Corporations - Piercing the Corporate Veil - Corporate Tort

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Recommended Citation
Salvatore J. Cucinotta, Corporations - Piercing the Corporate Veil - Corporate Tort, 6 Duq. L. Rev. 310 (1967).
Available at: https://dsc.duq.edu/dlr/vol6/iss3/10

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property” right, good against all the world except the United States Government. However, when the land is particularly suitable for the use to which it is going to be put, and such use has been intended by the owner, it would seem not only possible, but just, to draw a balance between the theory of the dominant servitude, and the theory of fair market value, as is done in an eminent domain proceeding of fast lands.\textsuperscript{46}

Irrespective of the many opinions of “just compensation,” the importance of \textit{Rands} is that it intended to eliminate doubt and to end the lower courts’ indecision on the question of fair market value for riparian lands. The Court summarily dismissed \textit{Monongahela} as a case “primarily” one of estoppel; explained the supposed “inconsistency” of \textit{River Rouge}; and expressly overruled the distinction made in \textit{Chandler-Dunbar} which gave added value to the lock and canal site.

In view of the history of the cases concerning eminent domain proceedings for riparian lands, it seems that the later Courts have centered not so much on the issue of \textit{what} elements of value full and just compensation encompasses, but \textit{when} it is to be paid. If the riparian land owner’s right of access is taken, or if the land is “incidentally destroyed,” compensation is not required. By construing the value of riparian lands in eminent domain proceedings to “inure to it due to the flow of the stream,” full and just compensation is avoided, as \textit{United States v. Rands} illustrates.

\textit{Jean McGuinness}

\textbf{Corporations—Piercing the Corporate Veil—Corporate Tort—} The United States Court of Appeals for the Third Circuit holds that the corporate entity will be disregarded to hold a shareholder liable for a corporate tort \textit{only} where the tort claimant can prove that the corporation was formed with a specific intent to escape personal liability for a specific tort or class of torts.


Plaintiffs in the instant case sustained injuries when barges owned by defendant Charles Zubik, Sr. broke loose from their moorings in an ice flow. The barges had been leased to defendant Zubik & Sons, Inc., a firm in which Charles Zubik, Sr. was the principal shareholder. The United States District Court entered multiple admiralty judgments totaling $207,504 against Charles Zubik, Sr. and Zubik & Sons, Inc., a closely held corporation which had assets of only $67,000.\textsuperscript{1}

\textsuperscript{1} 384 F.2d at 271.

\textsuperscript{46} \textit{Supra}, note 37 at 359.
On appeal the United States Court of Appeals for the Third Circuit affirmed the lower court's decision that the barges had been negligently tied to their moorings. However Judge Van Dusen, writing the unanimous opinion for the three judge Court of Appeals, overruled the District Court's holding that Charles Zubik, Sr. was personally liable for the injuries caused by the negligence of employees of Zubik & Sons, Inc. The lower court had based such liability on two findings: (1) that Charles Zubik, Sr. had actively participated in the commission of the tort by being in the immediate area of the fleet of barges on the night that they broke loose, and (2) that the corporate entity should be disregarded and shareholders held personally liable since Zubik & Sons, Inc. was "nothing more than the alter ego of the individual defendant [Charles Zubik, Sr.]..." Judge Van Dusen dismissed the first basis for the imposition of personal liability by holding that mere presence in the immediate area did not amount to sufficient participation in the commission of the acts of negligence. In rejecting the lower court's second basis for personal liability Judge Van Dusen closely examined the relationship between Charles Zubik, Sr. and Zubik & Sons, Inc. (hereinafter referred to as the corporation).

The District Court had based its alter ego determination on the following findings: (1) the corporation had paid salary and rental fees due Charles Zubik, Sr. to a corporate account and that the personal expenses of Charles Zubik, Sr. were paid by the corporation out of this account, (2) Charles Zubik, Sr. was the only officer of the corporation with the power to sign checks in its behalf, (3) for a three year period the corporation had failed to hold any meetings, (4) Charles Zubik, Sr. orally leased assets to the corporation, (5) Charles Zubik, Sr. loaned money to the corporation, (6) the corporation kept the records and deeds of Charles Zubik, Sr., (7) Charles Zubik, Sr. had the "last word" in corporate affairs, and (8) Charles Zubik, Sr. had the same attorney and accountant as the corporation.

On appeal Judge Van Dusen held that the above findings were not sufficient to warrant a piercing of the corporate veil. In so holding he relied on the principle that closely held corporations are not held to the

2. When barges drift loose from their moorings and cause damages through collision a presumption of negligence arises. Swenson v. The Argonaut, 204 F.2d 636 (3d Cir. 1953). The defendant must prove freedom from negligence or humanly unalterable circumstances in order to escape liability. Swenson v. The Argonaut, supra, at 640; The Louisiana, 3 Wall 164 (1866); see, The Rob, 122 F.2d 312 (2d Cir. 1941).
3. The general rule is that an officer of a corporation who takes part in the commission of a tort by corporation employees is personally liable. 3 FLETCHER CYC. CORP. § 1137 (Perm. Ed. Rev. 1965); 19 C.J.S. Corporations § 845 (1940); see, Chester-Cambridge Bank and Trust Co. v. Rhodes, 346 Pa. 427, 433, 31 A.2d 28 (1943).
4. 384 F.2d at 270.
5. 384 F.2d at 275-76.
same degree of formality as are the larger corporations and on evidence in the record which indicated a distinct corporate existence: (1) Charles Zubik, Sr.'s daughter could sign corporation checks by reason of a power of attorney, (2) the corporation borrowed from others as well as Charles Zubik, Sr., (3) the corporation had some assets of its own, (4) the fact that the corporation kept Charles Zubik, Sr.'s records and deeds was irrelevant because he could neither read nor write, and (5) as far as daily operations of the corporation were concerned Charles Zubik, Sr. was not the "last word," but only a spectator.

Judge Van Dusen distinguished the tort claimant from the corporate creditor who seeks to have the corporate entity disregarded: "the controversy in such [creditor] cases invariably involves some degree of reliance by the plaintiff, contributing to the fraud or undue advantage or trick accenting the injustice. But the injured tort claimant stands on a different footing." It is obvious that a tort claimant has not relied on the existence of a corporation. However it is submitted that it is deceiving to reject the argument of the tort claimant on this basis, for while a creditor at least has an opportunity to investigate the shareholder-corporation relationship in a closely held firm, the tort claimant must involuntarily accept this relationship.

Judge Van Dusen stated that there is a presumption in favor of recognizing the existence of a corporation when its existence has been challenged. To rebut this presumption the plaintiff-appellee was required to show that "fraud, illegality or injustice" would result unless the corporate entity was disregarded as where the "recognition of the corporate entity would defeat public policy or shield someone from liability for a crime." The court indicated that "fraud, illegality, or injustice" would vary with the type of case presented. In bankruptcy, taxation, and contract


7. 384 F.2d at 273.


cases different standards of fraud would be applied in determining whether to pierce the corporate veil. Where a plaintiff seeks to hold an individual shareholder liable for a corporate tort, as in the instant case, the court held that the plaintiff must show that the corporation was created "with specific intent to escape liability for a specific tort or class of torts. . . ."13 (Emphasis added). If this can be shown then the court will consider the intertwining of personal affairs with the operation of a closely held corporation as additional reason for piercing the corporate veil. However, the court did not discuss any specific factors which must exist before the veil can be pierced in the case of a corporate tort, but limited itself to a generalized statement of the rule in this area.14

Pennsylvania courts have held parent corporations liable for torts of their subsidiaries but have never held a shareholder personally liable for a corporate tort.15 Consequently the court cited Mull v. Colt Co.,16 as an example of the fraud and injustice that must be shown before an individual defendant shareholder is liable. In Mull the plaintiff was permitted to sue the principal shareholder of a taxicab corporation, the federal district court holding that the corporate entity should be disregarded since it violated a statute17 and defrauded the public. In the earlier case of Mull v. Colt Co.18 the court suggested different standards exist where a plaintiff attempts to pierce the corporate veil to reach a parent corporation than where one seeks to reach an individual shareholder. However, in Walkovszky v. Carlton19 the New York Court of Appeals refused to pierce the corporate veil where no violation of law was alleged despite the

13. 384 F.2d at 273.
15. In McCarthy v. Ference, 358 Pa. 485, 58 A.2d 49 (1948), where the parent corporation owned all the subsidiary's stock and both corporations had common directors, the Pennsylvania Supreme Court held that the subsidiary was an instrumentality of the parent and treated it as a department of the parent. See also, Whayne v. Transportation Management Service Inc., 252 F. Supp. 573 (E.D. Pa. 1966) where the plaintiff sued the subsidiary and the parent under the Jones Act and the unseaworthiness doctrine.
17. In violation of NEW YORK CITY POLICE REGISTRATION REGULATIONS, Mar. 26, 1953, Section II A(1) and II D(5)(1). The purpose of the regulations was to assure the public of safely maintained taxicabs. 31 F.R.D. 154, 161 (S.D.N.Y. 1962).
fact that the assets of the corporation consisted of only two mortgaged taxicabs covered by the legal minimum of insurance ($10,000 apiece) and the defendant shareholder was also a shareholder in several other two taxicab corporations. In *Thoni Trucking Co. v. Foster*\textsuperscript{20} the plaintiff successfully sued the majority shareholder of a closely held corporation whose truck had injured him. However in *Thoni Trucking Co.* the shareholder defendant had stripped the corporation of all its assets immediately following the accident.\textsuperscript{21}

Judge Van Dusen in *Zubik* stated that the corporate veil will be pierced in the case of a corporate tort only when the corporation was formed with the specific intent to escape liability for a specific tort or class of torts,\textsuperscript{22} but also indicated that a specific intent to escape personal liability is a primary motive for incorporation and is not alone a sufficient basis for piercing the corporate veil.\textsuperscript{23} Thus the plaintiff has a heavy burden: he is virtually required to prove a criminal motive behind the decision to incorporate before the entity will be disregarded. As a result of similar reasoning by other courts shareholders of a closely held real estate,\textsuperscript{24} entertainment,\textsuperscript{25} manufacturing,\textsuperscript{26} and shipping\textsuperscript{27} corporations with negligible assets can successfully avoid personal liability for corporate torts and the tort victim must bear the burden of his loss.

One suggested remedy\textsuperscript{28} to this problem is enacting a special statute for closely held corporations eliminating the no personal liability feature of the entity. This solution might impede investment, thus curtailing economic growth, and requires an explicit definition of a closely held corpora-

\begin{footnotes}
\item[20] 243 F.2d 570 (1957).
\item[21] In an appropriate case where the stockholder owns all the stock and the corporation is treated as an instrumentality, the corporate entity will be disregarded. Great Oak Bldg. & Loan Assn. v. Rosenheim 341 Pa. 132, 19 A.2d 95 (1964); "where one corporation controls another, and uses it as the means, agency and instrumentality by which the former carries out and performs its business, it is liable for the torts of the latter." Mangan v. Terminal Transport System, 157 Misc. 627, 631, 284 N.Y.S. 183, 188 (Sup. Ct. 1935), aff'd, 247 App. Div. 853, 286 N.Y.S. 666 (3d Dept. 1936); one commentator states that the rules used to pierce the corporate veil are result orientated. E. Latty, *Subsidiaries and Affiliated Corporations* 191 (1936).
\item[22] See note 13, *supra*.
\item[23] See note 12, *supra*. In Werner v. Hearst, 177 N.Y. 63, 67, 69 N.E. 221, 222 (1903), the court indicated that no inquiry will be made as to whether the corporation was formed in good faith or was an "evasive device" to escape individual responsibility.
\end{footnotes}
Another proposal\(^{29}\) suggests mandatory insurance coverage for all corporations which can be waived only upon showing of sufficient capitalization. Since the *Zubik* case involves maritime law there is a third possible remedy. The historic purpose of maritime laws is to preserve and protect maritime shipping and commercial interests. The *Zubik* decision jeopardizes these interests by permitting individuals to operate thinly capitalized corporations on our waters free from any risk of personal liability. In order to protect and perpetuate these interests the maritime tort claimant should not have to bear the heavy burden of proof required by *Zubik* before the corporate entity will be disregarded. It is submitted that the *Zubik* court did not give adequate consideration to the protective purposes of maritime law.

*Salvatore J. Cucinotta*

**Trusts-Purpose Contrary to Public Policy**—The Pennsylvania Supreme Court clarifies and updates its views on the validity of marriage and re-marriage conditions which are annexed to a testamentary trust, relating to the religion and national origin of the spouse of a beneficiary.


John Keffalas died testate on April 19, 1956. His last Will and Testament, dated December 8, 1944, was admitted to probate on May 1, 1956. The relevant paragraphs in the will are as follows:

"Fourth: To my daughter, Dorothy J. Keffalas Gregory, I give one-hundred dollars. . . . Should my daughter Dorothy either by divorce [sic] or death remarry a man of true Greek blood and descent and of Orthodox religion, . . . she shall after one year of successful marriage receive the sum of two-thousand ($2,000) from my trust funds."\(^{31}\) [Dorothy had married a non-Greek prior to execution of the will].

Fifth through Eleventh: A conditional bequest to each child but Dorothy of $2,000.00, on condition that such child marry a person of "true Greek blood and descent and of Orthodox religion."\(^{32}\)

Twelfth and Thirteenth: Disposed of testator's business to his three eldest sons, upon the same condition.

\(^{29}\) The Pennsylvania Senate has passed a new Business Corporation Law where the close corporation is defined to consist of 30 or less stock holders. Senate Bill No. 1169 (1967): Chap. B, Art. III, Sec. 1(4).


\(^{32}\) *Id.*