

IN THE SUPREME COURT OF OHIO

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

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Supreme Court Practice Rule VI, Section 8, Appellant Pro-Fab, Inc. respectfully gives notice of the relevant authority, *Dombroski v. Wellpoint, Inc.*, Slip Opinion No. 2008-Ohio-4827, which was recently decided on September 30, 2008.

Respectfully submitted,



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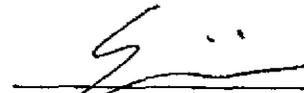
FILED
OCT 06 2008
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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Notice was sent by facsimile on the 6th day of October, 2008 to:

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THE SUPREME COURT of OHIO

Opinion Summaries

Court Modifies Test For Allowing Plaintiff to 'Pierce Corporate Veil,' Seek Damages from Shareholder

2007-2162. Dombroski v. WellPoint, Inc., Slip Opinion No. 2008-Ohio-4827.

Belmont App. No. 06-BE-60, 173 Ohio App.3d 508, 2007-Ohio-5054. Certified question answered in the negative and judgment reversed.

Moyer, C.J., and Lundberg Stratton, O'Connor, O'Donnell, Lanzinger, and Cupp, JJ., concur.
Pfeifer, J., dissents.

Opinion: <http://www.supremecourtsohio.gov/rod/docs/pdf/0/2008/2008-Ohio-4827.pdf>

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(Sept. 30, 2008) In a decision announced today, the Supreme Court of Ohio held that when a plaintiff pursuing a civil lawsuit against a corporation seeks to "pierce the corporate veil" (bypass the corporate structure and recover damages directly from a shareholder), the plaintiff must show that the shareholder used its control of the corporation "in such a manner as to commit fraud, an illegal act, or a similarly unlawful act."

The 6-1 decision, written by Chief Justice Thomas J. Moyer, modified one part of a three-prong test for piercing the corporate veil this Court established in a 1993 decision, *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos. Inc.* [See below for an explanation of the three-prong *Belvedere* test.] The effect of today's ruling was to deny an attempt by Kimberly Dombroski, a policyholder whose claim for coverage was denied by Community Insurance Company (CIC), a wholly owned subsidiary of WellPoint Inc., to pursue recovery directly from WellPoint for her claimed physical and emotional injuries arising from alleged bad faith denial of coverage by CIC.

In 2000 Dombroski was diagnosed with a profound hearing loss in both ears. In 2005, after she had received a cochlear implant in her left ear, Dombroski's treating physician certified that it was medically necessary and appropriate for her to be implanted with a similar device on the right side as well. When Dombroski sought approval to initiate that procedure, she was informed by CIC that her claim was not covered because corporate medical guidelines classified bilateral cochlear implantation as an "experimental" procedure, and Dombroski's CIC policy excluded coverage for experimental treatments. When her appeals to CIC were unsuccessful, Dombroski filed suit claiming bad-faith denial of her claim for coverage not only against CIC, but also against its parent company, WellPoint.

WellPoint filed motions seeking dismissal of Dombroski's claims against it on the basis that her insurance contract was with CIC, and that her complaint had not identified any legal ground that would allow her to bypass that corporate entity and assert claims against WellPoint as CIC's shareholder. The trial court ruled that Dombroski had not met either the second or third prongs of the *Belvedere* test for piercing the corporate veil of CIC, and dismissed her claims against WellPoint. On review, however, the 7th District Court of Appeals reversed the trial court's ruling and reinstated her claims against WellPoint. In its opinion, the court of appeals held that Dombroski's claim met all three prongs of the *Belvedere* test for piercing the corporate veil.

The 7th District certified, however, that its ruling in favor of Dombroski was in conflict with two decisions of the

6th District Court of Appeals regarding the proper interpretation and application of the second prong of the *Belvedere* test. The Supreme Court agreed to hear arguments in the case to resolve the conflict among districts.

In today's decision, Chief Justice Moyer wrote: "In *Belvedere*, this court established a three-prong test for courts to use when deciding whether to pierce the corporate veil, based on a test developed by the United States Court of Appeals for the Sixth Circuit in *Bucyrus-Erie Co. v. Gen. Prods. Corp.*... This test focuses on the extent of the shareholder's control of the corporation and whether the shareholder misused the control so as to commit specific egregious acts that injured the plaintiff: 'The corporate form may be disregarded and 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.'... All three prongs of the test must be met for piercing to occur."

Focusing on the second prong of the test, the Chief Justice noted that in the years since *Belvedere* was decided, the state's appellate courts have interpreted the phrase "fraud or illegal act" in two different ways. "Several courts of appeals, including the Seventh District Court of Appeals in this case and the Third, Tenth, Eleventh, and Twelfth District Courts of Appeals, have liberally construed the language of the second prong. These courts rely on the fact that piercing is an equitable remedy, seizing on language from *Belvedere* that piercing should occur 'when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity.'... Their modified version of the second prong thus requires the plaintiff 'present evidence that the shareholders exercised their control over the corporation in such a manner as to commit a *fraud, illegal, or other unjust or inequitable act* upon the person seeking to disregard the corporate entity.'... The Sixth District Court of Appeals has adopted a narrower view of the *Belvedere* language. That court of appeals strictly follows the plain language of the second prong and limits piercing to only those cases in which the defendant shareholder has used its control of the corporate form to commit fraud or an illegal act."

Although noting that there were "compelling reasons" to adopt the more liberal construction applied by the 7th District in allowing Dombroski to pierce the corporate veil in this case, Chief Justice Moyer wrote: "Nevertheless, we continue to adhere to the principle that limited shareholder liability is the rule,... and piercing the corporate veil is the 'rare exception' that should only be 'applied in the case of fraud or certain other exceptional circumstances.' While we noted in *Belvedere* that piercing should be allowed when it would be unjust for shareholders to hide behind the corporate fiction, we also stated that the test adopted there struck the correct balance between the guiding principles of limited shareholder liability and the fact that shareholders occasionally misuse the corporate form as a shield from liability for their own misdeeds."

"Limiting piercing to cases in which the shareholders used their complete control over the corporate form to commit specific egregious acts is key to maintaining this balance. Were we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders. Controlling shareholders in publicly traded corporations could also be subject to frequent piercing, regardless of the corporation's liability and its ability to pay for the plaintiff's injuries. Such expansive liability would run contrary to the concept of limited shareholder liability and upset the balance struck in *Belvedere*. Thus, the proposed expansion of the second prong of the *Belvedere* test to include unjust or inequitable conduct is simply too broad to survive exacting review."

Chief Justice Moyer went on, however, to note that after reviewing the tests for piercing the corporate veil employed in other jurisdictions, the Court found it necessary to make some modification to the second prong of the *Belvedere* test. "Limiting piercing to cases of fraud or illegal acts protects the established principle of limited liability, but it insulates shareholders when they abuse the corporate form to commit acts that are as objectionable as fraud or illegality. In view of the reality that shareholders could seriously misuse the corporate form and evade personal liability under the second prong as presently worded, we find it necessary to modify the second prong of the *Belvedere* test to allow for piercing in the event that egregious wrongs are committed by shareholders."

"Accordingly, we hold that to fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the

plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. Courts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct.”

Finding that the insurer bad faith claim asserted by Dombroski in this case “is a straightforward tort, a basic example of unjust conduct” rather than “the type of exceptional wrong that piercing is designed to remedy,” the Chief Justice concluded that Dombroski’s claim did not meet the second prong of the *Belvedere* test even as modified by today’s decision, and that the 7th District’s ruling in her favor must therefore be reversed.

The majority opinion was joined by Justices Evelyn Lundberg Stratton, Maureen O’Connor, Terrence O’Donnell, Judith Ann Lanzinger and Robert R. Cupp.

Justice Paul E. Pfeifer entered a dissent stating that, rather than expanding the range of shareholder misconduct for which a plaintiff is entitled to pierce the corporate veil, today’s majority ruling “greatly restricts” that range compared to the standard that a majority of the state’s courts of appeals have been following. He said the standard applied by the 7th District in this case was consistent both with *Belvedere* and with the U.S. 6th Circuit’s 1981 holding in *Bucyrus-Erie*, which specifically references not only claims of fraud and illegal acts, but also claims of “other dishonest or unjust act(s).”

Justice Pfeifer wrote: “(T)oday the majority abrogates this court’s previous reliance on *Bucyrus-Erie* and thus installs a much more restrictive test than it originally set forth in *Belvedere*. Ironically, the majority claims to be fine-tuning *Belvedere*’s second element to cover ‘egregious wrongs’ perpetrated by shareholders as it simultaneously greatly restricts the kinds of claims that can successfully be brought pursuant to *Belvedere*. The majority believes that it expands on the *Belvedere* element of a ‘fraud or an illegal act’ by including the redundancy ‘or a similarly unlawful act.’ Thus, not only may an ‘illegal act’ satisfy the second element of the *Belvedere* test, but so will an act that is similarly unlawful to an illegal act. The new language seems to be pulled from the air. Is there a notable distinction between an ‘unlawful’ and an ‘illegal’ act? Not that the majority identifies. The words appear to be two ways of saying the same thing. Potato, potatito, illegal, unlawful – let’s call the whole thing off.... Today, the majority adds words but no distinctions, and by whitewashing *Belvedere*’s reliance on *Bucyrus-Erie*, places Ohio within the most restrictive jurisdictions for proving a case of piercing of the corporate veil. That was never this court’s intent in *Belvedere*.”

Contacts

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