64,532

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81-1834

GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC., et al.,

Petitioners,

vs.

KELLEY SISK, as Personal Representative of the Estate of JAMES LARRY SISK,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO
THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF OF PETITIONER GENERAL BUILDERS CORPORATION OF FORT LAUDERDALE, INC.

WICKER, SMITH, BLOMQVIST, TUTAN,
O'HARA, McCOY, GRAHAM & LANE

and

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STATEMENT OF THE FACTS AND THE CASE

The Fourth District in this case expressly based its decision on its recent decisions in the cases of Dania Jai-Alai Palace v. Sykes, 425 So.2d 594 (Fla. 4th DCA 1982); and Vantage View, Inc. v. Bali East Development, 421 So.2d 728 (Fla. 4th DCA 1982).

In the Dania Jai-Alai case, the Florida Supreme Court has accepted jurisdiction and that case is before the Supreme Court on the merits. Supreme Court Case Number 63,394.

Similarly, the Vantage View case expressly acknowledges conflict between two lines of cases and expressly states that it is following the earlier line of cases.

Therefore, it is submitted that this Honorable Court should accept jurisdiction in the present case since the correctness of this decision will depend on which of two lines of cases is followed in Dania Jai-Alai.

The rule of law concerns the standard for piercing the corporate veil of a subsidiary corporation. One line of cases holds that it is only necessary to show domination of the subsidiary corporation by the parent corporation to pierce the corporate veil; however, another holds that it is necessary to show domination and fraud or wrongdoing in order to pierce the corporate veil. The Vantage View and the Dania Jai-Alai cases specifically state that they will follow the line of cases which hold that only domination

is necessary. Therefore, this Honorable Court should accept jurisdiction since the correctness of its decision depends on the Supreme Court's decision in Dania Jai-Alai. This rule of law will be discussed further in the "Argument" portion of the brief.

FACTS

The crux of this discretionary review is that an employee of a subcontractor was injured on the job but cannot sue either the subcontractor or general contractor because of workmen's compensation immunity. Therefore, the Plaintiff sued the general contractor alleging it is an owner/builder. However, he produced no legally sufficient testimony that it was an owner/builder and therefore the trial Court ruled that as a matter of law the separate corporate structure was intact.

The basis on which the Plaintiff sought to claim the general contractor was an owner/builder is that both the corporate owner of the land and the general contractor are wholly owned subsidiaries of a large national corporation.

The following are the three corporations:

> General Builders Corporation (hereinafter called "National Corporation") is a public company and a large national corporation. It was traded on the American Stock Exchange and is now traded in the over the counter market. It is a holding company. Among its numerous subsidiaries are General Builders Corporation of Fort Lauderdale, Inc., and Cedar Lane Developers, Inc., both of which are wholly owned subsidiaries.
>
> General Builders Corporation of Fort Lauderdale, Inc. (hereinafter called "Ft. Lauderdale General

Contractor"). This is the wholly owned subsidiary which has been in existence for several years working on numerous projects as a general contractor.

Cedar Lane Developers, Inc. (hereinafter called "Cedar Lane"). This is a wholly owned subsidiary which was organized to build the development project and owns the land.

It should also be noted that the subcontractor was not related to these. It was Wentworth Plaster of Boca Raton, Inc., and the employee who was killed was the Plaintiff, James Sisk. Therefore, the appropriate chart is as follows:

Cedar Lane Developers, Inc. (Cedar Lane) -
Owner of project.
↓
General Builders Corporation of Ft. Lauderdale, Inc. (Ft. Lauderdale General Contractor) -
The general contractor on the job.
↓
Wentworth Plaster of Boca Raton, Inc. (Wentworth)
Plastering subcontractor.
↓
James Sisk
Employee of Wentworth who was killed.

In short, the Plaintiff cannot file suit because of workmen's compensation immunity and therefore is attempting to disregard the separate corporate identity of Cedar Lane and General Builders Corporation of Ft. Lauderdale, Inc., and therefore lumps them together as an owner/builder on the basis that they are both wholly owned subsidiaries of the national holding company of General Builders Corporation. The allegation was solely domination by the parent corporation of the subsidiary corporation, and there was no allegation of fraud or wrongdoing.

ARGUMENT

THE DECISION IN THE PRESENT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF UNIJAX, INC. V. FACTORY INSURANCE ASSOCIATION, 328 So.2d 448 (Fla. 1st DCA 1976); GULFSTREAM LAND & DEVELOPMENT CORP. V WILKERSON, 420 So.2d 587 (Fla. 1982), AFFIRMING WILKERSON V. GULFSTREAM LAND & DEVELOPMENT CORP., 402 So.2d 550 (Fla. 4th DCA 1981); AND RILEY V. FATT, 47 So.2d 769 (Fla. 1950).

As indicated at the beginning of the Statement of the Facts and the case section of this brief, the Fourth District expressly based its decision on the Dania Jai-Alai and Vantage View cases. The Dania Jai-Alai case is before the Florida Supreme Court on the merits, and the Vantage View case expressly acknowledged conflict between two lines of cases and chose to follow one line.

The rule of law concerns the requirements for piercing the corporate veil. One line of cases holds that it is only necessary to show domination of a subsidiary corporation, and another line holds it is necessary to show fraud or wrongdoing. The Fourth District in Dania Jai-Alai, Vantage View and in the present case followed the rule of law that it is only necessary to show domination, and that fraud or wrongdoing are unnecessary.

The conflict cases listed above all hold that it is necessary to show fraud or wrongdoing.

The case of Unijax, Inc. v. Factory Insurance Association, supra, is in express and direct conflict with the present decision. In Unijax the question involved the

requirement to pierce the corporate veil of a wholly owned subsidiary, and the court held that in order to pierce the corporate veil it is not only necessary to show domination by the parent of the subsidiary, but it is also necessary to show fraud or wrongdoing:

> "Consistent with the foregoing, courts have uniformly held that a parent company is not liable for the torts of its subsidiaries, unless the subsidiary is operated as a 'mere instrumentality' of the parent. Taylor v. Standard Gas and Elec. Co., 96 F.2d 693 (10th Cir. 1938) reversed on other grounds, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669 (1939). The 'mere instrumentality' rule is rarely applied and only under special circumstances, for it runs contrary to established principles of corporate identity.
>
> > 'The instrumentality rule should only be invoked after mature consideration and caution. Indiscriminate application would destroy the purpose of the corporate law.' Brown v. Margrande Compania Naviera, 281 F.Supp. 1004, 1006 (E.D.Va. 1968). (Emphasis supplied)
>
> The tests to be applied for the instrumentality rule were set out in Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160 (7th Cir. 1963):
>
> > 'In order to establish that a subsidiary is the mere instrumentality of its parent, three elements must be proved: control by the parent to such a degree that the subsidiary has become its mere instrumentality; fraud or wrong by the parent through its subsidiary, e.g. torts, violation of a statute or stripping the subsidiary of its assets; and unjust loss or injury to the claimant, such as insolvency of the subsidiary.' 324 F.2d 157, 160." (Emphasis added) Pages 453-454.

The Florida Supreme Court ruled similarly in the Gulfstream case, affirming the Fourth District, and those decisions

are therefore in express and direct conflict with the present decision. Gulfstream was also a workers compensation case, and the Plaintiffs sought to disregard the separate corporation structure of a wholly owned subsidiary, and the court held that the separate corporate structure must be recognized and therefore there was workers compensation immunity. The District Court stated the traditional rule of law succinctly:

> "The result herein is dictated by basic corporate law principles which require that the corporate fiction be recognized and the corporate veil only be pierced where the corporate structure is used fraudulently. In analyzing the parent/subsidiary problem we now face, the court in Boggs v. Blue Diamond Coal Co., supra, explained:
>
> > [A] business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee.
>
> 590 F.2d at 662." (Emphasis added) Page 551.

As indicated, the Florida Supreme Court by written opinion affirmed this decision at 420 So.2d 587.

The decision is also in direct and express conflict with the Supreme Court's decision in Riley v. Fatt, supra, which applies the traditional rule of law and forcefully enunciates it:

> "The rule is that the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetuate a fraud upon them. See South Florida Citrus Land Co. v. Waldin, 61 Fla. 766, 55 So. 862; Biscayne Realty & Ins. Co. v. Ostend Realty Co., 109 Fla. 1, 148 So. 560; 14 C.J. 61, Corporations, §22; 18 C.J.S., Corporations, §§6, 7, page 376, et seq. There is no indication in the record that the corporation was organized as a subterfuge or for the purpose of enabling its members to escape, avoid or evade personal responsibility other than in a proper and legal manner. Compare Bellaire Securities Corporation v. Brown, 124 Fla. 47, 168 So. 625 ...." Page 773.

This rule of law was reaffirmed by the Third District case of Gladding Corp. v. Register, 293 So.2d 729 (Fla. 3d DCA 1974) where it held:

> "We point out that the fact that one corporation, the parent, owns all of the stock of a subsidiary company does not erase the latter's identity as a legal entity, nor create any conclusions that the latter is only the alter ego of the former. St. Petersburg Sheraton Corp. v. Stuart, Fla. App. 1970, 242 So.2d 185."

The Florida Supreme Court reached similar results in the cases of Roberts' Fish Farm v. Spencer, 153 So.2d 718 (Fla. 1963) and Naranja Rock Co. v. Dawal Farms, 74 So.2d 282 (Fla. 1954). Both cases were workmen's compensation cases in which the Plaintiff was seeking to pierce the corporate veil and the Florida Supreme Court disallowed this in both cases. In the Roberts' Fish Farm case, the Florida Supreme Court went into a lengthy discussion as to the sanctity of the corporate structure:

> "The corporate entity is an accepted, well used and highly regarded form of organization in the

> economic life of our state and nation. As we said in State ex rel. Continental Distilling Sales Co. v. Vocelle, 1949, 158 Fla. 100, 27 So.2d 728, 'Their purpose is generally to limit liability and serve a business convenience. Those who utilize the laws of this state in order to do business in the corporate form have every right to rely on the rules of law which protect them against personal liability unless it be shown that the corporation is formed or used for some illegal, fraudulent or other unjust purpose which justifies piercing of the corporate veil. This is the reason for the rule, stated in all Florida cases, that the courts are reluctant to pierce the corporate veil and will do so only in a court of competent jurisdiction, after notice to and full opportunity to be heard by all parties, and upon showing of cause which necessitates the corporate entity being disregarded in order to prevent some injustice." (Emphasis added) Page 721.

In accord, see St. Petersburg Sheraton Corp. v. Stuart, 242 So.2d 185 (Fla . 1970); DeArmas V. P.J. Constructors Inc., 402 So.2d 39 (Fla. 3rd DCA 1981).

Direct Conflict

In the present case, the decision is directly in conflict with the above cited cases. The present case holds that the corporate veil can be pierced and the parent corporation become liable solely because of domination of a wholly owned subsidiary, whereas the above cited cases hold that it is necessary to show fraudulent intent or wrongdoing in order to pierce the corporate veil.

The Vantage View case relied on by the Fourth District expressly cites the two lines of cases and states it will not follow the line which holds that fraud is necessary, but instead will follow the line which holds that mere

domination is sufficient, and the Dania Jai-Alai case is before the Supreme Court on the merits.

Great Public Importance

Additionally, it is submitted that this issue is of great public importance. In the present case the parent corporation makes a completely proper use of the corporate structure to develop a condominium project, but is now having the corporate veil pierced and becoming unlimitedly liable for the subsidiary even though there was no fraud or improper purpose. Corporations certainly are entitled to know that if they use the corporate structure with no fraudulent intent or wrongful purpose, it will be given effect by Florida.

CONCLUSION

The decision in the present case expressly and directly conflicts with the decisions of Unijax, Inc. v. Factory Insurance Association, 328 So.2d 448 (Fla. 1st DCA 1976); Gulfstream Land & Development Corp. v. Wilkerson, 420 So.2d 587 (Fla. 1982), affirming Wilkerson v. Gulfstream Land & Development Corp., 402 So.2d 550 (Fla. 4th DCA 1981); and Riley v. Fatt, 47 So.2d 769 (Fla. 1950).

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By Richard A. Sherman
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CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of November, 1983 to: DAVID L. KAHN, P.A., P.O. Box 14190, Fort Lauderdale, FL 33302; R.O. HOLTON, ESQUIRE, Pyszka and Kessler, P.A., 707 SE Third Avenue, Fort Lauderdale, FL 33316; and JAMES A. SMITH, ESQUIRE, Wicker & Smith et al., 712 Citizens Building, 105 South Narcissus Avenue, West Palm Beach, FL 33401.

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