

IN THE SUPREME COURT OF OHIO

JAMES MINNO, et al.

Case No. 2008-0170

Plaintiff-Appellee

vs.

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

PRO-FAB, INC., et al.

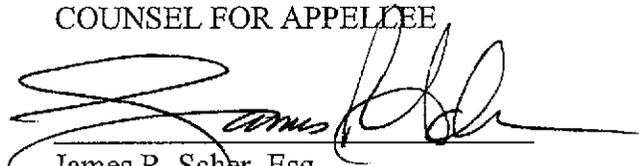
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STATEMENT OF FACTS

On September 24, 2003, Appellee was an employee of See-Ann as an ironworker at the Newton Falls 3-6 Elementary school construction project (hereinafter "Newton Falls Project"). This was the first day that the crane was onsite for steel erection work. (T.d. 42).

Donald Fisher, an employee of Appellant, Pro-Fab, Inc. (hereinafter Pro-Fab or Appellant), was the foreman onsite for See-Ann. (T.d. 31). As foreman, Mr. Fisher, a Pro-Fab employee, was specifically responsible for the safety of the workers for See-Ann onsite at the Newton Falls Project. (T.d. 31; 34). Thus, Pro-Fab, through Mr. Fisher, was at all times in control of the employees and the work performed by See-Ann at the Newton Falls Project.

On September 24, 2003, Mr. Fisher instructed Appellee to get up onto a cement block wall with a fall hazard of approximately nineteen (19) feet without any personal protective equipment, fall protective equipment, or *the means to be able to tie off* and begin setting beams of steel into place, which Safety Resources, See-Ann and Pro-Fab's safety expert, later found to be contributing factors to Appellee's fall. (T.d. 42). Not to mention neither See-Ann, nor Pro-Fab, provided a lift for the Newton Falls Project despite the fact that a lift had been provided for Appellee on all other past jobs. (T.d. 31; 35).

Appellee subsequently lost his balance and fell off the wall to the outside of the building and landed on a two course footer with capped rebar sticking up. Appellee was seriously injured resulting in paraplegia. (T.d. 42).

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

C. Myers) and Monroe Townsend, each of whom hold the same corporate interest in See-Ann and Pro-Fab. Also, See-Ann and Pro-Fab have the same officers; Anna C. Myers is the President and Treasurer for both companies and Monroe Townsend is the Vice President and Secretary for both companies. (T.d. 32).

Likewise, See-Ann and Pro-Fab have the same employees; Ginger Townsend is the controller for both companies; Donald Fisher is a foreman for both companies; and Michael Firth is a foreman for both companies. (T.d. 30; 31; 33). Additionally, major decisions to ensure safety on the jobsite are made by representatives and/or employees who work for both companies, such as the decision to order a lift and require fall protection equipment to be worn, and specifically, the safety on the Newton Falls Project. (T.d. 32).

On May 9, 2005, Pro-Fab filed a Motion for Summary Judgment denying their direct involvement in Appellee, James Minno's, injuries. (T.d. 13).

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

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

On December 20, 2007, Appellant filed a Motion to Certify a Conflict (Appx. A-1), and on February 5, 2008, the Eleventh District Court of Appeals filed a Judgment Entry overruling Appellant's Motion. The Court stated that the cases cited by Appellant, *Newtowne*

and *Higbee*, were not from other appellate districts, and even if they had been, there are merely factual distinctions and not an actual conflict of a rule of law. (Appx. A-2).

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

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

Generally, a corporation is not liable for the actions of its sister corporation. *Wallace vs. Shelley & Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005 Ohio 1345 at 37. This is because a corporation is a legal entity, apart from those who compose it. *Belvedere Condominium Unit Owners' Assn. vs. R.E. Roark Cos., Inc.* 67 Ohio St.3d 274, 287, 1993 Ohio 119. However, a three-pronged test has been set out to determine when corporate formalities should be disregarded and is as follows: the corporate entity must be a mere instrumentality of the other; there must have been an unjust loss or injury to the Plaintiff; and the corporate entity must be used to commit a fraud or wrong. *Spartan Tube & Steel vs. Himmelspach (In Re RCS Engineered Prods. Co.)*, 102 F.3d 223 (6th Cir. 1996).

As further set forth in this brief, Appellees have more than adequately met each prong of the *Belvedere* test. Appellees have unequivocally shown the indistinguishable nature of Pro-Fab and See-Ann and Pro-Fab's fraudulent attempts to hide behind its subsidiary, further evidenced through discovery, not to mention the undeniable unjust loss to Appellee.

Appellants in this matter attempt to twist Appellee's argument to make it sound as though Appellee has conceded that there is merely "some" alter ego relationship and that Appellee understands that Pro-Fab and See-Ann are separate and distinct companies. However, nowhere in the briefing of this action has Appellee even remotely accepted the

stance taken by Appellant that the two companies are separate. There is not just “some” alter ego relationship between Pro-Fab and See-Ann, there is an alter ego relationship.

Appellant argues that since Appellee indicated that a lift had been previously provided by See-Ann, that it indicates separate and distinct legal entities. Simply because a lift had been provided to Appellee by See-Ann on other past jobs, does not relieve Appellant from its alter ego relationship with See-Ann. Pro-Fab and See-Ann commingled jobs, employees and supervisors, particularly on the Newton Falls Project, and they are a mere instrumentality of one another.

Appellant also claims that “nowhere in Appellees brief does Appellee speak to the issue of ‘active participation.’” That is a very misleading statement. Though Appellee may not have used the actual term “active participation,” Appellees’ argument throughout this entire action has provided copious instances where Appellant actively and wholly participated in all the affairs of See-Ann and the work done on the Newton Falls Project, if that is even a valid issue in this action. For instance, throughout the briefing of this matter, Appellee has stated time and again the fact that Donald Fisher, a Pro-Fab employee, was the foreman on site for See-Ann and was responsible for the safety of the workers. Not to mention, that is the exact Pro-Fab employee that instructed Appellee to get onto a cement block without any personal protective equipment, fall protective equipment, an aerial lift, or the means to be able to be tied off. How much more could Pro-Fab “actively participate?” They played the central role in everything that happened at the Newton Falls Project. The only direction for the performance of the job Appellee had was from Appellant.

The trial court in this matter may have concluded that Pro-Fab did not exercise dominion or control over Appellee in the performance of his job duties while working for

See-Ann, but the Eleventh District quite clearly made an alternative finding. The Eleventh District acknowledged the fact that some of the companies' employees commonly work for both entities, the safety training is combined, and that tools and supplies are also shared where Pro-Fab provides the welding equipment used in the jobs for both Pro-Fab and See-Ann.

Additionally, the Appellate Court in this action reasoned as follows:

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 those circumstances, we reject Pro-Fab's arguments regarding whether there was any evidence of active participation on its part since this is not at issue.

Thus, the theory of "active participation" in this action is not valid in any way, and even if it were, Appellee has more than adequately argued the fact that Pro-Fab was actively involved in every part of Appellees' work that day. Therefore, it is clear that genuine issues of material fact exist when viewing the evidence most strongly in favor of Appellee, and the Eleventh District Court of Appeals properly reversed and remanded the decision of the trial court.

The Corporate Entity Must Be A Mere Instrumentality Of The Other

Appellant relies very heavily upon the dissenting opinion of the Honorable Diane V. Grendell, J.; however, it was the majority decision of Honorable Mary Jane Trapp, J., and Colleen Mary O'Toole, J. that found that the trial court erred in granting Pro-Fab's motion for

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summary judgment. In the opinion of the Eleventh District, Honorable Mary Jane Trapp, J., held:

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 steel erection business. Thus, at some point after there was common ownership of both companies, their functions became more indistinguishable.

Appellant has argued *ad nauseam* that Appellee should have sought to hold the individual shareholders, owners, and officers liable for their individual actions instead of asserting an alter ego relationship between the two companies, and also that an ownership interest is required in order for Pro-Fab to control See-Ann's actions. Appellant's argument is ineffective at best.

As stated by the Honorable Mary Jane Trapp, J. in her opinion of this matter:

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

In either case, the question of control is not dependant upon ownership. As the Court stated in *Labadie Coal Co. vs. Black* (U.S. App. D.C. 1982), 672 F.2d 92, 97, a case in which private shareholders were alleged to control the corporation, the question is "whether the corporation, rather than being a distinct, responsible entity, is in fact the alter ego or business conduit of the person in control. In many instances, the person 'controlling' a close corporation is also the sole, or at least dominant shareholder. In other cases the controlling person may seek to avoid personal liability by not formally becoming a shareholder in the corporation. *The question is one of control, not merely paper ownership.*" (Emphasis added.) Thus, since we have determined that there was sufficient showing of control to overcome summary judgment, we reject Pro-Fab's arguments.

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

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

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

Appellant cites to *Enwotwen Industries, Inc. v. Brookstone Limited Partnership*, 157 B.R. 374, in support of their argument. However, it has already been established that the instant action has been distinguished from *Enwotwen*. Appellees have asserted an argument based upon far more than just a commonality of ownership and officers as was the case in

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

Clearly, Pro-Fab is the domineering party at issue. Besides, finding an alter ego status requires just more than one being the domineering party, and it is well understood that merely having the same shareholders will not satisfy the elements to establish mere instrumentality. The Sixth Circuit Court of Appeals and various other circuit courts have recognized that factors relevant to a finding of alter ego status include "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *NLRB vs. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986). Pro-Fab and See-Ann share each and every one of those elements.

According to the invoice attached to the Affidavit of Anna C. Myers, Pro-Fab and See-Ann have the same business address, i.e. 2570 Pressler Road, Akron, Ohio. The business purpose and/or principal activity of both Pro-Fab and See-Ann are nearly identical, i.e. according to the Articles of Incorporation of Pro-Fab, the business purpose for which Pro-Fab was formed was to "carry on and conduct a business engaged in the fabrication and erection of structural and miscellaneous metals." According to the discovery responses received of See-Ann, its principal activity is to "perform structural and miscellaneous steel erection," (Emphasis added).

Furthermore, according to the Subcontractor's Agreement regarding the "steel" work performed on the Newton Falls Project, Appellant, Pro-Fab, is listed as the sub-contractor.

Also in accordance with the discovery responses received of See-Ann, See-Ann was also the subcontractor regarding the steel work performed on the Newton Falls Project.

Thus, Pro-Fab and See-Ann both performed worked for the same customer, i.e. the Newton Falls Exempted Local School District, and further, were responsible for the same type of work that was to be performed on the Newton Falls Project, i.e. the steel work, and therefore the companies are a mere instrumentality of one another.

Likewise, in relation to Article 8 of the Subcontractors Agreement hereinbefore described, Pro-Fab was responsible for furnishing all of the labor, materials, equipment, competent supervision, tools, and scaffolding for proper performance of the steel work for the Newton Falls Project. (Emphasis added). Nowhere was See-Ann listed as a subcontractor. See-Ann was not required to provide proof of insurance to the general contractor, owner, or the State of Ohio, yet Pro-Fab was.

Appellants also claim that not only was See-Ann the entity that employed Appellee, but also that those directing Appellee's work were See-Ann employees. This is a blatantly false statement. As previously established and undisputed, it was Donald Fisher, a Pro-Fab employee, who directed Appellee's work, specifically on the Newton Falls Project. Appellee was unaware of the common commingling of jobs, safety, and employees until the facts began to unfold concerning Pro-Fab's control over See-Ann. Now, the fact that Mike Firth, Anna C. Myers, Ginger Townsend and Monroe Townsend were all also See-Ann employees, might confuse Appellant's argument since the companies were mere instrumentalities of one another.

There Must Be An Unjust Loss Or Injury

At all times material hereto, Pro-Fab not only had a responsibility pursuant to its contract with Hummel, but also because it was Pro-Fab that was directing the work on site that day through the direct supervision of both Pro-Fab and See-Ann employees and also due to the fact that Pro-Fab was in charge of the safety, equipment, tools and so forth.

Appellee was one of the workers employed to perform the "steel work" for the Newton Falls Project. As previously set forth in the body of this brief, both Pro-Fab and See-Ann were the subcontractors in "control" and responsible for the "steel work" to be performed for the Newton Falls Project (although See-Ann was not a properly authorized subcontractor purposefully omitted by Appellant).

Nonetheless, Pro-Fab has contended that it was entitled to summary judgment because it did not have any direct involvement whatsoever with Appellees accident of September 24, 2003.

According to Article 8 of the Subcontractors Agreement hereinbefore described titled as "Subcontractor Obligations" the following is stated in pertinent part with respect to the responsibilities and obligations of Pro-Fab:

"8.9 Safety: The prevention of accidents on or in the vicinity of its work is the Subcontractor's responsibility."

Pro-Fab was not only responsible for the proper performance of the type work conducted by Appellee on September 24, 2003, but more importantly, Pro-Fab was responsible for the safety of Appellee and prevention of Appellee's accident. Additionally, Pro-Fab directed the exact work and failure to follow safety guidelines which caused Appellee's fall. As a result, Appellee and his family have suffered tremendously. Appellee is now permanently disabled from paraplegia and has been required to undergo extensive

medical treatments for his condition, resulting in a multitude of medical bills, a loss of companionship, and a loss of financial and mental stability for him and his family. He is forever unable to participate in activities that he once enjoyed, and is even limited in performing seemingly mundane tasks of daily life. Pro-Fab could not have been more directly involved.

Also, it is Appellant's contention that it is not liable for the injuries of Appellee because "where a subcontractor undertakes to do the work for another, and the very doing of which there are elements of real or potential danger, and one such contractor's employees is injured as an incident to performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of an independent subcontractor." However, as aforementioned, this argument not only is misplaced, but illogical.

Even assuming *arguendo* Appellant was accurate in its statement, this Honorable Court held in *Hirschbach v. Cincinnati Gas & Elec. Co.* (1983), 6 Ohio St. 3d 206, that "one who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate the hazard which he, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor."

This Honorable Court then modified the rule set forth in *Hirschbach* in *Cafferkey v. Turner Constr. Co.* (1986), 21 Ohio St. 3d 110, holding that "a general contractor who has not actively participated in the subcontractor's work, does not, merely by virtue of its supervisory capacity, owe a duty of care to employees of the subcontractor who are injured while engaged in inherently dangerous work."

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Appellant in the instant action did not simply hold a supervisory role with regard to the work performed on the Newton Falls Project. Not only were they technically listed as the “subcontractor” and not the “general contractor,” but they were also actively involved in every aspect of the job. Pro-Fab and See-Ann are one of the same, they were both considered the subcontractors to undertake the work of the Newton Falls Project, and the work done for the same was completely commingled whereas it is impossible to distinguish separate roles between them. Additionally, it was Appellant itself that created the specific inherently dangerous conditions precedent to the accident. How can it now claim it is a “separate,” unapproved, uninsured, subcontractor’s responsibility which it had full control over?

Appellant also cites to *Bond v. Howard Corp.* (1995), 72 Ohio St.3d 332, in support of its argument. However, the holding presented by Appellant further assists Appellees’ argument. Appellant cited to the following statement:

For purposes of establishing liability to the injured employee of an independent contractor, “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.

It has already been established that the issue of active participation is not a valid issue for the purposes of this argument due to the fact that the two corporations are a mere instrumentality of one another and are one of the same. However, if the theory of active participation were at issue, it is impossible to turn a blind eye to the fact that Pro-Fab was more than involved in the work performed at the Newton Falls Project, and more importantly, the acts that led to Appellee’s injury. It is undisputed that Pro-Fab was responsible for all the labor, materials, equipment, competent supervision, tools, and scaffolding for proper performance of the steel work. It was also Pro-Fab that instructed Appellee to get up onto a

cement block wall with a fall hazard of approximately nineteen (19) feet without any personal protective equipment, fall protective equipment, or the means to be able to tie off and begin setting beams of steel into place, which Safety Resources, both companies' safety expert, later found to be contributing factors to Appellee's fall. It was Pro-Fab that gave orders for Appellee to begin setting the steal beams into place, and it was also Pro-Fab that denied Appellee personal protective equipment, fall protective equipment, the means to tie off, or an aerial lift, all of which were contributing factors which led to Appellee's injuries.

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

Appellant claims that Appellee has offered zero evidence that See-Ann is without proper liability insurance to cover its employees. However, in See-Ann's responses to Interrogatories, it says in black and white: "See-Ann, Inc. does not have a policy of insurance for the claims made by Plaintiff against it." It is amazing that a company that partakes in business that commonly includes frequent hazardous and unsafe conditions and inherently dangerous work subjects their employees to this risk without this integral part of business practice. Their lack of insurance obviously causes it to be substantially undercapitalized and is further evidence of Pro-Fab's control and manipulation over See-Ann. Why else would See-Ann not have insurance? It is rather convenient that Pro-Fab, the company with insurance, was listed as the subcontractor not only with Hummel, but also the State of Ohio, but then put uninsured "See-Ann" employees under their supervision in the face of danger in order to protect itself. Ironically, it was Anna C. Myers, See-Ann and Pro-Fab's President, and Ginger Townsend, See-Ann and Pro-Fab's Controller, who answered the Interrogatory regarding insurance, but how is Pro-Fab now saying that we do not have evidence that See-Ann was without insurance?

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Thus, Pro-Fab placed insurance with the company holding most of the assets, and used the corporations as a convenience; using See-Ann for the non unionized, uninsured, and yet extremely dangerous work, and thereby subverting the entire bidding process and knowledge of any and all safety issues. Since all of the owners, officers, and directors of both companies are the same, they chose to undercapitalize their alter ego committing a fraud upon those it contracts with, and the employees of both companies.

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

In addition, Pro-Fab entered into a subcontract with Hummel Construction Company to complete the steel erection work on the Newton Falls Project. (T.d. 32). Nonetheless, See-Ann completed the work under the direct supervision of Pro-Fab. Pro-Fab did not disclose to Hummel that See-Ann was the company responsible for completing the steel erection work on the Newton Falls Project, and yet Pro-Fab was paid by Hummel for the steel erection work. Furthermore, all the representatives for See-Ann held themselves out to be representatives of Pro-Fab to Hummel. Pro-Fab fraudulently represented to Hummel that it would be responsible for completing the steel erection work and carry liability insurance on the Newton Falls Project when truthfully See-Ann would be the company responsible for the same, without any coverage.

Appellee was absolutely affected by Pro-Fab's fraud. Had Pro-Fab not used See-Ann as a sham and cover and actually done the work that it had contracted to do, Appellee may not have been on site that day. Also, by misrepresenting to Hummel and clandestinely using See-Ann, Pro-Fab veiled itself from liability from any injuries that may have and did occur instead of taking responsibility for the safety of its employees, as it was required to do.

The Eleventh District Court of Appeals stated in *Music Express Broad. Corp. vs. Aloha Sports, Inc.*, 161 Ohio App. 3d 737 (Ohio Ct. App. 2005), that "the test set forth in *Belvedere* is open-ended and versatile, i.e., it permits and encourages flexibility by its very definition." In referencing this for the second prong of the *Belvedere* test, the United States Sixth Circuit Court of Appeals has specifically held that "fraud, as an element of this test is not essential. Rather, the corporate fiction would be disregarded when its retention would produce injustice or inequitable consequences." *Bucyrus-Erie Co. vs. Gen Prod* (C.A. 6, 1981), 643 F.2d 413.

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

It has also been stated that the corporate entity should be disregarded only when justice cannot be served in any other way. *E.S. Preston Assoc., Inc. vs. Preston*, 24 Ohio

St.3d 7, 11, 24 Ohio B. 5, 492 N.E. 2d 441 (1986). It is an injustice to Appellee, James Minno, that a Pro-Fab employee was at all times during the Newton Falls Project the person in control of the work performed that day. It is an injustice to James Minno that a Pro-Fab employee was in control of the safety, supervision, and decision to not provide an aerial lift or fall protective equipment that day. Furthermore, it is an injustice to James Minno that he is forever condemned to a wheelchair for doing the work he was instructed to do by a Pro-Fab employee at the direction of Pro-Fab officers, owners and directors, not to mention, the continuing injustices to James Minno's family, who will no longer have the companionship of an active and able father or husband. It would be an injustice not to hold those who are responsible, accountable.

CONCLUSION

Appellant's argument would make sense if the only common element between the two companies was their shareholders. However, it has been established in this matter that the corporations not only share corporate officers and employees, but also engage in the same business enterprise, have the same address and phone line, and complete the same jobs interchangeably, not to mention the continuous control of Pro-Fab over See-Ann and their involvement through every aspect of the job, i.e. the contract, the safety, the supervision, See-Ann's employees, and day to day operations, including the decision to not provide an aerial lift for the employees or fall protective equipment, as well as undercapitalizing See-Ann.

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

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

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

Simply because Appellant in this matter is not satisfied with the outcome in how *Belvedere* was used, does not give way to the modification of how *Belvedere* should be applied. Appellant has not given reference to any authority in direct conflict with *Belvedere* or even cited any case law in their favor that even remotely resembles this matter.

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

After establishing both corporations' unity of interest, if in Appellant's example, one corporation misrepresents its services to not only another corporation, but also the State of

Ohio, fails to provide the required contracted services and obligated safety measures to the employees of its subsidiary, comingles its employees, supervisors and services with that of its subsidiary, and an injury results from an activity, then both corporations should absolutely be held accountable after applying *Belvedere*. In that instance, Appellant's example would begin to compare with the instant action, otherwise, Appellant's example barely even begins to scratch the surface as to the facts of this matter, much less give rise to changing the established law.

On the basis of the foregoing, Appellees respectfully move that this Court affirm the judgment of the Eleventh District Court of Appeals in order to proceed with trial on the merits against Appellant.

Respectfully submitted,



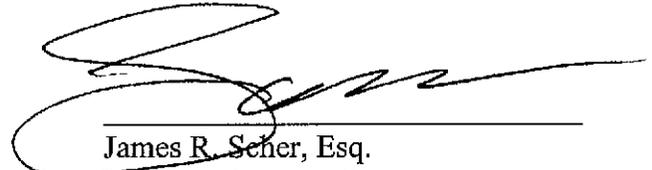
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IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

JAMES MINNO, et al.)	CASE NO. 2007-T-0021
)	
Plaintiffs-Appellants,)	<i>On Appeal From The Trumbull</i>
)	<i>County Court of Common Pleas</i>
v.)	<i>Case No. 2004 CV 2857</i>
)	
PRO-FAB, INC., et al.)	
)	MOTION TO CERTIFY A CONFLICT ON
Defendants-Appellees.)	BEHALF OF APPELLEE PRO-FAB, INC.

Pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution and Rule 25 of the Ohio Rules of Appellate Procedure, Appellee Pro-Fab, Inc. respectfully requests this Court to issue an Order certifying a conflict arising out of the instant appeal.

In this Court’s opinion of December 10, 2007, this Court reversed the trial court’s decision with regard to whether or not the corporation Pro-Fab could be held vicariously liable for the act of the corporation See-Ann, its “sister corporation”. Although the facts were essentially undisputed for purposes of summary judgment, this Court nevertheless reversed the trial court’s decision and remanded the matter for further consideration. Not only did this Court fail to agree with the trial court that Pro-Fab did not actively participate in any portion of the project which resulted in injury to the Plaintiff, but this Court also held that genuine issues of material fact remain regarding whether Pro-Fab is the “alter ego” of See-Ann, and whether Pro-Fab can be vicariously liable for the acts of See-Ann.

The decision of this Court is, therefore, in direct conflict with *In re Newtowne, Inc.* (S.D. Ohio 1993), 157 B.R. 374, 377. The *Newtowne* court stated that “it is impossible for [the other sister corporation], as a corporation, to exercise any control over [the other sister corporation].

In addition, this Court’s decision would seem to be in direct conflict with Ohio Supreme Court case law. The case of *North v. The Higbee Co.* (1936), 131 Ohio St. 507, stated that an

identity of shareholders does not merge corporations into one so as to make a contract of one corporation binding upon the other. *Id.* The *North* court further held that “the fact that 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”. *Id.*

For the reason that this Court’s December 10, 2007 judgment entry applying the doctrine of law of the case to reverse the decision of the Trial Court is in conflict with the decisions of *In re Newtowne, Inc.* (S.D. Ohio 1993), 157 B.R. 374, 377, and *North v. The Higbee Co.* (1936), 131 Ohio St. 507, Pro-Fab, Inc. respectfully requests this Court to certify a conflict to the Supreme Court of Ohio to address the following:

When sister corporations have similar shareholders, where one corporation has no ownership interest in the other, the entities are organized separately and it is undisputed that the corporations are separate and distinct legal entities, can the corporate form be disregarded to hold one corporation responsible for the act of the other?

Respectfully submitted,



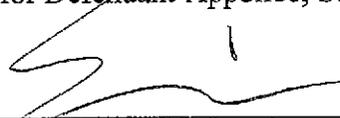
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Eric J. Williams (#0072048)

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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 -

JUDGMENT ENTRY

CASE NO. 2007-T-0021

FILED
COURT OF APPEALS

FEB 05 2008

PRO-FAB, et al.,

Defendants-Appellees.

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

The instant matter is before this court upon appellee, Pro-Fab's, et al., motion for certification of a conflict to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution and App.R. 25.

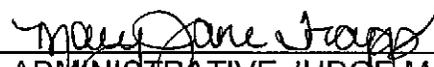
Pro-Fab contends this court's decision in *Minno v. Pro-Fab*, 11th Dist. No. 2007-T-0021, 2007-Ohio-6565 is in conflict with *In re Newtowne, Inc.* (S.D. Ohio 1993), 157 B.R. 374 and *North v. The Higbee Co.* (1936), 131 Ohio St. 507. In essence, Pro-Fab challenges our holding that there was sufficient evidence presented to raise a fact issue as to whether Pro-Fab is the alter ego of See-Ann and can be held vicariously liable for the acts of See-Ann. Pro-Fab contends that this holding is in conflict with the *Newtowne* decision, which held that one sister corporation could not exercise control over the other sister corporation, and with the *Higbee* decision, which stated that the identity of shareholders does not merge corporations into one.

Section 3(B)(4), Article IV, of the Ohio Constitution states that: "Whenever the judges of a court of appeals find that a judgment upon which they have

agreed *is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state*, the judges shall certify the record of the case to the supreme court for review and final determination." (Emphasis added.) Thus, in order to certify a conflict, a judgment must be in conflict with a judgment of another court of appeals. This means there must be an actual conflict between appellate districts on a rule of law before certification of a case to the Supreme Court for review and final determination is appropriate. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, paragraph one of the syllabus.

In this case, the alleged cases in conflict with our opinion are not from other appellate districts. Rather, the *Newtowne* decision is a federal decision and *Higbee* is a Supreme Court of Ohio decision. No conflict can be asserted based upon the authorities cited. Moreover, even if the alleged conflict cases were handed down by other appellate districts, we would still find certification inappropriate. To certify a conflict, there must be an actual conflict of a rule of law. Here, we merely have factual distinctions which will not support the certification of a conflict.

For the foregoing reasons, Pro-Fab's motion to certify conflict is overruled.


ADMINISTRATIVE JUDGE MARY JANE TRAPP

DIANE V. GRENDALL, P.J.,
COLLEEN MARY O'TOOLE, J.,
concur.

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FEB 05 2008
TRUMBULL COUNTY, OH
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