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July 26, 2013

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., Heritage Magnolia North, Inc., and Buildstar Corporation
Civil Action No. 2003-CP-26-3202
SC Court of Appeals Case Tracking No. 2009147806
SC Supreme Court Case No. 2012-212048
Our File No. 00470/01576

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, Petitioners submit the following pertinent and significant authorities that have come to their attention after briefing on their Petition for a Writ of Certiorari was completed in the above referenced case:

1. Andrew Cole, *The New Amalgamation in South Carolina—A Shortcut to Corporate Liability?* South Carolina Defense Trial Attorneys' Association's For the Defense, June 2012; and

2. Phillips L. McWilliams, *Magnolia North v. Heritage Communities: The South Carolina Court of Appeals' End Run Around the Necessity of Equitable Justification When Disregarding the Corporate Form*, 64 S.C. L. Rev. 825-847 (Summer 2013).

These authorities support the grounds for certiorari raised in Petitioners' Petition for Writ of Certiorari regarding amalgamation on pp. 5-10 and in Petitioners' Reply in Support of Certiorari at pp. 2-5. Copies of both the above-cited authorities are included herewith. By copy of this letter, we are serving opposing counsel with a copies of these supplemental citations.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:amb

cc: John P. Henry, Esquire
Stephen L. Brown, Esquire

ARTICLE

The New Amalgamation in South Carolina - A shortcut to corporate liability?

by Andrew Cole

We are witnessing the creation of common law in South Carolina. The new amalgamation legal theory was first referenced in a Court of Appeals case decided in 1986. Two recent cases—also from the Court of Appeals—confirm the establishment of this new amalgamation. Although there are a handful of cases that reference or seemingly give some analysis to this newly referenced legal theory, the majority and most significant of these cases come from construction defect cases.

The "common law" is a "body of law derived from judicial decisions, rather than from statutes or constitutions."[i]

> Historically, [the common law] is made quite differently from the Continental code. The code precedes judgments; the common law follows them. The code articulates in chapters, sections, and paragraphs the rules in accordance with which judgments are given. The common law on the other hand is inarticulate until it is expressed in a judgment. Where the code governs, it is the judge's duty to ascertain the law from the words which the code uses. Where the common law governs, the judge, in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision. They did not do so by construing the words of is judgment. They looked for the reason which had made him decide the case the way he did, the *ratio decidendi* as it came to be called. Thus, it was the principle of the case, not the words, which went into the common law. So historically the common law is much less fettering than a code.[ii]

The new amalgamation theory was first used in the case of *Kincaid v. Landing Development Corp.*[iii] This theory played a significant role in two recent cases from the court of appeals: *Pope v. Heritage Communities, Inc.*[iv] and *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc.*[v] As of the drafting of this article, neither of these cases is final through the appellate process.[vi]

As a quick aside, the author recommends reading the *Pope* and *Magnolia North* decisions for some other, important discussions about rulings on certain evidentiary and damages questions. For example, the court in both cases discusses the case of *Whaley v. CSX Transportation, Inc.*[vii] and its application of the "substantially similar" evidentiary fact test that lead to the admission of evidence at trial of other construction projects that were built by the defendants. Under this evidentiary issue is the interplay between the "substantially similar" admission of certain evidence at trial and the introduction of evidence regarding punitive damages.[viii] Also important is the discussion of the effect the defendants' trial strategy has at the directed verdict stage of the trial.[ix] However, our focus is upon new amalgamation.

For centuries an amalgamation meant generally the same thing. "Amalgamation is an English term used to designate a consolidation or merger."[x] It is "[t]he act of combining or uniting; consolidation," as in the "amalgamation of two small companies to form a new corporation."[xi] It is "[a] consolidation or merger, as of several corporations."[xii] That is, amalgamation is a term understood to mean a deliberate merger of two or more companies with the express intent to create a new entity.

A recent search for the term "amalgamation" in South Carolina case law yields less than thirty cases on Westlaw. About one-third of this list uses the term in some reference to a corporation. A majority of the corporation-amalgamation cases were decided in the 19th and early 20th centuries during the expansion of the railroads. Indeed, the various attempted[xiii] and intended railroad company mergers were created with documentation that was referenced generally as "articles of amalgamation and consolidation."[xiv] By 1986, use of the term "amalgamation," when referencing and/or describing companies, was never specifically defined or analyzed. The term was a descriptor of the intent of two or more companies merging into one by either stock or asset purchases. That is, "[w]hen two corporations merge or consolidate, each may be said to have contributed its net assets to the newly undertaken joint venture."[xv]

The new amalgamation now defines the term as the mere blurring of legal distinctions between corporations and their activities. To understand the

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new amalgamation, a brief history is necessary.[xvi]

The *Kincaid* case was a construction defect lawsuit involving a single family residence. The Kincaids purchased a lot from the defendant developer; the lot being sold by the defendant sales and marketing company. They then contracted with the defendant contractor to build their home. The defendant developer, defendant contractor, and defendant sales company were all sister companies. Without referencing any legal precedence, the Court of Appeals matter-of-factly affirmed the trial court's ruling that the three defendant companies should be deemed one entity. The court agreed with the trial court's finding that the evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."[xvii] The appellate court provided a list of factors – with no reference to any statutes or common law - why the defendant developer, sales, and construction entities should be considered one. The court noted that the entities had the same vice president, shareholders, officers, office space, point of contact for consumer complaints, and disseminated literature that described the sales and marketing company as "A Development, Construction, Sales, and Property Management Company."[xviii] The *Kincaid* court made no reference to or findings regarding corporate forms, corporate formalities, or even piercing the corporate veil.

The first case that actually attempted to analyze the new amalgamation theory created by *Kincaid* was *Mid-South Management Co., Inc. v. Sherwood Development Corp.*[xix] This case involved a fight to determine which corporate investors were liable for a settlement of a homeowners' association lawsuit. Generally, one group of investors involved in a joint venture condominium project settled a construction defect lawsuit and then made a capital call on another company in the joint venture to pay its portion of the settlement. Mid-South argued that the defendant and its parent company were liable for their portion of the settlement proceeds under the alternative theories of piercing the corporate veil, alter-ego, and/or amalgamation. The Court of Appeals analyzed these three theories of corporate liability and concluded that none of them applied in the case. Notably, this is the first case that discussed new amalgamation, and, by context, placed the theory at an equivalent footing as the piercing and alter-ego theories.

Piercing the corporate veil is considered an extreme remedy. It should be reserved for the rare circumstances when it would be grossly unfair to insulate the company owners from personal liability. "If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons."[xx] We need not delve into a deep discussion about the two-part piercing the corporate veil test that was first set forth in the *Sturkie* case. Suffice to say, the first prong looks at whether the corporation acted like a corporation and the second prong requires an analysis of whether there is "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals."[xxi] "The essence of the [second prong] fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneurship by doing so through a corporate veil."[xxii]

The alter-ego theory is similar to piercing. Where piercing examines the relationship between the company and its owners, the alter-ego or instrumentality theory considers the relationship between separate companies. "An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby."[xxiii] Although control of a company by another is the key to the alter-ego theory, "control, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one."[xxiv] Like piercing, the alter-ego theory "does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice."[xxv]

The piercing and alter-ego theories set a high bar for invading the corporate veil. Both look to the level of unfairness that is based on fraud or the equivalent misuse of the corporate shell to shield the owners or parent company from liability. New amalgamation sets the bar much, much lower. The question therein is whether the conduct of multiple companies is such that the legal distinctions between them are "blurred." This step down from fraud to blurriness is significant. The Court of Appeals in *Mid-South* explains that in *Kincaid* "this court found a sibling company liable for the obligation of another sibling company due to the evidence revealing an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."[xxvi] Apparently, it is no longer necessary to prove a deliberate or fraudulent attempt to misuse a corporate entity, nor is it necessary to prove some fundamental unfairness if the corporate shell is honored.

Lenders have also been caught up in new amalgamation. In *Kennedy v. Columbia Lumber & Manufacturing Co., Inc.*[xxvii] the Supreme Court weighed in by noting that it is possible that a lender could become so involved in the construction process that it is deemed a de facto developer and/or builder. This occurs "when the lender becomes highly involved with construction in a manner that is not normal commercial practice for a lender.... [so that] the lender may be said to be a joint venturer."[xxviii] The lender would then be deemed to

have impliedly warranted the workmanship and/or the habitability of the home construction. Although it did not find that the lender in *Kennedy* should be liable under those facts, the Supreme Court reached its conclusion that the possible liability is real by a "see generally" reference to *Kincaid* that "[t]he lender may be liable if it is so amalgamated with the developer or builder so as to blur its legal distinction."[xxix] Nearly two decades later, the Supreme Court found that the question whether a bank is so "substantially involved" in construction of a house is a question for the jury. [xxx]

New amalgamation analysis has appeared in other areas of the law. In *Ost v. Integrated Products, Inc.*[xxxi] the question was raised in a workers' compensation action. The issue was whether the number of employees of one company should be amalgamated with the number of employees of a sister corporation when determining the number of employees under a statutory employee analysis. Although the case did not cite *Kincaid*, the general discussion in *Ost* mirrored the "amalgamation as blurriness" conclusion of *Kincaid*. The conclusion was that all the employees should be counted and, therefore, the total number of employees was more than the four person threshold requiring workmen's compensation coverage. New amalgamation was also mentioned briefly in a footnote that suggests that it could be used to prove proper service on a corporation.[xxxii]

The Court of Appeals does not outline elements for new amalgamation. However, we can extrapolate a short list of factors, which includes: (1) shared owners/shareholders; (2) shared officers; (3) shared office location; and (4) other evidence generally showing the companies present themselves to the public as having common interests. The burden to prove amalgamation should be on the party seeking this involuntary merger.[xxxiii] Notably, new amalgamation does not rely on whether the subject companies were legitimate or in fact acted like corporations.

As referenced at the outset of this article, the most recent applications of new amalgamation are in the *Pope* and *Magnolia North* cases. Mr. Pope was the class representative of a condominium development: The Riverwalk at Arrowhead Country Club. The Riverwalk and Magnolia North projects are located in Horry County, South Carolina. The developer for both projects was Heritage Communities, Inc. (HCI) and the general contractor for both projects was BuildStar Corporation. HCI is described as the parent corporation of BuildStar. HCI was also the parent corporation of specially created seller entities named Heritage Riverwalk, Inc., and Heritage Magnolia North, Inc. for the respective projects. Although not specifically discussed in the opinions, the buildings at Riverwalk and Magnolia North were similar in design, being multi-family, multi-floor buildings with exterior stairwells and commons walkways on the fronts of the building. In short, the buildings are the typical, non-high-rise, multi-family structures that were constructed along the Grand Strand in the late 1990s and early 2000s.

Construction at Riverwalk started in June 1997 and was completed in December 1999. There were a total of 228 units in nineteen buildings at this project. Construction of Magnolia North started in 1998 and the project, after twenty-one buildings were completed, was turned over to the POA in September 2002. HCI and BuildStar constructed four additional projects with varying multi-family building styles during this same time period.

Unfortunately, HCI and BuildStar, along with the special purpose sales entities, were named as defendants in multiple lawsuits. At least four of the claims, in whole or in part, were tried to a verdict. The Pope/Riverwalk and the Magnolia North matters were tried during the Multi-Week Trial Docket in January and May, 2009, respectively. In both cases, the Plaintiffs moved for and the trial court found the defendant entities were amalgamated entities. These rulings greatly simplified the respective Plaintiffs' cases. Instead of having to prove the alleged causes of action that would otherwise correspond to specific defendants, the claims for negligence, breach of implied warranty of workmanlike service, and breach of fiduciary duty were all lumped together.[xxxiv] Stated another way, new amalgamation also blurred the legal claims that were pled in the lawsuits.

Although there can be some overlap, the legal duties of a developer are different from the legal duties of a contractor, and different still from the legal duties of a sales company. The developer's duty springs from its implied fiduciary relationship with the subsequent project owners.[xxxv] The contractor, however, is not a fiduciary. The contractor has a duty to exercise the reasonable degree of skill usually possessed by a member of the building occupation and verify that the work is done in conformity with the applicable building code and in a good and workmanlike manner.[xxxvi] The sales agents should refrain from misleading sales tactics. If all of these entities are amalgamated together and deemed conjoined as a single entity, then any legal distinctions of the various causes of action are lost.

South Carolina often markets itself as a business friendly State. One of those friendly business notions is that a corporate shell is intended to protect investors and/or business owners from liability where their conduct is not so egregious that the corporate shell should be invaded. The new amalgamation appears to erode away some of the corporate protections as it bypasses the traditional mechanisms established by the courts to attack the corporate shell. The *Pope* and *Magnolia North* cases highlight this shift in the Appellate courts away from some protections provided by the corporate shell. Unfortunately, it appears that this trend is expand-

Continued on next page

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ing. During the drafting of this article, the Supreme Court handed down another construction defect opinion titled *16 Jade Street, LLC v. R. Design Construction Co., LLC.*[xxxvii]

In *16 Jade Street*, the owner of a condominium project sued the general contractor, framing subcontractor, as well as the principal members of these limited liability corporations, alleging a series of construction defects. The trial resulted in a nearly seven-figure verdict for the condominium owner against both of the contractor entities as well as the individual licensee holder-member of the general contractor. The majority of the Supreme Court applied the rules of statutory construction to conclude that the South Carolina Limited Liability Corporation statute (Section 33-44-303(a)) "only protects non-tortfeasor members from vicarious liability and does not insulate the tortfeasor himself from personal liability for his actions."[xxxviii] The majority opinion explains that there was "no clear intent by the General Assembly" to extend the corporate protection to all members of the LLC.[xxxix] The dissent and some in the South Carolina Senate disagree with this conclusion.

The holding in *16 Jade Street* is likely more well-known amongst the contractors and subcontractors of South Carolina than the *Pope* and *Magnolia North* cases; nonetheless, the holdings in each were likely surprising. (*16 Jade Street* was likely the most surprising to the many contractors and subcontractors operating as single member or husband-wife member limited liability corporations who now learn they don't have the same corporate shell protection they thought they had one month before.) The cases discussed in this article may signal a shift in the common law away from some corporate protections.

Where does this leave the business owners, contractors, and subcontractors operating in South Carolina? With unfettered clarity, it can be said that nothing is certain. The appellate process as to these issues grinds forward. Rehearing in *16 Jade Street* was recently granted.[xl] Moreover, the Legislature has chimed in with a proposed Joint Resolution to clarify the specific Legislative intent that all members of a LLC are "shield[ed] ... from personal liability for actions taken in ordinary course of business of the LLC."[xli] The appeals of the new amalgamation are just now seeking certiorari to the Supreme Court. Perhaps the best advice to the contractors and subcontractors that are affected by these interim opinions is to warn them to be wary of commingling corporate interests and to warn the person who holds the license and/or is actually in the field in charge of a construction site that they have a bigger target on their back. By the end of the year, all of the appeals should be final and we can then advise our clients whether they should cringe or breathe a sigh of relief.

Footnotes

i Black's Law Dictionary p. 270 (7th Ed. 1999).

ii *Id.* Black's provides this additional explanation of the common law by quoting this passage from Patrick B. Devlin, The Judge p. 177 (Oxford 1979) (USC Law Library Call No. KD7285.A75 D48 1979).

iii 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).

iv 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), reh'g den. (Dec. 12, 2011).

v 2012 WL 469730 (S.C. App. Feb. 15, 2012).

vi The author contacted the Clerk for the South Carolina Supreme Court to inquire about the status of the appeals of these cases. As of the drafting of this article: the petition for certiorari in the Pope case has been pending since February 11, 2012; the petition for rehearing in *Magnolia North* was denied on April 20, 2012 - the deadline to file a petition for certiorari to the Supreme Court had not been reached. The Court of Appeals described the two cases as "similar action[s]." *See Magnolia North* at *1,n.1. In fact, two of the three appellants in each case are the same; two of the three appellate court judges—including the authoring judges of each opinion—decided the cases; the same attorneys represented the plaintiffs; the same trial judge—the Honorable Clifton Newman—presided over the trials; and the appeals question the same legal findings from their respective trials. The Court of Appeals resolved the two cases the same. We will have to monitor whether the Supreme Court chooses to weigh in on these points.

vii 362 S.C. 465, 609 S.E.2d 286 (2005).

viii The author believes that some of these evidentiary issues may be decided differently in the future in light of the bifurcation of punitive damages statute that was passed after the *Pope* and *Magnolia North* trials. South Carolina Code § 15-32-520, which statute was created by 2011 Act No. 52, is effective for all actions that accrue on or after January 1, 2012.

ix Hint: expect more successful directed verdict motions by plaintiffs when the defendants acknowledge that there are some portions of the subject buildings in a construction defect lawsuit that require repairs since "[a]n admission of counsel or evidence supporting less than all of the complaints' specifications of negligent conduct is sufficient to support a directed verdict for the POA." Magnolia North at *9.

x 19 Am.Jur.2d Corporations § 2166.

xi Black's Law Dictionary p. 79 (7th ed., 1999).

xii The American Heritage Dictionary p. 57 (3rd ed., 1992).

xiii The majority of the railroad cases decided in South Carolina State and Federal courts during this time period pontificate over possible monopolies.

xiv *See: Brown v. Am. Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924) (Discussing whether a purchasing railroad assumes the debts of the selling railroad and referencing the synonyms "reorganization, consolidation, amalgamation, or union."); *Ex Parte the Trustees of the Greenville Academies*, 7 Rich.Eq. 471, 28 S.C.Eq. 471, 1854 WL 2881 (S.C.App.Eq. 1854) (Discussing whether a lay (non-religious, eleemosynary) company, a school, can merge into, or amalgamate into, an ecclesiastical (religious) corporation.); *Coleman v. The Greenville & Columbia RR Co.*, 5 Rich. 118, 39 S.C.L. 118, 1851 WL 2568 (S.C.App.L. 1851) (The term amalgamation is used to describe the intentional merger of two railroad companies); *T.H. Colcock & Co. v. The Louisville, Cincinnati,*

and Charleston R.R. Co., 32 S.C.L. 329, 1847 SL 2124 (S.C.App.L. 1847) (Amalgamation used to describe the merger of two railroads.); *Smith v. Smith*, 3 Des. 557, 3 S.C.Eq. 557, 1813 WL 373 (S.C. 1813) (Using the term amalgamation to describe the deliberate attempt to merge an ancient society of masons into a modern society of masons to create a new society of masons.); *Tomlinson v. Branch*, 82 U.S. 460 (U.S.Sup.Ct. 1872) (Amalgamation used to describe merger of two railroads by way of a stock exchange and/or trade.); *In re Safety-Kleen Corp.*, 2002 WL 32349819 (D.S.C. 2002) (unpublished) (Noting in the facts that the subject corporation "represents an amalgamation of three different entities" following as series of name changes and mergers.); *Phinizy v. Augusta & K.R. Co.*, 62 F. 678 (1894) (Referencing the "amalgamation and consolidation" of a number of separate railroad lines (companies) into single railroad companies.).

xv *See Fidelity-Baltimore Nat'l Bank v. U.S.*, 328 F.2d 953, 955 (1964) (Noting the combined corporate assets do not necessarily infuse new money into the new company. "The amalgamation works a change in the assets underlying the stock of the stockholders of each constituent, but there is no new capital."); *see also Rivera v. Am. Gen. Fin. Serv., Inc.*, 259 P.3d 803, 815 (N.Mex. 2011) ("In corporate law, the term 'successor' is a legal term of art meaning a 'corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.'" (quoting Black's Law Dictionary 1569 (9th ed. 2009))).

xvi *See Mid-South Management Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 605, 649 S.E.2d 135, 144 (Ct. App. 2007), reh'g den. (Aug. 24, 2007), cert. den. (May 30, 2008) (citing *Kincaid*).

xvii *Kincaid* at 96, 344 S.E.2d at 874 (quoting the trial court).

xviii *Id.*

xix 374 S.C. 588, 649 S.E.2d 135 (Ct.App. 2007), reh'g den. (Aug. 24, 2007), cert. den. (May 30, 2008).

xx *Mid-South* at 597, 649 S.E.2d at 140 (quoting *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct.App. 1984)).

xxi *Mid-South* at 597-598, 649 S.E.2d at 140 (quoting *Sturkie* at 457-58, 313 S.E.2d at 318).

xxii *Mid-South* at 598, 649 S.E.2d at 141 (quoting *Multimedia Publ'g of S.C., Inc. v. Mullins*, 314 S.C. 453, 551, 556, 431 S.E.2d 571, 573 (1993)).

xxiii *Mid-South* at 603, 649 S.E.2d at 143 (quoting *Colleton County Taxpayers v. School District of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006)).

xxiv *Id.* (citing *Baker v. Equitable Leasing Corporation*, 275 S.C. 359, 367-68, 271 S.E.2d 596, 600 (1980)).

xxv *Id.* (quoting *Colleton County Taxpayers* at 237, 638 S.E.2d at 692).

xxvi *Mid-South* at 605, 649 S.E.2d at 144 (quoting *Kincaid* at 96, 344 S.E.2d at 874)).

xxvii 299 S.C. 335, 384 S.E.2d 730 (1989).

xxviii *Id.* at 340, 384 S.E.2d at 734 (citation omitted).

xxix *Id.* at 340-341, 384 S.E.2d at 734.

xxx *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) (Using the language from Kennedy that relied on the amalgamation language from Kirkman to find that summary judgment in favor of the lender was premature.)

xxxi 296 S.C. 241, 371 S.E.2d 796 (1988).

xxxii *Schenk v. National Health Care, Inc.*, 322 S.C. 316, 319 n.2, 471 S.E.2d 736, 737 n.2 (Ct.App. 1996), reh'g den. (June 21, 1996), cert den. (Dec. 5, 1996) (Noting, after a parenthetical reference to the new amalgamation theory in *Kincaid*, that "[w]e assume the appellant [National Health Care, Inc.] and 'National Healthcare Corporation' [which was the entity served] are one and the same or are so closely connected and related that judgment against one would bind the other.")

xxxiii *See Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct.-App. 1984) ("The party seeking to have the corporate identity disregarded has the burden of proving that the doctrine should be applied.")

xxxiv In both cases, the trial court directed verdicts in favor of the defendant developers on plaintiffs' breach of express warranty claims.

xxxv *See Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation*, 349 S.C. 251, 562 S.E.2d 633 (2002) (Discussing the developer's duty to either transfer common areas to the homeowners' association in good repair or to provide the necessary funds to all a "reasonably good repair" of the common elements.).

xxxvi *See Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 560, 658 S.E.2d 80, 88 (Quoting from the charge the trial judge gave to the jury, that "a builder who undertakes construction of a building impliedly represents that he possesses and will exercise a reasonable degree of skill usually possessed by a member of the building occupation; and that a builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with the applicable building code and in a good and workmanlike manner." (internal punctuation omitted)).

xxxvii 2012 WL 1111466 (Decided Apr. 4, 2012), pet. for reh'g granted (May 7, 2012).

xxxviii *Id.* at *6.m Justice Hearn drafted the majority opinion, of which Justices Pleicones and Kittredge concurred. Justice Beatty wrote in his dissent, to which Justice Toal concurred, that S.C. Code § 33-44-303(a) was unambiguous and should be read to provide limited liability for all members of a Limited Liability Corporation that are working pursuant to the charter of the company.

xxxix *Id.* at *5.

xl *Id.*

xli See Proposed Joint Resolution S.1416, introduced in the Senate on April 10, 2012, and referred to the Senate Committee on Judiciary on April 11, 2012.

SOUTH CAROLINA LAW REVIEW

SURVEY OF SOUTH CAROLINA LAW

AND

FOURTH CIRCUIT SURVEY

VOLUME 64 SUMMER 2013 NUMBER 4

MAGNOLIA NORTH V. HERITAGE COMMUNITIES: THE SOUTH CAROLINA COURT OF APPEALS' END RUN AROUND THE NECESSITY OF EQUITABLE JUSTIFICATION WHEN DISREGARDING THE CORPORATE FORM

I. INTRODUCTION

When is the judiciary justified in taking away a statutory right? In its 2012 decision in *Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc.*,[1] the South Carolina Court of Appeals "amalgamated" three corporations, holding the corporations liable as a single entity and thereby disregarding the corporations' statutory protection from extracorporate liability.[2] This Comment demonstrates that it is well-established in South Carolina law that courts will disregard statutory rights in the corporate context only upon the showing of an equitable justification of considerable magnitude—one sufficient to justify

1. 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

2. *Id.* at 358–60, 725 S.E.2d at 117–18; *see also* S.C. CODE ANN. § 33-3-102 (2006) (establishing the corporation as a separate and distinct legal entity).

setting aside a legislative enactment.[3] This Comment argues that no such equitable justification was established in *Magnolia North*, creating precedent that dangerously dilutes the long-standing statutory protection of corporations from extracorporate liability.[4]

Part II of this Comment discusses corporate law in South Carolina, the policy behind limited liability, and the rules the South Carolina Supreme Court has outlined for imposing tort liability on a company or its managers by ignoring legally formed entities. Part III addresses, in detail, the facts, procedural history, and holding of *Magnolia North* and briefly discusses the cases that gave rise to the amalgamation doctrine. Part IV analyzes the impact of amalgamation on South Carolina law and provides a synthesis of the law regarding the amalgamation doctrine. Part V calls on the South Carolina Supreme Court either to set more arduous, discernible standards for the doctrine or recognize that the doctrine has no place in South Carolina jurisprudence.

II. CORPORATE LAW IN SOUTH CAROLINA

A. Corporate Formation and Rights in South Carolina

In South Carolina, as in every state, corporations have a statutory right to be liable only for their own obligations.[5] This right allows South Carolina business

3. *See, e.g.*, Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) ("[E]quitable principles govern the veil-piercing remedy, and '[i]t is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection.'" (quoting Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984))).

4. *Compare Magnolia North*, 397 S.C. at 358–60, 725 S.E.2d at 117–18 (upholding the amalgamation of three corporations), *with* Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego" and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 407 (2006) ("It is, or at least once was and ought again to be, hornbook law that a shareholder or a parent corporation should not lose the protection of limited liability unless that shareholder or parent has somehow 'abused' the corporate form."), *and* S.C. CODE ANN. § 33-3-102 (establishing the corporation as a separate and distinct legal entity).

5. *See* S.C. CODE ANN. § 33-3-102 (making each properly formed corporation a separate jural person—that is, separate from its shareholders and separate from its affiliates, both horizontally and vertically); *see, e.g.*, ALA. CODE § 10A-2-3.02 (LexisNexis 2010) (establishing that, unless otherwise provided in the articles of incorporation, a corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs"); GA. CODE ANN. § 14-2-302 (2003) (same); N.C. GEN. STAT. ANN. § 55-3-02(a) (2011) (same); *see also* S.C. CODE ANN. § 33-6-220(b) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."); Mid-S. Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007) (citing Hunting v. Elders, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004)) ("It is generally recognized that a corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders."); Presser, *supra* note 4, at 406–07 (noting that every American jurisdiction "permits separate incorporation," and asserting that, under traditional hornbook law, shareholders and parent corporations enjoy limited liability unless the corporate form is abused).

owners to organize their businesses in more than one corporation for the express purpose of limiting liability.[6] The courts may disregard the corporate form only when a sufficiently powerful equitable justification is present.[7]

The procedure required to form a corporation in South Carolina is not complicated or difficult. A corporation may be formed for "the purpose of engaging in any lawful business."[8] All that is necessary to lawfully form a corporation—in addition to a lawful business purpose—is the filing of articles of incorporation with the South Carolina Secretary of State.[9]

A properly formed corporation is, by statute, a jural person separate from its shareholders and affiliates, both horizontally and vertically.[10] In creating this legal entity, the South Carolina General Assembly gave corporations specific statutory rights.[11] Among those is the shareholders' right of limited liability.[12] Just as the shareholders and affiliates of a corporation are not liable for the debts of the corporation, the corporation is not liable for the debts of its shareholders and affiliates.[13] Thus, a properly formed corporation in South Carolina is liable

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6. *See* S.C. CODE ANN. §§ 33-1-200, 33-3-102, 33-6-220(b); *see also Mid-South*, 374 S.C. at 595, 597, 606, 649 S.E.2d at 139, 140, 145 (holding that, when a subsidiary, which, according to one expert, was created for the "legitimate business reasons of reducing risk and exposure to liability," paid off a debt to its parent corporation and was then unable to satisfy a judgment, the court could neither pierce the corporate veil nor apply the alter ego or amalgamation doctrines to hold the parent corporation liable); Presser, *supra* note 4, at 406–07 (noting that every American jurisdiction "permits separate incorporation for the very purpose of limiting liability"); Walkovszky v. Carlton, 223 N.E.2d 6, 7–10 (1966) (explaining that there is nothing fraudulent about dividing a business into multiple corporations for the sole purpose of limiting liability and, thus, the court could not ignore the corporate form and pierce the corporate veil—indeed, with some limitations, "[t]he law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability").

7. *See* sources cited *supra* note 3.

8. S.C. CODE ANN. § 33-3-101. However, the purpose of the corporation can be limited if "a more limited purpose is set forth in the articles of incorporation." *Id.*

9. In general, "the corporate existence begins when the articles of incorporation are filed," S.C. CODE ANN. § 33-2-103(a), and the filing of the articles of incorporation by the Secretary of State serves as "conclusive proof that the incorporators satisfied all conditions precedent to incorporation," *id.* § 33-2-103(b). This "conclusive proof" is subject to one exception: "a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation." *Id.*

10. *See* S.C. CODE ANN. § 33-3-102 (asserting that a corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs"); *see also* sources cited *supra* note 5 (explaining that corporations are separate and distinct from its shareholders).

11. *See id.* § 33-3-102(1)–(15).

12. *See* S.C. CODE ANN. § 33-6-220(b) ("[A] shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.").

13. *See* S.C. CODE ANN. § 33-3-102; *see also* Mid-S. Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007) (citing Hunting v. Elders, 359 S.C. 217, 223, 597 S.E.2d 803, 806 (Ct. App. 2004)) (noting the distinction between corporate debts and the debts of individual shareholders); Carroll v. Smith-Henry, Inc., 281 S.C. 104, 106–07, 313 S.E.2d 649, 651 (Ct. App. 1984) (reversing the trial court for refusing to provide a requested jury

only for its own obligations.[14] Indeed, a corporation in South Carolina can be created for the express purpose of limiting liability.[15]

The doctrine of amalgamation takes away this statutory right without the equitable justification required for courts to disregard the corporate form.[16] This significantly lowers the previously established standard and fundamentally alters businesses' ability to limit their liability by separately incorporating segments of a business.[17]

The case law on the doctrine of amalgamation is limited.[18] No other state has expressly adopted the doctrine, although several states, most notably Texas and Louisiana, have applied a conceptually similar doctrine titled "single business enterprise."[19] However, the Texas Supreme Court recently rejected the doctrine, noting that absent "evidence of abuse, or . . . injustice and inequity,"[20] ignoring the corporate form "would seriously compromise what we have called a 'bedrock principle of corporate law'—that a legitimate purpose for forming a corporation is to limit individual liability for the corporation's obligations."[21]

B. The Purpose of Limited Liability

Corporations have long enjoyed the protection of limited liability.[22] This protection gives meaning to the corporate form by protecting investors and

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instruction when, without the instruction, "the jury might well have concluded that a parent corporation is always liable on its subsidiary's contracts").

14. *See supra* note 5 and accompanying text.

15. *See supra* note 6 and accompanying text. Although a corporation can be formed to limit liability, most corporations are formed with knowledge of other benefits the corporate form will provide, such as tax benefits. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 251 (1991).

16. *See supra* notes 2–4 and accompanying text (explaining that a substantial equitable justification must be established before a South Carolina court may disregard the statutory rights of a corporation).

17. *See supra* notes 3, 6 and accompanying text (establishing South Carolina's standard for disregarding corporate rights and describing the ability of South Carolina business owners to organize a business in multiple corporations).

18. *See, e.g.*, Andrew Cole, *The New Amalgamation in South Carolina—A Shortcut to Corporate Liability?*, 40 DEF. LINE, no. 2, Summer 2012, at 33, 33, *available at* http://www.collinslacy.net/marketing/pdf/SCDTAA_CorporateLiability_AndrewCole.pdf ("A recent search for the term 'amalgamation' in South Carolina case law yields less than thirty cases on Westlaw.").

19. Presser, *supra* note 4, at 420–24 (citations omitted) (noting that, while Texas and Louisiana are "the most visible" proponents of the single business enterprise theory, eleven other states and Puerto Rico "have at least recognized the idea"). Notably, South Carolina and the doctrine of amalgamation are not included in this list or discussed anywhere in Presser's article. *See id.*

20. SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008).

21. *Id.* (quoting Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006)).

22. *See, e.g.*, Presser, *supra* note 4, at 407 ("It is, or at least once was and ought again to be, hornbook law that a shareholder or a parent corporation should not lose the protection of limited liability unless that shareholder has somehow 'abused' the corporate form.").

encouraging capital formation.[23] Limited liability only protects the corporation's owners, not the corporation itself.[24] Still, the practice often comes under attack.[25] The general theme of arguments against limited liability is that it encourages corporations to engage in risky activities without adequate regard for the harm those activities will cause.[26]

Yet, the practice endures. Some commentators argue that limited liability is still the norm in America because it is a better practice than any alternative proposals.[27] Indeed, in the early twentieth century, the president of Columbia University proclaimed that "the 'limited liability corporation' was 'the greatest single discovery of modern times.'"[28] Furthermore, if legislatures had not created limited liability, then corporations would limit their liability by contract.[29] Thus, making limited liability the statutory rule simply enables the parties involved to reach the same result at a lower cost.[30]

Other justifications for limited liability include promoting efficient corporate governance, encouraging investing, and pooling of capital.[31] If shareholders are personally liable for the debts of the corporation, then they will understandably want to take an active part in management.[32] That system would not be conducive to running a large organization where operational efficiency requires a centralized decisionmaking process.[33] This would entail more costs for the corporation, thus raising the costs for the shareholders.[34] Furthermore,

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23. *See, e.g.*, STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 4.1, at 126, § 4.2, at 136 (2002) (noting that limited liability shields shareholders from corporate debts or torts, and asserting that personal liability in the corporate context would cause "higher costs of capital, which in turn would harm society by inhibiting economic growth").

24. EASTERBROOK & FISCHEL, *supra* note 15, at 11 ("'Limited liability' means only that those who contribute equity capital to a firm risk no more than their initial investments—it is an attribute of the investment rather than of 'the corporation.'").

25. *See* Joseph A. Grundfest, *The Limited Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387, 387 (1992) (citations omitted) (collecting sources that have critiqued the doctrine of limited liability).

26. Presser, *supra* note 4, at 410.

27. *See, e.g.*, Grundfest, *supra* note 25, at 420 ("[Limited liability] is not a thing of perfect beauty, but at least it works. In contrast, proportionate liability . . . is not a practical alternative . . . .").

28. Presser, *supra* note 4, at 409 (quoting STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1:1 (14th ed. 2004)).

29. EASTERBROOK & FISCHEL, *supra* note 15, at 40–41.

30. *See* BAINBRIDGE, *supra* note 23, § 4.2, at 131 (noting that when transactions costs related to contracting for limited liability are high, parties "cannot depend on private contracting to achieve efficient outcomes," but instead "legal rules must function as a substitute for private bargaining").

31. *See generally id.* §§ 4.1–4.2 (discussing various justifications for providing corporations with limited liability).

32. *See id.* § 4.2, at 135–36.

33. *See id.* § 4.2, at 135.

34. *See id.*; *see also* EASTERBROOK & FISCHEL, *supra* note 15, at 5 (noting the connection between corporate governance and returns to shareholders).

shareholders would spend too much time monitoring their investment, leaving them unable to maintain other employment.[35]

Limited liability also benefits creditors. In an unlimited liability scheme, it would be too costly for a creditor to bring individual suits against every shareholder spread throughout the nation.[36] Not only would issues arise with choice of law and jurisdiction, but creditors would have to constantly monitor the various shareholders' credit, as the creditors would rely on each shareholder's ability to repay the debt.[37] A scheme of joint and several liability would simply shift the cost of collection to the solvent shareholders, who would seek contribution from those shareholders unable to pay their share.[38] Just as bringing suit individually against every shareholder is cost prohibitive for creditors, it would be cost prohibitive for tort claimants harmed by a corporation's actions.[39]

These arguments appear tailor-made to justify a limited liability scheme for large corporations but seem ill-suited to the smaller close corporation run directly by the shareholders. However, limited liability was originally developed not only to promote economic growth through efficient corporate governance but also to encourage those with less means to form and grow corporations.[40] Indeed, it appears that limited liability envisions the lone entrepreneur who not only invested in but also managed the corporation.[41] Limited liability allows people with less wealth to develop their businesses when it would otherwise be cost-prohibitive to do so.[42] Without limited liability, only the wealthy could afford to create corporations.[43]

The South Carolina General Assembly undoubtedly intended to encourage business growth when it conferred limited liability on corporations.[44] The doctrine's manifestation in the South Carolina Business Corporation Act is a reflection of a public policy choice by the legislature.[45] Thus, the courts must provide substantial justification for ignoring this statutory right.

35. *See* BAINBRIDGE, *supra* note 23, § 4.2, at 135.
36. *See id.* § 4.2, at 137.
37. *See id.*
38. *See id.*
39. *See id.* § 4.2, at 137, 141.
40. *See* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155–56, 171–72 (1992).
41. *See id.* at 174.
42. *See id.* at 155–56.
43. *See id.*
44. *See generally* S.C. CODE ANN. § 33-3-102 (2006) (establishing the corporation as a separate legal entity); *see also* Presser, *supra* note 40, at 155 (asserting that, in the nineteenth century, certain state legislators viewed limited liability as a way to fuel economic growth).
45. *See* S.C. CODE ANN. § 33-1-101. Title 33 of the South Carolina Code is commonly referred to as the "South Carolina Business Corporation Act of 1988." *Id.*

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C. *Recognized Doctrines for Ignoring the Corporate Form in South Carolina*

The South Carolina Supreme Court has employed only two doctrines for ignoring the corporate form: piercing the corporate veil and alter ego.[46] While the doctrines are not the same, the "alter ego doctrine is merely a means of piercing the corporate veil."[47] Thus, both alter ego and piercing the corporate veil require a showing that, in giving effect to the corporate form, the court would "protect fraud, justify wrong, or defeat public policy."[48] A court must be able to point to a sufficiently powerful equitable justification when disregarding the corporate form.[49]

The seminal case for ignoring the corporate form in South Carolina corporate jurisprudence is *Sturkie v. Sifly*.[50] In *Sturkie*, the court outlined a two-part test to decide whether the corporate form should be ignored, thus subjecting the shareholders to tort liability.[51] The first prong of the test requires the court to analyze eight factors to determine whether the shareholders observed corporate formalities.[52] Those eight factors are:

> (1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder.[53]

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46. Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008).

47. *Id.* (quoting 18 C.J.S. *Corporations* § 23 (2007)) (internal quotation marks omitted).

48. *See, e.g., id.* at 101, 668 S.E.2d at 800 (quoting Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984)) (internal quotation marks omitted); *see also* Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (citing Baker v. Equitable Leasing Corp., 275 S.C. 359, 367–68, 271 S.E.2d 596, 600 (1980)) (concluding that in order to prevail in an alter ego claim, "[i]t is necessary [for the plaintiff] to show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy").

49. *See Sturkie*, 280 S.C. at 458, 313 S.E.2d at 319.

50. 280 S.C. 453, 313 S.E.2d 316. The two-pronged test that South Carolina courts apply when deciding whether to pierce the corporate veil is almost always attributed to *Sturkie*. *See, e.g., Drury*, 380 S.C. at 102, 668 S.E.2d at 800 (citing *Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318) (referring to the South Carolina Court of Appeals' adoption of the two-pronged test).

51. *See Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318.

52. *Id.* (citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976) (Russell, J.)).

53. Cumberland Wood Prods. v. Bennett, 308 S.C. 268, 271, 417 S.E.2d 617, 619 (Ct. App. 1992) (citing C.T. Lowndes & Co. v. Suburban Gas & Appliance Co., 307 S.C. 394, 397, 415 S.E.2d 404, 405 (Ct. App. 1991); *Sturkie*, 280 S.C. at 457, 313 S.E.2d at 318).

The plaintiff does not need to prove all eight factors in order to satisfy the first prong.[54] Presumably, the courts originally gave equal weight to each factor.[55] However, subsequent South Carolina decisions held that some of the *Sturkie* factors are less important.[56] The less important factors include: the nonpayment of dividends; the failure to observe corporate formalities; the nonfunctioning of other officers or other directors; and the absence of corporate records.[57]

The second prong of the test requires the party seeking to pierce the corporate veil to demonstrate that, unless the corporate form is ignored, injustice or fundamental unfairness will ensue.[58] The second prong is harder to prove,[59] and

> [t]he burden of proving fundamental unfairness requires that the plaintiff establish (1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property.[60]

To establish that the defendant is aware of the plaintiff's claim, the plaintiff must establish either the defendant's actual knowledge or "notice of facts which, if pursued with due diligence, would lead to knowledge of the claim."[61] Courts have further clarified that "[t]he essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell."[62] Essentially, the corporate form may not be abused by its shareholders.

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54. *See, e.g.*, Hunting v. Elders, 359 S.C. 217, 224–25, 597 S.E.2d 803, 807 (Ct. App. 2004) (quoting Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 644 (Ct. App. 1995)).

55. *See id.* at 225, 597 S.E.2d at 807 (citing *Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318).

56. *Id.* (citing *Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318).

57. *Id.*

58. *Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318 (citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 687 (4th Cir. 1976)).

59. In *Sturkie*, the court held that, absent any evidence of fraud, an unsatisfied judgment against the corporation was not sufficient injustice or fundamental unfairness to meet this burden, despite the plaintiff proving that the defendant "breach[ed] the integrity of the corporation." *Id.* at 458, 313 S.E.2d at 319; *see also* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 2:45, at 810 (2012 ed.). The facts in *Sturkie* "seem to show undercapitalization, siphoning of funds or assets, and an egregious lack of corporate formalities, but, according to the court of appeals, they were not enough to justify piercing the veil." *Id.*

60. *Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319.

61. *Hunting*, 359 S.C. at 229, 597 S.E.2d at 809 (citing Multimedia Publ'g of S.C., Inc. v. Mullins, 314 S.C. 551, 554, 431 S.E.2d 569, 572 (1993)).

62. Dumas v. InfoSafe Corp., 320 S.C. 188, 192–93, 463 S.E.2d 641, 644 (Ct. App. 1995) (citing *Multimedia Publ'g*, 314 S.C. at 556, 431 S.E.2d at 573).

In order to prevail under an alter ego claim the plaintiff must show "total domination and control" of one corporate entity by another.[63] There must be so much control or domination that "the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity."[64] Similar to piercing the corporate veil, the alter ego doctrine can apply only where there is a showing of "fraud or misuse of control by the dominant entity which results in some injustice."[65]

South Carolina courts have not clarified injustice in the context of the alter ego doctrine as they have fundamental unfairness in piercing cases.[66] However, the South Carolina Supreme Court has stated that "[t]he alter ego doctrine is merely a means of piercing the corporate veil."[67] Thus, the misuse and control that result in injustice clearly must meet the same standard of fundamental unfairness or fraud that courts have outlined for piercing the corporate veil: (1) the corporation must be aware of the plaintiff's claims, and (2) the corporation must act in a self-serving manner with regard to its assets in disregard of the plaintiff's claims to the assets.[68]

South Carolina courts have always required a substantial equitable justification to ignore the corporate form.[69] A corporation's inability to satisfy a judgment against it, absent fraud, is not substantial injustice or fundamental unfairness and is not a sufficiently powerful equitable justification for a court to disregard the corporate form.[70] South Carolina Supreme Court jurisprudence has required much more before ignoring the corporate form, and this standard for imposing extracorporate liability is well-settled.[71] However, a recent, significant opinion may totally alter this area of the law, as a new, unsettling precedent has been set.

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63. Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (citing Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992)).

64. *Id.*

65. *Id.*

66. Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

67. *Id.* at 101 n.1, 668 S.E.2d at 800 n.1 (quoting 18 C.J.S. *Corporations* § 23 (2007)) (internal quotation marks omitted).

68. *See* Sturkie v. Sifly, 280 S.C. 453, 459, 313 S.E.2d 316, 319 (Ct. App. 1984).

69. *Id.* at 458, 313 S.E.2d at 319.

70. *Id.*

71. *See Drury*, 380 S.C. at 101 n.1, 668 S.E.2d at 800 n.1 (quoting 18 C.J.S. *Corporations* § 23 (2007)); *see also Sturkie*, 280 S.C. at 457, 313 S.E.2d at 318 (citing Baker v. Equitable Leasing Corp., 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980)) ("It is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection.").

III. DISPENSING WITH THE EQUITY REQUIREMENT WHEN IGNORING THE CORPORATE FORM

A. *Facts of* Magnolia North

Heritage Communities, Inc. (HCI) filed articles of incorporation with the South Carolina Secretary of State on February 19, 1993.[72] HCI was a real estate development company that formed subsidiary corporations to facilitate its development projects.[73] HCI was the overall developer of the condominium project named the Magnolia North Horizontal Property Regime.[74]

Heritage Magnolia North, Inc. (HMN) filed articles of incorporation on May 8, 1998.[75] HMN was a subsidiary of HCI organized so that the development project, Magnolia North, could contain its own expenses and construction management, and could thus operate as a "cost center."[76] HMN held the title to the property and sold the condominiums to buyers.[77]

Buildstar Corporation (Buildstar) filed articles of incorporation on March 25, 1997.[78] Buildstar—another subsidiary of HCI—was the general contractor in charge of construction at Magnolia North.[79] However, Buildstar did not actually build any of the condominium project; it merely supervised and subcontracted out all the construction work.[80]

The three corporations shared corporate officers and directors.[81] At varying times, Roger Van Wie, Patty Van Wie, Jack Green, and Lynn Anderson were all on the board of directors for HCI.[82] Roger Van Wie and Jack Green were also officers of Buildstar.[83] Roger Van Wie was also the President and CEO of HCI.[84] Additionally, Roger Van Wie oversaw Buildstar's operations.[85] The

72. S.C. Business Filings for Heritage Communities, Inc., S.C. SECRETARY STATE, http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=216139 (last updated Mar. 14, 2013, 6:02 PM).

73. Transcript of Deposition of William Gwyn Hardister at 34, Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012) [hereinafter Hardister Deposition].

74. Brief of Appellants at 1, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112, *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

75. S.C. Business Filings for Heritage Magnolia North, Inc., S.C. SECRETARY STATE, http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=289761 (last updated Mar. 14, 2013, 6:02 PM).

76. Hardister Deposition, *supra* note 73, at 34, 41.

77. *Id.* at 43–44.

78. S.C. Business Filings for Buildstar Corp., S.C. SECRETARY STATE, http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=269637 (last updated Mar. 14, 2013, 6:02 PM).

79. Hardister Deposition, *supra* note 73, at 32–33.

80. *Id.*

81. *Id.* at 35.

82. *Id.* at 30–31.

83. *Id.* at 32.

84. *Id.* at 12.

85. *Id.* at 33.

officers and directors of these corporations often switched around, but in effect, the same individuals were in charge of the three corporations.[86] All three corporations shared the same address and telephone number.[87] Additionally, HCI and Buildstar shared employees.[88]

In 1998, construction began on the Magnolia North condominium complex.[89] The complex contained twenty-five buildings, of which the defendants built twenty-one.[90] Each building contained twelve, thirteen, or fifteen units.[91]

Magnolia North, like other HCI developments, began to experience water intrusion issues.[92] At Magnolia North's first homeowners' association meeting on March 8, 2000, HCI officials acknowledged issues with the roadways and leaking balconies and windows, and made promises to fix the issues.[93] Condominium purchasers also received the Heritage Communities Warranty Manual at their closings.[94] This warranty promised that HCI would repair construction defects.[95] When condominium owners contacted HCI about construction issues, HCI worked diligently to deal with the issues right up until it declared bankruptcy.[96]

In January 2001, when HCI declared bankruptcy, the officers and directors of HCI were also the directors of the homeowners' association.[97] On September 9, 2002, HCI gave control of the homeowners' association to the plaintiffs.[98] Another developer eventually took over the complex and completed the project.[99]

B. Procedural History of Magnolia North

On May 28, 2003, the Magnolia North Property Owners' Association (POA) filed suit in Horry County, South Carolina, over defects in the construction of the

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86. *Id.* at 41. When asked if the corporations "were essentially owned and operated by the same officers and directors," HCI's former Chief Operating Officer and Senior Vice President answered in the affirmative. *Id.*

87. *Id.* at 40.

88. *Id.* at 50.

89. Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 356, 725 S.E.2d 112, 117 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

90. *Id.*

91. *Id.*

92. *Id.* at 361, 725 S.E.2d at 119.

93. Hardister Deposition, *supra* note 73, at 64–70.

94. *Id.* at 42.

95. *Id.* at 43.

96. *Id.* at 42–43, 51.

97. *Magnolia North*, 397 S.C. at 356, 725 S.E.2d at 117.

98. *Id.*

99. *Id.*

Magnolia North Horizontal Property Regime in Myrtle Beach.[100] The defendants were HCI, HMN, and Buildstar.[101] POA amended the complaint eight times; the final amended complaint filed on February 24, 2009, alleged four main claims: (1) negligence and gross negligence against HCI, HMN, and Buildstar; (2) breach of express warranty against HCI; (3) breach of implied warranty of workmanlike service against Buildstar; and (4) breach of fiduciary duty against HCI and HMN.[102] Most importantly for purposes of this Comment, the eighth amended complaint contained an allegation that the prior complaints did not: that HCI, HMN, and Buildstar "have been formed and operated so their legal distinction is blurred and they are amalgamated."[103]

A related class action lawsuit was filed on January 5, 2005, but the class was decertified by the trial court and the claims of the named plaintiff were dismissed as time-barred.[104] The original suit went to trial on May 11, 2009.[105] At the close of the plaintiff's case, the trial court granted the defendants' motion for a directed verdict as to the breach of express warranty claim but denied all other claims.[106]

Before hearing the arguments on the defendants' directed verdict motion, the trial court ruled that the three corporate defendants were to be considered a single corporation "because the evidence has revealed an amalgamation of the corporate interest, the entities, and activities so as to blur the legal distinction between the corporation and their activities."[107] While the trial court purportedly reached this ruling by looking at all the evidence, it is clear that the court relied mainly on the testimony contained in a deposition given by HCI's former president and chief operating officer, Gwyn Hardister.[108]

At the close of the defendants' case-in-chief, both sides moved for directed verdicts.[109] The court granted the plaintiff's motions on the negligence and breach of implied warranty of workmanlike service claims.[110] The remaining claim for breach of fiduciary duty went to the jury, which found the defendants liable and awarded the plaintiff $6,500,000 in damages and another $2,000,000

100. Complaint at 1–8, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112 (No. 03-CP-26-3202), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

101. *Id.* at 1.

102. Eighth Amended Complaint at 1–7, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112 (No. 2003-CP-26-3203), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

103. *Id.* at 2.

104. Brief of Appellants, *supra* note 74, at 2.

105. *Magnolia North*, 397 S.C. at 357, 725 S.E.2d at 117.

106. *Id.*

107. Transcript of Record at 895–99, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112 (No. 03-CP-26-3202), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

108. *See id.* at 899 (stating that the amalgamation of corporate interests was "pointed out through Mr. Hardister's testimony").

109. *Magnolia North*, 397 S.C. at 357, 725 S.E.2d at 117.

110. *Id.*

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118. *Id.* at 9
119. *Id.*

in punitive damages.[111] Subsequently, the defendants filed five post-trial motions, all of which were denied except for the motion for set off.[112]

C. *Holding in* Magnolia North

On appeal, the South Carolina Court of Appeals upheld the trial court's ruling and denied the defendants' petition for a rehearing.[113] The court gave almost no analysis justifying the ruling but did note that the "case involves several indicia of an amalgamation of interests."[114] The indicia mentioned by the court were a shared location, telephone number, board members, officers, employees, and the warranty manual that held HCI out as the corporation responsible for construction defects.[115] The defendants' petition for certiorari is, at the time of this writing, pending before the South Carolina Supreme Court.[116]

D. *The Rise of Amalgamation in South Carolina*

The court's application of the doctrine of amalgamation was not unprecedented. In fact, the court of appeals created the doctrine of amalgamation in 1986 in *Kincaid v. Landing Development Corp.*[117] In *Kincaid*, the plaintiffs purchased a lot to build their single-family home from the defendant developer.[118] A sister corporation of the developer, the defendant sales and marketing agent, sold the home to the plaintiffs.[119] The developer subsequently contracted with another sister corporation, the defendant

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111. Verdict Form at 1–2, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112 (No. 2003-CP-26-3203), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

112. Order Denying Defendants' Post Trial Motions and Granting Defendants' Motion for a Set Off, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112, *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

113. *Magnolia North*, 397 S.C. at 358, 725 S.E.2d at 116–17.

114. *Id.* at 359, 725 S.E.2d at 118.

115. *Id.* at 360, 725 S.E.2d at 118. Notably, the court never analyzed whether the defendants adhered to corporate formalities. It is also significant that the plaintiffs were aware that HCI was the only company responsible for construction defects. *See id.* The warranty manual given to each homeowner at their closings notified the plaintiffs of such an arrangement. *See supra* note 94 and accompanying text. This was part of the bargained-for consideration of the transaction. *See id.* There are no allegations that the corporations engaged in any misleading or fraudulent activity. Nothing in the record supports the proposition that the plaintiffs were confused as to who was responsible for construction defects or that the plaintiffs were aware that the corporations shared locations, officers, and employees. While the court, in hindsight, identified indicia that might prove a blurring of entities, there is no evidence that the plaintiffs could identify these same indicia beforehand. *See id.* at 360, 725 S.E.2d at 118.

116. Petition for Writ of Certiorari, *Magnolia North*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

117. Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986).

118. *Id.* at 92, 344 S.E.2d at 871.

119. *Id.*

construction company, for the construction of the home.[120] After finding construction defects in the home, the plaintiffs brought suit against all three corporations for negligent construction and breach of warranty.[121] The court of appeals noted that the three corporations had the same corporate officers,[122] shareholders, and location; distributed literature that described the sales and marketing company as a company that developed, sold, and managed property; and that customers could contact any one of the three corporations to register a complaint.[123] Based on these factors, the court of appeals agreed with the trial court's ruling that the "evidence revealed 'an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.'"[124]

The next case to address amalgamation was *Kennedy v. Columbia Lumber & Manufacturing Co.*[125] In *Kennedy*, the South Carolina Supreme Court did not extend liability for construction defects to a lender who was not involved in the construction of a home.[126] However, the court noted that the lender could possibly be held liable for the defects for several reasons, including, for example, if the lender "is so amalgamated with the developer or builder so as to blur its legal distinction."[127]

The doctrine of amalgamation appeared to be an anomaly in South Carolina corporate jurisprudence until it was revived nearly two decades later in *Mid-South Management Co. v. Sherwood Development Corp.*[128] *Mid-South* involved a dispute over a settlement payment with a third-party homeowner's association for construction defects.[129] The settlement was paid by the plaintiff who developed the project as a joint venture with the defendant corporation.[130] The defendant corporation refused to pay a capital call for its portion of the settlement, and the plaintiff filed suit against the defendant corporation and its

120. *Id.*

121. *See id.* at 91, 344 S.E.2d at 871.

122. *Id.* at 96, 344 S.E.2d at 874. Interestingly, Roger Van Wie, who was an officer of all three corporations in *Magnolia North*, was the vice president of all three corporations in *Kincaid*. *Id.*; *see also supra* notes 81–88 and accompanying text (discussing the corporate structure of the defendant corporations in *Magnolia North*).

123. *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874.

124. *Id.* The court cited no precedent for this ruling and never analyzed whether the corporations adhered to corporate formalities. *See id.*

125. 299 S.C. 335, 384 S.E.2d 730 (1989).

126. *Id.* at 338–40, 384 S.E.2d at 733 (citing Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984)) (adopting the approach of *Roundtree Villas* and holding that a "lender could not be held liable in tort for construction defects caused by the builder's work").

127. *Id.* at 340, 384 S.E.2d at 734 (citing *Kincaid*, 289 S.C. 89, 344 S.E.2d 869). The South Carolina Supreme Court has subsequently found a lender's involvement with a developer to be a jury question. *See* Cole, *supra* note 18, at 35 ("[T]he [South Carolina] Supreme Court found that the question whether a bank is so 'substantially involved' in construction of a house is a question for the jury." (quoting Kirkman v. Parex, Inc., 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006))).

128. 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007).

129. *Id.* at 594–95, 649 S.E.2d at 139.

130. *Id.*

parent companies.[131] The plaintiff offered three alternative theories for holding the parent companies liable: piercing the corporate veil, alter ego, or amalgamation.[132] The court held that the plaintiffs failed to establish the requisite elements to hold the parent companies liable.[133] The amalgamation doctrine was inapplicable because "*Kincaid* was not a situation in which one company owed a judgment and the court imposed liability upon the parent company or a shareholder."[134] The court also noted that the evidence failed to show that the subsidiary could be confused with its parent corporations.[135] Thus, there was insufficient evidence to hold the parent companies liable.[136]

The court of appeals again dealt with the doctrine of amalgamation in *Pope v. Heritage Communities, Inc.*[137] Another construction defects case, the facts of *Pope* mirror those of *Magnolia North*.[138] In fact, two of the three defendants were the same corporations as those in *Magnolia North*, and the third defendant was the project-specific developer.[139] The corporations shared a location, telephone number, board members, and employees, and the overall developer held itself out as responsible for construction defects through its warranty.[140] On these facts, the court of appeals upheld the trial court's ruling that the legal distinction between the corporations was blurred and that "they are in effect one and the same as far as their representation and operation and that the action of one should apply to the others . . . because they are in effect one and the same."[141] Thus, each corporation was held liable for the principal actor's torts.

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131. *Id.*

132. *Id.* at 595, 649 S.E.2d at 139.

133. *Id.* at 606, 649 S.E.2d at 145.

134. *Id.* at 605, 649 S.E.2d at 144 (citing Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986)). Notably, this language appears to place amalgamation on equal ground with piercing the corporate veil and alter ego as a means of ignoring the corporate form. *See* Cole, *supra* note 18, at 34. However, no court has held that amalgamation requires the powerful equity that both piercing and alter ego require. *See id.* This also demonstrates the need to plead amalgamation before obtaining a judgment.

135. *Mid-South*, 374 S.C. at 605, 649 S.E.2d at 145.

136. *Id. Mid-South* is the only case where the court of appeals has analyzed the doctrine of amalgamation and found that it did not apply. *Mid-South* is also the only time that amalgamation was discussed by the court of appeals and Roger Van Wie was not an officer of the corporations. *See supra* note 122.

137. 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), *petition for cert. filed*, No. 2005-CP-26-3289 (S.C. Jan. 11, 2012).

138. *Compare id.* at 410, 717 S.E.2d at 769 (HCI and Buildstar sued for construction defects), *with* Magnolia N. Prop. Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 356–57, 725 S.E.2d 112, 117 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012) (same).

139. *See supra* note 138.

140. *Pope*, 395 S.C. at 419, 717 S.E.2d at 773.

141. *Id.* at 417–20, 717 S.E.2d at 772–73 (internal quotation marks omitted). There are many similarities between *Magnolia North* and *Pope*: the same trial judge, Judge Clifton Newman, presided over both trials; the same counsel represented the plaintiff in both cases; several of the same attorneys represented the defendants in both matters, but not exactly the same counsel; and two of the three court of appeals judges—Judge Geathers and Judge Short—sat on the bench for the

The doctrine of amalgamation was on firm enough footing in South Carolina corporate jurisprudence to be recognized by a federal district court in *Babb v. Lee County Landfill SC, LLC*.[142] In *Babb*, landowners brought an action against the owner of a landfill, the landfill's parent company, and an affiliate company.[143] The parent and affiliate companies provided assistance and support to the landfill, but the court found that "each [was] a wholly distinct legal entity" and that they were "not blurred such that they [were] in effect one and the same as required under South Carolina law to find liability under the theory of amalgamation of interests."[144]

E. Amalgamation in Other Areas of the Law

The South Carolina Supreme Court employed similar amalgamation analysis in *Ost v. Integrated Products, Inc.*[145] *Ost* was a workers' compensation case addressing whether the employees of one corporation could "amalgamate" to a sister corporation in order to determine the number of employees for a statutory employee analysis.[146] Admittedly, the court never specifically mentioned the doctrine of amalgamation or cited to a case that utilized the doctrine. However, in finding that the employees were counted toward the sister corporation, the court noted several facts similar to those considered in the amalgamation analysis in construction defect cases, including: the employees of the sister corporation performed tasks essential to the defendant corporation's operations, the corporations shared corporate officers and employees, and the corporations "intertwined their operations."[147]

Courts also appear amenable to the idea that amalgamation could be utilized to prove service of process on a corporation. In *Schenk v. National Health Care, Inc.*,[148] the defendant argued that a default judgment should be set aside for lack of proper service of process.[149] Although the case was decided without utilizing the doctrine of amalgamation, the court of appeals, in a footnote, suggested that

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appeal, and each authored one of the opinions. *Compare Magnolia North*, 397 S.C. 348, 725 S.E.2d 112, *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012), *with Pope*, 395 S.C. 404, 717 S.E.2d 765, *petition for cert. filed*, No. 2005-CP-26-3289 (S.C. Jan. 11, 2012).

142. 852 F. Supp. 2d 682, 686 (D.S.C. 2012).

143. *See id.* at 684–85.

144. *Id.* at 685–86.

145. 296 S.C. 241, 371 S.E.2d 796 (1988).

146. *See id.* at 242, 371 S.E.2d at 797.

147. *Id.* at 246–47, 371 S.E.2d at 799; *see also* Cole, *supra* note 18, at 35 (citing *Ost*, 296 S.C. at 246–47, 371 S.E.2d at 799; Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986)) ("[T]he general discussion in *Ost* mirrored the 'amalgamation as blurriness' conclusion of *Kincaid*.").

148. 322 S.C. 316, 471 S.E.2d 736 (Ct. App. 1996).

149. *Id.* at 318, 471 S.E.2d at 737.

amalgamation could bind two corporations together for purposes of establishing proper service of process.[150]

IV. THE IMPACT OF AMALGAMATION

A. Elements of Amalgamation

The doctrine of amalgamation fundamentally alters corporate jurisprudence in South Carolina. Notably, the court of appeals, when establishing the doctrine in *Kincaid*, cited no cases or statutes in support of its ruling.[151] Nor did the court provide any analysis of whether the defendants observed corporate formalities or of other established means of disregarding the corporate form in South Carolina.[152]

None of the previously discussed cases expressly delineate the elements of amalgamation.[153] However, a list of possible elements becomes readily apparent by reading the opinions: (1) shared owner/shareholders, (2) shared officers, (3) shared office location, (4) shared employees, and (5) other evidence that the companies present themselves to the public as sharing common interests.[154]

These elements focus on factors from the first prong of the *Sturkie* test that South Carolina courts have de-emphasized. The important factors in the first prong of the *Sturkie* test deal with misappropriation of funds for personal use;[155] however, amalgamation emphasizes a lack of corporate formalities leading to a blurring of corporate entities—an arguably lower standard for applying the doctrine.[156]

Noticeably absent from the amalgamation elements is the need for the plaintiff to demonstrate some sort of deliberate fraud perpetuated through the corporate form or that injustice or fundamental unfairness will result from

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150. *Id.* at 318 n.2, 471 S.E.2d at 737 n.2; *see also* Cole, *supra* note 18, at 35 (citing *Schenk*, 322 S.C. at 318 n.2, 471 S.E.2d at 737 n.2) ("[The] footnote [in *Schenk*] . . . suggests that [amalgamation] could be used to prove proper service on a corporation.").

151. *See* Cole, *supra* note 18, at 34 (citing *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874) ("The appellate court provided a list of factors—with no reference to any statutes or common law—why the defendant developer, sales, and construction entities should be considered one.").

152. *See id.* (citing *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874) ("The *Kincaid* court made no reference to or findings regarding corporate forms, corporate formalities, or even piercing the corporate veil.").

153. *See id.* at 35.

154. Cole draws four of these factors from South Carolina case law regarding amalgamation. *See id.* The final factor, "shared employees," although not listed in *Kincaid*, has been found to be an "indicia of amalgamation of interests" in every successful amalgamation since that case.

155. *See, e.g.*, Hunting v. Elders, 359 S.C. 217, 225, 597 S.E.2d 803, 807 (Ct. App. 2004) (discussing the *Sturkie* factors that courts consider less important when deciding whether to pierce the corporate veil). Nothing in the record of *Magnolia North* reflects improper fund movement, misappropriation of funds, or undercapitalization. *See* Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 359–60, 725 S.E.2d 112, 118 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

156. *See* Cole, *supra* note 18, at 34.

observing the corporate form.[157] Perhaps most importantly, the court of appeals has never acknowledged that the doctrine of amalgamation should be utilized only after "substantial reflection."[158] The absence of this cautionary phrase—which the South Carolina Supreme Court finds essential for properly piercing the corporate veil—signifies that the doctrine has a lower standard and may be applied more freely than other doctrines that allow courts to disregard the corporate form.

B. Known Effects of Amalgamation

The court of appeals in *Magnolia North* gave little reasoning in support of its ruling.[159] The court merely listed a set of facts it found to be sufficient "indicia of an amalgamation of interests" between the corporations, thereby justifying the court's amalgamation of the separate corporate entities.[160] In *Magnolia North*, the court of appeals effectively used amalgamation to pierce the corporate veil and hold a parent corporation liable for the torts of its subsidiary.[161] However, the court engaged in no discussion of corporate formalities, fundamental unfairness, or substantial injustice as South Carolina case law requires.[162] Aside from listing "several indicia of an amalgamation of interests," the court offered no further analysis to support its use of the doctrine.[163]

The South Carolina Supreme Court's conclusion that the alter ego doctrine is merely a means of piercing the corporate veil[164] demonstrates why the plaintiff, when putting forth an alter ego claim, must prove that fundamental unfairness will ensue if the corporate form is recognized.[165] *Drury* can be read as Chief Justice Toal's assertion that, whether a plaintiff asks a court to ignore the corporate form by piercing the corporate veil or through the alter ego doctrine, the standard is the same.[166] Thus, it follows that any doctrine allowing a court to

157. *See id.* ("Apparently, it is no longer necessary to prove a deliberate or fraudulent attempt to misuse a corporate entity, nor is it necessary to prove some fundamental unfairness if the corporate shell is honored.").

158. *See, e.g.*, Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) (citing Baker v. Equitable Leasing Corp., 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980)) ("It is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection.").

159. *See Magnolia North*, 397 S.C. at 359–60, 725 S.E.2d at 118.

160. *Id.* at 359, 725 S.E.2d at 118.

161. *See id.* at 360, 725 S.E.2d at 118.

162. *See supra* notes 114–15 and accompanying text.

163. *Magnolia North*, 397 S.C. at 358–60, 725 S.E.2d at 118.

164. *See supra* note 47 and accompanying text.

165. *See* Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (citing Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992)).

166. *See supra* note 47 and accompanying text.

disregard the corporate form—including amalgamation—must also satisfy this standard: the plaintiff has the burden of proving fundamental unfairness.[167]

The court of appeals in *Magnolia North*—or any other opinion analyzing the doctrine of amalgamation—did not force the plaintiff to meet this burden.[168] Nor did the court provide a reason why amalgamation does not require proof of fundamental unfairness. Admittedly, the court attempted to distinguish amalgamation from piercing the corporate veil.[169] However, the court supplied no analysis in reaching this distinction, but rather it simply stated that a South Carolina court can disregard the corporate form even if the requirements for piercing the veil have not been met.[170]

The court also mentioned that amalgamation is one of three theories raised in *Mid-South* as a possible means for holding a parent company liable in place of a subsidiary.[171] However, the court in *Mid-South* expressly rejected the notion that amalgamation is a means to hold a parent liable in place of a subsidiary, distinguishing *Kincaid* from *Mid-South* on that very basis.[172] The court's shift in *Magnolia North* demonstrates a willingness to expand the scope of amalgamation.[173] It is likely just a matter of time before the court of appeals utilizes the doctrine of amalgamation to hold shareholders liable. Thus, the doctrine may soon completely usurp other means of ignoring the corporate form in South Carolina.

Amalgamation's low standard is in direct contravention of South Carolina public policy. The General Assembly undoubtedly intended to encourage capital formation under South Carolina law by granting corporations the statutory protection of limited liability.[174] Historically, South Carolina courts have recognized the importance of limited liability, dispensing with it only when the transaction in question exhibited a sufficiently powerful equitable justification

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167. *See* Sturkie v. Sifly, 280 S.C. 453, 459, 313 S.E.2d 316, 319 (Ct. App. 1984).

168. *See supra* note 157 and accompanying text.

169. *See* Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 359, 725 S.E.2d 112, 118 (Ct. App. 2012), *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012).

170. *Id.* The court does mention that the trial court concluded the piercing analysis did not apply to these facts but engages in no analysis of this statement. *Id.* at 359, 725 S.E.2d at 118.

171. *Id.* at 358–59, 725 S.E.2d at 118 (citing Mid-S. Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597–605, 649 S.E.2d 135, 140–44 (Ct. App. 2007)).

172. *See Mid-South*, 374 S.C. at 605, 649 S.E.2d at 144 ("*Kincaid* was not a situation in which one company owed a judgment and the court imposed liability upon the parent company or a shareholder. Thus, *Kincaid* is inapplicable to the present action."). *But see* Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 419–20, 717 S.E.2d 765, 773 (Ct. App. 2011), *petition for cert. filed*, No. 2005-CP-26-3289 (S.C. Jan. 11, 2012) (utilizing amalgamation to hold a parent company liable for the torts of its subsidiary). It is not surprising that *Pope* and *Magnolia North* were decided in the same manner since they are effectively the same case. *See supra* note 141. The only difference is the particular development at issue in each case. *Compare Pope*, 395 S.C. at 410, 717 S.E.2d at 768 (concerning the construction of the Riverwalk Development condominium complex), *with Magnolia North*, 397 S.C. at 356, 725 S.E.2d at 117, *petition for cert. filed*, No. 2005-CP-26-0044 (S.C. May 21, 2012) (concerning the construction of the Magnolia North condominium complex).

173. *See* Cole, *supra* note 18, at 35–36.

174. *See supra* note 44 and accompanying text.

for doing so, such as fraud or fundamental unfairness.[175] Placing the burden of proof on the party asking the court to disregard the corporate form further illustrates the traditional rule that a statutory right should not be disposed of easily.[176] Amalgamation dispenses with the right of limited liability—a right created by the General Assembly and recognized by the judiciary through the common law—without the requisite equitable justification.[177]

Amalgamation also allows a plaintiff to recover from a corporate entity that has not harmed the plaintiff by breaching some standard.[178] A plaintiff no longer has to prove each individual claim against each individual defendant. Rather a plaintiff can lump all the defendants together through amalgamation, prove one claim as to one defendant, and collect damages from all the defendants.[179] In *Magnolia North*, the three corporations each had separate legal obligations and duties to the plaintiffs,[180] yet each separate entity was held liable for each entity's breach of a legal obligation.[181] By holding a corporation liable for the torts of another corporation—absent a legally justifiable reason such as respondeat superior or piercing the corporate veil—the doctrine will discourage capital formation under South Carolina law.

Dispensing with the necessity of demonstrating fundamental unfairness in disregarding the corporate form will also affect capital formation under South Carolina law. Corporations select their place of incorporation based on which states offer the most favorable laws.[182] Selecting a location that is more desirable for investors—the one with the greatest liability protection for investors—enables a corporation to generate more capital.[183] The state with the most attractive and clear rules for corporations will induce more corporations to form under its laws, thereby increasing its tax revenue.[184] South Carolina has long characterized itself as a business-friendly state.[185] However, decisions such as *Magnolia North* will undermine this characterization.[186] Piercing the corporate veil and the alter ego doctrine are considered extreme remedies and are

175. *See supra* notes 48–49 and accompanying text.

176. *See supra* note 167 and accompanying text.

177. *See* Cole, *supra* note 18, at 35 ("The new amalgamation appears to erode away some of the corporate protections as it bypasses the traditional mechanisms established by the courts to attack the corporate shell.").

178. *See id.*

179. *See* Brief of Appellants, *supra* note 74, at 2; *see also* Cole, *supra* note 18, at 35 ("Stated another way, new amalgamation also blurred the legal claims that were pled in the lawsuits.").

180. *See* Cole, *supra* note 18, at 35 (citing Mid-S. Mgmt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 603, 649 S.E.2d 135, 143 (Ct. App. 2007)).

181. *See id.*

182. *See* EASTERBROOK & FISCHEL, *supra* note 15, at 5–6.

183. *See id.*

184. *See id.* at 6.

185. *See* WALTER EDGAR, SOUTH CAROLINA: A HISTORY 530–35, 577–80 (1998); *see also* Cole, *supra* note 18, at 35 ("South Carolina often markets itself as a business friendly State.").

186. Cole, *supra* note 18, at 35–36.

applied only in a limited number of cases.[187] Every jurisdiction in the United States recognizes the doctrine of piercing the corporate veil,[188] but a jurisdiction that has an even lower standard for ignoring the corporate form—like amalgamation—is not likely to induce many businesses to organize under its laws. Thus, the expansion of the doctrine of amalgamation will cause South Carolina to drive away businesses and miss out on much needed tax revenue.

C. Possible Effects of Amalgamation

The court of appeals has signaled a willingness to expand the doctrine of amalgamation.[189] As previously discussed, amalgamation will likely soon be utilized to hold shareholders liable for the obligations of a corporation. The lowered bar for ignoring the corporate form makes the expansion of the doctrine much easier.[190] A doctrine that requires a showing of fundamental unfairness before it may be utilized by the courts cannot easily be transposed to other areas of the law; however, one that merely requires an "indicia of an amalgamation of interests" does not require a court to expend great resources in applying the doctrine in new circumstances.[191] This lowered standard, coupled with the fact that amalgamation may be utilized by courts without substantial reflection, increases the likelihood that the doctrine will continue its expansion into other areas of the law.[192]

Uncertainty over the expansion of the doctrine will discourage capital formation under South Carolina law. Businesses choose to form under state laws that are clearly defined so that managers can predict the consequences of the corporation's actions. Uncertainty over what actions lead to liability in South Carolina will discourage or drive away business and, consequently, investment and tax revenue.

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187. *See id.* at 34. The South Carolina Supreme Court has also acknowledged the extreme nature of this remedy by acknowledging that "[i]t is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection." Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (quoting Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984)) (internal quotations marks omitted).

188. *See* PRESSER, *supra* note 59, at §§ 2:1–55 (compiling each states' law on piercing the corporate veil).

189. The South Carolina Court of Appeals appears willing to use the doctrine to decide matters of civil procedure. *See supra* notes 148–50 and accompanying text. The South Carolina Supreme Court also utilized similar reasoning to analyze and decide a workers' compensation case. *See supra* notes 145–47 and accompanying text.

190. *See* Cole, *supra* note 18, at 35–36.

191. *See, e.g.*, *supra* note 114 and accompanying text (providing one example of the ease with which a court can amalgamate several corporations with no analysis under the "indicia of an amalgamation of interests" standard).

192. The area of the law that would be the most troubling for business—and for South Carolina's ability to attract new businesses—would be tax law. While no case has even remotely suggested that the doctrine may be utilized for tax purposes the fact that the doctrine appears to be expanding into seemingly unrelated areas of the law suggests that predicting where the doctrine will next be applied is not an easy task. *See* Cole, *supra* note 18, at 35–36.

This expansion will further harm South Carolina's reputation as a business-friendly state.[193] While amalgamation will undoubtedly induce businesses to incorporate under other states' laws, it remains to be seen if the doctrine will encourage previously incorporated South Carolina businesses to relocate. More specifically, will development companies decide to leave the state to find more favorable liability laws? The doctrine has thus far been used primarily on development companies;[194] however, the ease with which South Carolina courts could expand amalgamation to other areas of the law coupled with their apparent willingness to do so will likely lead to the doctrine being applied to other types of businesses.

D. Guidance for Practitioners

The easiest solution for practitioners is to not incorporate a client's business under South Carolina law. However, if the business must be formed under South Carolina law, there are still ways to protect the client. Attorneys may advise clients to make sure there is a clear delineation between the corporate entities. In particular, separately incorporated entities should be sure to have different locations, corporate officers, employees, letterhead, logos, and information pamphlets—anything they can do to ensure that the public knows the entities are separate but just happen to be affiliated and are not the same business.[195]

V. CONCLUSION

The South Carolina General Assembly has made a public policy decision to grant corporations the statutory right of limited liability in order to encourage more capital formation under South Carolina law. Until recently, South Carolina courts have recognized this decision by setting a high bar for disregarding the corporate form and imposing liability on shareholders or a parent corporation. The South Carolina Supreme Court has held that this high standard of fraud, injustice, or fundamental unfairness is applicable to all doctrines that seek to ignore the corporate form. Thus, courts may not take away this right unless they identify a sufficiently powerful equitable justification.

Magnolia North and the doctrine of amalgamation fundamentally alter corporate law by taking away the statutory protection from extracorporate liability without the requisite equitable justification. This practice is in direct contravention of the public policy of South Carolina. The result of this decision and its progeny will be to drive business out of South Carolina—eliminating much needed tax revenue for the state.

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193. *See supra* note 185 and accompanying text.

194. *See* Cole, *supra* note 18, at 33 ("[T]he majority and most significant of [the amalgamation] cases come from construction defect cases.").

195. *See id.* at 36 ("Perhaps the best advice . . . is to warn . . . [clients, specifically those in the construction business] to be wary of comingling corporate interests . . . .").

South Carolina cannot afford a system of corporate jurisprudence that hampers the state's ability to attract businesses. The South Carolina Supreme Court should grant review to *Magnolia North* and ensure that the doctrine of amalgamation is not applied without substantial reflection; that the doctrine—like all doctrines used to ignore the corporate form in South Carolina—must meet the second prong of the *Sturkie* test: "that there be an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals."[196]

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196. Sturkie v. Sifly, 280 S.C. 453, 457–58, 313 S.E.2d 316, 318 (Ct. App. 1984) (citing DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 685 (4th Cir. 1976) (Russell, J.)).