IN THE SUPREME COURT OF OHIO

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

REPLY OF APPELLANT, PRO-FAB, INC.
IN SUPPORT OF MERIT BRIEF

Craig G. Pelini (#0019221)
Eric J. Williams (#0072048)
Pelini, Campbell, Williams & Traub
8040 Cleveland Avenue NW, #400
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile: (330) 305-0042
Email: cgp@pelini-law.com
Email: ejwilliams@pelini-law.com
Counsel for Appellant, Pro-Fab, Inc.

James R. Scher (#0055885)
200 Chestnut Avenue NE
Warren, OH 44483
Telephone: (330) 393-3200
Facsimile: (330) 393-6436
Email: jim@title-company.net
Counsel for Appellees Minno

Robert E. Blackham (#0038844)
Lynn A. Gross (0072617)
Roetzel & Andress, LPA
1375 East Ninth Street–9th Floor
Cleveland, OH 44114
Telephone: (216) 623-0150
Facsimile: (216) 623-0134
Email: rblackham@ralaw.com
Email: lgross@ralaw.com
Counsel for Appellee, See-Ann, Inc.

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES i

MEMORANDUM IN SUPPORT 1

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX

Portions of deposition transcript of Donald L. Fisher A-1

TABLE OF AUTHORITIES

Page(s)

Cases

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark, 67 Ohio St.3d 274 . 1, 8, 9

Reno v. Concrete Coring, Inc. (June 17, 2005), 2005 WL 1415041 4

Wallace v. Shelley & Sands, Inc. 7th Dist. No. 04 BE 11, 2005 Ohio 1345 1

MEMORANDUM IN SUPPORT

In response to Appellant Pro-Fab, Inc.'s ("Pro-Fab") merit brief, Appellees, in their first line under their proposition of Law, misstate the law as set forth in the case of *Wallace v. Shelley & Sands, Inc.*, 7th Dist. No. 04 BE 11, 2005 Ohio 1345. Appellees state that generally a corporation is not liable for the actions of its ***sister*** corporation; however, the correct quote from the *Wallace* case is that generally a corporation is not liable for the actions of its ***subsidiary*** corporation. Huge difference!

In this case, the legal entity that is Pro-Fab is unable to exercise control over the legal entity that is See-Ann, Inc. ("See-Ann"), as Pro-Fab has no ownership interest or control interest in See-Ann whatsoever. The only potential control is possibly by individual officers and shareholders of both companies. Pro-Fab has no ability whatsoever to control See-Ann. Again, huge difference.

Appellees further misstate the law when setting forth the three-prong test in *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark*, 67 Ohio St.3d 274. Appellees leave out an important part of *Belvedere*. *Belvedere* holds that corporate formalities can be disregarded and ***individual*** liability can be imposed, in certain cases. In this case, Appellees have chosen not to pursue individual officers and shareholders of the companies who could theoretically exercise control over either company. Instead, Appellees have chosen to pursue the legal entity that is Pro-Fab.

A review of Appellees claim reveals that it is never explicitly clear which company is supposed to control the other; whether it is Pro-Fab controlling See-Ann, See-Ann controlling Pro-Fab, or both. Appellees spend a great deal of time talking about the issue of control, then completely disregard the issue of control and say the companies are simply indistinguishable. This begs the question: which is it? Is it that the companies are indistinguishable, or is it that Pro-Fab exercised control over See-Ann? As Ohio case law provides, it is impossible for Pro-Fab to have any control over the legal entity that is See-Ann.

In fact, throughout their brief, Appellees even make the mistake of referring to "Pro-Fab's fraudulent attempts to hide behind its ***subsidiary***" (emphasis added). The record is devoid of any proof of such a control relationship. The reason is that there is no control.

The Appellees' attempt to explain that Pro-Fab somehow controlled the worksite at issue is that Donald Fisher was a foreman on site for See-Ann. Donald Fisher was an employee of both companies, albeit at different times. It is undisputed from the record that comprises this case that Donald Fisher was an employee of See-Ann, working for See-Ann and being paid by See-Ann on the Newtown Falls project. (See Donald Fisher's depo., pp. 6, 7, 15.) Donald Fisher was paid by See-Ann on this job, and even by Appellee's own admission, was the foreman on-site for See-Ann. (See Donald Fisher's depo., p. 15; Brief of Appellee, p. 8.) Appellee himself was also a See-Ann employee, which is undisputed.

It is further undisputed that Donald Fisher was a foreman on-site for See-Ann as a See-Ann employee on the Newtown Falls project. Appellees then make the quantum leap that since Donald Fisher was the foreman on site, Pro-Fab was actively involved in every part of Appellee's work on the day in question. This argument is flawed and an illogical stretch, at best. Donald Fisher was there as the foreman for See-Ann, and while he was an employee of both See-Ann and Pro-Fab at different times, he was unequivocally acting in a capacity/duty as a See-Ann employee on the Newtown Falls project.

In the Eleventh District majority decision, it is stated 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". Not only is this a misstatement of the law as set forth by the Ohio Supreme Court, this is a dangerous legal doctrine to endorse. If a related company is sought to be held liable under alter-ego principles, present law requires some measure of control. Affirming the majority decision will be a change in existing Ohio law.

Throughout Appellees' brief, they talk about control of day-to-day operations of a ***subsidiary's*** business. Once again, this is not a subsidiary situation. Pro-Fab has no ownership interest in See-Ann, and See-Ann has no ownership interest in Pro-Fab.

Appellees also argue that there are subcontractor agreements in place between the general contractor, Hummel Construction, and Pro-Fab. Appellees state that there were safety requirements in place, and argue that things should

have been done differently by Pro-Fab in order to comply with these agreements. First of all, Appellees have no standing to address contractual issues between Pro-Fab and Hummel. Furthermore, this argument fails based upon *Reno v. Concrete Coring, Inc.* (June 17, 2005), 2005 WL 1415041, which held that a party having contractual control over safety policies and procedures does not rise to the level of active participation in order to hold another contractor liable for an injury sustained by a contractor's employee.

Appellees 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.

Appellees claim that Pro-Fab and See-Ann engage in the same business enterprise. This is untrue. There are situations where the entities work through different unions, and undertake different work. Pro-Fab is primarily engaged in material supply, while See-Ann is more involved in steel erection. In addition,

the companies work through different unions, and contracts are separated based upon which union is providing the labor. (See Donald Fisher's depo., p. 6.)

On page 12 of their brief, Appellees state that "clearly, Pro-Fab is the domineering party at issue". Amazingly, there is no cite and no facts in the record whatsoever to support this conclusory and baseless allegation. Just stating this conclusion does not make it so, no matter how desperately Appellees wish that to be the case.

In the "business purposes" section of Appellees' brief, Appellees state that Pro-Fab and See-Ann are nearly identical; however, they leave out the fact that there is no ***fabrication*** of structural and miscellaneous metals in the business statement of See-Ann. That is something that Pro-Fab does that See-Ann does not. Once again, amazingly, Appellees draw the conclusion that since Pro-Fab and See-Ann both performed work for the same customer, and were responsible for the same type of work, generally the steel work (ignoring the difference between fabrication and erection), "therefore the companies are a mere instrumentality of one another". It is dangerous for any court, including this Honorable Supreme Court, to endorse this flawed logic. Simply being on the same jobsite and performing work for the same customer occurs daily in the construction industry in the State of Ohio, and to allow the logic and position of the Appellees to prevail would put every single company with shared ownership and employees at risk in the State of Ohio. We are facing an uncertain economy in our state, exposing companies to additional risk and exposure is concerning.

On page 13 of their brief, Appellees claim that Donald Fisher, a Pro-Fab employee, directed Appellee's work on the Newton Falls project. This statement is not accurate. Appellees seek to conduct revisionist history with regard to the record.

Donald Fisher, according to his own deposition testimony, was a See-Ann employee on the Newton Falls project. He was the foreman for See-Ann, and even Appellees state this fact several times throughout their brief. To claim that it has previously been established and is undisputed that Donald Fisher, as a Pro-Fab employee, directed Appellee's work on the Newtown Falls project is disingenuous, unfair and false. Pro-Fab did not direct Mr. Minno's work on this project, it was See-Ann and See-Ann's employees that directed Mr. Minno in his work on the Newtown Falls project. To state that Pro-Fab "could not have been more directly involved" is patently false and untrue, and in direct contravention to the findings of the trial court in this matter. This is not an issue of fact, it is undisputed that he was, at all times relevant to the case, a See-Ann employee.

Appellees discuss the corporate entity being used to commit a fraud or a wrong. Appellees claim that Appellants have alleged that Appellees have offered zero evidence that See-Ann is without proper liability insurance to cover its employees. That is ***not*** the claim of the Appellant.

Appellees contend that lack of insurance caused See-Ann to be substantially undercapitalized. There is no evidence anywhere in the record to substantiate this allegation. Appellees have put forth no evidence of the corporate assets of See-Ann. Appellees have put forth no evidence of the

corporate assets of Pro-Fab. However, Appellees make the blanket assertion that Pro-Fab is the company holding "most of the assets". Where in the record does this proof exist?

Appellees then make another amazing leap of logic when they state that See-Ann's "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?" Again, See-Ann may have insurance, it simply does not have an intentional tort endorsement. Appellees claim that the alleged lack of insurance obviously causes See-Ann to be substantially undercapitalized. How? Where is any evidence whatsoever regarding the capitalization and/or financial condition of See-Ann? Where is any evidence whatsoever regarding any assets of See-Ann? There is none. This is simply an attempt by Appellees to create potential liability where none presently exists. Appellant's contention that there is no intentional tort endorsement for See-Ann's general liability policy does not lead to the conclusion that See-Ann was undercapitalized. Again, there is absolutely no evidence whatsoever regarding the assets of either Pro-Fab or See-Ann.

Appellees go on to state that, thus, Pro-Fab placed insurance with the company holding most of the assets, and used the corporations as a convenience. That is simply not the case as spelled out above, and there is no evidence in the record to substantiate this allegation. Appellant challenges Appellees to support this claim by reference to the record before this Court.

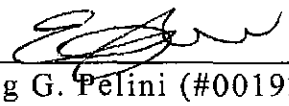
Appellees argue that "it has also been stated that the corporate entity should be disregarded only when justice cannot be served in any other way". Appellant is in complete agreement. If, in fact, there are individual shareholders and/or officers of either company that should shoulder personal liability, they should have been sued. They were not. Appellees chose not to pursue those individual shareholders. They decided to pursue a corporation with similar ownership only. They chose their strategy, and they must now live with those decisions.

CONCLUSION

Appellees seek to modify *Belvedere*. In order to satisfy the *Belvedere* test, ***control*** must be demonstrated. Control over the corporation by those to be held liable must have been exercised. In this very case, Pro-Fab, Inc. as a legal entity, had no ability, legally or otherwise, to control See-Ann, Inc., a distinct and separate legal entity. To pursue Pro-Fab as a legal entity with no ownership interest or ability to control See-Ann in any way is contrary to the *Belvedere* case and existing Ohio law as set forth by this Honorable Supreme Court. The highest court in this state has the right to reverse existing law, if it so chooses.

This is what Appellees urge. They want state decisions disregarded. This Appellant urges affirmation of *Belvedere* and reversal of the 2-1 decision of the Eleventh District Court of Appeals, reinstating the summary judgment granted by the trial court.

Respectfully submitted,



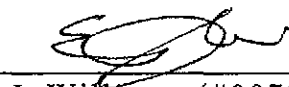
Craig G. Pelini (#0019221)
Eric J. Williams (#0072048)
Pelini, Campbell, Williams & Traub
8040 Cleveland Avenue NW, #400
North Canton, OH 44720
Telephone: (330) 305-6400
Facsimile: (330) 305-0042
Email: cgp@pelini-law.com
Email: ejwilliams@pelini-law.com
Counsel for Appellant, Pro-Fab, Inc.

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief was sent by regular U.S. mail on the 8th day of August, 2008 to:

James R. Scher, Esq.
200 Chestnut Avenue NE
Warren, OH 44483
Counsel for Appellees Minno

Robert E. Blackham, Esq.
Lynn A. Gross, Esq.
Roetzel & Andress, LPA
1375 East Ninth Street – 9th Floor
Cleveland, OH 44114
Counsel for Appellee, See-Ann, Inc.



Eric J. Williams (#0072048)

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1 Q. And with respect to your employment,
2 whom do you currently work for?
3 A. Pro-Fab, Incorporated.
4 Q. And how long have you been a Pro-Fab,
5 Incorporated employee?
6 A. 22 years, that's close. Not -- I'm
7 not positive.
8 Q. So I gather you were a Pro-Fab
9 employee on September 24th of 2003?
10 A. Yes.
11 Q. Have you ever worked for See-Ann,
12 Incorporated?
13 A. Yes.
14 Q. Okay. When, or under what
15 circumstances, would you work for See-Ann,
16 Incorporated?
17 A. If we're in an area for erection, and
18 out of like in Youngstown, or Canton, or
19 sometimes in Cleveland.
20 Q. Would that be outside of Local 17's
21 jurisdiction?
22 A. Normally, yes.
23 Q. Do you know the business address for
24 See-Ann, Incorporated?
25 A. No, I don't.

EXHIBIT A-1

1 Q. Okay. Do you know the business
2 address for Pro-Fab, Incorporated?
3 A. Yes, I do.
4 Q. And what is that?
5 A. 2570 Pressler Road. I'm 90 percent
6 sure it's 2570.
7 Q. Okay. And when you would work for
8 See-Ann, Incorporated, whom was your direct
9 contact with See-Ann?
10 A. Well, Monroe Townsend.
11 Q. My understanding is he is a Pro-Fab,
12 Incorporated employee; is that correct?
13 A. Yeah, I would assume.
14 Q. What -- what is your current position
15 with Pro-Fab, Incorporated?
16 A. I'm a field foreman.
17 Q. And how long have you been in that
18 position with Pro-Fab?
19 A. Ten years.
20 Q. When you work for See-Ann,
21 Incorporated what is your position with them?
22 A. Foreman.
23 Q. Same -- same job?
24 A. Yes.
25 Q. How often do you work for See-Ann?

1 Q. And I take it those all would have
2 been for See-Ann?
3 A. No.
4 Q. No?
5 A. Some of them were before I went to
6 work for See-Ann.
7 Q. Okay. Mr. Fisher, we're going to
8 talk about September 24th, 2003 for the
9 moment. Do you recall that day as we sit here
10 today?
11 A. Is that the day he fell that --
12 Q. Yes.
13 A. Yes.
14 Q. And do you remember the Newton Falls
15 project well?
16 A. Fairly well, yes.
17 Q. And it's my understanding you were
18 the foreman on site that day; is that correct?
19 A. Yes.
20 Q. Do you recall who contacted you for
21 this job, to -- to be foreman for this job?
22 A. No.
23 Q. Do you recall whether you were paid
24 by See-Ann or Pro-Fab for that job?
25 A. See-Ann.