann with the knowledge that See-Ann carried no liability insurance. Under these circumstances, there is a causal connection between Pro-Fab's control and award of the job to See-Ann and the resultant injury and loss to Mr. Minno that arises from the complete failure of See-Ann to carry liability insurance.

{¶50} Nevertheless, Pro-Fab argues that this prong cannot be satisfied because it never actively participated in Mr. Minno's work and cannot be responsible for his injuries. Pro-Fab's argument is disingenuous at best. The law regarding active participation applies in the context where one is trying to hold the general contractor liable for the injuries sustained by the employee of a subcontractor. *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332. In those circumstances, the plaintiff must prove that either the general contractor directed the activity that resulted in the injury or retained control over a critical variable in the work environment. *Id.* at 337; *Sopkovich v. Ohio*

Edison Co., 81 Ohio St. 3d 628, 642-643. The inherent flaw with Pro-Fab's argument is that Mr. Minno is not arguing liability based upon the contention that Pro-Fab is the general contractor and that See-Ann is the subcontractor. Instead, Mr. Minno maintains that under the alter-ego/piercing the corporate veil theories Pro-Fab and See-Ann are essentially one entity and that Pro-Fab is liable for his injuries under those theories. Under these circumstances, we reject Pro-Fab's arguments regarding whether there was any evidence of active participation on its part since this is not an issue.

{¶51} For the above reasons, we find that the trial court erred in granting Pro-Fab's motion for summary judgment. Genuine issues of material fact remain regarding whether Pro-Fab is the alter-ego of See-Ann and whether it can be vicariously liable for Mr. Minno's injuries.

{¶52} The judgment of the Trumbull County Court of Common Pleas is reversed and this case is hereby remanded for further proceedings.

COLLEEN MARY O'TOOLE, J., concurs.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

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{¶53} Mr. Minno suffered terrible injuries as the result of his accident. It is natural to be sympathetic toward him. A jury has yet to decide to what extent, if any, See-Ann is liable to Mr. Minno for his injuries. However, this does not allow us, as a court, to misapply the *Belvedere* test in order to find Pro-Fab "fundamentally

indistinguishable" from See-Ann, a separate corporate entity and Minno's employer, when both the facts and the applicable law make it clear that *Belvedere* does not apply. Moreover, even if we were to assume, arguendo, the *Belvedere* test was applicable, Minno has failed to establish a prima facie showing that all of the elements of the test were satisfied. Summary judgment was properly granted in this case. Accordingly, I respectfully dissent.

{¶54} The evidence is undisputed that Pro-Fab and See-Ann are separately incorporated entities, and that Minno was employed by See-Ann, and *not* Pro-Fab, at the time his accident occurred. This court has held that, "[p]iercing the corporate veil is not a claim, [but] a remedy encompassed within a claim." *Geier v. Natl. GG Industries, Inc.* (Dec. 23, 1999), 11th Dist. No. 98-L-172, 1999 Ohio App. LEXIS 6263, at *10. However, that is precisely what Minno has attempted to do by arguing that the "corporate veil" of See-Ann should be pierced, i.e., he is attempting to state a claim against Pro-Fab, an undisputedly separate legal entity.

{¶55} "Ohio Courts have treated the separate legal personality of a corporation as the norm and it remains clear that disregarding this norm is the exception and not the rule." *Clinical Components, Inc. v. Leffler Industries, Inc.* (Jan 22, 1997), 9th Dist. No. 95CA0085, 1997 Ohio App. LEXIS 199, at *6 (citations omitted) (emphasis added). "This is because a corporation is a legal entity, apart from those who compose it." *Wallace v. Shelly and Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005-Ohio-1345, at ¶37 (citation omitted).

{¶56} "One of the purposes of incorporation is to limit the liability of individual shareholders. *** Thus, the burden of proof is upon the party seeking to impose liability

on the shareholder or shareholders to demonstrate that one of the grounds for piercing the corporate veil exists." *LeRoux's Billyle Supper Club v. DVJ's Plumbing* (1991), 77 Ohio App. 3d 417, 423 (emphasis added). Mr. Minno, as the party seeking to impose liability in this case, bears the burden of proof.

{¶57} As the majority correctly notes, these grounds are set forth in the case of *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos. Inc.*, 67 Ohio St.3d 274, 1993-Ohio-119.

{¶58} In *Belvedere*, the Supreme Court of Ohio 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 had 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 a person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Id.* at 289 (emphasis added) accord *Bucyrus-Erie Co. v. General Prods. Corp.* (C.A.6, 1981), 643 F.2d 413, 418. Consistent with the structure of this test, there must be evidence to show that *all three elements* are satisfied before the corporate veil may be pierced. *Belvedere*, 67 Ohio St.3d at 289.

{¶59} As is evident from the foregoing, the *Belvedere* test contemplates piercing the corporate veil to hold *shareholders* liable for corporate misdeeds, and *only* when manifest injustice results from the corporation's actions. See *Music Express Broadcasting Corp. v. Aloha Sports, Inc.* (11th Dist.), 161 Ohio App.3d 737, 2005-Ohio-3401, at ¶29 ("Courts have been reluctant to disregard the corporate entity and have

done so only where the corporation has been used as a cloak for fraud or illegality, or where the *sole owner* has exercised *such excessive control* over the corporation that it no longer has a separate existence. *** It has also been stated that the corporate entity should be disregarded *only when justice cannot be served in any other way.*") (citation omitted) (emphasis added).

{¶60} Here, the majority acknowledges that "Mr. Minno does not seek to hold the individual shareholders [Mr. Townsend and Ms. Myers] personally liable." It nevertheless concludes that "whether one is attempting to pierce the corporate veil by holding individual shareholders liable or by holding a related company liable under alter-ego principles is a distinction without a difference." I disagree.

{¶61} While it is tempting to accept the majority's dictum at face value, its statement fails to acknowledge the *very real* distinction between a sister corporation and a *parent corporation*.

{¶62} Based upon the undisputed evidence presented on summary judgment, reasonable minds can only conclude that Pro-Fab and See-Ann were *sister corporations*. A sister corporation is defined as "one of two or more corporations controlled by the same, or substantially the same, owners." Black's Law Dictionary (8 Ed. 2004), 368. In contrast, a parent corporation is defined as one that "*has a controlling interest* in another corporation *** usu[ally] through *ownership* of more than one-half the voting stock." *Id.* at 367. Here, there is no evidence whatsoever that Pro-Fab, Inc. was an *owner* of See-Ann, Inc., despite the fact that each corporation was owned by the same individuals and served a *similar*, but not identical, business purpose.

{¶63} The *Belvedere* test applies to those situations where plaintiffs have sought to impose liability on *individual* shareholders or *parent corporations*, as the owners and holders of a corporation's stock. *Taverns for Tots, Inc. v. Toledo* (N.D. Ohio 2004), 307 F.Supp.2d 933, 941 (Piercing the corporate veil for clear abuses of corporate privilege and protections "occurs either where shareholders misuse the corporate structure for personal benefit or advantage, *** or where a *parent corporation, as the alter ego of a subsidiary company, is not entitled to avoid liability for the subsidiary's misdeeds.*") (emphasis added); see also, e.g., *Starnier v. Guardian Industries* (2001), 143 Ohio App.3d 461, 466 (parent-subsidary relationship examined); *Ohio City Orthopedics, Inc. v. Medical Billing and Receivables, Inc.*, 8th Dist. No. 81930, 2003-Ohio-1881, at ¶1 (president and sole shareholder relationship examined).

{¶64} Even then, it is the general rule that "a parent corporation is not liable for the actions of its subsidiary, even if the subsidiary is wholly owned by the parent corporation." *Starnier*, 143 Ohio App.3d at 468 (citations omitted); accord *Clinical Components*, 1997 Ohio App. LEXIS 199, at *8 ("Ohio law permits one corporation to own all of the stock of another corporation as well as to employ common officers and directors *** [and] *other personnel*, without risking shareholder liability") (citations omitted) (emphasis added).

{¶65} Thus, the *Belvedere* test does *not apply* where neither corporation holds "any [ownership] interest in the other" and "[t]he only common element between the two is the shareholders of each corporation." *In re Newtowne, Inc.*, (S.D. Ohio 1993), 157 B.R. 374, 377. This is because "it is impossible for [the one sister corporation], as a *corporation*, to exercise any control over [the other sister corporation]." *Id.* In other

words, under the *Belvedere* analysis, the first element of the test, otherwise known as the "alter ego" test, cannot *possibly* be satisfied by Pro-Fab, since there is absolutely no evidence of "control" in the sense implied by that test. See *North v. Higbee Co.* (1936), 131 Ohio St. 507, 513-514 ("The fact that the stockholders in two corporations are the same *** , such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one *** .") (citation omitted).

{¶66} What Minno has attempted to do, and what the majority endorses, is unprecedented, and has been characterized by the one court which has discussed this theory of liability as "triangular piercing." *Nursing Home Consultants, Inc. v. Quantum Health Servs., Inc.* (E.D.Ark. 1996), 926 F.Supp. 835, 840 n.12.

{¶67} As explained by that court, "a triangular pierce results from a sequential application of the traditional piercing doctrine and the 'reverse piercing' doctrine – which itself is controversial in that it allows corporations to be liable for the acts of their shareholders *** which thereby permits two related, though independent entities (often referred to a[s] 'sister corporations') *** which hold no ownership interest in each other, to be held liable for the malfeasance of the other. The linchpin of this theory of liability is that the sister corporations must have a common 'parent,' which is usually a third corporate entity *** though conceptually there is no reason why this parent cannot be a common individual stockholder, especially in cases involving groups of closely held sister corporations." *Id.* (citations omitted) (emphasis added).

{¶68} As in this case, "liability under a triangular pierce would be imposed by first applying a traditional pierce to render the parent shareholder *** [individually] liable for the malfeasant sister corporation *** , and *then* applying a reverse pierce to render

the *** sister corporations *** liable for the parent shareholder *** and, by extension, the malfeasant sister corporation ***." *Id.* (emphasis added). Although the case was not decided on these grounds, the court, in *Nursing Home Consultants*, acknowledged "serious reservations as to the viability of this 'triangular piercing' theory of liability, in that it is plainly out of harmony with both the traditional piercing doctrine and the more novel 'reverse piercing' doctrine." *Id.* Even if the "triangular pierce" theory were tenable, Minno's failure to name Townsend and Myers as defendants renders the application of such a theory of recovery impossible, because the "traditional pierce," under *Belvedere*, cannot be accomplished without naming the controlling shareholders as parties.

{¶69} Moreover, when limited solely to the viability of the "reverse piercing" theory in situations similar to this, (i.e., where a contract of employment existed between a closely held corporation and the plaintiff, and an alleged tort has been committed), it has been noted that, while "this approach has been allowed [by other courts] in limited cases where the corporation was found to be the alter ego of the controlling shareholders and a creditor has sought to reach assets of the corporate entity to satisfy the debts of the controlling alter ego, *the theory has not been embraced by Ohio courts* ***." *Winston v. Leak* (S.D. Ohio 2001), 159 F.Supp.2d 1012, 1018 (citations omitted) (emphasis added).

{¶70} Since the first element of the *Belvedere* test is not satisfied, the trial court properly granted summary judgment. However, I also write to briefly address another troubling aspect of the majority's opinion, i.e., the statement that See-Ann's "lack of

liability insurance, at the least, raises a genuine issue of material fact on [the] second prong." Again, I disagree.

{¶71} With regard to this second and third prongs of the *Belvedere* test, Minno's argument is that Pro-Fab "has used the corporate fiction to commit a fraud, wrong, or inequitable result *** by subcontracting its work to See-Ann, an entity that admitted in its response to [his] request for production of documents that it carried no liability insurance."

{¶72} I agree with Pro-Fab's argument that the lack of general liability insurance, standing alone, is insufficient where "there was no evidence to show that the lack of insurance caused See-Ann to be undercapitalized nor was there proof that Pro-Fab was the company with the most assets."

{¶73} It must be remembered that the issue of this case is whether Pro-Fab, a "related" corporation, could properly be made a party to the case under a "piercing the corporate veil" theory on the basis of an alleged fraud or wrongful act on the part of See-Ann, a corporation to which, again, Minno offered no evidence of a subsidiary relationship to Pro-Fab.

{¶74} Evidence Rule 411 operates to prohibit the introduction of "[e]vidence that a person was or was not insured against liability *** upon the issue [of] whether he acted *** wrongfully. *** Thus, 'the exclusionary principle of Rule 411 applies only where liability insurance is offered to establish *** culpability.'" *Beck v. Cianchetti* (1982), 1 Ohio St.3d 231, 235 (citations omitted). As is clear from the arguments raised by Minno, the *sole reason* See-Ann's lack of insurance is relevant is to establish that Pro-Fab could be held liable as a *defendant*, due to its "relationship" (and potentially

"deeper pockets"), despite the fact that no evidence was offered that See-Ann, *if liable for his injuries*, was undercapitalized and unable to pay any potential damages.

{¶75} More importantly, Minno has cited to no legal precedent to support the proposition that a corporation is *required* to carry general liability or accident insurance. A review of R.C. Chapter 1701, the general corporation statute, reveals no such requirement because, indeed, there is none. One can think of several examples where a corporation has elected not to purchase a general liability policy, instead choosing to self-insure against potential losses. Absent some affirmative evidence in the record suggesting that See-Ann was undercapitalized or insolvent, there was simply nothing to lead a reasonable mind to conclude that See-Ann's decision not to purchase liability insurance was in any way, shape, or form, a "wrongful" act under *Belvedere*.

{¶76} For the foregoing reasons, I would affirm the judgment of the Trumbull County Court of Common Pleas.