

2012 WL 1119870 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

WAGONER CARE CENTER, L.L.C. d/b/a Wagoner Care Center, Plaintiff/Appellant,

v.

THE HONORABLE DARRELL SHEPHERD, DISTRICT JUDGE FOR THE
FIFTEENTH JUDICIAL DISTRICT, Wagoner County, Oklahoma, Defendant/Appellee.,

v.

The Estate of Edna Irene GEURIN, Real Party in Interest.

No. 110365.

March 5, 2012.

Supreme Court No. 1103665 District Court of Wagoner County, Oklahoma

Case No. CJ-2009-0595

The Honorable Darrell Shepherd, District Judge

Response Brief On Behalf of Respondent and Real Party in Interest

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***1 I**

ASSUMPTION OF JURISDICTION AND ISSUANCE OF A WRIT OF PROHIBITION

Petitioner, Wagoner Care Center, L.L.C., requests that this Court issue the extraordinary Writ of Prohibition to the Honorable Darrell Shepherd, because he followed case law allowing the Plaintiff in the underlying action, The Estate of Edna Irene Geurin, to amend her petition to assert the legal theory of piercing the corporate veil and holding the individual owners responsible for the death of Edna Irene Geurin. Thus, the first decision for this Court is whether or not, in the exercise of its sound discretion, the Court desires to assume jurisdiction to grant the requested Writ and whether the circumstances of this case are such that a Writ of Prohibition is appropriate.

In exercising its discretion, the Oklahoma Supreme Court considers the limited role of its original jurisdiction as well as the competing demands upon its time in performing its appellate *2 functions.¹ The Court noted in its Opinion, “Naturally all litigants would like, in the first instance, to step into this court of last resort, thereby avoiding the expense and delay incident to appeal, but the interests of the whole people of the sovereign state are paramount to those of the individual litigants...” This

Court has previously noted that it must not be led too far astray from its appellate work, as this court, was by the framers of the Constitution, intended primarily as an appellate court.²

Respondent would point out to the Court that the case in which the writ is requested presents a private controversy and specifically, as in the cited case above, involves private litigants, private contract and alleged tortious conduct of private parties, and thus is not a case where a great public concern is involved or where a great injury will be suffered by a failure to exercise original jurisdiction.³

The requested writ of prohibition arises from the Trial Court following established case law and allowing an amendment to a petition. An adequate remedy exists by means of appeal and thus, considering that a writ of prohibition is only issued with forbearance and caution and only in cases of necessity and not in a doubtful case, the writ in this matter should be denied.⁴

II

COURT ALLOWING PLAINTIFF TO AMEND HER PETITION

Plaintiffs 4th and 5th Interrogatories signed for respectively on September 1, 2011 and October 6, 2011 requested the Defendant provide to Plaintiff information about ownership of the operator of the nursing home and ownership of the structure of the nursing home, with less than full answers forthcoming, a continuing problem in this case.

*3 Even the Defendant in this case agrees that Plaintiff sought to amend her petition within two years of when Defendant asserts it provided ownership information, an assertion that is contested.

Plaintiff, pursuant to a scheduling order that asserted that the Parties could amend pleadings until June 30, 2011, on May 23, 2011 filed her Amended Petition which did add the request to pierce the corporate veil and hold the now named members of Wagoner Care Center, L.L.C. (hereinafter referred to as "WCC") liable for the obligations of and misconduct of WCC which had failed to secure and maintain liability insurance and which had allowed Wagoner Care Center, L.L.C. to be suspended from doing business. The Plaintiff, after objection by the Defendant, sought the Court's permission to file the Amended Petition which permission was granted by Court Order dated Jan. 16, 2012.

Thus, if the Court sees fit to assume original jurisdiction in this case the issue presented on appeal will simply be whether or not the Order entered by the Trial Judge granting Plaintiffs Motion To Amend Petition was correct or not.

The Oklahoma Court of Civil Appeals has rendered a decision in another nursing home case similar to the one presently before the Court. It is a 2011 case where the personal representative of the estate voluntarily dismissed the initial petition and then later refiled the petition and in the refiled petition added the nursing home's shareholders as defendants based upon the theory of piercing the corporate veil. The Court noted that the allegations of the 2009 petition were substantially the same as the original 2007 petition, except the 2009 petition alleged that defendants had used the corporate entity to avoid public policy, had failed to secure and maintain liability insurance, had failed to adequately capitalize the corporation and acted intentionally, recklessly, and with malice, thereby entitling Plaintiff to punitive as well as compensatory damages. *4 The defendants in December of 2009 filed a motion to dismiss based upon the expiration of the statute limitations. Defendants essentially argued that the Plaintiff's refiled 2009 petition included additional parties and claims not included in the original petition, and Plaintiffs claim was barred by the applicable two-year statute of limitations; the same argument made to the Trial Court and made to this Court.

In deciding the *Boulden v. Colbert Nursing Home, Inc.*⁵ case, the Court made the following statements:

"On November 16, 2009, Plaintiff refiled the case, again alleging that Nursing Home's improper treatment had caused Decedent's death. In this petition, Plaintiff named as Defendants certain individuals identified as Nursing Home's "shareholders or

officers or directors,” including Appellees Phillip Green, Gilbert Green, Angela Tabor, and Marcinda Mitchell (collectively, Shareholders). Plaintiff sought to impose liability against these individuals by piercing Nursing Home's corporate veil. The allegations of the 2009 petition were substantially the same as the 2007 petition, except the 2009 petition alleged that Defendants had “used the corporate entity” to avoid public policy, had failed to secure and maintain liability insurance, had failed to adequately capitalize the corporation, and had acted intentionally, recklessly, and with malice, thereby entitling Plaintiff to punitive as well as compensatory damages.” *Boulden v. Colbert Nursing Home, Inc.* 249 P.3d 105, 106 -107 (Okla.Civ.App. Div. 4,2011)

“In December 2009, Shareholders each filed a “special entry of appearance and motion to dismiss,” seeking to dismiss the petition based on the expiration of the statute of limitations. These motions argued that Plaintiffs refiled 2009 petition “included additional parties and claims not included” in the original petition, and that Plaintiffs claim was barred by the applicable two-year statute of limitations. Because Shareholders were not sued in Plaintiffs original action, they claimed any applicable limitations period was not tolled by Oklahoma's “savings” statute, 12 O.S.2001 § 100.” *Boulden v. Colbert Nursing Home, Inc.* 249 P.3d 105, 107 (Okla.Civ.App. Div. 4,2011)

Again, it is easy to see that the petitioner in this case has argued the same things as the defendant did in *Boulden*. So what we have is a 2011 decision in a nursing home case that has already determined the legal issues raised in this 2012 nursing home case.

*5 Additional quotes from *Boulden* include:

“¶ 14 In this case, Plaintiff argues that his second petition did not add a new claim or new parties. Instead, he asserts, his petition is based on the same “operative facts” as were asserted in his 2007 petition. He also argues that, even though he names several additional defendants, because they are named only under a “corporate veil” theory of recovery, they are substantially the same “party.” (emphasis added)

“[5] [6] ¶ 15 Generally, a corporation is regarded as a separate legal entity that is distinct from the individuals who comprise it. *Fanning v. Brown*, 2004 OK 7, ¶ 16, 85 P.3d 841, 846. However, “Oklahoma has long recognized the doctrine of disregarding the corporate veil in certain circumstances.” *Id.* In an appropriate case, the court will look behind the corporate entity and treat the corporate shareholders and the corporation as one entity. *Id.* In *Fanning*, which also involved a claim against a nursing care facility, the Supreme Court characterized the Plaintiff's allegations to pierce the corporate veil as “a legal theory,” and not a wholly separate cause of action. The Court also found the following allegations sufficient to survive a motion to dismiss: [The Plaintiff] alleged the shareholders used the corporate entity to defeat the public policy of protecting a resident from neglect and abuse, that they failed to secure and maintain liability insurance, and that they allowed [the facility] to become suspended from doing business within the state. [The Plaintiff] also argued that the public policy of protecting elderly residents is a compelling ... reason to disregard the corporate entity and pierce the corporate veil.” (emphasis added)

“*Id.* at ¶ 17, 85 P.3d at 847. Plaintiffs refiled petition contains allegations very similar to the Fanning allegations.”

“¶ 16 *Fanning* also supports the contention that the refiled petition's corporate veil allegations are not a completely new “cause of action,” but merely plead a new legal theory based upon the same operative event - Nursing Home's alleged negligence - set forth in Plaintiffs first petition. See *Mann v. State Farm Mut. Auto. Ins. Co.*, 1983 OK 84, 669 P.2d 768; see also 1 W.M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 41, at 603 (perm. ed. rev. vol. 1990) (“An attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action....”). The same rationale applies to Plaintiffs refiled petition's allegations for punitive damages: no new cause of action is pled, merely another theory of recovery based on the same set of events underlying the original petition.” (emphasis added)

*6 “¶ 17 We also find that the refiled petition was filed against substantially the same party as Plaintiff's first petition. Although Oklahoma appellate courts have not specifically addressed the issue presented here, they have recognized that

shareholder liability for a corporation's judgment may be litigated - on a corporate veil or alter ego theory of recovery - after the statute of limitations on the underlying claim has expired. See Green v. Oilwell, Div. Of U.S. Steel Corp., 1989 OK 7, 767 P.2d 1348; Sproles v. Gulfcor, Inc., 1999 OK CIV APP 81, 987 P.2d 454." (emphasis added)

"¶ 18 Moreover, courts of other jurisdictions have recognized that an action against a corporation may toll the statute of limitations so as to permit the addition of shareholders as defendants to the original action after limitations on the original cause of action has expired. For example, in *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F.Supp.2d 472, 478-80 (W.D.N.C.2003), the court held that a Plaintiff's refiled action that added a claim to pierce the defendant's corporate veil was derivative of his negligence claim and was protected by a North Carolina savings 110 statute similar to Oklahoma's. As such, the court held the refiled action against the corporate shareholders "relates back to the original filing date, making the current claim timely" against the defendants. *Id.* at 479. See also *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571 (Tex. 1975), where the Texas Supreme Court held that a defendant credit company was the alter ego of its parent company, and that the filing of a suit against the defendant credit company stopped the running of a two-year statute of limitations as against the parent, which was not joined as a defendant until more than two years after the alleged cause of action accrued." (emphasis added)

"¶ 19 We find the reasoning of the latter cases persuasive and their holdings generally consistent with Oklahoma law concerning piercing the corporate veil. We hold that the two-year statute of limitation applicable to Plaintiffs negligence and negligence per se causes of action was tolled by Plaintiff's 2007 petition against Nursing Home. We also hold that Plaintiff's refiled action against Nursing Home and its Shareholders asserts substantially the same cause of action against the same corporate defendant and individuals with an identity of interest with that defendant. The allegations of Plaintiff's refiled petition neither add a new or different cause of action or parties, nor are insufficient to state a claim." (emphasis added)

*7 A review of the above quotes from the *Boulden* case makes clear that because the original cause of action was filed within the appropriate statute of limitations; because the operative facts of the original petition and the amended petition were essentially the same and because an assertion of piercing the corporate veil is a legal theory and not a wholly separate cause of action, but rather is a means of imposing liability in the underlying action, that the Plaintiffs Motion To Amend was appropriately granted by the Trial Court. Additionally, as noted above, an action against the Corporation tolls the statute of limitations so as to permit the addition of shareholders as defendants to the original action after the limitation on the original action would have otherwise expired. Further, the claim to pierce the corporate veil is simply derivative of the negligence claims as set forth in the original filing date making the current claim timely.

The Plaintiffs Amended Petition in the case at bar reasserts its original causes of action and asserts Plaintiffs legal theory of piercing the corporate veil, making the owners responsible for the negligence of the corporation. The Court in *Boulden* has stated that this does not add additional defendants nor does it assert a new cause of action.

Thus, it is clear that the arguments raised by the Defendants about the expiration of the statute of limitations is an argument which is already been rejected by the Oklahoma Court of Civil Appeals in January of 2011 in the *Boulden* case. Thus, the court in its 2011 *Boulden* decision answers the issues of whether or not a new cause of action has been asserted; whether or not new defendants have been added; whether or not tolling exists in this case; whether or not there is a statute of limitations issue and the issue of relating back to the original date of filing of the Petition.

The Petitioner in this case seeks to avoid the effects of the *Boulden* case by asserting that *Boulden* is not applicable because in *Boulden* the Plaintiff had timely filed a petition alleging *8 negligence and negligence per se and then after the statute of limitations had run, Plaintiff in *Boulden* dismissed the action and refiled pursuant to 12 OSA 100, adding additional defendants, and the legal theory of piercing the corporate veil. The petitioner then observes at p. 5 of its brief, "in the case at bar, there has

been no dismissal.” Thus, in Petitioner's mind the difference in this case is simply that the Plaintiff in the underlying action did not dismiss its case. It is easy to see that in both the *Boulden* case and in the case at bar the Plaintiff timely filed their petitions and, after the statute of limitations would have run, refiled in the *Boulden* case, and in this case, simply amended her petition, in both cases asserting in the refiled/amended petition the legal theory of piercing the corporate veil and naming as defendants the owners of the corporate entity.

The illogic of the petitioner's argument is that if the Plaintiff in the underlying action dismissed and refiled her cause of action within one year we would be on all fours with the *Boulden* case and the distinction Petitioner seeks to make would not exist. Respondent does not believe that the dismissal and refiling were the critical parts of the *Boulden* case. It is the Respondent's position that it is not the legal principles of the saving statute that are involved in the legal issues presented to this Court or that were involved in the legal issues presented to the Trial Court. It is the Respondent's position that the legal principles that form the basis of the Trial Court's position in this matter and resulting decision are those set forth in the *Boulden* case that state that:

1. The amended petition in this case, and the refiled petition in the *Boulden* case, are against substantially the same party as the Plaintiffs first petition.

2. A refiled/amended petition relates back to the original filing date, making the current claim timely.

3. The two-year statute limitations applicable to Plaintiffs negligence and other causes of action was tolled by Plaintiffs original petition against the nursing home and thus, the Amended Petition is timely with or without relation back of the amendment.

*9 4. The refiled/amended petition against the nursing home and its owners asserts substantially the same cause of action against the same corporate defendant and individuals with an identity of interest with the defendant. The identity is obvious, they were the owners.

5. The allegations of Plaintiffs refiled/amended petition neither add a new or different cause of action or parties, nor are insufficient to state a claim.

6. That the filing of the original petition tolled the statute of limitations as to the claims for piercing the corporate veil.

The Petitioner also asserts that the Plaintiff in the underlying action would not be able to amend and relate back under [12 OSA 2015](#). The Respondent disagrees.

Respondent believes it is clear that Plaintiff would be allowed to amend under [12 OSA § 2015\(A\)](#) and that the amendment, under [12 OSA § 2015\(C\)\(2\)](#) relates back.

In this case the language of the Amended Petition is very similar to the language in the *Boulden case* and in the *Fanning case*⁶ and adds the legal theory of piercing the corporate veil. This becomes significant as the Courts statements and decision in *Boulden*, as well as the underlying pleadings in this case, clearly provide the legal basis under the statute for the relation back of all claims asserted.

[Title 12 OSA § 2015 \(C\)](#) is the statutory provision which provides for amendment of petitions and relation back of the amended petition. This is a statute that does not come into play in this matter as the statute of limitations was tolled as set forth in *Boulden*, but even if it was applicable, the statute states:

C. RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when:

1. Relation back is permitted by the law that provides the statute of limitations applicable to the action; or

*10 2. The claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; **or**

3. The amendment changes the party or the naming of the party against whom a claim is asserted if paragraph 2 of this subsection is satisfied and, within the period provided by subsection I of Section 2004 of this title for service of the summons and petition, the party to be brought in by amendment:

a. Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and

b. Knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Pursuant to the legal principles established in the *Boulden* case, the Amended Petition in the underlying action does not name new parties nor does it assert a new cause of action and because the statute of limitations was tolled, the Amended Petition was filed within the applicable statute of limitations. Additionally, it is clear that the Amended Petition asserts claims that arose out of the same conduct, transaction or occurrence set forth in the original pleading and thus the amendment requested by the Plaintiff and granted by the Trial Court is allowed pursuant [Title 12 OSA 2015 \(C\) \(1\) and \(2\)](#).

The decision the Trial Court in this matter was correct and thus this Court should not accept original jurisdiction in this matter and even if the Appellate Court saw fit to assume original jurisdiction should deny the requested writ.

Footnotes

1 [Kitchens v. McGowen, 1972 OK 140, 503 P.2d 218](#)

2 [Kitchens v. McGowen, 1972 OK 140, 503 P.2d 218 2](#)

3 [Oklahoma Oncology & Hematology P.C. v US Oncology, Inc., 007 OK 12, 160 P.3d 936](#)

4 [Woolen v. Coffman, 1984 OK CR 53, 676 P2d 1375](#) and [Elliott v. Mills, 1959 OK CR 22, 335 P.2d 1104](#).

5 [249 P3d 105](#)

6 [Fanning v. Brown, 2004 OK 7, 85 P.3d 841 \(2004\)](#)