

FILED

FEB 8 - 2011

CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2009-SC-000819-D

INTER-TEL TECHNOLOGIES, INC.,
AND INTER-TEL, INC.

APPELLANTS

v.

LINN STATION PROPERTIES, LLC AND
INTEGRATED TELECOM SERVICES CORP.

APPELLEES

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO: 2008-CA-002266-MR and the
JEFFERSON CIRCUIT COURT, HON. IRV. MAZE, JUDGE
CASE NO: 03-CI-05485

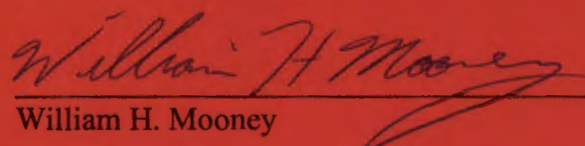
BRIEF FOR THE APPELLANTS,
INTER-TEL TECHNOLOGIES, INC., AND INTER-TEL, INC.



Scott D. Spiegel, Esq.
William H. Mooney, Esq.
Lynch, Cox, Gilman & Goodman PSC
500 West Jefferson Street, Suite 2100
Louisville, Kentucky 40202
*Counsel for Appellants,
Inter-Tel Technologies, Inc. and Inter-Tel, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of foregoing was on this 7 day of February 2011, sent via Federal Express to the Clerk of the Supreme Court, Room 235, State Capitol, 700 Capitol Avenue, Frankfort, Kentucky, 40601 with a true and correct copy of the foregoing sent via U.S. mail to: Ridley M. Sandidge, Jr., Esq., Reed, Weitkamp, Schell, Vice, PLLC, 2400 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202-2812; Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Irv Maze, Jefferson Circuit Court, Division Ten, 700 W. Jefferson Street, suite 901, Louisville, Kentucky 40202.



William H. Mooney

INTRODUCTION

The present appeal arises from a suit filed by the Appellee, Linn Station Properties, LLC, seeking to pierce the corporate veil of not only the parent corporation, but also the “grandparent” corporation in an attempt to enforce a default judgment. In affirming the Trial Court’s grant of summary judgment piercing the corporate veil of the parent and the grandparent corporations, the Court of Appeals disregarded the record which established that the piercing claims were known but not asserted in the default judgment action and applied a subjective “do no harm” standard regarding the Trial Court’s decision to pierce which did not involve a finding that the alleged “harm” was the result of the wrongful use of the corporate form of a subsidiary by the parent and/or grandparent corporations involved.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants, Inter-Tel Technologies, Inc., and Inter-Tel, Inc., believe that oral argument in this case would be beneficial to allow this Court to clarify how Kentucky Courts should apply the myriad of tests and factors relating to piercing the corporate veil.

STATEMENT OF POINTS AND AUTHORITIES

	Pages
INTRODUCTION.....	i
STATEMENT CONCERNING ORAL ARGUMENT.....	ii
STATEMENT OF POINTS AND AUTHORITIES.....	iii-v
STATEMENT OF THE CASE.....	1-4
ARGUMENT.....	4
<p>A. <u>The Court of Appeals erred in failing to address an issue of first impression in Kentucky, i.e. whether a default judgment is void as it relates to non-parties.</u></p>	
.....	4
<u>Brewer v. Burch</u> , 306 Ky. 339, 207 S.W.2d 562, 564 (1974).....	5
<u>Proctor v. Mitchell</u> , 302 Ky. 179, 194 S.W.2d 177, 179 (1946).....	5
<u>Boles v. National Development Co., Inc.</u> , 175 S.W.3d 226 (Tenn. Cd. App. 2005).....	7
<p>B. <u>The Opinion of the Court of Appeals creates a standardless, subjective test for piercing the corporate veil in Kentucky in contravention of prior law.</u></p>	
.....	8
<u>White v. Winchester Land Development Corp.</u> , 584 S.W.2d 56, 61 (Ky. App. 1979).....	8-11, 14, 19, 20, 23-26
<u>Poyner v. Lear Siegler Inc.</u> , 542 F.2d 955, 958 (6th Cir. 1976).....	9, 14
<u>Morgan v. O’Neil</u> , 652 S.W.2d 83, 85 (Ky. 1983).....	9

<u>American Commercial Lines, Inc. v. Ostertag</u> , 582 S.W.2d 51, 53 (Ky. App. 1979).....	9, 26
1. Instrumentality Theory	10
<u>Milford v. Commercial Carriers, Inc.</u> , 210 F.Supp.2d 987, 992 (N.D. Ill. 2002).....	12
<u>Brown v. Advantage Engineering, Inc.</u> , 732 F.Supp.1163 (N.D. Ga.1990).....	13
<u>Hando v. PPG Industries, Inc.</u> , 771 P.2d 956 (Mt. 1989).....	13
<u>1 Fletcher’s Cyclopedia of Private Corporations § 43</u> (2009).....	14-16, 24-25
U.S.C. §1501 (1982).....	17
<u>Illinois Bell Telephone, Co., Inc., v. Global NAPS Illinois, Inc.</u> , 551 F.3d 587 (Seventh Cir. 2008).....	18-19
<u>Thompson v. Quorum Health Resources, LLC</u> , 2007 WL 2815972, *2 (W.D. Ky. 2007).....	19, 25
<u>Commonwealth Ex.Rel., Beshear v. ABAC Pest Control, Inc.</u> , 621 S.W.2d 705, 708 (Ky.App.1981).....	20-21
2. Alter-ego Theory	23
<u>Folger v. Cottle</u> , 2002 WL 414339 *3 (Cal. App. 4 th Dis.).....	23-25
<u>Sonora Diamond Corp. v. Superior Court</u> , 83 Cal. App. 523, 539, 99 Cal. Rprt. 2d 824 (Cal. Ct. App. 2000).....	25
<u>Haywood v. Louisiana Sugar King Products, et al.</u> , 692 So.2d 524, 530 (La. App. 3 Cir. 1997).....	25

American Commercial Lines, Inc. v. Ostertag, 582 S.W.2d 51, 53
(Ky. App. 1979).....26-27

Collett v. American Nat'l Stores, Inc., 708 S.W.2d 273
(Mo. App. 1986).....27

CONCLUSION.....28

APPENDIX.....30

STATEMENT OF THE CASE

The background of the present action begins with the execution of a commercial lease on December 4, 1997, relating to real property located at 1016 Linn Station Road, Louisville, Kentucky (the "**Property**"). The lease was executed between Caldwell R. Willig, as landlord, and Integrated Telecom Services Corporation ("**ITS**"). At the time the lease was originally executed, Mr. Willig was the chairman of ITS and also the landlord of the Property. On or about July 2, 1998, all of the stock of ITS was purchased by Inter-Tel Technologies, Inc ("**Technologies**"). At all times relevant hereto, Technologies was wholly owned by Inter-Tel, Inc ("**Inter-Tel**"). It was not until July 29, 1999, that Linn Station Properties, LLC ("**Linn Station**") purchased the office building and the Property from Mr. Willig.

Following the acquisition of ITS by Technologies, the business operations of ITS changed in accordance with the policies of Technologies. Such changes included that the employees of ITS became employees of Technologies. (Record on Appeal, "**RA**" p. 242). All of the existing business of ITS was operated as a branch of Technologies and/or Technologies' parent company, Inter-Tel. (Id). From the time Linn Station purchased the Property in July of 1999 through April 2002, Inter-Tel paid the rent on behalf of ITS directly to Linn Station. (RA pp. 245-46). There is no dispute that the lease in issue provided, in part, "Tenant shall not assign or transfer this Lease or any interest under this Lease or sublease any part of the Leased Premises in any manner without the prior written consent of Landlord, which consent shall not be unreasonably withheld or delayed." (RA p. 262, ¶ 23; Appendix "**App.**" 3, p. 10, ¶ 23). There is also no dispute that: 1) Linn Station knew that Technologies and not ITS was operating out of

the Property; 2) No written consent to transfer / assign / sublet ITS's interest in the Property was ever provided by Linn Station or Caldwell Willig; 3) All lease payments were being made by Inter-Tel directly to Linn Station from July 1999 until May 2002, and; 4) Linn Station never requested nor obtained an assignment or guarantee of the lease from Technologies or Inter-Tel.¹

In early January of 2002, Linn Station entered into negotiations for the sale of the Property. Apparently as part of the sale process, Linn Station contacted Technologies in an attempt to obtain a Tenant Estoppel Certificate on or about January 23, 2002. (RA pp. 249- 252; App. 4). Clearly Linn Station recognized that Technologies had some potential obligations under the lease because this letter was addressed to Technologies and ITS. (Id). On January 28, 2002, John L. Gardner, counsel for Inter-Tel, wrote counsel for Linn Station advising "Inter-Tel Technologies, Inc. is not a tenant on the lease, and accordingly I cannot sign the tenant estoppel certificate." (RA p. 267, App. 5). On January 31, 2002, Mr. Gardner forwarded a copy of the Tenant Estoppel Certificate signed only on behalf of ITS, which specifically stated that there were no guarantors of the lease. (RA pp. 269-270; App. 6, ¶ 11).

No objection was raised by Linn Station to the Tenant Estoppel Certificate executed on behalf of ITS, nor did Linn Station attempt to exercise any of its rights under the lease, i.e. assignment, guarantee or termination. It was not until May of 2002 before Linn Station began issuing a series of documents including notice(s) of default and a demand for arbitration in regards to the alleged defaults under the lease. All of these documents were either copied or sent directly to Inter-Tel or Technologies confirming

¹ Without any evidence in the record to support its conclusion, the Court of Appeals found that an attempt to request either an assignment or guarantee would have been an exercise in futility. (App. 2, p. 21).

Linn Station's belief that Inter-Tel and/or Technologies had potential obligations under the lease.

On May 2, 2002, Linn Station initiated arbitration proceedings. At this point, Linn Station departed from its prior conduct. Instead of including Technologies and/or Inter-Tel in addition to ITS, Linn Station filed arbitration against only ITS. On May 21, 2002, Mr. Gardner advised Linn Station that only ITS was a tenant on the Property and, therefore, the only responsible entity under the terms of the lease. (RA p. 272, App. 7). Mr. Gardner further advised Linn Station that ITS was defunct and had no assets. (Id). Finally, Mr. Gardner advised that Technologies was the parent company of ITS and that the parent company had neither guaranteed the lease, nor assumed liability for the same. (Id).

On or about June 19, 2002, Linn Station filed a civil action with the Jefferson Circuit Court against only ITS for breach of the lease. At the time this litigation was filed, Linn Station had not dismissed its arbitration against ITS and had not received an arbitration award. In fact, Linn Station **never** obtained an arbitration award against ITS, choosing instead to voluntarily dismiss the arbitration. On July 31, 2002, Linn Station obtained a default judgment against ITS on all issues from the Jefferson Circuit Court (RA p. 25).

It was not until June 20, 2003, that Linn Station filed the present civil action in Division Ten of the Jefferson Circuit Court against ITS, Technologies and Inter-Tel claiming that it was entitled to pierce the corporate veil of Technologies **and** Inter-Tel in order to enforce the default judgment previously obtained against ITS. (RA pp. 1-25). Linn Station moved for summary judgment against Technologies and Inter-Tel arguing

that the corporate veil of both must be pierced and that neither Technologies nor Inter-Tel could assert a defense on the merits. Technologies and Inter-Tel filed their response on July 25, 2008, arguing, among other things, that Linn Station failed to meet the high threshold in Kentucky allowing a court to pierce the corporate veil of the parent company [Technologies] much less the “grandparent” company [Inter-Tel], and that even if the corporate veil was pierced, Technologies and/or Inter-Tel were not bound by a default judgment entered in an action in which neither were a party. (RA pp. 221-275).

The Trial Court’s decision granting Linn Station’s Motion for Summary Judgment against Inter-Tel and Technologies was entered on November 11, 2008.(RA pp. 221-298; App. 1). The Court of Appeals entered its Opinion affirming the Trial Court on November 20, 2009. (App. 2).

ARGUMENT

A. The Court of Appeals erred in failing to address an issue of first impression in Kentucky, i.e. whether a default judgment is void as it relates to non-parties.

One of the specific issues raised in this case which was not addressed by the Court of Appeals was whether Linn Station could use piercing the corporate veil to impose liability against Technologies and/or Inter-Tel and preclude them from defending on the merits of the claim even though Inter-Tel and Technologies were not parties to the default action. The record in this case establishes: 1) Linn Station knew at the time it acquired the Property in July of 1999 that Technologies was operating out of the Property; 2) that the ITS lease precluded assignment or subletting of the Property without the prior written consent of the Landlord [Caldwell Willig and/or Linn Station]; 3) that neither Mr. Willig nor Linn Station ever provided written consent to ITS for any such assignment and/or sublease 4) that Technologies and **not** ITS was operating out of the

Property with the full knowledge of Mr. Willig and/or Linn Station from approximately July 1998 through May of 2002; and 5) that Inter-Tel was paying the lease payments on behalf of ITS without an assignment or guarantee of the lease and had been since approximately July of 1998.

Nevertheless, Linn Station filed suit and obtained default judgment against only ITS. (RA p. 25). It was not until June 20, 2003, that Linn Station filed the present action in Jefferson Circuit Court against ITS, Technologies and Inter-Tel claiming that it was entitled to pierce to corporate veil of Technologies and Inter-Tel in order to enforce the default judgment previously obtained only against ITS. (RA, pp. 1-25). As part of their defense to this action, Inter-Tel and Technologies argued that the default judgment was void as against them because they were not parties to the default action and that even if the corporate veil was pierced against one or both, that they would then be entitled to defend on the merits.

Kentucky has long recognized that: "It is a universal rule, without exception, that no one having any interest in the subject matter of the litigation is bound by a judgment wherein he was not before the court, and any judgment rendered against him in such circumstances is void.... 'A void judgment is no judgment at all, and no rights are acquired by virtue of its entry of record.'" Brewer v. Burch, 306 Ky. 339, 207 S.W.2d 562, 564 (1974). "It cannot be denied that a judgment is void when rendered against a person not before the court and it is immaterial whether that person be sui juris or under disability." Proctor v. Mitchell, 302 Ky. 179, 194 S.W.2d 177, 179 (1946).

Despite the fact that this is a question of first impression in Kentucky, the Court of Appeals failed to even address this issue. In its opinion, the Court of Appeals

recognized that Inter-Tel and Technologies had raised the argument that "...the trial court's opinion overlooked a material issue of fact and question of law, namely how Linn Station could, with full knowledge of its potential piercing claim, file suit against only ITS, thus preventing either Inter-Tel or Technologies from asserting a defense on the merits of the underlying lease dispute." (App. 2, p. 15).

Without addressing the merits of this argument by Inter-Tel and Technologies, the Court of Appeals begins its analysis by holding held "[o]ur review of the record shows that this is a claim that could have been brought by the appellants in their first appeal and is therefore barred from our consideration. The 'law of the case' rule is that parties on a second appeal may not relitigate matters affecting the subject of the litigation which could have been introduced in support of the contention of the parties on the first appeal." (Id). The first appeal of Inter-Tel and Technologies referenced by the Court of Appeals is styled Inter-Tel Technologies Inc. and Inter-Tel Inc. v. Linn Station Properties, LLC and Integrated Telecom Services Corporation, file number 2007-CA-001185. This appeal was from the Trial Court's reversal of its prior opinion which granted Inter-Tel and Technologies' Motion to Compel Arbitration pursuant to the terms and provisions of the lease. The fallacy to the Court of Appeals' ruling is that in the first appeal, Inter-Tel and Technologies raised this very argument but it was not directly addressed due to the holding that all matters relating to the merits of the case should be resolved by the Trial Court as opposed to arbitration.

The Court of Appeals' failure to address Inter-Tel and Technologies' argument was inconsistent with its earlier recognition that a claim for piercing the corporate veil does not constitute a separate and independent cause of action. (App. 2, p. 7). In its

opinion, the Court of Appeals cited to a 2005 Tennessee Court of Appeals case and a 1999 Southern District of New York Bankruptcy case for the proposition that piercing the corporate veil is merely a procedural device which does not constitute a separate and independent cause of action. (Id). This is the exact argument that Inter-Tel and Technologies raised with the Trial Court and the Court of Appeals. More importantly, the Boles v. National Development Co., Inc., 175 S.W.3d 226 (Tenn. Ct. App. 2005) decision cited by the Court of Appeals in its opinion actually supports the proposition that a piercing claim needs to be asserted in the same litigation in which the liability is sought against the subsidiary corporation, at least if known.

In discussing piercing the corporate veil and imposing liability for a judgment entered against a corporate entity, the Boles Court held:

Once a trial court has determined that an individual is a corporate entity's other self and a judgment against the corporate entity is in place, then there is also in place a judgment against the individual who is the corporate entity's other self. This is because the individual is no longer a legally separate entity from the corporate debtor.

(Boles, supra at 251). The Boles' Court clarifies this statement in a footnote where it explained that the judgment acts as a judgment against the corporate entity's other self **"provided the alter ego is a party to the action."** (Id) (emphasis added).

The Court of Appeals also makes reference to the letter of May 21, 2002 Mr. Gardner, General Counsel for Technologies and Inter-Tel, as apparent support for failing to address this issue. (App. 2, p. 15). The Court of Appeals states that as a result of Mr. Gardner's letter, Linn Station was invited "[t]o take a default judgment solely against ITS and denied any liability on the part of his clients [Inter-Tel and Technologies]." (Id). This language however simply begs the question. Is the Court of Appeals equating Mr.

Gardner's letter to constitute a waiver on behalf of Inter-Tel and Technologies to a piercing the corporate veil claim when no claim had been asserted and when there is no evidence to establish that Inter-Tel or Technologies had any reason to believe that the corporate form of ITS would be disregarded? As even the Court of Appeals recognizes, Mr. Gardner's letter relating to the ability of Linn Station to obtain default related solely to ITS. (Id). Inter-Tel and Technologies has argued repeatedly before the Trial Court and the Court of Appeals that the letter of Mr. Gardner did not constitute a waiver of any of their rights or defenses as it related to Linn Station's claims against ITS and that if Linn Station had properly asserted the piercing the corporate veil claim in conjunction with the litigation against the underlying entity ITS, then the result of that action would have been different.

Accordingly, Inter-Tel and Technologies submit that on this basis alone, the Court of Appeals' decision affirming the Trial Court's grant of summary judgment should be vacated and this matter should be remanded to the Trial Court for dismissal or, at a minimum, a trial on the merits on the underlying claim as it relates to Inter-Tel and Technologies.

B. The Opinion of the Court of Appeals creates a standardless, subjective test for piercing the corporate veil in Kentucky in contravention of prior law.

It has long been the law in Kentucky that, absent "specific, unusual circumstances" shareholders cannot be held personally liable for the torts or debts of the corporation. White v. Winchester Land Development Corp., 584 S.W.2d 56, 61 (Ky. App. 1979). The exception to this rule, or "piercing the corporate veil," arises when it is apparent from the evidence that the corporate "artificial personality serves to shield individuals from legal responsibility for **fraudulent or criminal acts**, or that the form of

organization is subversive of public policy.” Poyner v. Lear Siegler Inc., 542 F.2d 955, 958 (6th Cir. 1976) (emphasis added).

Because of its long legal history and its importance to commerce, however, Kentucky Courts may disregard the corporate form and impose liability on individual shareholders only where “extraordinary circumstances” exist. Morgan v. O’Neil, 652 S.W.2d 83, 85 (Ky. 1983) (“It is fundamental corporate law that a shareholder is not liable for a debt of the corporation unless extraordinary circumstances exist to impose liability”). The approach of Kentucky Courts in piercing the corporate veil has been described as evidencing “a general aversion for any disregard of the corporate entity.” American Commercial Lines, Inc. v. Ostertag, 582 S.W.2d 51, 53 (Ky. App. 1979) (citations omitted). Thus, the corporate veil can only be pierced “**reluctantly and cautiously.**” White, 584 S.W.2d at 62 (emphasis added). Determining whether or not to pierce the corporate veil is, as a matter of law, a fact specific inquiry; a case-by-case analysis should be used because “issues of ‘alter ego’ do not lend themselves to strict rules and prima facie cases.” White, 584 S.W.2d at 62.

In its Opinion, the Court of Appeals discusses the seminal case of White, *supra*, and the tests outlined in that Opinion regarding piercing the corporate. In affirming the Trial Court’s decision to pierce the corporate veil of both Inter-Tel and Technologies, the Court of Appeals only applies the instrumentality and alter ego tests. While the Court of Appeals cites to the above law that disregarding the corporate existence should only occur where “extraordinary circumstances” exist, its Opinion is designed more to right a perceived wrong in this case as opposed to properly analyze whether the corporate form

of ITS was improperly used by Inter-Tel and Technologies to achieve an unjust result. (App.2, p. 5).

The Court of Appeals sums up its decision by stating that, “[a]lthough Linn Station was aware that ITS’s rent was being paid by Inter-Tel, it had no reason to believe that Inter-Tel would suddenly stop paying the rent, would refuse to pay for damages to the property, or that ITS was insolvent.” (App.2, p. 26). Whether Linn Station’s beliefs were reasonable is not a factor to be considered when evaluating the corporate structure of ITS or the potential liability of Inter-Tel or Technologies. Moreover, the Court of Appeals decision appears to rely upon a quasi-contractual obligation on the part of Inter-Tel to comply with the terms of the lease which is unsupported by the record and in no way relates to whether the corporate structure of ITS was improperly used by either Inter-Tel or Technologies. Because the Court of Appeals decision is driven by these previously unrecognized and subjective standards, its analysis of the record as applied to the instrumentality and alter ego tests law is fatally defective and cannot shape subsequent cases in Kentucky.

1. Instrumentality Theory

The instrumentality theory is one of the primary theories outlined in White that Kentucky Courts rely on when piercing the corporate veil. White, 584 S.W.2d at 61. In order to prevail on the instrumentality theory, the party seeking to pierce the corporate veil must show:

- (1) that the corporation was a mere instrumentality of the shareholder; (2) that the shareholder exercised control over the corporation in such a way as to defraud or to harm the plaintiff; and (3) that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss.

(Id).

At the outset of its analysis, the Court of Appeals began by making a determination concerning the concurrent liability of ITS's parent corporation, Technologies, and ITS's "grandparent's" liability, Inter-Tel, which it applied to both the instrumentality theory and the alter ego theory. As indicated above, the instrumentality theory only applies to a corporation which is a mere instrumentality of the shareholder. (White, supra). Similarly, the alter ego theory, which will be addressed hereinafter, applies when the corporation is not only influenced but where there is such a unity of **ownership** that separateness has ceased to exist. The undisputed record in this case is that ITS was wholly owned by Technologies. (RA p. 241). Inter-Tel did not own any of the ITS stock nor was it a direct owner of ITS. At best, Inter-Tel, by reason of it being the sole shareholder of Technologies, had an indirect interest in ITS. On this basis, Inter-Tel argued to both the Trial Court and the Court of Appeals that it was not subject to liability under any of the piercing the corporate veil theories in Kentucky.

Inter-Tel argued to the Court of Appeals that Inter-Tel and Technologies could not be used interchangeably in order to establish the elements of any piercing the corporate veil theory. Rather, if piercing was to apply, then Linn Station must first establish that it was entitled to pierce the corporate veil of Technologies. Only if it was then able to establish all of the same elements necessary to pierce the corporate veil of **Technologies**, should it be entitled to seek to pierce the corporate veil of Inter-Tel and seek judgment against Inter-Tel. The record is devoid of any argument or analysis by Linn Station, the Trial Court or the Court of Appeals regarding the corporate structure of Technologies. Because of this, Inter-Tel argued that the Trial Court's decision was erroneous, at least at it related to it.

In its Opinion, the Court of Appeals essentially ignored these arguments. Instead, the Court of Appeals stated “[w]e are unable to find any legal authority in Kentucky which states that the parent of a parent may not be liable when the corporate veil is pierced and the case law of other jurisdictions is replete with examples of piercing actions against grandparent holding companies.” (App. 2, p. 16). Undaunted by the lack of Kentucky case law to support its conclusion, the Court of Appeals, as it did for a substantial portion of its Opinion, relied upon non-jurisdictional cases to support the theory that piercing actions against “grandparent” corporations should be allowed in Kentucky. However a review of the cases cited by the Court of Appeals does not support this proposition.

The Court of Appeals cited initially to Milford v. Commercial Carriers, Inc., 210 F.Supp.2d 987, 992 (N.D. Ill. 2002) in support of this proposition. The plaintiff in that case, Mr. Gary Milford, was a car hauler employed by a subsidiary of Ryder Systems, Inc. In the scope of his employment Mr. Milford was injured and subsequently filed suit against his immediate employer and parent and “grandparent” corporations of his employer under the theories of strict liability and negligence. The plaintiff attempted to pierce the corporate veil claiming that his immediate employer and subsidiaries were mere alter egos of the “grandparent” corporation, Ryder. The legal issue discussed by that Court was whether Ryder would be entitled to assert the worker’s compensation immunity defense to the claims of the plaintiff if the corporate veil was pierced all the way up to the “grandparent” corporation, Ryder. While this is the closest case to applying piercing the corporate veil principles to a “grandparent” corporation, it fails to

provide a standard for piercing actions against a “grandparent” corporation, and ultimately held that whether the corporate veil should be pierced was a jury issue.

The second case cited by the Court of Appeals was Brown v. Advantage Engineering, Inc., 732 F.Supp.1163 (N.D. Ga.1990). In that case, an employee was injured as a result of the failure of certain equipment utilized at his employer’s facility. Rather than the plaintiff, Mr. Antonio Brown, attempting to pierce the corporate veil of his employer to reach the parent and/or “grandparent” corporation, this was a case where the “grandparent” corporation sought to pierce the corporate veil of its subsidiaries and thereby assert that it was entitled to the worker’s compensation immunity defense to plaintiff’s claims. Despite the fact that this case presented many of the same markers relied upon by the Court of Appeals and Trial Court in this case to establish that piercing the corporate veil was appropriate, and despite the arguments of the “grandparent” corporation that if it was attempting to deny alter ego status in order to avoid liability that it would be unsuccessful, the United States District Court for the Northern District of Georgia refused to pierce the corporate veil as it related to the “grandparent” corporation. The language of that case cited by the Court of Appeals in its Opinion was merely a recitation of the factual arguments presented by the “grandparent” corporation in an attempt to establish its reverse piercing argument and did not represent the findings of that Court nor did it form the basis of a finding that piercing the corporate veil could/should be utilized to impose liability upon a “grandparent” corporation.

Finally, the Trial Court relied on the case of Hando v. PPG Industries, Inc., 771 P.2d 956 (Mt. 1989). In this case, Ms. Emma Jean Hando sought to pierce the corporate veil of her immediate employer Spring Creek Mine in order to reach the parent

corporation of NERCO, Inc. While the Court of Appeals cited to some general language in that opinion that, on occasion, courts may extend obligations and resulting liabilities of a subsidiary corporation to a parent or “grandparent” corporation, it ignored the fact that the case did not involve a “grandparent” corporation.

The decision of the Court of Appeals simply cannot constitute the law in the Commonwealth of Kentucky. It provides no standard for Courts in Kentucky to use when attempting to extend the piercing of the corporate veil to a “grandparent” corporation. If this decision is allowed to stand, then the law in the Commonwealth of Kentucky will provide that a “grandparent” corporation can be held liable if some of the factors of piercing the corporate veil apply to reach the parent corporation without any analysis of the “grandparent” corporation’s subsidiary. Under no circumstances does this represent the law in Kentucky or in other jurisdictions and therefore should be reversed by this Court.

As for Technologies, the Court of Appeals reviewed, in a cursory fashion, several factors which it felt supported a finding of liability under the instrumentality theory. Inter-Tel and Technologies had argued that the only evidence of “instrumentality” apparently relied upon by Linn Station is the fact that Technologies owned all the stock of ITS. The Court of Appeals initially acknowledged that Kentucky law recognizes that “mere ownership and control of a corporation by the person sought to be held liable is not alone a sufficient basis for denial of entity treatment.” White, 584 S.W.2d at 61 (citing Poyner v. Lear Siegler, Inc., 542 F.2d 955, 958 (6th Cir 1976)). (App. 2, p. 17). However, The Court of Appeals then cited 1 Fletcher’s Cyclopedia of Private

Corporations § 43 (2009), which had also been partially cited by Inter-Tel and Technologies:

[O]wnership of all the stock of a corporation coupled with common management and direction does not operate as a merger of the two corporations into a single entity. However, each additional bit of evidence, such as ownership of one corporation of all or a majority of the stock of another, or the fact that the corporations have common officers and directors, or both, may tend to show too close or too direct a relationship between corporations, and disregard by one corporation of the normal corporate process and formalities in regard to the other, under capitalization of the subsidiaries, comingling of funds or holding out by one that the other is a department of its business or that it stands behind it are all additional bits of evidence that favor a finding of parental liability when viewed together.

The Court of Appeals, apparently relying upon the “additional bit of evidence language” contained within this cite and listed a few factors which it considered as adding cumulative evidence in support of applying the instrumentality theory to Technologies.² For example, the Court of Appeals recognized that in addition to owning all of the stock, **Technologies** functioned as the “operating entity” of ITS. (App. 2 p. 17). The fallacy to this conclusion peals is that Technologies never acted as the operating entity of ITS. On the contrary, the evidence in this case establishes that Technologies was the operating entity located within the Property and that Linn Station **knew** this!

Moreover, the Court of Appeals found that ITS and **Technologies** had officers and directors in common. (App. 2, p. 17). However, it was never established nor was it found that there was a unanimity as between the officers and directors of ITS and Technologies. The mere fact the some of the officers for Technologies were also officers of ITS hardly rises to the level of establishing liability under the instrumentality theory even when considered in conjunction with the fact that Technologies owned all of the

² It is important to note that the Court of Appeals’ Opinion in this regard is limited to an analysis of Technologies only. (App.2, pp. 17,18).

stock of ITS. As the Fletcher's Cyclopeda provision cited by the Court of Appeals recognizes, common officers or directors or both **may** tend to show too close or too direct a relationship between corporations. However, it must still be established that there is a too close or too direct a relationship between these corporations. The record in this case fails to establish that as a result of the common directors and/or officers, that there was a too close or too direct relationship between the corporations. That is because the evidence established that ITS was not operating and therefore any common officers and directors were not "controlling" or dictating the operations of ITS.

The Court of Appeals' decision also came to the conclusion that **Technologies** offered little tangible evidence that it observed normal corporate process or formalities such as annual stock holder meetings. (App. 2, p. 17). Setting aside the fact that the analysis should have focused upon whether there was evidence that ITS observed normal corporate process or formalities, the evidence submitted into record as it relates to the observance of corporate formalities stands in stark contrast to the conclusion of the Court of Appeals and at the very minimum raises a material issue of fact which should have been resolved in favor of denying the original motion for summary judgment.

The record establishes that ITS and Technologies produced unsigned copies of "Minutes of Directors and Shareholders" that took place in 1998, 1999, 2000, 2001, and 2002. The Court of Appeals concluded that Mr. Gardner was unable to confirm that the originals were actually signed or identify anyone who could do so. (App. 2, p. 11). While that may be technically accurate, Mr. Gardner expressly testified that Inter-Tel and Technologies were only able to produce unsigned copies of the corporate minutes because the originals had been produced in prior litigation and, as a result of that

production, the originals had been lost. Mr. Gardner specifically stated that the originals were dated and signed. (RA. 243). Further, Mr. Gardner testified that the corporate records would have been signed as close in time to the meeting dates as possible. (RA. 244). The inability to produce “signed” minutes from its meetings is not nearly enough evidence to prove that ITS and Technologies disregarded or abandoned essential corporate formalities or at a very minimum created a material issue of fact precluding a definitive finding in this regard.³

The Court of Appeals then considered the consolidated financial reporting of Inter-Tel, Technologies and ITS in its analysis. (App. 2, p. 18). It is at this point in the Opinion where the Court of Appeals disregarded any attempt to distinguish between Technologies and Inter-Tel. In discussing all the other factors concerning the instrumentality theory up to this point, the Court of Appeals’ Opinion focused solely upon **Technologies**. However, when it came to discussing the tax practices, the Court of Appeals, merely referenced the “appellants”. (RA 2, pp. 18, 19). Despite recognizing that Inter-Tel and Technologies properly cited to 26 U.S.C. § 1501 and § 1501 of the Internal Revenue Code which expressly allows a corporation to shelter taxable income from a profitable subsidiary [Technologies] by offsetting it from loses from an unprofitable subsidiary [ITS], the Court of Appeals nevertheless came to the conclusion that “the tax practices and corporate structure of Inter-Tel and Technologies vis-à-vis ITS led to the conclusion that ITS was a shell corporation used by its parents to avoid various liabilities.” (App. __, p. 19). However, the Court of Appeals failed to cite to any portion of the record which establishes this finding. There was no evidence in the record

³ Obviously the inability of ITS and/or Technologies to produce minutes has no bearing on Inter-Tel, which was neither an owner nor a shareholder of ITS.

which established that ITS had any liabilities other than the default judgment at issue -- a default judgment which was obtained by Linn Station with the full knowledge that ITS was a defunct corporation with no assets and that it had potential claims against Technologies and/or Inter-Tel which it could have and should have raised at the time it filed the initial suit against ITS.

The Court of Appeals tried to also provide some legal support for this position by its citation to the case of Illinois Bell Telephone, Co., Inc., v. Global NAPS Illinois, Inc., 551 F.3d 587 (7th Cir. 2008). However, the Court of Appeals reliance upon this case is misplaced. The facts of that case are substantially dissimilar to the facts presented by this case. In that action, the plaintiff had entered into a contractual relation with the defendant corporation. It was admitted that the defendant corporation, **at the time it was originally** formed, had no assets and was nothing more than a drawer entity. Subsequent to the creation of this drawer entity, it entered into a contract with the plaintiff. That is simply not the case in the present action.

On the contrary, at the time ITS signed the lease, it was an ongoing entity. Even after Technologies acquired all of the stock of ITS, some assets remained in the name of ITS for a period of time. Regardless, Linn Station did not enter into a contract with ITS at the time it was a non-functioning entity. Unlike the plaintiff in the Illinois Bell Telephone case cited by the Court of Appeals, Linn Station acquired the existing lease with ITS after it purchased the Property in approximately July of 1999. The evidence in this case establishes that Linn Station knew that ITS was not an operating entity, that Technologies was operating out of the Property and that Inter-Tel was paying the lease payments. Linn Station also knew that it had a lease that precluded ITS from either

subletting or assigning the lease to another party without the prior written approval of Linn Station. Despite this knowledge and despite this record, Linn Station did nothing from the time it acquired the Property in 1999 until 2002 to protect its interests. Therefore, the conclusion by the Court of Appeals that this case is in any way similar to the Illinois Bell Telephone case or that ITS was somehow operated to hold only liabilities with no assets is unsupported by the record.

Inter-Tel and Technologies also argued to the Court of Appeals that in order to meet the second element of the instrumentality theory, i.e. that there must be a showing that the individual shareholders' control over the corporation [ITS] was exercised in such a way as to **defraud or do harm to Linn Station**. Linn Station was required to show all the elements of a common law fraud claim, i.e., "material representation, falsity, scienter, reliance, deception, and injury." White, 584 S.W.2d at 61 (emphasis added). The same requirement of fraud applies to claims for piercing the corporate veil against the parent/subsidiary "the use of the parent/subsidiary corporate form must be fraudulent." Thompson v. Quorum Health Resources, LLC, 2007 WL 2815972, *2 (W.D. Ky. 2007). The Court of Appeals rejected this argument and held that they "...do not believe that under Kentucky law a finding of strict fraud is required in order to pierce the corporate veil." (App. 2, p. 19). Instead, the Court of Appeals stated that the opinion in White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky. App. 1979) provided that for liability to attach that a shareholder must "exercise [] control over the corporation in such a way as to **defraud or to harm** the plaintiff[.]" (App. 2, p. 20). The Court of Appeals went on to state that "surely, if a finding of fraud was required, the Court would not have included the 'or to harm' language." (Id). The Court of Appeals did not cite to

a single case which established a standard or a precedent from which the courts in Kentucky can derive factors which can or should be considered when the court is asked to determine whether a shareholder's exercise of control over a corporation is done in such a way as to cause harm.

The only case cited by the Court of Appeals to support what it admits is a "broader interpretation" of the holding in White, supra, was Commonwealth Ex.Rel., Beshear v. ABAC Pest Control, Inc., 621 S.W.2d 705, 708 (Ky.App.1981). (App. 2, p. 20). Once again, a review of that case establishes that it does not support the holding of the Court of Appeals. In that case, the Kentucky Attorney General filed suit against a pest control company for violations of the Kentucky Consumer Protection Act. The allegations included fraudulent representations to prospective customers in order to gain access to the home, misrepresentations concerning the cost and financing of services and the rendition of inadequate and/or unneeded services. Instead of viewing this prior decision in context, the Court of Appeals took a citation from a different case referenced in that opinion and used it to support its expansion of piercing the corporate veil principles which would allow a Court to use its equitable powers to rectify some "harm," such as the failure of a judgment creditor to receive payment. Rather than representing a broader, equity based interpretation of piercing the corporate veil, that decision recognized that fraudulent acts are the "wrong" which need to be addressed through application of this doctrine. "The rule that a corporate entity will be disregarded where it serves as a shield for fraudulent acts of individuals is not absolute. **There must be evidence that the individual against whom personal liability is sought to be imposed actively participated in the fraudulent scheme, or was aware of its existence and did**

nothing about it.” (ABAC Pest Control, 621 S.W.2d at 708) (emphasis added). Clearly, contrary to the Opinion of the Court of Appeals, Kentucky law does not support a broad, equitable approach to piercing the corporate veil.

However, even if this Court were to adopt a broader, equitable basis for allowing the piercing of a corporate veil, such a situation did not exist in this case. The undisputed evidence is that at the time Linn Station acquired the Property in 1999, Technologies had already acquired the stock of ITS and was operating consistent with its corporate policy. (RA. 242). Moreover, it is also undisputed that from the time Linn Station acquired the Property in 1999, it knew that all monthly rent payments were paid by Inter-Tel. (RA. 245–46). Further, even though Linn Station was aware that Technologies was operating from the Property and even though Linn Station was aware that no written consent to an assignment of the lease between ITS and Inter-Tel or Technologies had occurred, Linn Station never objected to this arrangement even though the lease clearly provided that there had to be prior written consent before any assignment or sublease of the Property could occur. (App. 3, p. 10, ¶ 23). Finally, to resolve any doubt regarding Linn Station’s knowledge of the aforementioned arrangement, Linn Station contacted ITS and Inter-Tel in early 2002 about being guarantors of the lease and Linn Station was advised that ITS was the sole lessee on the Property and that there were no guarantors and would be no guarantors on the lease. (RA. 266 and 267 – 68; App. 5 and 6).

Linn Station knew **all** the facts concerning the status of the lease and the lessee the entire time Linn Station owned the Property. The fallacy to the Court of Appeals attempt to use piercing the corporate veil in this case calls to mind the old adage, “that in order to receive equity, one must first do equity.” Linn Station knowingly accepted

monthly rent from Inter-Tel on behalf of ITS for approximately **three** years and allowed Technologies to operate out of the location without requiring or even requesting that either Inter-Tel or Technologies execute an assignment or guarantee for the lease. It was only after Linn Station attempted to sell the Property that it ever mentioned obtaining a guaranty from either Inter-Tel or Technologies. (RA. 248-49; App. 4). Even after Linn Station was specifically advised that neither Technologies nor Inter-Tel had guaranteed, or would guarantee, the lease, Linn Station took **no action** to address the situation. Instead, Linn Station filed suit against only ITS, a company it **knew** was defunct with no assets at the time it filed suit. (RA 269; App. 7). It was with this knowledge that Linn Station obtained its default judgment against ITS alone.

While the Court of Appeals recognized the evidence of record, it nevertheless disregarded Linn Station's actions. The Court of Appeals decision concluded that some form of quasi-contractual estoppel existed and presumably the breach of this arrangement was the "harm" the Court of Appeals feels will occur without piercing the corporate veil. However, under the reasoning of the Court of Appeals, since Inter-Tel paid the rent on behalf of ITS for several years, it was not unreasonable for Linn Station to assume that this arrangement would continue. (App.2, p. 21). Moreover, the Court of Appeals concluded that it would have been an exercise in futility for Linn Station to have requested Inter-Tel and/or Technologies to execute an assignment or guarantee. (Id). Despite the fact that there is absolutely no evidence to support the conclusions, these arguments completely miss the point. Pursuant to the terms of the lease, assignment or subleasing could not occur without the written consent of Linn Station. Even if the conclusion of the Court of Appeals that Inter-Tel and Technologies would not have

signed such a document is taken as true, the fact that the failure to do so would constitute a breach of the lease entitling Linn Station to evict ITS is never discussed.

More importantly, all of this does not show how either Inter-Tel or Technologies used the corporate form of ITS to cause harm to Linn Station. If, as the Court of Appeals reasons, it was not unreasonable for Linn Station to assume that Inter-Tel would continue to pay the rent on behalf of ITS or, refuse to pay for damages to the property or that Linn Station was not on notice that ITS was insolvent, then why was it reasonable for Linn Station to not try and address this “harm” pursuant to this allegedly reasonable reliance when it filed suit against ITS in the first place? Simply put, it chose not to. Thus, any harm that occurred to Linn Station was the result of its failure to act appropriately to protect its own interests, not as a result of any improper use of the corporate form of ITS by either Inter-Tel or Technologies. Accordingly, Linn Station is not entitled relief from its knowing and intentional failure to act under equitable principles.

2. Alter-ego Theory

An alternative theory recognized by Kentucky Courts regarding piercing the corporate veil is the alter-ego theory. White, 584 S.W.2d at 61. As stated in White, Kentucky courts will, in “specific, unusual circumstances” disregard the corporate form and assess liability against shareholders under the alter-ego doctrine. Id. As with all piercing theories, the alter-ego doctrine is considered an “extreme remedy, sparingly used.” Folger v. Cottle, 2002 WL 414339 *3 (Cal. App. 4th Dis.). Much like the instrumentality theory, the elements of the alter-ego doctrine are:

- (1) that the corporation is not only influenced by the owners, but also that there is such unity of ownership and interest that their separateness has ceased; and
- (2) that the facts are such that an adherence to the normal

attributes, viz, treatment as a separate entity, of separate corporate existence would sanction fraud or promote injustice.

White, 584 S.W.2d at 61-62.

Subsumed under the alter-ego doctrine's first element are a number of factors that courts should consider when determining whether to pierce the corporate veil:

(1) Undercapitalization; (2) a failure to observe the formalities of corporate existence; (3) nonpayment or overpayment of dividends; (4) a siphoning off of funds by the dominate shareholder(s); and (5) the majority shareholders having guaranteed corporate liabilities in their individual capacities.

White, 584 S.W.2d at 62. It should be noted that these factors should be weighed in concert, not individually. The presence of even one or two factors does not necessarily mandate piercing the corporate veil. *See Folger*, 2002 WL at *5. However, the "tests and factors may differ somewhat when dealing with a parent/subsidiary relationship." 1 Fletcher's Cyclopedia of Private Corporations § 41.30, ¶ 4.

The Court of Appeals decision rejected the arguments of Inter-Tel and Technologies that, like the instrumentality theory, Linn Station had to establish that Inter-Tel was an owner of ITS before liability under this theory could be imposed. The Court of Appeals merely cited the same reasons previously cited to reject the argument that Inter-Tel could not be held liable under the instrumentality theory. (App.2, p. 22). For all of the reasons cited above, Inter-Tel and Technologies submit that the Court of Appeals decision is erroneous in this regard.

Similarly, the Court of Appeals rejected the argument that fraud must be established. In addition to all the reasons cited above, Inter-Tel and Technologies submit that the Court of Appeals was in error because it ignored the law concerning the need for fraud in the application of the alter ego theory. As with the instrumentality theory, a

party attempting to pierce the corporate veil pursuant to the alter ego theory must show some type of improper or fraudulent conduct:

Thus generally, absent fraud or bad faith, a corporation will not be held liable for the acts of its subsidiaries or other affiliated corporations. There is a presumption of separateness that a plaintiff must overcome to establish liability by showing that a parent is employing a subsidiary to perpetrate a fraud or commit wrongdoing and that this was the proximate cause of the plaintiff's injury.

1 Fletcher's Cyclopaedia of Private Corporations § 43, ¶ 1.

As stated by the Court in Sonora Diamond Corp. v. Superior Court, 83 Cal. App. 523, 539, 99 Cal. Rptr. 2d 824 (Cal. Ct. App. 2000), "the alter-ego doctrine does not guard every unsatisfied creditor of a corporation, but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. **Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard.**" (emphasis added). See also Folger v. Cottle, 2002 WL 414339, *5 (Cal. App. 4th Dist.)("[D]ifficulty in enforcing or collecting a debt does not support application of [the piercing remedy] . . . some conduct amounting to bad faith must be demonstrated"); see Haywood v. Louisiana Sugar King Products, et al., 692 So.2d 524, 530 (La. App. 3 Cir. 1997); see also Thompson v. Quorum Health Resources, LLC, 2007 WL at *2 (In order to pierce the corporate veil, "the use of the parent/subsidiary corporate form must be fraudulent").

Instead, the Court of Appeals turned to the equitable factors identified by White, supra, to establish liability under this theory. However, the Court of Appeals did not consider all of the factors identified in White, supra. Instead, the Court of Appeals determined that only three of those factors were pertinent to the facts of this case: "(1)

undercapitalization; (2) a failure to observe the formalities of corporate existence and (3) a siphoning off of funds by the dominant shareholder(s).” (App. 2, p.22).

As a threshold matter, the Court in White noted that “[t]he theory of undercapitalization . . . is not significant here because Kentucky law does not require any minimum paid-in capital before a corporation begins to do business.” White, 584 S.W.2d at 62. In American Commercial Lines, Inc. v. Ostertag, 582 S.W.2d 51, 53 (Ky. App. 1979), the Court of Appeals declined to follow the “. . . **growing trend of denying corporate entity treatment for inadequate capitalization, except in the event of fraudulent reorganization. . . .**” We do not believe that the Kentucky courts would so extend a doctrine [undercapitalization] which they have not yet adopted in its basic formulation.” Id. (emphasis added).

The Court of Appeals took the statements of law identified above and found that the Court in White was “prepared to apply the undercapitalization element within an equitable context...” citing to the policy reasons behind the prohibition of undercapitalization of protecting third parties who are not aware they are dealing with impecunious entities discussed by the White Court. (App. 2, p.22). The only support cited by the Court of Appeals as it relates to the policy reasons concerning undercapitalization is to, once again, ignore the knowledge and inaction of Linn Station. Once again, the Court of Appeals found that Linn Station acted reasonably in this case through its reliance upon the belief that because Inter-Tel had been paying the rent on behalf of ITS for the prior three years, that Inter-Tel would continue to do so. (Id, p. 23). The Court of Appeals concluded that because Linn Station was ITS’s landlord and not its

banker and even though it knew that ITS was not paying the rent, Linn Station had “no reason to be concerned with the financial status of ITS.” (Id).

The problem with the Court of Appeals reasoning is that it is not consistent with the policy reasons upon which it is relying. After all, the policy reasons as outlined by the Court of Appeals was to protect third parties who **are not aware they are dealing with impecunious entities.** (App. 2, p.22). Clearly this is meant to describe innocent third parties, not parties who have all the information necessary to place them on notice of financial issues. If the ruling of the Court of Appeals is allowed to stand in this regard, then even if facts exist, as they do in this case, that would place a reasonable and prudent creditor on notice of potential issues, that creditor can still claim that it is an innocent third party. It runs contrary to the entire equitable concept of an innocent third party to allow Linn Station to accept rent from an entity other than the tenant for approximately three years before the tenant vacates the premises but claim that it was not aware that there might be financial issues relating to its tenant. This knowledge, combined with the knowledge that the tenant on the lease is not the entity that is occupying the Property and that no other entity or individual has guaranteed payments under the lease, precludes a finding that Linn Station falls within the equitable policy concerning undercapitalization. It is not the policy in Kentucky to allow a party to claim “innocent third party status” when it was on notice of issues and takes absolutely no action to protect its own interests.

The Court of Appeals then harkened back to the failure to observe corporate formalities. As previously indicated, the record in this regard created a material issue of fact which has been ignored by the Court of Appeals. The Court of Appeals stated that Inter-Tel and Technologies have not explained what additional evidence might show that

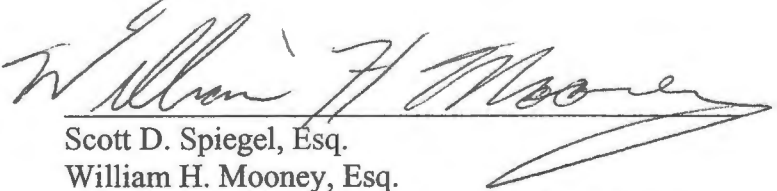
corporate formalities of any kind whatsoever had been observed in connection with ITS. (App. 2, p.25). What additional evidence is necessary? Inter-Tel and Technologies have maintained throughout that ITS was not an operating entity and was only being maintained for tax purposes.

Finally, the Court of Appeals decision acknowledged that there was no evidence that neither Inter-Tel nor Technologies siphoned off any funds or assets from ITS. Despite the fact that the Court of Appeals cited to this factor as constituting a basis for its decision, it then minimized the application of this factor to this case. (App. 2, p.25). Without explanation, the Court of Appeals merely concluded that it believed that ITS was used by Inter-Tel and Technologies as an “expedient and chameleonic entity” which assumed whatever form or structure was most advantageous to its parents’ current circumstances. (Id). Setting aside the obvious failure of the Court of Appeals to make any attempt to distinguish between Inter-Tel and Technologies, this conclusion is without any support in the record or the law.

CONCLUSION

Accordingly, Inter-Tel and Technologies respectfully submit that the decisions of the Trial Court and the Court of Appeals should be vacated and this matter should be dismissed. Linn Station’s claim of piercing the corporate veil does not constitute a separate cause of action, should have been asserted in the initial lawsuit filed against ITS and the failure to do so precludes the filing of this suit. Alternatively, the decisions of the Trial Court and the Court of Appeals should be vacated and this matter should be remanded back to the Trial Court for a trial on the merits of the underlying claim for breach of lease against Inter-Tel and Technologies.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "William H. Mooney". The signature is written in black ink and is positioned above a horizontal line.

Scott D. Spiegel, Esq.

William H. Mooney, Esq.

LYNCH, COX, GILMAN & GOODMAN, P.S.C.

500 West Jefferson Street, Suite 2100

Louisville, KY 40202

(502) 589-4215

Counsel for Appellant,

Integrated Telecom Services Corporation

INDEX TO THE APPENDIX

1. Opinion of the Jefferson Circuit Court	RA pp. 293-298
2. Opinion of the Kentucky Court of Appeals	N/A
3. Lease	RA pp. 8-13
4. Request for Tenant Estoppel Certificate from Linn Station	RA pp. 249-252
5. Response to Request to Tenant Estoppel Certificate from John L. Gardner	RA p. 267
6. Signed Tenant Estoppel Certificate	RA pp. 269-270
7. Letter from John L. Gardner, General Counsel, Inter-Tel Incorporated dated May 21, 2002	RA p. 272

RENDERED: NOVEMBER 20, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002266-MR

INTER-TEL, INC.; AND INTER-TEL
TECHNOLOGIES, INC.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE IRV MAZE, JUDGE
ACTION NO. 03-CI-005485

LINN STATION PROPERTIES, LLC;
AND INTEGRATED TELECOM
SERVICES CORPORATION

APPELLEES

OPINION
AFFIRMING

BEFORE: CAPERTON AND DIXON, JUDGES; HENRY,¹ SENIOR JUDGE.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

HENRY, SENIOR JUDGE: Inter-Tel, Inc. ("Inter-Tel") and Inter-Tel Technologies, Inc. ("Technologies") appeal from an opinion and order of the Jefferson Circuit Court granting a motion for summary judgment brought by Linn Station Properties, LLC. Inter-Tel is the parent corporation of Technologies, which was in turn the parent corporation of Integrated Telecom Services Corporation ("ITS"). ITS is now defunct. The sole issue on appeal is whether the circuit court correctly determined that the corporate veil of ITS may be pierced and that Inter-Tel and Technologies are consequently liable for a default judgment that Linn Station obtained against ITS. Having reviewed the circuit court's decision, we affirm.

This legal action stems from the breach of the lease of an office building located on Linn Station Road in Louisville, Kentucky. The lease was executed on December 4, 1997, between ITS, a provider of commercial telephone services, and Caldwell R. Willig, the owner of the building. Willig was also the principal shareholder and chairman of ITS. Under the terms of the lease, which ran for six years from January 1, 1998 to December 31, 2003, ITS was obligated to make non-structural repairs to the interior of the building, including maintenance and repair of the building's utility systems. The lease also contained an arbitration clause which governed any dispute under the lease, except the landlord's right to institute legal action with respect to a default in the payment of rent by the tenant.

On July 2, 1998, about seven months after the lease was executed, Technologies, a wholly-owned subsidiary of Inter-Tel, purchased all of the stock of