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Piercing the Corporate Veil in Florida: Defining Improper Conduct

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“enveloped in the mists of metaphor”¹

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1. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) (Cardozo, J.).

I. INTRODUCTION

In *Dania Jai-Alai Palace, Inc. v. Sykes*,² the Supreme Court of Florida held that the corporate veil may not be pierced absent a showing of improper conduct.³ The *Dania* court quoted lengthy passages from prior Supreme Court of Florida cases dealing with this issue, including *Riley v. Fatt*,⁴ *Advertects v. Sawyer*,⁵ and *Roberts' Fish Farm v. Spencer*⁶ to support its holding. However, the court made no attempt to reduce the passages into a workable formula that could be used to determine what types of conduct might be considered improper, and furthermore, did not indicate from where the improper conduct standard was derived.⁷

As a result, Florida courts and practitioners faced with the piercing issue do not have a clear set of guidelines or elements that can be used to evaluate whether the shareholder conduct in question will warrant piercing the corporate veil. Consequently, the purpose of this article is to examine *Dania* and the cases cited therein, as well as post-*Dania* decisions, in an effort to define a set of factors or guidelines that can be used with some consistency to determine what type of conduct might be considered improper.

In addition, the article will examine Oregon law, which also requires a finding of improper conduct to pierce the corporate veil, to show the relationship between equitable estoppel and piercing the corporate veil, and how the elements of equitable estoppel might be used to prove improper conduct. Before beginning to evaluate the *Dania* decision or Oregon law, however, a brief overview of the history and theories behind piercing the corporate veil is necessary.

2. 450 So. 2d 1114 (Fla. 1984).

3. *Id.* at 1121.

4. 47 So. 2d 769 (Fla. 1950).

5. 84 So. 2d 21 (Fla. 1955).

6. 153 So. 2d 718 (Fla. 1963).

7. It is of some interest that the phrase "improper conduct" was mentioned in two other piercing the corporate veil cases in Florida long before the *Dania* decision; however, those cases do not seem to lend any support in deciphering what type of conduct can be considered improper. See *Advertects*, 84 So. 2d at 24; *Coryell v. Pilkington*, 39 F. Supp. 142, 145 (S.D. Fla. 1941), *aff'd*, 317 U.S. 406 (1943). Of further interest, is the fact that the seventeenth century chancery courts used improper conduct as a standard in denying requests for specific performance. The chancery courts defined improper conduct as, among other things, negligent misrepresentation. See also Kevin M. Teeven, *Decline of Freedom of Contract Since the Emergence of the Modern Business Corporation*, 37 ST. LOUIS U. L.J. 117, 145 (1992).

II. THE EQUITABLE DOCTRINE OF PIERCING THE CORPORATE VEIL

"Piercing the corporate veil is the most litigated issue in corporate law and yet it remains among the least understood."⁸ Notwithstanding the inherent confusion, the doctrine of piercing the corporate veil is easily understood by acknowledging that incorporation's single valuable attribute is limited liability. "Limited shareholder liability was extended to corporate shareholders to encourage risk capital investments."⁹ In describing the necessity of limited liability, William O. Douglas once said that "[i]t is legitimate for a man or group of men to stake only a part of their fortune on an enterprise."¹⁰ Behind these theories, the attribute of limited liability did in fact encourage investment and have a positive effect on the economy; but as incorporation became more popular, limited shareholder liability led to abuses of the corporate forum.¹¹ As a result, courts began to disallow shareholders limited liability protection when they used the corporation as a vehicle to achieve some type of inequity, and in a manner not contemplated by law. This process became known as piercing the corporate veil.

Probably the most important point to be made about the doctrine of piercing the corporate veil is that it is not itself a cause of action.¹² In most cases, a plaintiff cannot seek to pierce the corporate veil until the corporation itself is found liable¹³ and the judgment against it is returned unsatisfied.¹⁴ This process is most easily explained in that the doctrine of piercing the corporate veil originated in courts of equity.¹⁵ Historically, a prerequisite to seeking relief in a court of equity was that there be no adequate remedy at law.¹⁶

8. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991) (footnote omitted).

9. *Amfac Foods, Inc. v. International Sys. & Controls Corp.*, 654 P.2d 1092, 1097 (Or. 1982).

10. Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193-94 (1929).

11. *Amfac*, 654 P.2d at 1097.

12. See *Turner Murphy Co. v. Specialty Constructors, Inc.*, 659 So. 2d 1242, 1245 (Fla. 1st Dist. Ct. App. 1995); WILLIAM MEADE FLETCHER, 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (1990).

13. FLETCHER, *supra* note 12, § 41.

14. Elizabeth Diane Clark, *Piercing the Corporate Veil in Florida: The Requirement of "Improper" Conduct*, 16 STETSON L. REV. 59, 61 (1986).

15. See FLETCHER, *supra* note 12, § 41.

16. HENRY L. MCCLINTOK, PRINCIPALS OF EQUITY 47 (1948).

For example, if a plaintiff is successful in a suit against a corporation but the judgment rendered against the corporation is returned unsatisfied, due to the fact that the corporation is insolvent, the plaintiff despite receiving the judgment, would not have an adequate remedy at law because the corporation's insolvency would not permit the legal remedy to be carried through. In this situation, a plaintiff could then seek equitable relief because the remedy at law is inadequate. Equity principals, under the proper circumstances, would then be used to pierce the corporate veil and hold the shareholders, who would otherwise have limited liability to the amount of their investment in the corporation, personally liable for the judgment against the corporation. In sum, piercing the corporate veil is simply a means of enforcing a judgment against a corporation.

The confusion surrounding application of the doctrine of piercing the corporate veil, and possibly other doctrines or causes of action that originated in equity, may well have to do with the merger of law and equity. It has been said that "[w]hen the principles of equity force their way into the common law they lose their cohesiveness and fly apart."¹⁷ As further analysis indicates, the standards and metaphors that have resulted from the application of the once purely equitable remedy of piercing the corporate veil in courts of law are no exception.

III. METAPHORS USED FOR PIERCING THE CORPORATE VEIL

There have been a number of formulations suggested by courts as to the proper standard for piercing the corporate veil.¹⁸ The most typical standards

17. RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 258 (1961).

18. See generally PHILLIP BLUMBERG, *THE LAW OF CORPORATE GROUPS* § 6.01 (1987), a multi-volume treatise on piercing the corporate veil. Professor Blumberg asserts that there are three main variants in piercing jurisprudence—instrumentality, alter ego, and identity. The "instrumentality" doctrine has three factors—"excessive exercise of control; wrongful or inequitable conduct; and [a] causal relationship to the plaintiff's loss." *Id.* § 6.02. The "alter ego" doctrine holds that piercing is proper when:

(1) such unity of ownership and interest exists that the two affiliated corporations have ceased to be separate and the subsidiary has been relegated to the status of the 'alter ego' of the parent; and (2) where recognition of them as separate entities would sanction fraud or lead to an inequitable result.

Id. § 6.03.

[The "identity" doctrine] is such a diffuse and relatively useless approach that it does not deserve extended discussion. . . . [The standard is] "that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate iden-

used in piercing the corporate veil cases seem to be the mere instrumentality doctrine and the alter ego doctrine.¹⁹ The mere instrumentality approach is most often associated with parent-subsidiary cases.²⁰ Florida courts have characterized the mere instrumentality doctrine as “total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.”²¹

The alter ego approach is more appropriate when the corporation is made up of one or two shareholders.²² The alter ego theory is usually invoked by demonstrating that the shareholders have failed to separate their personal affairs from that of the corporation.²³ Notwithstanding these more common approaches, there are numerous other rules and formulations that courts have relied on to pierce the corporate veil.²⁴ Most courts and commentators agree, however, that the labels used to describe piercing the corporate veil are useless metaphors.

Another area of conflict in piercing the corporate veil law revolves around the concept of fraud. On one extreme is the view that “fraud” must be pleaded and proven.²⁵ On the other extreme is the view that proof of plain fraud is not a necessary prerequisite to pierce the corporate veil.²⁶

tity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation of one corporation for the benefit of the whole enterprise.”

Id. § 6.04 (quoting *Zaist v. Olson*, 227 A.2d 552, 558 (Conn. 1967)).

19. J. Penn Carolan, III, *Disregarding the Corporate Fiction in Florida*, 27 U. FLA. L. REV. 175, 175–76 (1974); see generally BLUMBERG, *supra* note 18.

20. See *Vantage View, Inc. v. Bali E. Dev. Corp.*, 421 So. 2d 728, 735 (Fla. 4th Dist. Ct. App. 1982).

21. *Dania Jai-Alai Palace, Inc. v. Sykes*, 425 So. 2d 594, 598 (Fla. 4th Dist. Ct. App. 1982), *affirmed in part and quashed in part*, 450 So. 2d 1114 (1984) (quoting *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974)).

22. See *Biscayne Realty & Ins. Co. v. Ostend Realty Co.*, 148 So. 560, 565–66 (Fla. 1933); see also Clark, *supra* note 14, at 67; BLUMBERG, *supra* note 18, § 6.03 (discussing generally the elements of each test).

23. MICHAEL W. GORDON, 2 FLA. CORP. MANUAL § 13.25 (1996).

24. Cathy S. Krendl & James R. Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENV. L.J. 1, 1–7 (1978).

25. See, e.g., *Bartle v. Home Owners Coop.*, 127 N.E.2d 832 (N.Y. 1955). The *Bartle* court stated “[g]enerally speaking, the doctrine of ‘piercing the corporate veil’ is invoked ‘to prevent fraud or to achieve equity’ But in the instant case there has been neither fraud, misrepresentation, nor illegality.” *Id.* at 833 (citation omitted).

26. See *Vantage View*, 421 So. 2d at 734 (citing *Levenstein v. Sapiro*, 279 So. 2d 858 (Fla. 1973) (footnote omitted)). See also Krendl & Krendl, *supra* note 24, at 21.

Under this second view, the fact that a corporation is a “mere instrumentality” of another corporation is, in most cases, sufficient to pierce the veil.

The *Dania* decisions exemplify the lack of uniformity and general confusion associated with piercing the corporate veil standards mentioned above. The district court in *Dania* applied the “mere instrumentality” test and held “it was not necessary to establish fraud or other wrongdoing on the part of Saturday [the parent] under the mere instrumentality doctrine.”²⁷ The Supreme Court of Florida, as discussed *infra*, quashed this formulation, holding instead that the district court decision directly and expressly conflicted with decisions of the supreme court which held that the corporate veil could not be pierced absent a showing of improper conduct.²⁸ In other words, satisfying the “mere instrumentality” test alone was insufficient to pierce the corporate veil.²⁹

What is equally significant is that the court did not say that “fraud” must be proven, only that “improper conduct” must be proven.³⁰ While it is clear that proof of fraud would satisfy the improper conduct test, it is far from clear what other conduct might also satisfy that test. It is submitted that the Supreme Court of Florida’s formulation was designed to chart a middle course between those tests requiring proof of fraud and those that allow piercing without proof of either fraud or wrongdoing. Although the supreme court gave no precise formula, no exact parameters, and no list of elements to the test, a review of the *Dania* opinion, and the cases cited therein, assists in creating a standard that can be used to indicate what type of conduct may be considered improper.

IV. THE *DANIA* DECISION

In *Dania*, a woman was hit by a car in the parking lot of a jai-alai fronton owned by *Dania Jai-Alai, Inc.*³¹ The car that hit the woman was driven by a valet who was employed by *Carrousel, Inc.*³² *Carrousel* was the sister corporation of *Dania Jai-Alai* that handled valet parking and other

27. *Dania*, 450 So. 2d at 1116.

28. *Id.* at 1121.

29. *See In re Homelands of DeLeon Springs, Inc.*, 190 B.R. 666, 670 (Bankr. M.D. Fla. 1995) (stating that the mere instrumentality doctrine cannot be used without a showing of improper conduct).

30. *Dania*, 450 So. 2d at 1121.

31. *Id.* at 1115–16.

32. *Id.* at 1116.

aspects of the jai-alai business.³³ Both Dania and Carrousel were wholly-owned subsidiaries of Saturday Corporation.³⁴

The woman chose to sue all three corporations as a result of the injuries she sustained from being hit by the car. Specifically, she sued Carrousel for the negligence of its parking attendant and independent negligence, Dania for alleging that Carrousel was its mere instrumentality or alter ego, and Saturday for alleging Carrousel and Dania were its mere instrumentalities.³⁵ The trial court found that Dania and Carrousel were Saturday's mere instrumentalities "and that it was not necessary to establish fraud or other wrongdoing on the part of Saturday under the mere instrumentality doctrine."³⁶ The Fourth District Court of Appeal agreed that it is not necessary to show improper conduct in order to pierce the corporate veil.³⁷ Therefore, the issue posed for the Supreme Court of Florida was whether it was necessary to show fraud or wrongdoing in order to pierce its corporate veil.

The supreme court reversed the Fourth District's holding.³⁸ The court held that absent some showing of "improper conduct" the corporate veil could not be pierced.³⁹ The court relied on *Riley v. Fatt*,⁴⁰ *Advertects, Inc. v. Sawyer Industries*,⁴¹ and *Roberts' Fish Farm v. Spencer*,⁴² previously decided Supreme Court of Florida cases on piercing the corporate veil and general corporate law, as authority for its holding.⁴³ Accordingly, a review of these cases will help reveal what types of conduct can be considered improper.

*Riley v. Fatt*⁴⁴ was the first case the *Dania* court relied on for its holding that "improper conduct" must be shown in an action to pierce the corporate veil.⁴⁵ In that case, Fatt contracted with Riley Builders to make improvements to his property. When Riley Builders breached the contract, Fatt

33. *Id.* at 1115.

34. *Id.*

35. *Dania*, 450 So. 2d at 1116.

36. *Id.*

37. *Id.*

38. *Id.* at 1121.

39. *Id.*

40. 47 So. 2d 769 (Fla. 1950).

41. 84 So. 2d 21 (Fla. 1955).

42. 153 So. 2d 718 (Fla. 1963).

43. *Dania*, 450 So. 2d at 1119-21.

44. 47 So. 2d 769 (Fla. 1950).

45. *Dania*, 450 So. 2d at 1119-20.

obtained a judgment against the corporation to be satisfied out of the assets of the corporation in the amount of the value of the breach.⁴⁶

When the judgment was returned unsatisfied, Fatt sought to hold the sole stockholder and president of Riley Builders, Alonzo Riley, personally liable for the value of the judgment he obtained against the corporation.⁴⁷ The court however, said that although Riley Builders was a one-man corporation completely dominated by Alonzo Riley, and the corporate funds were not handled with the degree of care expected from a well managed corporation, the facts were insufficient to warrant piercing the corporate veil.⁴⁸ "In the absence of pleading and proof that the corporation was organized for an illegal purpose or that its members fraudulently used the corporation as a means of evading liability with respect to a transaction that was, in truth, personal and not corporate, Fatt cannot be heard to question the corporate existence"⁴⁹ The *Riley* court held 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 perpetrate a fraud upon them."⁵⁰

Riley cited *Biscayne Realty & Insurance Co. v. Ostend Realty Co.*⁵¹ as authority for its holding. Interestingly, the *Dania* court did not directly rely on *Biscayne* for the proposition that "improper conduct" must be shown in order to pierce the corporate veil, however, certain language in *Biscayne* is seemingly squarely on point.

If the stockholders of a corporation enter into a transaction in their individual and private interests, and utilize the name of the corporation merely as a convenience for the completion of the transaction, where the legal entity as such has no interest in the matter, but the name is used to mislead creditors or perpetuate a fraud upon them, the legal entity in the name of which the transaction was carried will be ignored and the parties held to individual liability.⁵²

46. *Riley*, 47 So. 2d at 770–71.

47. *Id.* at 771.

48. *Id.* at 773.

49. *Id.*

50. *Id.* (citations omitted).

51. 148 So. 560 (Fla. 1933).

52. *Id.* at 564 (citation omitted).

The *Biscayne* court also noted that “[t]he directors of a private corporation have no right under any circumstances to use their official position for their own individual benefit.”⁵³

The *Dania* court next relied on *Advertects, Inc. v. Sawyer Industries*.⁵⁴ In that case, Advertects recovered a money judgment against Sawyer Industries, which was returned unsatisfied.⁵⁵ Thus, Advertects sought to have the judgment satisfied out of the personal assets of Neil and Kay Sawyer, the stockholders of Sawyer.⁵⁶ Advertects alleged that the Sawyers organized Sawyer as a convenient means of doing business without subjecting themselves to personal liability.⁵⁷ However, the court stated that unless Advertects could show that Sawyer

was organized or after organization was employed by the stockholders for fraudulent or misleading purposes, or in some fashion that the corporate property was converted or the corporate assets depleted for the personal benefit of the individual stockholders, or that the corporate structure was not bona fide established or, in general, that property belonging to the corporation can be traced into the hands of the stockholders[]

the corporate veil could not be pierced.⁵⁸ As a result, the *Advertects* court refused to pierce the corporate veil, even though the Sawyers: 1) habitually operated through numerous corporations, many of which were unsuccessful; 2) were the sole stockholders; and 3) handled the business affairs poorly, because there was no showing that the stockholders improperly converted any of Sawyer’s property for their own use or abused their relationship with Sawyer.⁵⁹

Roberts’ Fish Farm v. Spencer,⁶⁰ the last case cited by the *Dania* court as authority for its holding, may be the most helpful in determining what type of conduct can be considered improper. *Dania* cited *Roberts’ Fish*

53. *Id.* at 565 (quoting *Donovan v. Purtell*, 75 N.E. 334, 337 (Ill. 1905) (summarizing *Hoffman v. Reichert*, 35 N.E. 527 (Ill. 1893))).

54. 84 So. 2d 21 (Fla. 1955).

55. *Id.* at 23.

56. *Id.*

57. *Id.*

58. *Id.* at 24.

59. *Advertects*, 84 So. 2d at 24.

60. 153 So. 2d 718 (Fla. 1963).

Farm for its remarks on the purpose of corporate entities and the rationale for the law controlling piercing the corporate veil.⁶¹

The corporate entity is an accepted, well used and highly regarded form of organization in the economic life of our state and nation. . . . "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.⁶²

By citing *Roberts' Fish Farm* in this capacity, the *Dania* court indicates that a shareholder's conduct will be considered improper if it contravenes the corporate enterprise system's purpose for existence. As *Roberts' Fish Farm* indicates, a corporation's purpose is not to limit personal liability in personalized transactions but to promote commerce and industrial growth, and encourage investment by limiting personal liability in business transactions.

V. STANDARD FOR PIERCING THE CORPORATE VEIL AND DETERMINING IMPROPER CONDUCT

The equitable nature of the piercing the corporate veil doctrine,⁶³ and certain statements made by the *Dania* court, including the rationales of *Riley*, *Biscayne*, *Advertects*, and *Roberts' Fish Farm*, can be combined to create a standard for piercing the corporate veil and indicating what types of conduct might be considered improper. In determining whether or not to pierce the corporate veil the analysis should proceed as follows.

61. *Dania*, 450 So. 2d at 1120–21.

62. *Roberts' Fish Farm*, 153 So. 2d at 721 (citation omitted).

63. See discussion *supra* Section II.

First, a plaintiff must seek a judicial determination of whether or not the corporation is liable on the underlying cause of action.⁶⁴ If the corporation is found liable, the plaintiff must then try and have the judgment against the corporation satisfied out of the corporation's assets.⁶⁵ If the corporation's assets are sufficient to satisfy the judgment, there is no need for the plaintiff to pierce the corporate veil.⁶⁶ If however, the judgment against the corporation is returned unsatisfied, the plaintiff may then seek to pierce the corporate veil and hold the shareholders liable for the judgment against the corporation.⁶⁷

The first step in piercing the corporate veil is to ask why is the corporation unable to satisfy the judgment rendered against it. If the corporation is unable to pay simply because its business affairs were poorly managed by the shareholder(s), resulting in the corporation's insolvency, the plaintiff may not be able to pierce the corporate veil.⁶⁸ However, if the corporation is unable to satisfy the judgment due to some improper conduct on the shareholders part, the plaintiff should be permitted to pierce the corporate veil. The final question, then, is what type of conduct can be considered improper.

It seems that a plaintiff may be able to identify improper conduct by keeping in mind a few different statements and pervading themes mentioned throughout the *Dania* opinion. First, a corporation's general purpose is to limit personal liability and serve a business convenience,⁶⁹ and that the

64. In *Dania*, for example, the underlying cause of action was for personal injury sustained by Ms. Sykes.

65. This will be the primary factor in determining if there is an adequate remedy at law.

66. As the *Dania* court noted, "[i]f this requirement were not made then every judgment against a corporation could be exploited as a vehicle for harassing the stockholders and entering upon fishing expeditions into their personal business and assets." *Dania*, 450 So. 2d at 1120 (quoting *Advertects, Inc. v. Sawyer Indus.*, 84 So. 2d 21, 24 (Fla. 1955)).

67. See *Advertects*, 84 So. 2d at 23; *Riley v. Fatt*, 47 So. 2d 769, 770 (Fla. 1950). See *supra* note 14 and accompanying text. It is very important to keep in mind that a prerequisite to equitable relief is that there be no adequate remedy at law. Until a judgment against a corporation is returned unsatisfied, there may be no basis for piercing the corporate veil in that there may be an adequate remedy at law, namely, enforcing the judgment against the corporation. This may well have been one of the problems with the plaintiff's case in *Dania*. The plaintiff sought to pierce the corporate veil before a judgment was returned unsatisfied. It would seem therefore, that the corporate veil cannot, and should not, be pierced unless the corporation has no means of satisfying a judgment against it. See *Riesen v. Maryland Casualty Co.*, 14 So. 2d 197, 199 (Fla. 1943).

68. *Riley*, 47 So. 2d at 773 (indicating that the courts do not consider the fact that a corporation was poorly run alone sufficient to constitute improper conduct).

69. *Roberts' Fish Farm*, 153 So. 2d at 721.

shareholders of a corporation have no right to use their corporate positions for their own personal benefit.⁷⁰ Under this basic principle of corporate law, if there is proof that the shareholders, or parent as the case may be, used the corporation in order to mislead creditors,⁷¹ or shield themselves from liability in a transaction that was in truth personal and not corporate, then the privilege of incorporation has been abused and the requisite improper conduct should be found to exist.⁷² Evidence of the foregoing may be established if the corporate entity had no interest in the matter due to the fact that the subject matter of the transaction was unrelated to the nature of the corporation's business,⁷³ or corporate property was converted to, or depleted for, the personal benefit of the stockholders.⁷⁴

The analysis can now proceed with a look at post-*Dania* decisions to view what kind of conduct the district courts consider to be improper in piercing the corporate veil cases. Analyzing the later cases will also indicate how accurate the proposed standard might be in defining improper conduct.

VI. THE DISTRICT COURTS' INTERPRETATIONS OF *DANIA*

A. *First District Court of Appeal*

In *Futch v. Head*,⁷⁵ Head was employed by Realty Center, Inc., a company owned by Futch. Futch promised Head that if he helped her sell the "Melroe" property he would receive a commission. Head found a buyer and the deal went through. In the terms of final sale, Futch received a twenty-percent interest in the Melroe property for her efforts. Futch ultimately sold her interest in the Melroe property for \$1,300,000 and paid one of her companies a \$130,000 commission from the proceeds. Head filed a breach of contract and fraud claim when Futch failed to pay him his promised commission.⁷⁶

The trial court found that the sale was consummated for Futch's benefit and that Futch converted the interest she received in the Melroe property to

70. *Biscayne Realty & Ins. Co. v. Ostend Realty Co.*, 148 So. 560, 565 (Fla. 1933).

71. *Riley*, 47 So. 2d at 773.

72. The general underlying theme should be that a corporation cannot be used as a personal convenience to shield its shareholders from personal liability in personalized transactions.

73. *Biscayne*, 148 So. at 564.

74. *Advertects*, 84 So. 2d at 24.

75. 511 So. 2d 314 (Fla. 1st Dist. Ct. App. 1987).

76. *Id.* at 316.

her own name, with the intent to deprive Head of his portion of the sale.⁷⁷ The first district affirmed the trial court's findings and added that the fact that Futch merged her corporation's liabilities and assets with her own personal funds also constituted improper conduct.⁷⁸ Therefore, the corporate veil was pierced and Futch was forced to pay Head's commission out of the money she received from the sale of her portion of the property that she converted to her own use.⁷⁹

In *USP Real Estate Investment Trust v. Discount Auto Parts, Inc.*,⁸⁰ #90 North was a wholly-owned subsidiary of Discount Auto Parts. The property was leased by #90 North from USP, in order to operate an auto parts business. The premises were abandoned before the lease expired and USP sued #90 North for breach of contract and lease agreement and was awarded a judgment. Evidence showed that the officers of both corporations were the same, #90 never had a bank account, filed no tax returns, could produce no written sublease between it and Discount Auto Parts, and never kept any receipts of expenditures. Therefore, the court found that Discount Auto Parts simply created #90 for the purpose of holding the lease in order to shield itself from any liability if the lease was broken.⁸¹ In light of these findings, the court held that the improper conduct requirement was satisfied and the corporate veil could be pierced.⁸²

The first district's reasoning in both cases is aligned with the proposed standard for finding improper conduct. In *Futch*, the district court agreed with the trial court that the transaction was consummated for the benefit of the stockholder and not the corporation.⁸³ Furthermore, evidence supported the court's finding that corporate property was converted to personal use, because Futch sold her interest in the property and converted the money to her own use, in order to deprive Head of his commission.⁸⁴ Thus, Futch used the corporation to evade liability in a transaction that was of a personal and not corporate nature.

In *USP*, the court found improper conduct when a parent created a subsidiary for the sole purpose of holding a lease. The convincing evidence

77. *Id.* at 316–17.

78. *Id.* at 323.

79. *Id.*

80. 570 So. 2d 386 (Fla. 1st Dist. Ct. App. 1990).

81. *Id.* at 392–93.

82. *Id.* at 393.

83. *Futch*, 511 So. 2d at 323.

84. *Id.* at 317, 322–23.

was that the subsidiary did not have any assets or conduct any business.⁸⁵ Again, the court would not allow the parent to use a subsidiary for the sole purpose of shielding itself from liability where the subsidiary had no interest in the transaction.

B. *Second District Court of Appeal*

In *Hester v. Tucker*,⁸⁶ J.L. Hester, the president of International Trade, a closely held corporation, contracted with Tucker to build a residence on property owned by International. Hester signed the construction contract in his capacity as president of International. When Hester refused to make payments on the contract price, Tucker sued International and Hester individually. Tucker stated that when he entered into the contract, he was told that the residence would be the asset of International. However, upon substantial completion, the house was transferred from International to Hester.

The second district found that there was no improper conduct because the transfer of the house from International to Hester did not establish fraud at the time the contract was entered into.⁸⁷ The court premised its decision on the fact that International had been in business since 1966, as well as the fact that Hester carried on extensive business projects and construction by way of the corporation.⁸⁸

Another second district case dealing with the issue was *Southeast Capital Investment, Corp. v. Albemarle Hotel, Inc.*⁸⁹ In this case, Southeast Investment, a wholly-owned subsidiary of Southeast Capital, contracted with Albemarle to purchase the Albemarle Hotel. The contract was finalized on the agreement that Southeast Investment would make payment of the full purchase price at the closing. When Southeast Investment did not have the money at the closing, Albemarle sued Southeast Capital for specific performance of Southeast Investment's contractual obligations. The court held that since the subsidiary entered into a contract for the benefit of the parent without the present ability to perform, the requisite improper conduct was present and the corporate veil could be pierced.⁹⁰

85. *USP*, 570 So. 2d at 393.

86. 465 So. 2d 1261 (Fla. 2d Dist. Ct. App.), *review denied*, 476 So. 2d 674 (Fla. 1985).

87. *Id.* at 1262.

88. *Id.*

89. *Southeast Capital Inv. Corp. v. Albemarle Hotel, Inc.*, 550 So. 2d 49 (Fla. 2d Dist. Ct. App. 1989).

90. *Id.* at 51.

The second district's reasoning in *Hester* does not seem to follow the proposed standard but may indicate a possible misreading of *Dania*. There does not appear to be any reason for Hester to have signed the contract in his capacity as president of International. The contract was for the construction of a residence. There were no facts presented that indicated why the corporation would need a residence and no explanation of why it was transferred to Hester after its completion. Hester clearly converted corporate property to his own use, which is a clear example of improper conduct as stated in *Advertects*.⁹¹ Moreover, Tucker certainly satisfied the requirement of being a mislead creditor. The court's statement that fraud was not established at the time the contract was entered into lends no support to whether or not Hester acted improperly. Nothing in *Dania* indicates that the improper conduct must take place the time a contract is entered into. The *Hester* decision seems to turn *Dania* on its head.

Southeast Capital's reasoning is much more in line with *Dania* and the proposed standard. The standard indicates that a parent cannot use a subsidiary for the sole purpose of shielding its liability in a transaction that the subsidiary has no interest in. The court used an identical rationale to find of improper conduct on Southeast Capital's part.

C. Third District Court of Appeal

In *Resorts International v. Charter Air Center*,⁹² Resorts entered into contract negotiations with Charter regarding the possibility of Charter providing air transportation to a casino owned by Resorts. On the day the parties sat down to sign the contract, Resorts substituted its subsidiary GB, as the named party in the contract with Charter. When GB violated the terms of the contract, Charter sued Resorts for damages. The court held that GB was a mere instrumentality of Resorts, and Resorts use of GB to avoid liability on the contract with Charter was sufficient improper conduct to pierce the corporate veil.⁹³

In *Estudios Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A.*,⁹⁴ Granados, who owned a controlling interest in EPICA individually, personally guaranteed the repayment of loans given by BNP, the creditor, to ACIA, the debtor. BNP assigned an interest in some of these notes to Swiss Bank Corp., appellee. When ACIA and Granados

91. See *supra* note 58 and accompanying text.

92. 503 So. 2d 1293 (Fla. 3d Dist. Ct. App. 1987).

93. *Id.*

94. 507 So. 2d 1119 (Fla. 3d Dist. Ct. App. 1987).

defaulted on payment of the notes, the trial court issued an order on SBC's behalf allowing attachment of a farm owned by Estudios.⁹⁵ The court of appeals held that although Estudios was not a debtor of SBC, Estudios was Granados' alter ego because Granados had a history of transferring his property to Estudios to shield it from creditors.⁹⁶ This was considered improper conduct and the attachment was allowed.⁹⁷

In *Ally v. Naim*,⁹⁸ Naim was injured during his employment with Hialeah Vending, a company owned by Ally. Naim made a workers compensation claim against Hialeah and Ally individually.⁹⁹ However, Naim only received a judgment against Hialeah.¹⁰⁰ When the judgment was returned unsatisfied, Naim sought to pierce the corporate veil of Hialeah and impose personal liability on Ally for Hialeah Vending's obligations.¹⁰¹ The court noted that although Hialeah's business affairs were poorly handled by Ally, there was no showing that Ally improperly converted its property to his own use or abused his relationship with the corporate entity.¹⁰²

The third district cases indicate the accuracy of the proposed standard, and provide factual scenarios which exemplify where improper conduct is, and is not, present. In *Resorts*, the fact that the parent tried to substitute its subsidiary as the contracting party at the last minute is clear evidence of an attempt to evade liability if the contract was breached. Furthermore, the subsidiary had no interest in the transaction other than to shield the parent from liability. In *Estudios*, there was evidence that the shareholder had a history of transferring property to his corporation to shield it from creditors. This is clear abuse of the purpose of the corporate entity. In *Ally*, the shareholder did not act improperly just because the small company did not produce enough income to cover the amount of a judgment against it. Therefore, the third district decisions seem to indicate that the proposed standard correctly states the criteria for defining improper conduct.

95. *Id.* at 1120.

96. *Id.*

97. *Id.* at 1121.

98. 581 So. 2d 961 (Fla. 3d Dist. Ct. App. 1991).

99. *Id.* at 962.

100. *Id.*

101. *Id.*

102. *Id.*

D. Fourth District Court of Appeal

In *Eagle v. Benefield-Chappell, Inc.*,¹⁰³ Eagle contracted with Benefield-Chappell to design and furnish a condominium unit. Derrell Benefield and Virginia Chappell were sole shareholders of Benefield-Chappell. Benefield-Chappell arranged for Daro Builders to do the construction work on the condominium. Daro completed the work and submitted the costs to Benefield-Chappell. Benefield-Chappell obtained some of Daro's stationery and prepared an identical breakdown, but increased the costs by thirty-percent. This invoice was sent to Eagle.

Next, Eagle sent two \$50,000 payments to Benefield-Chappell for furniture deposits. However, shortly thereafter the parties had a falling out and terminated the contract, but Benefield-Chappell refused to return the deposits. Prior to trial, the corporate account that Eagle's \$100,000 was deposited in was depleted to as low as \$22,000.

Eagle sued the corporation and Benefield and Chappell individually. The court held that the retention of funds belonging to the Eagles constituted conversion and the deliberate increase of actual construction costs, contrary to the terms of their contract, constituted improper conduct.¹⁰⁴ The court did remark that failure to issue stock and keep proper corporate records, standing alone, was insufficient grounds to render the individuals personally liable.¹⁰⁵

In *111 Properties, Inc. v. Lassiter*,¹⁰⁶ Vara was the sole shareholder of 111, a corporation that purchased property from Lassiter's corporation A&M. Vara acknowledged that 111 Properties was formed in part because Lassiter, a partner of A&M, disliked Vara and would not sell the property to him. 111 Properties and Vara were later sued by A&M on a breach of contract theory based on assertions made in the contract by 111 Properties and Vara. The court held that the corporate veil could not be pierced on the grounds that 111 Properties was formed to keep the seller A&M from knowing who they were selling to.¹⁰⁷ The court said that although Vara's use of the corporate entity was "clever," it was not the kind of improper conduct referred to in *Dania*.¹⁰⁸

Eagle does not provide much help in interpreting what type of conduct might be considered improper because the facts clearly show conversion and

103. 476 So. 2d 716 (Fla. 4th Dist. Ct. App. 1985).

104. *Id.* at 718-19.

105. *Id.* at 719 (citations omitted).

106. 605 So. 2d 123 (Fla. 4th Dist. Ct. App. 1992).

107. *Id.* at 125-26.

108. *Id.* at 126.

fraud on behalf of the shareholders which will always warrant piercing the corporate veil. *111 Properties*, however, is more interesting. Although there was no evidence that the corporation was being used to evade liability, it was admittedly used to mislead the seller of the property. Notwithstanding, the case does not present the proper factual scenario for piercing the corporate veil or implementing the proposed standard.

E. *Fifth District Court of Appeal*

In *Walton v. Tomax, Corp.*,¹⁰⁹ McGuire was the manager of Tomax Construction. His wife was the sole shareholder but did not participate in the management of the corporation. Walton paid Tomax \$20,000 as a deposit for a home that Tomax was to construct for Walton. After Tomax received the deposit it never again contacted Walton. Tomax filed for bankruptcy in 1990, a few months after it received Walton's deposit. The court found that the property that Tomax was to build Walton's house on was never owned by Tomax and that McGuire mishandled funds through the corporation.¹¹⁰ Therefore, improper conduct was found and McGuire could be held liable for the return of Walton's deposit that was paid to Tomax.¹¹¹

The *Walton* decision is reminiscent of the fourth district's *Eagle* decision. The officer of Tomax accepted a deposit for the purchase of property that was not even owned by the corporation and would not return it. This exceeds "improper conduct" and borders on fraud or conversion. Since fraud and conversion are much more egregious than improper conduct, the fifth district had no trouble finding that McGuire acted improperly.

After reviewing the district court decisions, it seems that the proposed standard for finding improper conduct could effectively be used in piercing the corporate veil cases. The district courts seem to agree that so long as a party can show that the corporation was used as a tool to evade liability, with respect to a transaction in which the corporation has no interest, improper conduct will be found.

109. 632 So. 2d 178 (Fla. 5th Dist. Ct. App. 1994).

110. *Id.* at 180.

111. *Id.* at 181.

VII. THE RELATIONSHIP BETWEEN IMPROPER CONDUCT AND EQUITABLE ESTOPPEL

Treatises and case law agree that one of the theories most frequently employed to justify piercing the corporate veil is equitable estoppel.¹¹² This makes perfect sense in that piercing the corporate veil was developed as an equitable doctrine.¹¹³ As will be seen, the phrase improper conduct takes on a more definite identity when viewed in the context of equitable estoppel. The relationship between the two is brought to light, in the piercing the corporate veil context, in Oregon case law. Oregon courts, in fact, used the improper conduct requirement in piercing the corporate veil cases long before Florida.¹¹⁴ The leading case in Oregon that explains and applies the improper conduct standard is *Amfac Foods, Inc. v. International Systems & Controls Corp.*¹¹⁵

The *Amfac* court stated that misrepresentation, commingling, and holding out, are types of conduct that have been held to be improper in piercing the corporate veil cases.¹¹⁶ Interestingly, the *Amfac* court noted that some of the cases it cited for the proposition that misrepresentation constitutes improper conduct would also allow recovery on an estoppel theory.¹¹⁷ In essence, the *Amfac* court illuminated the relationship between improper conduct and equitable estoppel. By definition, “[e]quitable estoppel is a judicially-developed doctrine that precludes a party to a lawsuit, because of some *improper conduct* on that party’s part, from asserting a claim or

112. See *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 n.5 (Me. 1981) (citing cases and treatises supporting the proposition that equitable estoppel is frequently employed to pierce the corporate veil); *United Paperworkers Int’l Union v. Penntech Papers, Inc.*, 439 F. Supp. 610, 617 n.7 (N.D. Me. 1977) (citing cases and treatises supporting this proposition). It is important to make the distinction that the estoppel theory is also used for another purpose in piercing the corporate veil cases. In piercing cases that involve defrauded or misled creditors, counsel representing the corporation will sometimes argue that the creditor is estopped from alleging that the shareholders are liable, since the creditor chose to contract with the corporation and did not get personal guarantees from the shareholders or further investigate the corporation’s credit worthiness.

113. See discussion *supra* Section II.

114. The reader should be aware that *Dania* does not cite any Oregon authority as precedent for developing the improper conduct standard; however, since Oregon is the only state that used improper conduct as a standard in piercing the corporate veil actions before Florida, Oregon case law cannot be ignored in trying to decipher the meaning of improper conduct.

115. 654 P.2d 1092 (Or. 1982).

116. *Id.* at 1102.

117. *Id.* at 1098, 1102 n.17.

defense, regardless of its substantive validity.”¹¹⁸ If equitable estoppel can be triggered by improper conduct, it is plausible to posit that the elements of equitable estoppel may be used to prove improper conduct.

Although the *Amfac* court did not mention the doctrine of equitable estoppel by name to describe the elements it requires to show improper conduct and pierce the corporate veil, the *Amfac* court’s requirements and the elements of equitable estoppel are virtually the same. The *Amfac* court started with the contention that misrepresentation is a type of improper conduct.¹¹⁹ The *Amfac* court continued that the shareholder’s conduct must have been improper in relation to the plaintiff entering the transaction,¹²⁰ and there must be a relationship between the improper conduct and the plaintiff’s injury.¹²¹ Essentially, the court said that improper conduct occurs when: 1) there is a misrepresentation; 2) that causes the plaintiff to enter into a transaction; and 3) the misrepresentation interferes with the corporation’s performance of its obligation toward the plaintiff.¹²² A comparison of the *Amfac* court’s elements to those of traditional equitable estoppel will indicate the similarities.

Equitable estoppel as defined by the Supreme Court of Florida requires: 1) a misrepresentation of material fact; 2) reliance on that misrepresentation; and 3) which causes injury to the party claiming estoppel.¹²³ In sum, the

118. *Combs v. United States*, 790 F. Supp. 850, 852 (S.D. Ind. 1992) (citing *Phelps v. Federal Emergency Management Agency*, 785 F.2d 13, 16 (1st Cir. 1986) (emphasis added)). See generally *Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 605 (7th Cir. 1992); *State Bank of Coloma v. National Flood Ins. Program*, 851 F.2d 817, 819 (6th Cir. 1988); *Federal Deposit Ins. Corp. v. Roldan Fonseca*, 795 F.2d 1102 (1st Cir. 1986); *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1332 (N.D. Ill. 1991); *United States v. Paez*, 866 F. Supp. 62 (D.P.R. 1994); *United States v. Murwin*, No. 90-2309-O, 1990 WL 254984, at *2 (D. Kan. 1990); *United States v. Government Dev. Bank*, 725 F. Supp. 96 (D.P.R. 1989); *Independent Fire Co. No. 1 v. West Virginia Human Rights Comm’n*, 376 S.E. 2d 612 (W. Va. 1988); *In re Upset Sale, Tax Claim Bureau of Wayne County*, 510 A.2d 1291 (Pa. Commw. Ct. 1986).

119. *Amfac*, 654 P.2d at 1102. The *Amfac* court also indicated that “misrepresentations which may not be sufficient to constitute fraud would support a recovery against a shareholder on a misrepresentation theory.” *Id.*

120. *Id.* at 1101.

121. *Id.* at 1103. In regard to this causation requirement, the *Amfac* court noted that the improper conduct must have either caused the plaintiff to enter into the transaction with the corporation or caused the corporation to default on the underlying obligation. *Id.* at 1101.

122. *Amfac*, 654 P.2d at 1101–02.

123. *State Dept. of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981) (citing *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 524 (Fla. 1st Dist. Ct. App. 1971)).

elements of improper conduct required by the Oregon courts are almost identical to the elements of equitable estoppel as stated by Florida courts.

In the absence of clearer guidance from the Florida courts on what type of conduct can be considered improper, an argument based on what Oregon considers to be improper conduct, although not controlling, would seem to be extremely persuasive. Moreover, because authorities in the field agree that equitable estoppel can be used to pierce the corporate veil and the elements required to prove equitable estoppel in Florida are the same as those required by the Oregon courts to prove improper conduct, the Florida practitioner might possibly use the elements of equitable estoppel to prove that improper conduct is present, instead of simply trying to argue what improper conduct is without any clear guidelines at all.

VIII. CONCLUSION

Although the *Dania* court did not make it completely clear what type of conduct could be considered improper, the proposed standard or the equitable estoppel theory should provide a persuasive means by which to prove improper conduct. Regardless, absent further clarification from the courts, piercing the corporate veil cases, and the metaphors used therein, may continue to be as elusive as they have been in the past.