SUPREME COURT OF KENTUCKY
NO. 2010-SC-000183-DG

THOMAS J. SCHULTZ — **APPELLANT**

VS.

GENERAL ELECTRIC HEALTHCARE FINANCIAL SERVICES, INC., GENERAL ELECTRIC COMPANY, AND GENERAL ELECTRIC CAPITAL CORPORATION — **APPELLEES**

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE CLAYTON, JUDGE
CIVIL ACTION NO. 04-CI-03093

BRIEF FOR APPELLANT

Respectfully submitted,

Hon. Bruce A. Brightwell
1212 State Street
New Albany, IN 47150
(812) 542-0007

BY: Bruce A. Brightwell
BRUCE A. BRIGHTWELL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following was mailed to the Hon. Denise Clayton, Judge, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, Kentucky 40202; and to Tanya Bowman, 400 W. Market Street, Suite 3200, Louisville, KY 40202; this the 3rd day of February, 2011. I further certify that the record on appeal was never checked out from the Court of Appeals or Supreme Court.

Bruce A. Brightwell
Bruce A. Brightwell

INTRODUCTION

This is a case where General Electric sued Thomas Schultz, who was the sole shareholder of a corporation, to pierce the corporate veil and find Mr. Schultz personally liable for a $4.6 million judgment previously entered for GE against that corporation. The trial court granted GE a judgment on the pleadings to pierce the corporate veil and awarded GE a judgment in the amount of $450,000 against Mr. Schultz individually, which was affirmed by the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant strongly desires oral argument in this case. This $450,000 judgment essentially bankrupts the Appellant, and he therefore wishes every opportunity to be heard on this matter. Moreover, this case involves important issues regarding the law of piercing the corporate veil, and judgment on the pleadings, that Appellant believes would best be thoroughly addressed through oral argument, in addition to briefing.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Appellant states as follows for his Statement of the Case.

I. Parties and Relevant Non-Parties for this Appeal.

The Appellant is Thomas Schultz (**"Schultz"**).

The Appellees are General Electric Healthcare Financial Services, Inc., General Electric Company, and General Electric Capital Corporation (**"GE"**).

Schultz is the sole shareholder of Intra-Med Services, Inc., (**"Intra-Med"**). Intra-Med was a corporation that was involved in performing various diagnostic imaging services, such as MRI's and CT scans. It essentially went out of business in approximately June of 2005.

Diagnostic Medical Imaging Associates, Inc. (**"DMIA"**), is a professional services corporation which had a contractual arrangement with Intra-Med to read the results of the diagnostic imaging services that Intra-Med provided.

II. Relevant cases.

Procedurally, this case is the result of the convergence of two different lawsuits involving Intra-Med. In April of 2004, Intra-Med had initiated a lawsuit against Diagnostic Medical Imaging Associates, Inc., in Jefferson Circuit Court, Cause Number 04-CI-3093. (Hereinafter referred to as the **"DMIA Case"**.)

On July 8, 2004, GE filed a lawsuit against Intra-Med in the Jefferson Circuit Court, for the breach of Intra-Med's equipment leases, under Cause No. 04-CI-5709. (Hereinafter referred to as the **"Lease Case"**.)

III. Procedural History.

In the Lease Case, GE alleged that Intra-Med had defaulted under its Master Lease Agreement (hereinafter "Lease") with GE because it failed to make its required lease payments on various pieces of imaging equipment, and GE was entitled to recovery of the equipment and judgment against Intra-Med for its damages because of those defaulted payments. (This Complaint, with the Master Lease Agreement, is attached as Appendix 4.)

GE's Lease was solely with Intra-Med, and Schultz was not a party to, nor a guarantor for, the Lease. (App. 4.) Schultz was not named as a party by GE in the Lease Case, and GE never made any allegations about piercing the corporate veil in the Lease Case. (App. 4.)

Intra-Med admitted it was in default under the terms of the Lease. Thus, on November 15, 2004, GE was awarded a judgment against Intra-Med for $4,746,921.80 in the Lease Case. (Appendix 5.) (The amount of the judgment was so large because GE invoked the acceleration clause in the Lease.) GE was able to initially collect approximately $700,000 of that judgment from Intra-Med as it was closing down its business.

In the DMIA Case, DMIA had filed a counterclaim against Intra-Med. Following a bench trial, DMIA received a judgment against Intra-Med on that Counterclaim on June 21, 2005. (Record ("R.") at 868-871.) Prior to the trial, DMIA had amended its counterclaim to allege that the corporate veil should be pierced, and that Schultz should be individually liable for what Intra-Med owed DMIA. The trial court had bifurcated any claims against Schultz, individually, from the initial trial. However, after receiving its judgment against Intra-Med, DMIA moved forward with its claim against Schultz, individually.

On July 11, 2005, GE filed a Motion to Intervene in the DMIA Case, and to file a Third

Party Complaint against Schultz individually as well, alleging that the corporate veil should be pierced and Schultz should be individually liable for Intra-Med's judgment to GE from the Lease Case. (R. at 933-936.) Ultimately, Schultz settled with DMIA in mediation, and only GE's claim against him for piercing the corporate veil is relevant to this appeal.

On October 7, 2005, GE filed its Third-Party Complaint ("Complaint") against Schultz. (R. at 1196-1301; App. 6.) The primary basis of GE's Complaint against Schultz was that Schultz had allegedly used various Intra-Med funds to purchase real property that was used for Intra-Med's business, and then, when the property was sold, kept the funds for himself. (App. 6.) Thus, GE's Complaint alleged that the corporate veil should be pierced and Schultz should be personally liable for GE's judgment against Intra-Med. (App. 6.)

Schultz denied the majority of those allegations, and also raised twenty-two affirmative defenses to GE's claim that it was entitled to pierce the corporate veil. (R. at 1306-1311; Appendix 7.)

On April 17, 2007, GE filed a Motion for Partial Judgment on the Pleadings or in the Alternative Imposition of a Constructive Trust. (R. at 1594-1650; Appendix 8.) (Hereinafter, the term "Motion" shall refer exclusively to that Motion.) Essentially, in that Motion, GE argued that it was undisputed that Schultz should be personally liable to it for $1,150,000 of GE's judgment against Intra-Med.

On August 18, 2007, the trial court entered an order denying GE's Motion for Judgment on the Pleadings, because it found there was a question of fact as to whether Schultz's claim that he was owed $700,000 that he had loaned to Intra-Med would offset the amount claimed by GE. (Appendix 2.) This was not a final and appealable order. (App. 2.)

On August 23, 2007, GE filed a motion stating that based upon the court's August 18, 2007 Order, even if Schultz were granted a credit for the $700,000 of the claimed loan, GE would still be entitled to a judgment against Schultz of $450,000, and asked the court to enter a judgment for that amount as a final judgment. (Appendix 9.)

On September 10, 2007, GE's request for that judgment was heard by the trial court. At that time, Schultz objected, in part, on the grounds that such a judgment should not be entered as a final judgment at that time, because all of GE's other claims against Schultz were still outstanding. GE stated, at that hearing, that because of practical considerations, if the requested $450,000 judgment was entered, it would forego the rest of its claims. At that point, the trial court stated it would be signing GE's tendered judgment.

Although the judgment was signed on September 10, 2007, the clerk's docket showed that the judgment was not mailed to counsel until September 24, 2007. (App. 1.)[1]

On October 3, 2007, Schultz filed a Motion to Alter or Amend the Judgment of September 24, 2007. On October 24, 2007, the trial court entered an Order denying that Motion.

---

[1] Although GE raised the issue that September 10, and not the 24th, was the relevant date for that judgment, Schultz ultimately filed a Supplement to his Motion to Alter or Amend that cited both CR 77.04 and *Fox v. House*, 912 S.W.2d 450, 451 (Ky.App. 1995) for the black-letter proposition that the time for taking any action from a judgment is triggered not by the date the judgment is marked as entered, but by the date of the clerk's notation on the docket of the service of notice of entry. (R. at 1867-1878.)

Thus, under all of the established, relevant law set forth in that Supplement, September 24, 2007 was the trigger date for Schultz to take any action from that judgment, and that should not be an issue in this appeal.

(App. 3.)[2]

On October 23, 2007, Schultz filed his Notice of Appeal from the September 24, 2007 Judgment, and the August 13, 2007 Order underlying it. (R. at 1887-1888). On October 29, 2007, Schultz filed a second Notice of Appeal that added an appeal from the Order of October 24, 2007, denying his Motion to Alter or Amend. (R. at 1889-1890).

These two appeals were consolidated, and were heard by the Court of Appeals. The Court of Appeals, with one judge dissenting, upheld the lower court's judgment. (App. 12.) Schultz moved for discretionary review, and the case is now before this court.

---

[2] In its order, the trial court specifically found: "In Mr. Schultz's motion to alter, amend, or vacate, he raises arguments not in the order the Court signed on September 10, 2007 but the Court's order, which was entered on August 18, 2007. Pursuant to CR 59.05 Mr. Schultz's motion to alter, amend this judgment is not timely." (App. 3.) Schultz submits that the Court's reasoning on that issue was faulty at the outset.

The August 18 Order was not a final and appealable order. (App. 2.) Thus, pursuant to CR 54.02, it was interlocutory and subject to revision at any time prior to entry of a final judgment. Because the final and appealable Judgment of September 24 was based upon the interlocutory Order of August 18, filing a motion under CR 59.05 to the final judgment of September 24 was a procedurally proper way to address any issues with the August 18 Order, especially as they affected that Judgment. Thus, the fact that Schultz's Motion to Alter or Amend the final judgment addressed issues raised in the interlocutory August 18 Order should not be an issue in this appeal.

ARGUMENT

GE should not have received a judgment on the pleadings to pierce the corporate veil against Schultz individually, for four reasons.

First, the specific denials Schultz made to all the allegations in GE's Complaint about piercing the corporate veil precluded GE from receiving a judgment on the pleadings.

Second, the affirmative defenses Schultz plead in his Answer precluded GE from receiving a judgment on the pleadings, because they negated two of the necessary elements for piercing the corporate veil.

Third, Schultz's denials and affirmative defenses created questions of fact that could not be decided in a judgment on the pleadings.

Fourth, GE cannot pierce the corporate veil in this case at all, because it could have asked Schultz to personally guarantee the Lease at the time it was made, and it never did so.

Additionally, even if GE could receive judgment on the pleadings against Schultz, the amount awarded to GE was too much, because GE was claiming that it was entitled to recover the money that was used to buy the real property, and the sale proceeds from the real property, instead of just the sale proceeds.

I. GE's Judgment on the Pleadings Against Schultz Was Improper, Because Schultz Specifically Denied the Allegations in GE's Complaint Regarding All Three of the Essential Elements for Piercing the Corporate Veil.

As noted by Judge Thompson in his dissent, the starting point for consideration in this case has to be that GE received its Judgment against Schultz as a judgment on the pleadings under CR 12.03. (App. 12.) In light of the applicable standards, it is clear that GE could not

receive such a judgment in this case.

In considering a motion for judgment on the pleadings, if the non-moving party has denied any of the movant's allegations, those allegations must be taken as not being true. *Archer v. Citizens Fidelity Bank & Trust Co.*, 365 S.W.2d 727 (Ky. 1963). It is fundamental that a judgment on the pleadings must be entered with caution and can only be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt County*, 104 S.W.3d 757 (Ky. 2001). Thus, in light of notice pleading, a judgment on the pleadings against a defendant who has filed a proper answer is a rarity. *La Vielle v. Seay*, 412 S.W.2d 587 (Ky. 1967).

In its Motion, GE had argued that the pleadings showed it was entitled to pierce the corporate veil against Schultz under the instrumentality theory. (App. 8.) However, GE should not have received a judgment on the pleadings on that theory, because Schultz's Answer specifically denied all of GE's allegations regarding the instrumentality theory.

GE argued in its Motion, using *White v. Winchester Land Development Corp*, 584 S.W.2d 56, 61 (Ky.App. 1979), that the following three elements had to exist for it to obtain judgment on the pleadings:

> (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.

(App. 8.) Because this was a Motion for Judgment on the Pleadings, the trial court could not have found these elements existed, and given GE its judgment, because GE had alleged all

three of these elements in its Complaint, and Schultz had specifically denied those allegations.

- In Paragraph No. 41 of its Complaint, GE alleged that Intra-Med was an instrumentality of Schultz. (App. 6.)
- In Paragraph 44, GE alleged that Schultz "exercised control over Intra-Med in such a way as to defraud or harm GE." (App. 6.)
- In Paragraph 45, GE alleged that a refusal to disregard the corporate form of Intra-Med "would subject GE to an unjust loss". (App. 6.)

In his Answer, Schultz affirmatively denied every one of these allegations. (App. 7, ¶ 18.)

Because Schultz specifically denied those allegations, those allegations must be taken as not true. Because those allegations constituted the three essential elements necessary to pierce the corporate veil, it was fundamental error to grant GE a judgment on the pleadings.

Therefore, the trial court's entry of judgment on the pleadings against Schultz was improper and must be reversed.[3]

---

[3] Schultz would also submit that not only did the trial court err in granting GE a judgment on the pleadings because each one of these elements had to be considered as untrue, but it also erred because it did not specifically find that all three of these elements actually existed in any of its Orders. (See Appendices 1, 2 and 3.) *White* requires that all three elements co-exist for liability to be found. *Supra*. Thus, the trial court's judgment for GE was in error, because not only did it ignore the presumptions in favor of Schultz in considering GE's Motion, but it failed to specifically find that all three of the elements necessary to grant GE's Motion actually existed.

II. GE's Judgment on the Pleadings Against Schultz Was Improper, Because Schultz's Affirmative Defenses Negated Two of the Essential Elements for Piercing the Corporate Veil.

In his Answer, Schultz asserted 22 affirmative defenses to GE's Complaint. (App. 7.) The trial court, in its Order of August 23, 2007, found those defenses would not preclude entry of judgment against Schultz. (App. 2.) Schultz respectfully submits that the trial court's ruling was incorrect. Because Schultz asserted affirmative defenses that negated the essential elements for piercing the corporate veil, that precluded granting a judgment on the pleadings.

In *Sheffer v. Chromalloy Mining and Mineral Div. of Chromalloy Am. Corp.*, 578 S.W.2d 594, 595 (Ky. 1979), the court held that in a motion for judgment on the pleadings, the moving party admits the non-moving party's defenses for purpose of the motion. As the court stated:

> Under the guidelines of *Archer, supra*, the moving party on a motion for a judgment on the pleadings admits for the purposes of the motion the truth or denials of the adversary's pleadings. Applying *Archer, supra*, to this fact situation, appellee as movant admits for the purpose of the motion appellants' defenses. If want of consideration were properly pled, then this defense raises a sufficient defense or material issue precluding a judgment on the pleadings.

Id. See also, Bennett v. Bennett, 477 S.W.2d 799, 800 (Ky 1972) (When a plaintiff moves for judgment on the pleadings, any sufficient defense raised by the non-moving party defeats the plaintiff's motion.)

Applying Schultz's affirmative defenses to the required elements of *White, supra*, finds that GE was never entitled to judgment on the pleadings against Schultz.

A. Schultz's affirmative defenses negated a finding of fraud.

The second essential element to piercing the corporate veil under *White, supra*, that GE

had to satisfy is "that the shareholder exercised control over the corporation in such a way as to defraud or to harm the plaintiff". The court in *White* stated that to satisfy this element, it is necessary to show "the essential elements of fraud, *i.e.* material representation, falsity, scienter, reliance, deception, and injury." *Id.* at 61.

GE's Complaint, although it used the "buzzword" of fraud, did not actually state any allegations that Schultz intentionally made any material misrepresentations of fact to GE, that GE relied upon on any of Schultz's actions, or that GE was deceived by any Schultz's actions. Thus, GE's Complaint failed to allege any of the essential elements of fraud, as required by *White*.

Moreover, Schultz raised the following affirmative defenses in his Answer:

> 14. The Complaint is barred, in whole or in part, because General Electric knew, at the time it entered into its agreements with Intra-Med in July of 2001, that if there was a default and the acceleration clause was invoked, Intra-Med did not have sufficient assets to pay the full amount that was owed.
>
> 15. The Complaint is barred, in whole or in part, because GE had, at the time it entered into the agreements with Intra-Med in July of 2001, full access to Intra-Med's financial information, and still proceeded with the transaction.
>
> 16. The Complaint is barred, in whole or in part, because GE had, at the time it entered into the agreements with Intra-Med in July of 2001, the option of asking Thomas Schultz for an individual guaranty to secure these agreements, and it failed to do so.

(App. 7.) Those affirmative defenses, which must be taken as true, establish that there were no misrepresentations nor any deception by Schultz, nor any reliance by GE. Fraud is an essential element for piercing the corporate veil, and Schultz's affirmative defenses negate that element. Although the Court of Appeals finds that the corporate veil should be pierced under the

instrumentality theory, it doesn't make any mention of fraud, nor make mention of any of the essential elements of fraud, in making that conclusion. (App. 12, pp. 7-8.)

Fraud is an essential element for piercing the corporate veil under *White, supra.* The Court of Appeals, in affirming the trial court's decision, never made any findings regarding the specific elements of fraud, or showed how those elements had been satisfied by the pleadings. Moreover, Schultz's affirmative defenses negate the elements of fraud.

Because nothing in the pleadings would conclusively establish fraud, then GE should never have received a judgment on the pleadings to pierce the corporate veil.

B. Schultz's affirmative defense that GE did not obtain a personal guarantee from him, even though it could have done so, precluded finding on the pleadings that GE suffered an unjust loss.

The third element for piercing the corporate veil that GE had to satisfy under *White, supra,* is "that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss". GE could not obtain a judgment on the pleadings for that element, because it never asked Schultz for a guarantee under the Master Lease Agreement.

This exact situation was addressed by the Court in *White, supra.* There, the court specifically noted the unjust loss element was not satisfied because the bank did not obtain individual guarantees on the loan at issue.

> Suffice it to say here that the bank's loss was not unjust because it could have secured the loan to The White House, Inc., merely by requiring the Whites to sign those notes in their individual and separate capacities.

Id. Other courts that have considered the matter have come to the same conclusion. *See also*: *KMart Corp. v. First Hartford Realty Corp.,* 810 F.Supp. 1316 (D.Conn.1993) (court would not pierce veil of corporation dominated by single individual when plaintiff freely chose to deal

with corporate entity without benefit of personal guarantees); *Truckweld Equipment Co., Inc. v. Olson*, 618 P.2d 1017 (Wash.App. 1980) (corporate veil would not be pierced where supplier of corporation made no effort to obtain sole shareholder's personal guarantee prior to extending credit).

In this case, Schultz's affirmative defenses included:

> 16. The Complaint is barred, in whole or in part, because GE had, at the time it entered into the agreements with Intra-Med in July of 2001, the option of asking Thomas Schultz for an individual guaranty to secure these agreements, and it failed to do so.

(App. 7.) This defenses must be taken as true. *Sheffer, supra*. In *White*, the bank's failure to have the defendants sign notes in their individual capacities meant that the bank would not suffer an unjust loss. Here, Schultz raised the affirmative defense, that must be taken as true, that GE's failure to have Schultz sign an individual guaranty bars GE's meant that GE would not suffer an unjust loss.

Because Schultz's affirmative defense precludes finding, from the pleadings, the third element from *White* that GE's loss was unjust, GE's judgment on the pleadings must be reversed.

III. Schultz's Affirmative Defenses and Denials Created Questions of Fact That Precluded Granting GE a Judgment on the Pleadings.

GE received a judgment on the pleadings against Schultz. However, Schultz denied the key allegations of GE's Complaint, and plead 22 affirmative defenses to GE's Complaint. Those denials and affirmative defenses created various questions of fact that prevented GE from receiving a judgment on the pleadings.

It is fundamental that a judgment on the pleadings can only be granted "if it appears

beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt County*, 104 S.W.3d 757 (Ky. 2001).

The court in *White* made it clear that the three required elements for piercing the corporate veil are very fact sensitive.

> While these two formulations are helpful as an analytical framework, issues of "alter ego" do not lend themselves to strict rules and prima facie cases: whether the corporate veil should be pierced **depends upon the innumerable equities of each case.**

Id. at 62. (Emphasis added.)

In this case, Schultz's affirmative defenses, as set out above, created issues of fact that would enable him to defeat GE's claim. Additionally, Schultz raised the following affirmative defenses:

> 5. The allegations in Paragraph Nos. 16, 17 and 18 are barred, in whole or in part, because Schultz only charged minimal, below market rent to Intra-Med to use his property for its business.
>
> 20. GE's Complaint is barred, in whole or in part, to the extent it failed to mitigate its damages.

(App. 7.) Both of those affirmative defenses created numerous questions of fact that cannot be resolved on the face of the pleadings.

Moreover, GE's own discovery answers (although going beyond the face of the pleadings) show the existence of factual disputes regarding these issues.

In Request for Admission Nos. 15 and 16, GE was asked:

> 15. Schultz charged Intra-Med rent at a below market rate for its use of the premises at 8700 Dixie Highway.
> 16. Schultz could have paid for all costs associated with the premises at 8700 Dixie Highway with his own personal funds, and then charged Intra-Med a higher rent then he did charge it.

(App. 10.) GE answered both of these Requests, in part, by saying "the GE Plaintiffs state that they cannot admit or deny this allegation." (App. 10.) Thus, there is a genuine issue of fact as to whether GE has a valid claim with regard to the disposition of the Dixie Highway property.

Further, in Interrogatory No. 2, when asked about communications related to the possible sale of GE's machines to Jewish Hospital, which would have mitigated GE's damages, GE stated, in part:

> GE had communications with Mark Carter of Jewish Hospital regarding assuming the leases of the equipment at Intra-Med's Dixie Highway location. Neither Intra-Med, Schultz, or Jewish Hospital would cure the arrearages on the leases in question. As such, Jewish Hospital advised GE that it would not assume the leases on the GE Plaintiffs' equipment located at Intra-Med's Dixie Highway location.

(App. 11.) Certainly, this statement by GE raises genuine issues of material fact regarding GE's mitigation of damages.

Schultz's Answer raised several affirmative defenses which, on a Motion for Judgment on the Pleadings, have to be accepted as true. Moreover, the discovery in this case shows that there are legitimate questions of fact regarding those affirmative defenses.

As stated by *White, supra*, the resolution of this case depends upon "innumerable equities". Schultz's affirmative defenses create numerous factual questions that would be a factor in weighing those equities.

Further, Schultz had denied GE's allegation that it would suffer an unjust loss if the corporate veil was not pierced. GE's original action against Intra-Med was that Intra-Med had defaulted on the terms of its Lease, and the majority of its judgment against Schultz were the damages invoked by virtue of the acceleration clause in the Lease. GE ultimately repossessed the

equipment, and recovered $700,000 of its judgment against Intra-Med. Thus, the question of whether GE would suffer an unjust loss merely because it could not recover the rest of its damages under the Lease's acceleration clause against Schultz personally is both a question of fact and an equitable determination that cannot be decided on the pleadings.

The trial court and Court of Appeals found that these denials and defenses were not enough to defeat a judgment on the pleadings. However, in making that finding, the courts short circuited the trial process, and made judgement calls that were inappropriate for a judgment on the pleadings. For example, in its Opinion, the Court of Appeals stated that the lack of a personal guaranty was "just another factor to be considered when balancing the equities of this case". (App. 12, p. 9.) It also stated, "We find Mr. Schultz's blatant use of corporate funds as his own outweighs the lack of a personal guarantee." (App. 12, p. 9.) (Emphasis added.)

That analysis by the Court of Appeals would have been appropriate if it was reviewing a judgment made by the trial court after a trial. But, Schultz submits this was completely improper to "balance" various factors in deciding a judgment on the pleadings. Because the lower courts were weighing the factors to be considered in piercing the corporate veil against each other, they were, by definition, not ruling on GE's motion as a motion on the pleadings.

Schultz was denied his day in court because the lower courts applied the wrong standard in ruling on this case as a judgment on the pleadings, and that is a manifest injustice that should be reversed. Because Schultz's affirmative defenses and denials create genuine questions of fact that precluded GE from receiving a judgment on the pleadings, that judgment must be reversed.

IV. GE's Judgment Should Be Reversed, Because GE's Failure to Ask Schultz to Personally Guarantee These Leases, When it Could Have Done So, Precludes it from Ever Piercing the Corporate Veil, Because it Would Not Suffer an Unjust Loss.

As shown above, the fact that GE failed to ask Schultz to personally guarantee these leases, when it could have done so, constituted an affirmative defense that precluded GE from receiving a judgment on the pleadings. However, in this case, GE's failure to do so not only means that GE's judgment should be reversed, but it should be precluded from ever piercing the corporate veil against Schultz in this case.

The third element that GE must satisfy is to pierce the corporate veil is "that a refusal to disregard the corporate entity would subject the plaintiff to unjust loss". As stated above, the court in *White, supra*, noted that element was not satisfied because the bank did not obtain individual guarantees on the loan at issue. That same argument directly applies here, with even more force.

GE has affirmatively admitted that GE could have conditioned its approval of the July 27, 2001 Master Lease Agreement upon receiving a personal guaranty from Schultz, and that it did not request such a guaranty. (See Appendix 10, Request Nos. 1 and 2.)

GE is the world's second largest corporation, with annual revenue of over 150 billion dollars. (*Financial Times Global 500*, September 28, 2007.) GE is certainly a sophisticated enough entity that it could have examined Intra-Med's financial records and understood the possibility that if it defaulted on the Lease, and triggered an acceleration clause that could run into the millions of dollars, that it would not be able to pay that out of corporate funds. GE also is sophisticated enough to know that having Schultz sign a personal guarantee would be a possible

"hedge" against such an event. There is no allegation that GE never had ample opportunity to examine Intra-Med's records and/or to require Schultz to sign a personal guarantee for the Lease.

If Winchester Bank's loss in *White* was not unjust because it failed to obtain individual guarantees on the loan at issue, then certainly, GE's loss is not unjust, when it failed to have Schultz sign a personal guarantee for these contracts.

In its Opinion, the Court of Appeals stated that lack of a personal guarantee could not be dispositive of the issues, because otherwise, "the entire concept of piercing the corporate veil would be obsolete and irrelevant." (App. 12, p. 9.) However, that conclusions is simply not true.

First, the concept of piercing the corporate veil applies to judgments derived from all kinds of cases, while the issue of a guarantee only comes into play for judgments based upon contracts. Thus, it would still apply to judgment based upon torts and other causes of action.

Second, both *White* and this case involve sophisticated commercial plaintiffs who failed to ask for a personal guarantee for contracts involving small, closely held corporations, and there is no proof of fraud in the underlying transaction. Because the concept of unjust loss is an individualized, equitable determination, there are certainly other factual scenarios where the failure of a contract plaintiff to get a personal guarantee would not be a bar to piercing the corporate veil. For example, if a plaintiff didn't ask for a personal guarantee because a corporation's shareholder committed fraud by presenting false financial statements to the plaintiff, that would not be a bar to piercing the corporate veil.

Under the facts of this case, as established by the pleadings, GE could have asked for a personal guarantee, and failed to do so. Thus, GE should never be able to pierce the corporate veil at all.

V. Even if GE Was Entitled to a Judgment, the Amount of GE's Judgment Was Too Much, Because GE Cannot Recover Both the Intra-Med Funds That Were Used to Buy and Improve the Dixie Highway Property and the $850,000 That Schultz Received upon the Sale of the Property.

In its original Motion for Judgment on the Pleadings, GE asked for a $1,150,000 judgment based upon the allegations in paragraphs 14-21 of its Complaint. (Appendix 6.) A major portion of those allegations were that Schultz used Intra-Med's funds to buy and improve real property on Dixie Highway, and then, when the property was sold, kept the $850,000 in sale proceeds. (App. 6, ¶¶ 16 and 17.)

Schultz submits GE's judgment must be reversed because it should never have been granted. However, if GE was entitled to a judgment, the amount of that judgment was too much. GE's judgment should be reversed, in part, to subtract the amount that was claimed for the purchase and improvement of the Dixie Highway property.

GE never specifically itemized how much it was claiming was spent to buy and improve the Dixie Highway property in its Complaint or its Motion for Judgment on the Pleadings. (App. 6 and App. 8.) However, the $1,150,000 that GE was seeking through this its Motion for Judgment on the Pleadings breaks down as follows.

- Intra-Med funds used to buy New LaGrange Road property - $50,000. (Complaint, App. 6, ¶ 14.)
- Amount received for sale of Dixie Highway property - $850,000. (Complaint, App. 6, ¶ 17.)
- Amount spent for marina slip - $23,000. (Complaint, App. 6, ¶ 19.)

These amounts total $923,000. By subtracting the $923,000 from the $1.15 million, it

appears that GE was claiming $227,000 for the money spent to buy and improve the Dixie Highway property. (Complaint, App. 6, ¶ 16.) It was improper for GE to include that $227,000 in what it was seeking to recover.

The heart of GE's claim is that Schultz used "Intra-Med funds for his own personal gain." (GE Motion, App. 8, p. 4.) However, the use of Intra-Med funds to buy and improve the Dixie Highway property was not the use of Intra-Med's funds for his own personal gain. In fact, there was not any alleged gain by Schultz whatsoever from just the purchase and improvement of the Dixie Highway property. The only alleged gain occurred when the property was sold, and Schultz kept the proceeds.

The core of GE's complaint with regard to the Dixie Highway property is that it was improper to use Intra-Med funds to buy the property, and for Schultz to *then* keep the sale proceeds. Thus, it is only the $850,000 in sale proceeds, and not the money used to buy the property, that GE would even have a claim for.

For example, if the Dixie Highway property had been sold and the money had gone directly to GE for Intra-Med's debt as GE claims it should have, GE would have no claim that it should then be able to *also* recover from Schultz the Intra-Med money that was used to buy and improve the property to begin with. That scenario illustrates how GE's claim with the Dixie Highway property is impermissible "double dipping."

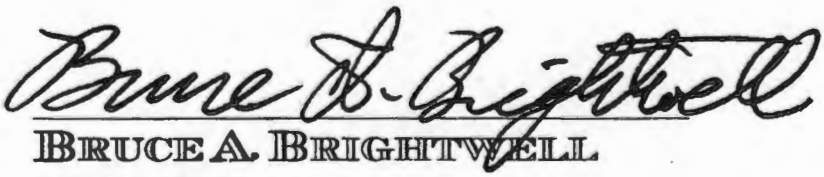
GE's only possible claim for the Dixie Highway property is for the $850,000 that Schultz received upon the sale of the property. Thus, the only amount that was even properly claimed by

could have asked Schultz to personally guarantee the Master Lease Agreement at the time it was made, and it never did so.

Additionally, even if GE could receive judgment on the pleadings against Schultz, the amount awarded to GE was too much, and the judgment should be reversed in part, to $223,00.

Thus, GE's judgment on the pleadings should be reversed, and the case remanded to the trial court to enter a judgment in favor of Schultz because of GE's failure to ask for a guarantee, or, in the alternative, to allow the case to proceed to trial on the merits.

Respectfully submitted:



BRUCE A. BRIGHTWELL
1212 State Street
New Albany, Indiana 47150
(812) 542-0007
bruce@brightwell-law.com
Counsel for Appellant, Thomas Schultz