Index No. 190187/10

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – FIRST DEPARTMENT

RAYMOND FINERTY AND MARY FINERTY

Plaintiffs-Respondents,

– against –

ABEX CORPORATION *et al.*,

Defendants,

FORD MOTOR COMPANY,

Defendant-Appellant.

MEMORANDUM OF LAW OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF FORD MOTOR COMPANY'S MOTION FOR LEAVE TO APPEAL

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus* briefs in cases raising issues of concern to the Nation's business community.

This case presents a question of importance to the Chamber and its members: whether, even in the absence of any basis for corporate veil-piercing, a parent company can be held liable for torts allegedly committed by its subsidiary on the theory that the parent is "in the best position to exert pressure for the improved safety of products." This Court's answer in the affirmative is contrary both to well-settled Court of Appeals precedent on corporate separateness and to basic principles of corporate law uniformly recognized by courts across the country. The Chamber's members have a strong interest in the proper resolution of this important question.

ARGUMENT

Ford Motor Company ("Ford USA") did not manufacture, produce, sell, or distribute a single product in Ireland, where plaintiff Raymond Finerty claims he

contracted a form of mesothelioma working as an auto mechanic. Plaintiffs seek to hold Ford USA liable instead for products manufactured by its subsidiary in the United Kingdom, Ford Motor Company, Ltd. ("Ford UK"). This Court acknowledged in its February 26, 2015 Order ("Order") that plaintiffs presented "no basis for piercing the corporate veil" between Ford USA and Ford UK. Order 13. Under well-established Court of Appeals precedent, that should have been the end of the matter. The Court went on, however, to hold that Ford USA could nonetheless be held "directly liable" on the novel theory that Ford USA was "in the best position to exert pressure" on Ford UK to improve product safety. *Id.* at 13-14 (internal quotation marks omitted). The Chamber urges the Court to grant Ford USA's motion for leave to appeal this holding, which both "conflict[s] with prior decisions of [the Court of Appeals]," and presents a "novel" issue of "public importance." 22 N.Y.C.R.R. § 500.22(b)(4).

As Ford USA's motion explains, this Court's new theory of parent liability without veil-piercing cannot be reconciled with Court of Appeals precedent recognizing that a parent company may be held liable for the conduct of its subsidiary only where the plaintiff satisfies the "heavy burden" of demonstrating that the circumstances warrant piercing the corporate veil. *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998); *see also In re Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 (1993).

In their opposition, plaintiffs emphasize that the Court described its theory as one of "direct liability." *See* Order 13; Plaintiffs' Opposition 2, 10-13. The liability contemplated by the Court, however, is expressly premised on the acts of the subsidiary: It was Ford USA's "role in facilitating" *Ford UK's* distribution of auto parts and its ability "to exert pressure" *on Ford UK* that led the Court to conclude that *Ford USA* could be held liable. There is no doubt that the Court's decision provides plaintiffs with a roadmap for asserting claims against parent companies based solely on their ability to influence their subsidiaries. But that sort of liability has *always* required piercing the corporate veil.

Indeed, allowing Ford USA to be held liable for the acts of its subsidiary absent corporate veil-piercing contradicts not only New York precedent, but fundamental principles of corporate law uniformly recognized by courts across the country. As the Supreme Court of the United States has observed, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *see also* Stephen B. Presser, *Piercing the Corporate Veil* § 1:1 (2014) ("It is now accepted as one of the first principles of American law that those who own shares in corporations, whether such shareholders are individuals or are themselves corporations, normally are not liable for the debts of their corporations."). Federal and state courts alike have

consistently refused to hold parent corporations liable for the conduct of subsidiaries except in the "extraordinary circumstances" where the standards for veil-piecing are satisfied. *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996); *see also, e.g., In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) ("[T]he act of one corporation is not regarded as the act of another merely because the first corporation is a subsidiary of the other . . . Rather, to pierce the corporate veil based on an agency or 'alter ego' theory, 'the corporation must be a sham and exist for no other purpose than as a vehicle for fraud.'").[1]

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[1] *See also, e.g., Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 349 (4th Cir. 1998) ("A corporate parent cannot be held liable for the acts of its subsidiary unless the corporate structure is a sham and the subsidiary is nothing but a 'mere instrumentality' of the parent."); *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 513 (3d Cir. 1996) ("Even in the case of a parent corporation and its wholly-owned subsidiary, limited liability normally will not be abrogated. A court may not depart from this principle and pierce the corporate veil unless it finds that a subsidiary was a mere instrumentality of the parent corporation.") (internal citations and quotation marks omitted); *Minton v. Ralston Purina Co.*, 146 Wash. 2d 385, 399, 47 P.3d 556, 563 (2002) ("[A] parent corporation is not liable for the torts committed by its wholly owned subsidiary absent a showing of an intentional disregard for the corporate entity or an intentional fraud."); *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 634, 561 S.E.2d 663, 634 (2002) ("[C]ourts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other."); *In re Birmingham Asbestos Litig.*, 619 So. 2d 1360, 1362 (Ala. 1993) ("It is well settled that a parent corporation, even one that owns all the stock of a subsidiary corporation, is not subject to liability for the acts of its subsidiary unless the parent so controls the operation of the subsidiary as to make it a mere adjunct, instrumentality, or alter ego of the parent corporation. . . . Thus, it is the law in Alabama that a plaintiff must first 'pierce the corporate veil' before the parent

In the face of all this precedent, the Court cited only a single case (and with a "*see e.g.*"): *Godoy v. Abamaster of Miami*, 302 A.D.2d 57 (2d Dep't 2003). Order 14. But in *Godoy*, the question was whether, between two liable parties, one could seek indemnification from the other. *Id.* at 58. That is irrelevant to the issue of whether a party should be liable in the first place.

This Court's decision not only conflicts with an abundance of precedent, but potentially abolishes the doctrine of veil-piercing. As the Court of Appeals has explained, where a plaintiff seeks to pierce the corporate veil in order to hold a parent corporation liable for the conduct of a subsidiary, the plaintiff must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris*, 82 N.Y.2d at 141. This Court's holding eviscerates these requirements, instead allowing for parent liability based simply on the parent's ability "to exert pressure" on the subsidiary to improve the safety of its products or warn consumers of potential hazards. Order 13-14. Of course, nearly every parent corporation is in a position to exert pressure on its subsidiaries; the parent *owns* the subsidiary.

Unsurprisingly, the Court's decision is already garnering media attention.

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corporation's liability may be established.").

One article describes the Court's ruling as "especially unusual," noting that it "offers plaintiffs a new way to pursue U.S.-based global companies for their overseas exposures even without evidence of any direct collusion between the American parent and its overseas unit." Sindhu Sundar, *Ford Ruling Gives Plaintiffs Road Map To Sue Global Cos.*, Law360 (Mar. 3, 2015 9:08 PM ET), http://www.law360.com/automotive/articles/627169/. The public importance of this dramatic expansion of liability for multinational companies is readily apparent. Moreover, the Court's decision may become something akin to a statewide law. Given a plaintiff's wide latitude in venue under N.Y. C.P.L.R. § 503(a), a plaintiff may simply bring its suit in the First Department whenever it wants to sue a parent. The Court of Appeals should have the final say on a decision with such a major and widespread impact.

The Court of Appeals should have an opportunity to review this Court's groundbreaking and highly contentious theory for holding parent corporations liable for products they neither manufactured nor distributed.

CONCLUSION

The Court should grant Ford USA's motion for leave to appeal to the Court of Appeals.

Dated: New York, New York
March 17, 2015

Respectfully submitted,

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PLEASE TAKE NOTICE

☐ *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on*

☐ *that an Order of which the within is a true copy will be presented for settlement to the Honorable one of the judges of the within named Court, at on , at*

Dated: _____

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Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: _____ _____
Print signer's name

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ABEX CORPORATION *et al.*,

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AFFIRMATION OF E. JOSHUA ROSENKRANZ IN SUPPORT OF MOTION FOR LEAVE TO FILE A MEMORANDUM OF LAW AS AMICUS CURIAE

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Service of a copy of the within is hereby admitted.

Dated,

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