SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

RAYMOND FINERTY and MARY FINERTY,	:	**INDEX NO. 190187/10**
Plaintiffs,	:	**AFFIRMATION IN SUPPORT**
-against-	:	
ABEX CORPORATION, *et al.,*	:	
Defendants.	:	

ELLIOTT J. ZUCKER, an attorney duly admitted to practice law in the courts of the State of New York, hereby affirms under the penalties of perjury and upon information and belief as follows:

1. I am a member of the law firm of AARONSON RAPPAPORT FEINSTEIN AND DEUTSCH, LLP, the attorneys for defendant FORD MOTOR COMPANY (hereinafter "Ford") in the above-captioned matter. As such, I am fully familiar with the facts and circumstances herein, based upon a review of the file maintained in your affirmant's office for the defense of this matter.

2. This affirmation is respectfully submitted in support of the within motion, which seeks: (1) an order pursuant to CPLR Articles 5601 *et. seq.* and 22 NYCRR §600.14(b), granting leave to appeal to the Court of Appeals this Court's order of February 26, 2105 on a certified question; and (2) granting such other relief as may be just and appropriate in the circumstances.

3. A copy of this court's decision and order of February 26, 2015 ("Order") is annexed hereto as **Exhibit "A."**

4. The Order resolved two separate appeals, one brought by Ford itself, and the other brought by Ford's United Kingdom subsidiary, Ford Motor Company, Limited (hereinafter "Ford UK"). Both appeals were taken from denials of motions in the court below, but they were appeals from separate individual orders, made on separate and distinct records. This Court correctly reversed the lower court's denial of the dismissal motion that had been made by Ford UK. This motion for leave to appeal does not concern that portion of the Order.

5. The issue presented in this motion relates to this Court's decision as to Ford itself—referred to as "Ford USA" in the Court's decision—which is Ford UK's parent corporation. Plaintiffs seek to hold Ford liable for damages caused by asbestos exposure from auto parts manufactured and distributed by Ford UK. Long-established corporate law places a heavy burden on plaintiffs seeking to undermine the corporate form by holding a parent corporation liable for the acts of its subsidiaries. In particular, there are only two accepted bases for holding a parent liable for the conduct of its subsidiary. *First*, a court can pierce the corporate veil between the parent and subsidiary if a plaintiff carries his "heavy burden" of demonstrating not only that the parent dominated the subsidiary, but that the plaintiff was subjected to a wrongful or unjust act that justifies ignoring the corporate form. Morris v. New York State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 603 N.Y.S.2d 807 (1993). This Court correctly determined that there is no basis for "piercing the corporate veil" between Ford and its foreign subsidiary. Order at 13. *Second*, and relatedly, some courts have held a parent corporation liable for the acts of its subsidiary if the plaintiff can demonstrate that the subsidiary was the parent's "alter ego." Plaintiffs have made no effort to demonstrate that Ford UK is Ford's alter ego, nor could they. There is accordingly no basis in established law to hold Ford liable for the conduct of its subsidiary.

6. The Court's contrary conclusion rests on an entirely novel theory of corporate liability. The Court concluded (on its view of the record) that "Ford USA acted as the global guardian of the Ford brand" and had a "substantial role" in the "design, development and use" of auto parts that were distributed by Ford UK, "with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." Order at 13. Based on this factual conclusion, the Court held that questions of fact exist as to whether Ford may be held "directly liable" for its role "on the ground that it was 'in the best position to exert pressure for the improved safety of products'" or to warn end users of the hazards of the auto parts in question. Order at 13-14 (citing Godoy v. Abamaster of Miami, Inc., 302 A.D.2d 57, 754 N.Y.S.2d 301 (2nd Dept. 2003)).

7. This Court's legal conclusion—i.e., that corporate separateness may be ignored, and a parent corporation may be held liable for the conduct of its subsidiary, if it (as the "global guardian" of its brand) was "in the best position to exert pressure for the improved safety of products" manufactured and sold by its subsidiary—has no support in precedent. To the contrary, the decision is contrary to Court of Appeals precedent holding that even a parent's *domination* of a subsidiary—let alone ability to exert pressure on that subsidiary—cannot overcome the strong presumption favoring corporate separateness. And the decision more broadly undermines the clear policy of this and other States that respect for corporate separateness requires precluding liability against a parent corporation for the conduct of its subsidiary except in narrow circumstances that admittedly have no application here. After all, nearly every corporate parent can "exert pressure" on its corporate subsidiaries, so the Court's decision will radically expand the circumstances under which a parent corporation may be held liable for the conduct of its corporate subsidiaries, at least in products liability cases.

8. Because the Court's novel decision is contrary to Court of Appeals precedent and the established policy of this State, the Court should grant leave to appeal to the Court of Appeals on the following question: Whether a corporate parent can be held liable for the conduct of its subsidiary merely because it is in a position to "expert pressure" on the subsidiary to improve the safety of its products, when there is no basis for piercing of the corporate veil and when the subsidiary is not the "alter ego" of the parent.

9. Court of Appeals review is appropriate because this Court's decision implicates a "novel" question "of public importance." 22 NYCRR § 500.22(b)(4). Moreover, the Court's holding is contrary to on-point Court of Appeals precedent. *Id.* An expansion of parent corporation liability of the sort contemplated by the Court's decision should not be allowed without the Court of Appeals's approval.

BACKGROUND

10. We assume full familiarity with the essential facts and issues in this case based on the recent vintage of both the oral argument of this matter on February 5, 2015, and the Court's determination of the appeal. We will thus engage in only a short review of the background of this case.

11. Plaintiff Raymond Finerty is alleged to have contracted a serious, and indeed terminal, illness as the result of many years of exposure to asbestos-containing products. The great portion of that exposure took place while the plaintiff was living in Ireland. Although Mr. Finerty referred to repeated exposure to different "Ford" products while he was working in Ireland, it is undisputed that he was using that name in the generic sense, and that he could not identify any products with which he came into contact that were actually manufactured, distributed or sold by Ford Motor Company.

12. Indeed, during motion practice in the court below, Ford produced sworn affidavits by individuals with actual knowledge that demonstrated that, during the relevant time period, Ford itself did not in fact manufacture, produce, sell or distribute or sell *any* products in Ireland (see pages 257-264 of the Record on Appeal). That same proof went on to describe the corporate structure of both Ford and the foreign subsidiaries which would have been responsible for putting these products into the stream of commerce.

13. Plaintiffs did not dispute this proof. Plaintiffs nevertheless sought to hold Ford UK (the subsidiary) *and* Ford (the parent) liable for asbestos exposure from parts manufactured by Ford UK. Plaintiffs disclaimed any argument based on corporate veil piercing, but instead argued that Ford USA could be held liable for "its own actions" and "direct involvement" in the products that Mr. Finerty may have used in Ireland (see respondent's brief at page 4).

14. The court below agreed that there could be no piercing of the corporate veil here, but that certain of the Ford documents on which the plaintiffs were relying were sufficient to raise a question of fact with regard to Ford's role in the products manufactured by Ford UK or by another subsidiary, Ford Ireland (see pages 7-9 of the record on appeal).

THE COURT MISAPPLIED CONTROLLING LAW, AND CREATED NEW LAW, IN RENDERING ITS DECISION

15. It is a "deeply engrained" legal principle and economic principle that parent corporations are generally not liable for the acts of their subsidiaries. United States v. Bestfoods, 524 U.S. 51, 61 (1998). As the Court of Appeals has explained, the law recognizes the "the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." Morris v. New York State Dep't of Taxation & Fin., *supra,* 82 N.Y.2d at 140 (1993).

The law has accordingly deliberately made it difficult to hold a parent corporation answerable for the actions of a subsidiary, or – in the context of product liability litigation – to impose upon a parent company liability for products that, indisputably, were manufactured, marketed, distributed and sold by a foreign subsidiary.

16. In particular, the Court of Appeals has explained that a plaintiff seeking to disregard the corporate form "bear[s] a *heavy burden* of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." TNS Holdings v. MKI Sec. Corp., 92 N.Y.2d 335, 339, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998) (emphasis added). Until this case, there were essentially only two recognized (though related) grounds to hold a parent corporation liable for goods manufactured, marketed, and distributed by a subsidiary. The first was under a "piercing the corporate veil" standard. This requires proof of such things as "complete domination" by the parent of the subsidiary, and the abuse of the corporate form that amounts to a fraud. See, e.g., Millennium Construction LLC v. Loupolover, 44 A.D.3d 1016, 845 N.Y.S.2d 110 (2nd Dept. 2007). This Court correctly held that there is no evidence that could plausibly allow piercing the corporate veil here.

17. Delaware courts have recognized a similar, "alter ego" theory. Holding the parent liable under this theory would require a showing that the parent corporation and its subsidiary functioned as a single entity, and that the subsidiary was a "sham," designed to defraud. See, e.g., Crosse v. BCBSD, Inc., 836 A.2d 492 (Del. 2003); Pearson v. Component Tech. Corp., 247 F.3d 471, 485 (3d Cir. 2001). Plaintiffs have not advocated an "alter ego" theory in this case, nor could they.

18. This Court's conclusion that Ford USA can nevertheless be held liable for the conduct of its subsidiary is based on an entirely novel legal theory previously unrecognized by any authority of which we are aware. What is more, the Court's decision is not only wholly without precedent, but if left to stand, threatens to undermine the fundamental respect for corporate separateness on which this State's (and every other State's) corporate law is based.

19. As explained earlier, the Court concluded that there is a question of fact concerning whether Ford USA can be held liable because "Ford USA acted as the global guardian of the Ford brand" and had a "substantial role" in the "design, development and use" of auto parts that were distributed by Ford UK, "with the apparent goal of the complete standardization of all products worldwide that carried the signature Ford logo." Order at 13. Thus, the Court held, a reasonable jury could find that Ford USA can be held "directly liable" "on the ground that it was 'in the best position to exert pressure for the improved safety of products'" or to warn end users of the hazards of the auto parts in question. Order at 13-14.

20. That holding is squarely contrary to Court of Appeals precedent governing the question when a parent may be held liable for the acts of its separate corporate subsidiary. That Court has explained that "[w]hile *complete domination* of the corporation is the key to piercing the corporate veil, … such domination, standing alone, *is not enough*." Morris v. New York State Dep't of Taxation & Fin., *supra,* 82 N.Y.2d at 141 (1993) (emphasis added). Rather, that Court has required in addition "some showing of a wrongful or unjust act toward plaintiff." *Id.* The conflict between that straightforward rule and this Court's decision is obvious: if "complete domination" of a corporate subsidiary does not suffice to pierce the corporate veil, then it follows, *a fortiori*, that a parent's mere opportunity to "exert pressure" on a subsidiary cannot possibly overcome the strong presumption in favor of corporate separateness.

21. This Court cited no case to the contrary. And the only case it did cite—Godoy, *supra*, is entirely inapposite. In fact, Godoy has nothing at all to do with the liability of a corporate parent. Rather, that case concerns whether "a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from use of the product." 302 A.2d at 60. That Second Department held that such "innocent conduits" as distributors and retailers may be held liable under a theory of strict product liability because "policy considerations" dictate that those types of entities may be in the "best position" to "exert pressure for the improved safety of products." *Id.* at 63. Thus, Godoy is a case about the liability of actors down the chain of distribution from the manufacturer of a defective product. It says nothing at all about the liability of a corporate parent for injuries caused by its subsidiary.

22. If the theory of products liability allowing plaintiffs to hold down-chain actors liable for a manufacturer's defective design were expanded to the context here—i.e., the liability of a parent corporation for injury caused by its subsidiary—there would be nothing left to the strict corporate separateness courts have long recognized as a mainstay of corporate law. After all, every (or virtually every) parent corporation has the ability to "exert pressure" on their subsidiaries. Indeed, a parent corporation is almost always a significant stockholder in the subsidiary corporation. Yet except in extraordinary circumstances, parent corporations are not held liable for injuries caused by their subsidiaries. That is why the Court of Appeals has made clear that a parent's "domination" of its corporate subsidiary, "standing alone, is not enough" to hold a parent corporation liable. Morris, *supra,* 82 N.Y.2d at 141. Under this Court's novel rule, in contrast, any parent corporation with the "ability to exert pressure" on its subsidiary—i.e., essentially every parent corporation—would be liable for the conduct of its subsidiaries, at

least in products liability cases. There is no basis whatever for that expansive theory of liability.

23. This Court's decision is thus without precedent, and is in fact directly contrary to decisions of the Court of Appeals clearly delimiting the circumstances under which a parent corporation can be held liable for the acts of its subsidiary. Under that precedent, this Court's conclusion that there is no evidence supporting a veil-piercing theory should have been dispositive as to Ford's liability here.

24. Thus, the Court should grant leave to appeal to the Court of Appeals. There is no question that the Court's decision presents a "novel" question of great public importance—there is no precedent for it, and it threatens to radically alter the circumstances in which corporate separateness may be overcome. Moreover, as explained above, the Court's decision is contrary to Court of Appeals precedent. Such a vast expansion of liability for corporate parents should not be affected without the Court of Appeals's review, specifically on the question whether a corporate parent can be held liable for the conduct of its subsidiary merely because it is in a position to "expert pressure" on the subsidiary to improve the safety of its products, when there is no basis for piercing of the corporate veil and when the subsidiary is not the "alter ego" of the parent. *See* 22 NYCRR § 500.22(b)(4) (Court of Appeals review appropriate when appeal raises issues that are "novel or of public importance," or "present a conflict with prior decisions" of the Court of Appeals).

WHEREFORE, it is respectfully requested that the within motion be granted in its

entirety, and that this Court grant such other relief as is appropriate.

Dated: New York, New York
March 4, 2015

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