

Liability of a parent corporation—Whether a parent corporation is liable for the actions of its subsidiary when the parent company does not perpetrate a fraud.

By Sharrissa Stratton*

R&M Mixed Beverage Consultants, Inc., v. Safe Harbor Benefits, Inc., 578 S.W.3d 218 (Tex. App.—El Paso 2019, no pet.).

Factual Summary

In *R&M Mixed Beverage Consultants, Inc., v. Safe Harbor Benefits, Inc.*, the appellant, R&M Mixed Beverage Consultants, Inc. (“R&M”), a Texas Corporation, owns and operates several bar and grill establishments in El Paso, Texas.¹ In December 2006, R&M, acting through an agent for Safe Harbor Benefits, Inc. (“Safe Harbor”), purchased its first liquor liability insurance policy from a surplus lines company.²

Before the policy expired, R&M requested a new quote from Safe Harbor which contacted USG Insurance Services (“USG”), a wholesale broker, which in turn contacted WKF&C Agency, Inc. (“WKF&C”), a managing general underwriter, which contacted Indemnity Insurance of DC Group (“Indemnity”).³ R&M received a quote from Indemnity along with disclosures including the company’s rating of an A-, and R&M received from Safe Harbor written notice that Indemnity was registered with the State of Texas as a Risk Retention Group (“RRG”), which meant it did not participate in the Texas Insolvency Guaranty Fund.⁴ R&M renewed the policy with Indemnity in 2009 and 2010.⁵

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¹ *R&M Mixed Beverage Consultants, Inc., v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 222 (Tex. App.—El Paso 2019, no pet.).

² *Id.* at 223.

³ *Id.*

⁴ *Id.* at 223-24.

⁵ *Id.* at 224.

In September 2011, two customers were served liquor at one of R&M's bar and grill establishments and involved in separate accidents.⁶ Victims of the accidents filed suit against R&M under the Dram Shop Act. Initially, Indemnity provided attorneys to defend R&M, but in April 2014, Indemnity suffered a financial calamity resulting in liquidation and causing attorneys representing R&M to withdraw and exposing R&M to liability without insurance coverage.⁷ In March 2015 R&M filed third-party petitions against Safe Harbor and USG.⁸ In July 2015 R&M added WKF&C and its related entities Ryan Specialty Group, LLC, and Ryan Specialty Group Services, LLC (collectively, the "Ryan Defendants").⁹ In a supplemental petition, R&M contended WKF&C was a subsidiary of the Ryan Specialty Group, and these entities provided insurance related services pertaining to the series of transactions that included Safe Harbor and USG, leading to R&M's purchase of the Indemnity insurance policy.¹⁰ R&M asserted that the third-party defendants made misrepresentations and/or failed to disclose material information concerning R&M's purchase of the Indemnity policy, that the defendants were negligent, and engaged in violations of the Texas Deceptive Trade Practices Act (DTPA), and the Texas Insurance Code.¹¹

In April 2012, an entity known as the RSG Underwriting Managers, LLC, entered into a purchase agreement, to purchase the assets of WKF&C. Thereafter, WKF&C voluntarily dissolved in 2013.¹² Being unable to name WKF&C as a third-party defendant in the underlying lawsuit, R&M ultimately named the Ryan Defendants, contending that WKF&C had "merged"

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 225.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 227.

into and/or had been “acquired” by the two Ryan Specialty Group Defendants. R&M further contended that WKF&C was a “division, component or subsidiary of the Ryan Specialty Group” entities as referenced in the petition, and/or was an alter ego of the Ryan Specialty Group Defendants, and sought to hold them liable for WKF&C’s conduct in procuring the Indemnity insurance policy on the basis that they were, in effect, WKF&C’s parent corporations.¹³

Further, in May 2012 by means of an Instrument of Assumption included in the WKF&C purchase agreement, another entity identified as WKFC Underwriting Managers, (WKFC), a series of RSG Underwriting Managers, LLC, assumed certain liabilities of the WKF&C companies, as assignee of RSG Underwriting Managers, LLC. The Instrument of Assumption, however, also expressly excluded all obligations of WKF&C, and its related entities, unless specifically stated.¹⁴

Ryan Specialty Group filed motions for summary judgment against all claims,¹⁵ and the trial court granted summary judgment in favor of the Appellees.¹⁶ The trial court also granted the motions for summary judgment filed by Safe Harbor and USG, disposing of all parties and all claims.¹⁷

Analysis

On appeal, the Court overruled all R&M’s arguments and affirmed the trial court’s order granting summary judgment in favor of Appellees.¹⁸ In one issue, the possible liability of the Ryan Defendants’ liability as parents, or that the Ryan Defendants and WKFC were operated as

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 225.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 232.

a single business enterprise, the Court reminded that a parent corporation is not liable for the actions of its subsidiary, the corporate veil will not be pierced, unless the parent used the subsidiary to perpetrate an actual fraud.¹⁹

R&M argued the trial court erred in granting the Defendants' motion for summary judgment because there was a genuine issue of material fact.²⁰ R&M contended there were genuine issues as to whether WKFC was the Ryan Defendants' alter ego making them liable for WKFC's "errors and omissions" through Indemnity.²¹ Additionally, R&M contended the Ryan Defendant's purchased WKFC's assets in a sham transaction to avoid liabilities and the purchase was nothing more than a shell game.²²

The appellate Court decided R&M's arguments failed for several reasons.²³ First, an entirely different entity acquired WKFC's assets under the Purchase Agreement, and two of the Defendants were not named or involved in the purchase.²⁴ Additionally, R&M failed to explain why it did not name Ryan Underwriting as a defendant other than that it was a subsidiary of Ryan Specialty Group.²⁵ R&M based their reasoning for Ryan Defendants' liability on the contention that WKFC was a subsidiary of the Ryan Defendants and/or that the Ryan Defendants and WKFC were operated as a single business enterprise with overlapping finances and operations.²⁶

¹⁹ *Id.* at 231, citing TEX. BUS. ORGS. CODE ANN. § 21.223(b).

²⁰ *R&M Mixed Beverage Consultants, Inc., v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 228 (Tex. App.—El Paso 2019, no pet.).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 229.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The Court explained the fact that a corporation is the parent of a subsidiary corporation does not automatically render it liable for the actions of its subsidiaries.²⁷ The Court cited *Formosa Plastics Corp., USA v. Kajima Intern., Inc.*,²⁸ in which it was held that “subsidiary corporations and parent corporations are considered separate and distinct ‘persons’ as a matter of law, and the separate entity of corporations will generally be observed the courts...”²⁹ The El Paso Court also cited *Lucas v. Texas Indus.*,³⁰ in which the Texas Supreme Court noted that courts will not disregard the corporate fiction and hold a parent corporation liable for the torts of its subsidiaries because a parent corporation generally has no duty to control its subsidiaries.³¹ The Court quoted the Texas Supreme Court as stating, “it has never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances” there must also be evidence of “abuse, or injustice and inequity” before a court will pierce the corporate veil to hold a parent company liable for the subsidiary’s actions.³² *Gentry v. Credit Plan Corp. of Houston*,³³ is quoted by the Court where the Supreme Court held a subsidiary corporation will not be treated as the alter ego of the parent company merely because of stock ownership, duplication of some or all directors or officers, or an exercise of control that stock ownership.³⁴ The Court acknowledges that “corporate structure should not shield —fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct and

²⁷ *Id.*

²⁸ *Id.*; *Formosa Plastics Corp., USA v. Kajima Intern., Inc.*, 216 S.W.3d 436 (Tex. App.—Corpus Christi 2006, pet. denied).

²⁹ *Formosa Plastics*, 216 S.W. 3d at 459–60, (citing *Valero S. Tex. Processing Co. v. Starr County Appraisal Dist.*, 954 S.W.2d 863, 866 (Tex. App.—San Antonio 1997, pet. denied)).

³⁰ *R&M Mixed Beverage Consultants, Inc., v. Safe Harbor Benefits, Inc.*, 578 S.W.3d 218, 229–30 (Tex. App.—El Paso 2019, no pet.); *Lucas v. Texas Indus.*, 696 S.W.2d 372 (Tex. 1984).

³¹ *Lucas v. Texas Indus.* at 374.

³² *R&M Mixed Beverage Consultants* at 230; *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008).

³³ *Gentry v. Credit Plan Corp. of Houston*, 528 S.W.2d 571 (Tex. 1975).

³⁴ *Id.* at 573.

the like.”³⁵ A determination of abuse should be examined before disregarding the corporation as a separate entity.³⁶ While “actual fraud” is not statutorily defined, it involves “dishonesty of purpose or intent to deceive.”³⁷ The Supreme Court has held that the fact that two corporations may have mingled their finances and assets is not enough to pierce the corporate veil, there must be evidence that one of the corporations was using the other for purpose of perpetrating actual fraud for the defendant’s direct personal benefit.³⁸

Here, there was no evidence that Ryan Defendants were utilizing RSG Underwriting Managers and/or WKFC entities to perpetrate fraud on R&M.³⁹ Additionally, there is no evidence that the Ryan Defendants were aware of Indemnity’s financial instability at the time of the WKFC asset purchase or in the future.⁴⁰ The record reflects that at the time of purchase Indemnity had an A- rating and was not downgraded until a year and a half after the purchase.⁴¹ Moreover, the Delaware Insurance Commissioner did not institute proceedings until after a year from the date of purchase.⁴² There is no evidence to support actual fraud, that the agreement was made with the intent to deceive or defeat R&M’s claim for personal benefit, thus the parent will not be liable for the subsidiary’s action.⁴³

³⁵ *R&M Mixed Beverage Consultants* at 230, citing *SSP Partners*, 275 S.W.3d at 455.

³⁶ *R&M Mixed Beverage Consultants* at 230.

³⁷ *Id.* at 231.

³⁸ *Id.*

³⁹ *Id.* at 232.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*