[Cite as *Stewart v. R.A. Eberts Co., Inc.*, 2009-Ohio-4418.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

William Stewart d/b/a Stewart Coal Company,	:	
Plaintiff-Appellant,	:	Case No. 08CA10
v.	:	
R.A. Eberts Company, Inc., et al.,	:	DECISION & JUDGMENT ENTRY
Defendants-Appellees.	:	
		Released 8/18/09

APPEARANCES:

Charles F. Shane and David C. Greer, Bieser, Greer & Landis LLP, Dayton, Ohio, for appellant.

Thomas M. Spetnagel and Paige J. McMahon, Chillicothe, Ohio, for appellees R.A. Eberts, LLC, William R. Parks, T.L. Darlington, Scot Parks and Denton Bowman.

William C. Martin, Jackson, Ohio, for appellees Phil Bowman, R.A. Eberts Co., Inc. and Waterloo Coal Company, Inc.

BRYANT, J.

{¶1} Plaintiff-appellant, William Stewart d/b/a Stewart Coal Company ("Stewart"), appeals from a June 11, 2008 judgment of the Jackson County Court of Common Pleas granting partial summary judgment in favor of defendants-appellees, William R. Parks, T.L. Darlington, Scot Parks, Denton Bowman, and Phil Bowman (the "individual defendants"), concluding Stewart failed to meet the requirements of the test established in *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, that would allow Stewart to pierce the corporate veil and subject the individual defendants to personal liability for money purportedly owed to Stewart under a 1995

purchase agreement between R.A. Eberts, Inc. and Stewart. Timely appealing the June 11, 2008 summary judgment order upon the trial court's express determination pursuant to Civ.R. 54(B) that "no just reason for delay" exists, Stewart assigns a single error:

> SUMMARY JUDGMENT WAS IMPROPERLY GRANTED WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT WHEREBY REASONABLE MINDS COULD COME TO THE CONCLUSION THAT THE CORPORATE VEIL OF THE CORPORATE-APPELLEES COULD BE PIERCED SUBJECTING THE INDIVIDUAL SHAREHOLDER DEFENDANTS/APPELLEES TO BE SUED IN THEIR INDIVIDUAL CAPACITIES.

Because the amended complaint's allegations, supported with evidence in the record that creates a genuine issue of material fact, are sufficient for Stewart to seek to pierce the corporate veil, we reverse the trial court's judgment and remand this cause for further proceedings.

I. Procedural History

{¶2} On June 30, 1995, Stewart and R.A. Eberts, Inc. ("Eberts Inc.") executed a purchase agreement in which Stewart agreed to sell all of his interests in a coal mining operation to Eberts Inc. for the total purchase price of $3,500,000. Pursuant to the terms of the purchase agreement, Eberts Inc. agreed to: (1) pay Stewart $475,000 in cash when the parties executed the agreement, (2) assume approximately $1,588,195 in debt Stewart owed, (3) make royalty payments to Stewart for the remaining balance of $1,436,805 at a rate of $1.00 for each ton of coal mined, but not less than a minimum monthly royalty of $5,000, and (4) pay Stewart the total amount due under the agreement by June 30, 2003.

{¶3} On October 14, 2003, Stewart filed a complaint against Eberts Inc. and its officers, directors, and shareholders. Stewart claimed, in part, that Eberts Inc. breached the terms of the June 30, 1995 purchase agreement by stopping its royalty payments to him (the "Stewart royalty liability") and, as a consequence, failing to pay him the total amount due under the contract by June 30, 2003. In January 2005, Stewart amended the complaint to add a count in which he sought to pierce the corporate veil of Eberts Inc. and impose personal liability on Eberts Inc.'s officers, directors, and shareholders for the corporation's alleged breach of contract.

{¶4} Ultimately, in March 2007, Stewart amended his complaint a third time (the "amended complaint") to join Scot Parks, Denton Bowman, Waterloo Coal Co., Inc. ("Waterloo"), and R.A. Eberts, LLC ("Eberts LLC") as additional defendants. Claiming all defendants were jointly and severally liable for approximately $920,776 in damages that Stewart purportedly suffered as a result of the alleged breach, the amended complaint again sought to pierce the corporate veil and subject all of the individual defendants to personal liability for Stewart's alleged damages.

{¶5} After discovery concluded, defendants-appellees moved for summary judgment, attaching an affidavit of T.L. Darlington in sole support of their motion. Defendants-appellees contended, in relevant part, that Stewart cannot satisfy the first two prongs of the test established in *Belvedere* to pierce the corporate veil and subject the individual defendants to personal liability.

{¶6} In his memorandum contra, Stewart argued that the documentary evidence he submitted demonstrated material questions of fact remain for a jury's consideration as to whether the corporate veil can be pierced and the individual defendants be held

personally liable for the wrongful acts of the defendant corporations. Stewart's evidentiary materials included numerous documents defendants produced during discovery, together with depositions of the individual defendants and two other persons who are not parties to this action: Joseph Saloom, a certified public accountant who provided financial services for defendants, and Rita Edwards, who performed accounting services for and was familiar with financial matters concerning defendants.

{¶7} According to Stewart's documentary evidence, Eberts Inc. was severely undercapitalized and losing money when it entered into the June 1995 purchase agreement with Stewart, and it continued to be insolvent until December 1998, when it ceased operations. The corporation remained insolvent throughout a winding up of its corporate affairs until it was formally dissolved in February 2001.

{¶8} Pursuant to a December 21, 1998 agreement that the officers of Eberts Inc. and Waterloo signed, all of Eberts Inc.'s assets *and liabilities* were to be transferred to Waterloo, a highly capitalized mining corporation that in 1999 had over 30 million dollars in assets and several million dollars in retained earnings. From 1995 until the end of 1998 or beginning of 1999, Eberts Inc. and Waterloo had the same officers, directors and shareholders: Phil Bowman, William Parks, and T.L. Darlington. On December 31, 1999, Darlington, William Parks, and Phil Bowman, as Eberts Inc.'s officers and shareholders, signed a resolution to liquidate the corporation and transfer its real estate and tangible assets to Waterloo and to transfer the corporation's intangibles and all of its substantial liabilities, including the Stewart royalty liability, to Eberts LLC, a newly-formed business entity.

{¶9} According to Darlington, when Eberts Inc. closed, it simply reopened in 1999 as Eberts LLC with two of Eberts Inc.'s original owners, William Parks and Darlington, and two new owners, Scot Parks and Denton Bowman, who together acquired Phil Bowman's former interest. Since 1999, these four individuals have been the sole officers, directors, and shareholders of Waterloo and co-owners of Eberts LLC. Documentary evidence shows that Eberts LLC was intended to be a limited liability partnership, but defendants failed to "file the appropriate certificates necessary to alter the nature of [Eberts LLC's] general partnership." (Darlington affidavit, ¶14.) Documentary evidence Stewart submitted demonstrated Eberts LLC has been insolvent, has had no active business operations to generate income, and has had no payroll since the business entity was created and assumed Eberts Inc.'s liabilities.

{¶10} Rita Edwards stated Darlington made the decision to put the Stewart royalty liability on the books of Eberts LLC instead of Waterloo; she stated Waterloo has never had the Stewart royalty liability on its books. (Edwards depo., 24-25.) The evidence is undisputed that after Eberts LLC assumed the Stewart royalty liability, it paid some royalties to Stewart but then stopped making the payments. Eberts LLC's most recent balance sheet, which defendants produced during discovery and Stewart submitted as documentary evidence, reflects Eberts LLC has an outstanding long-term liability of $920,766 for the "Stewart Royalty Liability."

{¶11} On June 11, 2008, the trial court entered a decision and order granting defendants-appellees' motions for summary judgment "as to the issue of the liability of the corporate officers and shareholders." Specifically, the trial court found Stewart failed to satisfy the second and third prongs of the *Belvedere* test and therefore "could not pierce

the corporate veil and seek individual liability against Defendants William R. Parks, T.L. Darlington, Scot Parks, Denton Bowman and Phil Bowman." Although Eberts LLC joined defendants-appellees in seeking summary judgment, the trial court made no determinations or ruling concerning the issue of Eberts LLC's liability, either as a business entity or through its owners individually. In a July 22, 2008 agreed entry and order, the trial court declared the June 11, 2008 decision to be final and appealable pursuant to Civ.R. 54(B) and stayed all claims not resolved on summary judgment pending Stewart's appeal to this court.

II. Assignment of Error

{¶12} In his appeal, Stewart asserts the trial court erred in granting summary judgment and preventing him from seeking to pierce the corporate veil. Stewart contends the facts set forth in the amended complaint, together with documentary evidence submitted in support, are sufficient to withstand summary judgment and enable a jury to consider whether he successfully can pierce the corporate veil in this case.

{¶13} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶14} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The moving party, however, cannot discharge its initial burden under this rule with a conclusory assertion that the non-moving party has no evidence to prove its case; the moving party must specifically point to evidence of a type listed in Civ.R. 56(C), affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. Id.; *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259; *Blood v. Nofzinger,* 162 Ohio App.3d 545, 2005-Ohio-3859, ¶25. An affidavit that contains only conclusory assertions is insufficient to demonstrate a lack of genuine issues of material fact as to the elements of a plaintiff's claim. Id. at ¶26. Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing that a genuine issue exists for trial. *Dresher* 293; *Vahila* 430; Civ.R. 56(E). See also *Castrataro v. Urban* (Mar. 7, 2000), 10th Dist. No. 99AP-219.

{¶15} The general rule is that corporations are legal entities distinct from the natural persons who compose them; therefore, officers, directors, and shareholders are not normally liable for the debts of their corporations. *Belvedere* 287. "Because '[o]ne of the purposes of incorporation is to limit the liability of individual shareholders,' the party seeking to have the corporate form disregarded bears the burden of proof." *RCO Internatl. Corp. v. Clevenger,* 180 Ohio App.3d 211, 2008-Ohio-6823, ¶10, quoting *Univ. Circle Research Ctr. Corp. v. Galbreath Co.* (1995), 106 Ohio App.3d 835, 840, citing Section 3, Article XIII of the Ohio Constitution.

{¶16} In *Belvedere,* the Supreme Court of Ohio held that in order to pierce the corporate veil and impose personal liability upon shareholders, the person seeking to pierce the corporate veil must show that: (1) those to be held liable hold such complete control over the corporation that the corporation has no separate mind, will, or existence of its own; (2) those to be held liable exercise control over the corporation in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. Id. at paragraph three of the syllabus.

{¶17} Here, in granting summary judgment for the individual defendants on the issue of their liability as corporate officers, directors, and shareholders, the trial court concluded plaintiff failed to meet the requirements of *Belvedere*. In addressing the second prong of the three-pronged *Belvedere* test, the trial court determined Stewart failed to establish that "control over the corporation by those to be held liable was exercised in such manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity." (June 11, 2008 Decision & Order.) The trial court noted "[t]he only allegation that could relate to this branch is that the assets and liabilities of R.A. Eberts, Inc. were transferred to the limited partnership, R.A. Eberts, LLC" and the court then noted "[t]he assets and liabilities of R.A. Eberts, LLC were subsequently assumed by Defendant Waterloo Coal Company, Inc." Id. The trial court determined "Plaintiff has failed to set forth any facts which show this transfer was committed for the purpose of defrauding Plaintiff." Id. Finally, the trial court stated, "as to the third prong of the test set forth in *Belvedere,* Plaintiff has failed to show the loss that allegedly resulted was caused by the actions of the shareholders of the corporation." Id.

{¶18} Stewart contends the trial court's decision was based upon an unduly restrictive interpretation of the second prong of the *Belvedere* test. Stewart argues Ohio courts have held the second prong of the test is satisfied upon a showing of "unjust or inequitable conduct" in addition to "fraud or an illegal act." See, e.g., *Sanderson Farms, Inc. v. Gasbarro,* 10th Dist. No. 01AP-461, 2004-Ohio-1460, ¶38-39; *Stypula v. Chandler,* 11th Dist. No. 2002-G-2468, 2003-Ohio-6413, ¶19; *Robert A. Saurber Gen. Contractor, Inc. v. McAndrews,* 12th Dist. No. CA2003-09-239, 2004-Ohio-6927, ¶34; *Wiencek v. Atcole Co., Inc.* (1996), 109 Ohio App.3d 240, 244. Stewart claims he satisfied the second and third prongs of the *Belvedere* test when he presented facts showing that the individual defendants exercised control over the defendant corporations in such a manner as to cause "unjust or inequitable consequences" to Stewart, namely, the loss of more than $900,000 owed to him under the 1995 purchase agreement.

{¶19} Subsequent to the trial court's decision in this matter, the Supreme Court of Ohio squarely addressed the central question posited here: "what conduct must be demonstrated to fulfill the second prong of the test for piercing the corporate veil created in *Belvedere." Dombroski v. WellPoint, Inc.,* 119 Ohio St.3d 506, 2008-Ohio-4827, ¶15. In answering the question, the court rejected a proposal to liberally construe the second prong to include "unjust or inequitable conduct" not rising to the level of "fraud or an illegal act." Id. at ¶20-27, abrogating *Stypula, Sanderson Farms, Saurber Gen. Contractor,* and *Wiencek,* supra. The court reasoned that such a construction would mean "virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action[.]" *Dombroski,* ¶27. Despite its reluctance to broadly construe *Belvedere's* second prong to include "unjust or inequitable conduct," the Ohio Supreme

Court concluded the test in *Belvedere*, if construed too strictly, "insulates shareholders when they abuse the corporate form to commit acts that are as objectionable as fraud or illegality" and thus is too limited to protect potential parties from the wide variety of egregious shareholder misdeeds that may occur. Id. at ¶28.

{¶20} In resolving the tension between the two constructions, the court found a limited expansion of the *Belvedere* test necessary in order to allow the corporate veil to be pierced when a plaintiff demonstrates a defendant shareholder has exercised control over a corporation in such a manner "as to commit fraud, an illegal act, *or a similarly unlawful act.*" (Emphasis added.) *Dombroski,* syllabus (modifying *Belvedere*). The court emphasized, however, that "[c]ourts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct." Id. at ¶29.

{¶21} In this case, the trial court properly declined to broadly construe the second prong of the *Belvedere* test to include "unjust or inequitable conduct" not rising to the level of "fraud, an illegal act, or a similarly unlawful act." *Dombroski,* syllabus. The trial court erred, however, in determining Stewart failed to set forth sufficient facts that created a genuine issue of fact under the second and third prongs of the test clarified in *Dombroski*. In particular, the trial court erred in focusing primarily, if not exclusively, on the allegations of Stewart's complaint.

{¶22} "Under the Ohio Rules of Civil Procedure, a complaint need only give the defendant fair notice of a desired claim and an opportunity to respond." *RCO Internatl. Corp.* at ¶11, citing *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26, 31. " 'Piercing the corporate veil is not a claim, it is a remedy encompassed within a claim.

It is a doctrine wherein liability for an underlying tort may be imposed upon a particular individual.' " Id., quoting *Geier v. Natl. GG Industries, Inc.* (Dec. 23, 1999), 11th Dist. No. 98-L-172. In accord *Trinity Health System v. MDX Corp.,* 7th Dist. No. 07-JE-18, 2009-Ohio-417, ¶26 (stating " 'piercing the corporate veil' is not a cause of action in and of itself, but rather, is a legal rule or doctrine that permits a court to disregard the formal corporate structure so that individual shareholders may then be held liable for the action of the corporation").

{¶23} Here, the amended complaint alleges, in pertinent part, that "[i]n December of 1998, Eberts, Inc. was dissolved and by proported corporate resolution or record, all of its assets and liabilities were to be transferred to Waterloo" but "[c]ontrary to corporate resolution or record, the Stewart liability resulting from the Purchase Agreement was transferred to a newly-formed entity named R.A. Eberts, LLC." (Amended Complaint, ¶4 and ¶5.) In seeking to pierce the corporate veil, the amended complaint further alleges the individual defendants not only "exercised such dominion and control over Eberts, Inc. and/or Waterloo and/or Eberts, LLC that the entities had no separate mind, will or existence of their own" but also that "such entities were at all relevant times undercapitalized," and the individual defendants "failed to follow the legal corporate formalities permitting a corporate shield." (Complaint, ¶21.) According to the complaint, the individual defendants used their "dominion and control of Eberts, Inc. and/or Waterloo and/or Eberts, LLC * * * to commit fraud and illegal acts by dissolving Eberts, Inc. and reconstituting it as Eberts, LLC and in transferring and disposing of assets of Eberts, Inc. and/or Waterloo and/or Eberts, LLC," all "in an effort to frustrate Plaintiff's attempts to collect under the Purchase Agreement." (Complaint, ¶22.) The complaint asserts that

"[a]s a direct and proximate result [of] the Individual Defendants' fraud and illegal acts," plaintiff was damaged "in an amount in excess of Twenty-five Thousand and No/100 Dollars ($25,000.00)." (Complaint, ¶23.) Finally, the complaint alleges "[t]he Individual Defendants are all jointly and severally liable." (Complaint, ¶24.)

{¶24} Plaintiff's allegations are sufficient to notify defendants of Stewart's attempt to pierce the corporate veil and subject the individual defendants to personal liability for damages Stewart purportedly suffered as a result of the alleged breach of the 1995 purchase agreement. Specifically, the second and third requirements for piercing the corporate veil are satisfied in Stewart's allegations that the individual defendants exercised dominion and control over the defendant corporations in such a manner as "to commit fraud and illegal acts by dissolving Eberts, Inc. and reconstituting it as Eberts, LLC" and by transferring and disposing of assets and liabilities "in an effort to frustrate Plaintiff's attempts to collect under the Purchase Agreement," resulting in unjust losses to him of more than $900,000.

{¶25} Essentially, the allegations assert the defendant shareholders, acting through the defendant corporations, committed "fraud and illegal acts" in the form of fraudulent transfers when they transferred and disposed of assets and liabilities with the intent to hinder, delay or defraud Stewart as a creditor. See generally Ohio's Uniform Fraudulent Transfer Act ("UFTA"), R.C. Chapter 1336, and *Carter-Jones Lumber Co. v. Denune* (1999), 132 Ohio App.3d 430, 434, discretionary appeal not allowed, 86 Ohio St.3d 1443 (determining a plaintiff need only show standing as a creditor and a transfer to hinder, delay, or defraud collection by the creditor in order to establish a fraudulent transfer). See also *Blood v. Nofzinger,* 162 Ohio App.3d 545, 2005-Ohio-3859; *Atlantic*

Veneer Corp. v. Robbins, 4th Dist. No. 01CA678, 2002-Ohio-5363; *Lesick v. MedGroup Mgt., Inc.* (Oct. 29, 1999), 1st Dist. No. C-990097, discretionary appeal not allowed (2000), 88 Ohio St.3d 1432*; Permasteelisa CS Corp v. The Airolite Co.* (S.D.Ohio, Dec. 31, 2007), No. 2:06-CV-569, 2007 WL 4615779. In a case involving a fraudulent transfer, the creditor may obtain damages and "any other relief that the circumstances may require," including punitive damages and attorney fees if warranted. See R.C. 1336.07(A)(3)(c) and 1336.10; *Blood,* ¶59-60.

{¶26} Unlike common-law fraud that must be pleaded with particularity under Civ.R. 9(B), no similar requirement applies when the issue of a fraudulent conveyance is raised. *Wagner v. Galipo* (1990), 50 Ohio St.3d 194, 197; *Atlantic Veneer Corp.*, ¶49-51; *Carter-Jones,* 434-35; *RCO Internatl. Corp.,* ¶11; *Geier,* supra. A creditor also need not prove the elements of common-law fraud in order to establish a fraudulent transfer. *Lesick*, citing *Comer v. Calim* (1998), 128 Ohio App.3d 599. Fraud is imputed to the debtor when the statutory elements of a fraudulent transfer have been met. Id.; *Locafrance United States Corp. v. Interstate Dist. Servs., Inc.* (1983), 6 Ohio St.3d 198, 200. See R.C. 1336.04(A)(1) (providing a transfer made or an obligation incurred by a debtor is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation with "actual intent to hinder, delay, or defraud" the creditor), and R.C. 1336.05 (providing a transfer made or an obligation incurred by a debtor is fraudulent as to a creditor if the debtor either (a) "made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as the result of the transfer or obligation" or (b) made a transfer to an insider at the time the debtor is

insolvent, and the insider had reasonable cause to believe the debtor was insolvent). Thus, to the extent the trial court determined the allegations in Stewart's complaint were insufficient, the court erred.

{¶27} In addition, despite the evidence Stewart submitted in connection with his memorandum contra to support the allegations of his complaint, we cannot discern what consideration, if any, the trial court gave to that documentary evidence. The issue before the trial court was procedurally postured as a motion for summary judgment, not a motion to dismiss; the trial court was required to construe the evidence in a light most favorable to Stewart, as the nonmoving party, and determine whether Stewart raised a genuine issue of material fact as to an element of the test for piercing the corporate veil.

{¶28} Our de novo review reveals initially that defendants failed to discharge their initial burden under Civ.R. 56 because instead of pointing to specific places in the record supporting assertions made in their summary judgment motions, they instead relied solely on Darlington's affidavit, which contains only conclusory assertions. Such conclusions are insufficient to demonstrate that no genuine issues of material fact exist in this case. *Dresher* 293; *Vahila; Blood,* ¶26. Moreover, contrary to the decision of the trial court, Stewart presented sufficient facts to withstand summary judgment on the second and third prongs of the test for piercing the corporate veil, as the evidence regarding the post-1995 transfers of assets and liabilities by and between the various defendant entities creates genuine issues of material fact.

{¶29} We note the trial court's decision does not address the first prong of that test. Thus, we are uncertain whether the trial court found Stewart presented sufficient facts which, if proven, demonstrate "control over the corporation by those to be held liable

was so complete that the corporation has no separate mind, will or existence of its own." *Belvedere,* paragraph three of the syllabus.

{¶30} Also unclear is whether the trial court dismissed the individual defendants from Stewart's action when it granted summary judgment in their favor. Parenthetically, if evidence at trial establishes that Eberts LLC was a common-law partnership rather than a limited liability partnership or corporation during the relevant time periods, the individual defendants that are members of the partnership may be subject to individual liability for wrongful acts the partnership committed. See generally R.C. Chapter 1775 (Ohio's uniform partnership law), and see R.C. 1775.14 and 1705.48(C). Each of the individual defendants is also subject to potential liability for any of his individual wrongful conduct against Stewart because neither the corporate shield nor a shield of limited liability insulates a wrongdoer from liability for his or her own tortious acts. *Dombroski,* ¶17, citing *Belvedere* 287; *Gator Dev. Corp. v. VHH, Ltd.,* 1st Dist. No. C-080193, 2009-Ohio-1802, ¶38; *Atram v. Star Tool & Die Corp.* (1989), 64 Ohio App.3d 388, 393.

{¶31} While we are uncertain concerning the noted portions of the trial court's judgment, we conclude the trial court erred to the extent it determined that Stewart's complaint insufficiently alleges the second and third prongs of the *Belvedere* test or that Stewart failed to present evidence creating a genuine issue of fact under those two prongs. Accordingly, we sustain Stewart's assignment of error. In so doing, however, we cannot and do not express an opinion as to the ultimate merit of Stewart's claims. The trial court's June 11, 2008 order granting partial summary judgment is reversed, and this case is remanded for further proceedings in accordance with law and this opinion.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellees shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

*Sadler, J. & Brown, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Peggy L. Bryant, Judge*

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

*Peggy L. Bryant, Lisa L. Sadler, and Susan Brown, from the Tenth Appellate District, sitting by assignment of the Supreme Court of Ohio in the Fourth Appellate District.