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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Roger M. Young, Sr., Circuit Court Judge

Supreme Court Case No. 2024-001509
Appellate Case No. 2022-001385
Berkeley County Case No. 2017-CP-08-02238

Matthew Zetz Petitioner,

v.

Daniel Island Company, Inc.;
Daniel Island Community Foundation, Inc.;
Daniel Island Town Association, Inc.; and
MGR Resources, Inc. d/b/a Moonlighting
Landscape Lighting Systems Defendants

Of which Daniel Island Company, Inc. is the Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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AND NOW COMES Respondent Daniel Island Company, Inc. (hereinafter referred to as “Developer”) and respectfully submits the following Return to Petition for Writ of *Certiorari*.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Did the trial court properly grant Developer’s Motion for Summary Judgment where the Plaintiff failed to carry his burden of establishing that Developer exercised sufficient control over the subject premises such that it could be held liable for the injuries that occurred on that property?

SUGGESTED ANSWER: *Yes.*

2. Did the trial court properly grant Developer’s Motion for Summary Judgment where the Plaintiff failed to carry his burden of establishing that Developer exercised sufficient control over the entity that owned the subject premises such that Developer could be liable for that entity’s negligence?

SUGGESTED ANSWER: *Yes.*

INTRODUCTION

This case arises out of an incident that occurred in what was known as the Children’s Park on Daniel Island on the night of November 11, 2016. (*See e.g.*, R. p. 8). The Petitioner, Matthew Zetz, accompanied his brother to inspect a vendor’s booth that had been set up to promote his brother’s orthodontics practice during Daniel Island Park Day, which was scheduled to take place the following day. (*See id.*). Petitioner’s brother walked into the Park with the guidance of a police officer with a flashlight. Petitioner, who was unfamiliar with the Park, walked some distance behind them without the aid of a flashlight. (*See id.*).

The Children’s Park, which was recently razed to allow for the construction of a new park and public marina, was built to resemble a map of the Charleston area. (*See id.*). Some of the local

waterways depicted on the hardscape surface of the children’s play area were built as an actual water feature, consisting of a fountain that filled shallow concrete trenches with water. (*See id.*). On the night of the incident, the fountain had been turned off and, by all accounts, there was no water in the trenches. (*See id.*). Unfortunately, Petitioner took the proverbial “step in the dark” and stepped into one of the water feature trenches, fracturing his left ankle. (*See id.*).

After his fall, Petitioner sued Developer and several other “Daniel Island entities”: Daniel Island Town Association (“Association”), Daniel Island Community Association (“DICA”), and Daniel Island Community Foundation (“DICF”), as well as MGR Resources, Inc. d/b/a Moonlighting Landscape Lighting Systems.¹ (*See generally*, R. pp. 14-40). Although Petitioner eventually sought to hold Developer liable under a corporate veil piercing and/or corporate amalgamation theory, his only stated cause of action against Developer was negligence. (*See* R. pp. 30-41).

On September 14, 2020, Developer filed its Motion for Summary Judgment. (*See* R. pp. 47-48). In that Motion, Developer sought summary judgment on Petitioner’s claims on the grounds that the claims were filed well beyond the applicable statute of repose and that Developer owed Petitioner no legal duty at the time of the incident that is the subject of this litigation. (*See id.*). In granting Developer’s Motion on September 9, 2022, the trial court held in relevant part that the Petitioner “failed to provide any support for the notion that [Developer] had sufficient control over the park to create a legal duty in that entity.” (*See* R. p. 11). The trial court further held that Petitioner “was not able to point to any facts in the record to support either [a corporate amalgamation or veil piercing claim].” (*See id.*).

¹ At the time it was granted summary judgment, Developer was the only defendant remaining in the case.

On October 4, 2022, Petitioner filed his Notice of Appeal from the Order granting Developer’s Motion for Summary Judgment. (*See R. pp. 1072-1073*). Following submission of briefs by the parties, the Court of Appeals issued its Unpublished Opinion affirming the trial court’s Order. *Zetz v. Daniel Island Co., Inc., et al*, Op. No. 2024-UP-244 (S.C. Ct. App. filed July 3, 2024) (the “Opinion”). On July 18, 2024, Petitioner filed a Petition for Rehearing, which the Court of Appeals denied on August 19, 2024. Petitioner then filed his Petition for a Writ of *Certiorari* on October 10, 2024.

ARGUMENT

I. Petitioner Has Not Shown Any “Special and Important Reasons” Warranting the Grant of *Certiorari*

A writ of *certiorari* “is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” S.C.R. App. P. 242(b). The rules governing petitions for writs of *certiorari* are well-settled in South Carolina and provide that *certiorari* should only be granted only in rare cases, such as:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

See S.C.R. App. P. 242(b). In accordance with this framework, this Court has emphasized “it will grant *certiorari* to the court of appeals only where special reasons justify the exercise of that discretion.” *S.C. Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236 (2020). As set forth below, there are no special or important reasons to grant *certiorari* in this case and the Petition should therefore be denied.

Petitioner contends “[t]his Court should grant certiorari to specifically clarify whether corporate principles are relevant in the context of premises liability...” (Pet. for *Certiorari*, at 10). However, despite Petitioner’s suggestion to the contrary, this case does not present any novel legal questions that warrant this Court’s review. In fact, this case centers around a question that has been addressed by this Court on numerous occasions: whether one entity has sufficient control over another entity such that it can be held liable for the second entity’s negligence. *See, e.g., Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018) (single business enterprise theory); *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008) (corporate veil-piercing claims). The fact that this question is being asked in a case involving a premises liability claim is entirely immaterial, as the Court’s guidance makes it clear that the same analysis is to be used regardless of the nature of the claims at issue.

What’s more, the substance of Petitioner’s arguments indicates that he does not actually seek clarification on the applicability of corporate law principles in the context of premises liability, but instead seeks an upheaval of an entire body of law unique to corporations. To be sure, in an effort to hold Developer liable under basis premises liability principles, Petitioner proposes that this Court carve out an exception to the established protections afforded to corporations in any case involving a premises liability claim. This is not a novel question of law, but simply Petitioner’s renewed attempt to advance his claims against Developer by couching his incorrect application of the law as a novel issue. Accordingly, because this case does not present any novel questions of law and there are no other special or important reasons to grant *certiorari*, the Petition should be denied.

II. Petitioner's Arguments in His Petition for Writ of *Certiorari* Do Not Have Merit

This Court should deny the Petition for the sole reason that it fails to present any special or important reasons that justify *certiorari*. However, even assuming, *arguendo*, that the Petition sufficiently comports with the requirements set forth in Rule 242 and with this Court's standards for granting *certiorari*, the Petition nevertheless should be denied because the Court of Appeals correctly affirmed Judge Young's granting of Developer's Motion for Summary Judgment.

Petitioner's claims against Developer all hinge on a single word: "control." However, Petitioner's definition of "control" has been a moving target throughout the litigation. On one hand, Petitioner claims that Developer is liable because Developer had direct control over the Children's Park. On the other hand, Petitioner claims that Developer is liable because Developer has control over the Association, a separate corporate entity that owns the Children's Park. In making these arguments, Petitioner has conflated entirely separate areas of law. In its Order, the trial court distinguished between the different concepts of control that Petitioner purports to use in asserting his claims against Developer, stating:

'Control' is not a word with a single legal definition. In the context of horizontal property regimes, master deeds frequently refer to a "declarant control period." That is simply common parlance for the time during which the original developer of a community may appoint the board members of a property owners association it has formed. That said, if proper corporate formalities are observed, the declarant does not actually exercise direct operational control over the POA, much less the common elements that are owned by its members. In the context of the kinds of premises liability cases upon which the [Petitioner] relies, "control" is used as a way to describe the circumstances under which a legal duty arises to protect occupants and visitors to a property. That is a very different analysis than what is appropriate to examine the relationships between separate corporate entities.

(See R. p. 10). Importantly, while Petitioner has, at various times, attempted to rely upon several different bodies of law to support his claims against Developer, it has become abundantly clear that each of Petitioner's arguments is focused on "control" as it relates to the relationship between

two separate corporate entities, the Developer and the Association. That relationship, as well as Developer's connection to the Children's Park, was properly summarized in the trial court's Order:

[Developer] is a for profit corporation. It was the original developer entity for the entirety of Daniel Island. As part of the master plan to develop the island, the City of Charleston mandated a number of parks and greenspaces be built and be open to the public. The City also mandated that all such parks must be conveyed to one of the nonprofit property owners' associations on the island or to the City itself. The Children's Park where the [Petitioner] was injured was constructed by [Developer] in 1999 and conveyed to the Daniel Island Town Association ("DITA") immediately upon its completion, per the City's requirements. DITA has been the sole owner of the Children's Park since that conveyance. DITA, a South Carolina non-profit corporation, is managed by a board of directors and operated in accordance with a Master Deed. [Developer], as the declarant entity listed in the DITA Master Deed, has the right to appoint DITA's directors until a given number of properties with that association have been sold to third party owners, at which time its board members will be elected from the association's members.

(See R. pp. 8-9). As the discovery phase of the litigation progressed, Petitioner realized the facts could not sufficiently support a basic premises liability theory against Developer. Petitioner then set out to establish Developer's liability under a corporate amalgamation or corporate veil piercing theory, as is required under the law of corporations. Then, when the evidence did not support either of those theories, Petitioner again shifted gears and began to develop a vicarious liability theory. This new theory was discussed at length during the second hearing on Developer's Motion for Summary Judgment, at which time Petitioner's counsel compared the relationship between Developer and DITA to a typical master-servant relationship:

MR. JEFFERIES: . . . I mean, it's like, for instance, my boss controls me and I control my paralegal. There's nothing wrong with that. That's a typical structure. But it also means that my boss has control over my paralegal. That if my paralegal commits some sort of tort, not only am I potentially on the hook because I had control, but my boss could be, too, because he had control. The same way the superintendent of the school controls the principal and the principal controls the teacher. So the superintendent has control over the teacher. The fact that's there [sic] an intermediary in that chain of control doesn't wipe it out.

(See R. p. 1242, lines 14-25). In making his vicarious liability argument, Petitioner applies common law master-servant concepts to the relationship between two entirely separate corporate entities. He effectively claims that it is entirely irrelevant that both Developer and the Association are corporate entities that are afforded certain protections under South Carolina law.

As set forth in more detail below, each of Petitioner's arguments lack merit and Developer was properly awarded summary judgment on all of Petitioner's claims.

A. The Court of Appeals properly affirmed the award of summary judgment because the trial court correctly determined that Developer did not owe Petitioner any duty as a matter of law.

Petitioner asks this Court to grant *certiorari* "to correct the court of appeals' erroneous conclusion that Developer did not owe a duty of care to patrons of the Park." (Pet. for *Certiorari*, at 5). In support of his request, Petitioner contends the "conclusion that the Developer owed no legal duty is an error of law because whether the Developer owed a duty depended on the degree of control it exerted over the Association or the Park." (*Id.*, at 6). According to Petitioner, "because the degree of control is heavily fact dependent and a genuine issue of material fact exists, [whether the Developer had sufficient control to render itself liable for Petitioner's injuries] is a decision for the jury, not for the trial court to make at the summary judgment stage." (*Id.*, at 12). Petitioner's argument fails for a number of reasons.

First, Petitioner's argument improperly conflates the distinct roles of the judge and the jury and directly contradicts the purpose of summary judgment, which is to "expedite the disposition of cases not requiring the services of a fact finder." *S.C. Pub. Interest Found. v. City of Columbia*, 431 S.C. 164, 167, 847 S.E.2d 257, 258 (Ct. App. 2020) (quoting *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011)). It is well settled that the existence and scope of a duty is a question of law for the court. See, e.g., *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 272, 781 S.E.2d 903, 912 (2016) ("A court must

first determine, as a matter of law, whether the law recognizes a particular duty.”). It is equally well settled that whether to amalgamate entities is a decision for the court. *See Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281 (“As with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy.”). Thus, regardless of whether Petitioner seeks to hold Developer liable under a negligence theory or corporate amalgamation theory, his assertion that there is a factual dispute concerning Developer’s “degree of control” is entirely immaterial for purposes of summary judgment.

Furthermore, the trial court and the Court of Appeals correctly held that Developer did not owe Petitioner any duty of care as a matter of law. However, it seems Petitioner seeks to establish a duty of care owed by developers to third parties through an expansion of this Court’s decision in *Walbeck v. I’On Co., LLC*, 439 S.C. 568, 889 S.E.2d 537 (2023). According to Petitioner, the *Walbeck* decision “demonstrate[s] that a Developer who maintains control through positions on an association’s board, may be liable based on the control they exert.” (Pet. for *Certiorari*, at 10). Petitioner’s argument lacks merit and his reliance on the *Walbeck* case is misplaced. That case, unlike this one, dealt with a developer’s fiduciary duty to an association. Ironically, the fiduciary duties addressed in *Walbeck* arise out of corporate law concepts, not tort. In *Walbeck*, this Court held that amalgamation was proper based on its determination that “the evidence shows that not only were the various entities intertwined and working in concert with each other, *their conduct demonstrates ‘bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities’ legal distinctions.*” *Walbeck*, 439 S.C. at 594, 889 S.E.2d at 550 (quoting *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280-81 (2018)) (emphasis added). In reaching its conclusion in *Walbeck*, this Court merely reaffirmed the well-established principles that a

developer owes a fiduciary duty to owners within an HOA and that such owners may enforce that duty via a shareholder derivative suit. In other words, even if the application of the single-business enterprise theory in *Walbeck* extended beyond the context of fiduciary duties, this Court made it explicitly clear that the theory is only applicable and entities may only be amalgamated upon a showing of bad faith, abuse, fraud, wrongdoing, or injustice resulting *from* the blurring of the entities' legal distinctions. As set forth in more detail below, there is no evidence of bad faith or nefariousness anywhere in the record, nor does Appellant point to any such evidence in his Petition. Accordingly, the Court should reject the Petitioner's assertion that the *Walbeck* holding should be expanded so as to establish a new duty of care in tort owed to third parties by entities like Developer.

B. The Court of Appeals properly affirmed the award of summary judgment because the trial court correctly determined that Petitioner cannot prevail on his claims based on "control."

As previously mentioned, Petitioner contends that Developer "could be liable if it exerted sufficient control over the Association or the Park itself." (Pet. for *Certiorari*, at 6). However, it is clear from his arguments that Petitioner's primary aim is *not* to seek to hold Developer liable based on its control over the premises itself, but instead based on its purported control over the Association, a separate corporate entity that owns and controls the premises at issue. To be sure, Petitioner's theory of liability against Developer is set forth in his own Petition as follows:

[B]ecause the Association was responsible for maintaining the common areas, it clearly exerted sufficient control to owe a duty of care in the context of a premises liability case.

Logically, the next question concerns whether an entity that controls the Association may also be liable in premises liability. While [this question] does not appear to have been addressed in this state, the legal analysis to answer this question is the same as in any premises liability case: the person or entity that "controls the use of property has a duty of care not to harm others by its use."

(Pet. for *Certiorari*, at 6-7 (quoting *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)). In support of his theory, Petitioner cites a myriad of basic premises liability cases, all of which reinforce the notion that one who controls a property owes a duty of care not to harm others by its use. On appeal, the Court of Appeals explicitly recognized the flaws in Petitioner's theory of liability, including his misplaced reliance on basic premises liability principles to advance his claims against Developer, finding:

[Petitioner] argues Developer had sufficient control over the Association, and subsequently the park, to be liable for his injuries. Initially, we find [Petitioner] conflates two different theories of "control." First, he contends whatever entity controls the park is liable. See *Dunbar v. Charleston & W. C. Ry. Co.*, 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (stating premises liability "depends upon control, rather than ownership, of the premises"). Next, he asserts Developer is liable for his injuries because it controls the Association through selecting the members of its board. These are separate theories of control. The second theory relates to the law of corporations, not premises liability.

(Opinion, at 1). As both the Court of Appeals and the trial court have recognized, Petitioner is trying to have his cake and eat it too. On the one hand, Petitioner is arguing the Developer has the same duty to Petitioner as the Association under the common law of premises liability. On the other hand, Petitioner seems to recognize that to make that argument, he must connect the Developer to the premises. The only way to do so is to link the Developer to the Association via their corporate chain. However, rather than piercing the corporate veil on the vertical axis or amalgamating the entities on the horizontal axis, as is required under the law of corporations, Petitioner seeks to automatically attribute the Association's negligence to Developer using basic premises liability principles. This is not only a misapplication of well-settled law, but a wholesale rejection of an entire body of law unique to corporate entities. As set forth in more detail below, because Petitioner cannot prevail on his claims against Developer under any theory of liability, Developer was properly awarded summary judgment.

1. The Court of Appeals properly affirmed the trial court’s award of summary judgment in favor of Developer because Petitioner cannot prevail against Developer under a premises liability theory.

Petitioner originally sought and, to some degree, continues to seek to hold Developer liable by asserting that Developer had direct control over the Children’s Park. (*See, e.g.*, Pet. for *Certiorari*, at 6 (“Developer could also be liable if it exerted sufficient control over the Association or the Park itself.”) (emphasis added)). However, the trial court and the Court of Appeals properly held that Developer did not owe a legal duty to Petitioner under the basic principles of premises liability law. At the time of Petitioner’s injury, Developer had not owned the subject property for approximately seventeen years. In fact, Developer was not even the most recent prior owner at the time of the incident. The notion that a past owner of real property cannot be held liable for bodily injury to a subsequent owner’s licensee or invitee is so fundamental to the principles of premises liability law that very few South Carolina cases have ever had to articulate it. *See, e.g., Dunbar v. Charleston & W. Carolina Ry. Co.*, 211 S.C. 209, 216, 44 S.E.2d 314, 317 (1947) (“As a general rule, liability for injuries caused by dangerous instrumentalities terminates with a cessation of control thereover; and the liability of a land owner, likewise, is terminated ordinarily when he parts with possession of the premises in question. Thereafter he is not accountable at the suit of one who may sustain injuries while on the property, at least when the cause of the injuries developed after the transfer of possession.”). That said, this basic principle has been routinely emphasized by other authorities:

Once the landowner sells the land or leases it to a tenant, his duties to make conditions on the land reasonably safe are limited or nonexistent. The reasons for and effects of the limitation are not like those in landowner cases already covered. In other landowner cases, the question was whether anyone owed a duty of any kind. In cases of vendors and landlords, however, the question is not so much whether a duty is owed but who owes it. It is not the existence of responsibility but the allocation of it. Subject to some qualifications, the traditional common law regarded the transfer of

land title as a shift of responsibility for conditions that might cause physical harm to others on the land.

Once the purchaser of land takes title and possession, he becomes responsible for dangers to himself or others on the land; and correspondingly the vendor is freed from responsibility.

DAN B. DOBBS ET AL, THE LAW OF TORTS § 280 (2d ed. 2011); *accord Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009) (vendor owes no duty to protect from dangerous condition, because vendor no longer controls condition of property); *Brady v. 5644 Ave. U Assocs., L.P.*, 291 A.D.2d 523, 524, 737 N.Y.S.2d 640, 642 (2002) (“Where an owner of property is no longer in possession and control of the property, and retains no right to re-enter for purposes of inspection and repair, the owner cannot be held liable for defects in the property.”); *Occidental Chemical Corporation v. Jenkins*, 478 S.W.3d 640, 649 (Tex. 2016) (previous owner owes no duty under premises liability law for injuries caused to entrant by dangerous condition on land, even where previous owner had role in creating condition; “liability ends with the property's sale”); *Brenner v. Amerisure Mutual Insurance Company*, 374 Wis.2d 578, 893 N.W.2d 193 (2017) (former property owner owes no duty with respect to hazardous condition on property, even if former owner created condition).

The Restatement has taken a similar approach. It provides that, “[e]xcept as stated in [section] 353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.” *See* Restatement (Second) of Torts § 352.

Despite these fundamental principles, Petitioner nevertheless maintains that Developer is liable for his injuries under premises liability law. In support of his argument, Petitioner cites to a number of basic premises liability cases that are wholly inapplicable to the facts of this case. The first set of cases upon which Petitioner relies analyzes the liability of a landowner and a leaseholder

when an injury occurs on leased property. (*See* Pet. for *Certiorari*, at 6). The second set of cases that Petitioner cites in his Petition all analyze a general manager's potential liability for an injury that occurs at the store where the manager works but does not own. (*See id.*, at 8). Apparently, Petitioner relies on these cases as support for the notion that a party can be held liable in a premises liability action even when they do not own the premises at issue. While that principle may be true in the context of leaseholders and store managers, it is entirely irrelevant to this case. Here, unlike a leaseholder or a store manager who has a direct connection to a property, Developer's connection to the Children's Park is extremely attenuated if not entirely nonexistent. In fact, one can see just how removed Developer is from the Park and Petitioner's injury simply by going through each link in the chain: Developer selects the Board of the Association. The Association's Board makes upper-level decisions for that entity. The Association's employees and vendors carry out those decisions. The Children's Park is one of the common elements owned by the many property owners that actually own all of the property that comprises the Association. An injury occurred in that park, allegedly because of inadequate lighting.

The undisputed evidence unequivocally demonstrates that Developer did not own, maintain, control, or even use the Park around the time of Petitioner's injury. As the trial court stated in its Order, Petitioner has not and, frankly, cannot provide "any support for the notion that Developer has sufficient control over the park to create a legal duty in that entity." (*See* R. p. 11). Accordingly, Petitioner's attempts to hold Developer liable based on its direct control of the Park fail, and Developer was properly awarded summary judgment on Petitioner's claim.

2. The Court of Appeals properly affirmed the trial court's award of summary judgment in favor of Developer because Petitioner cannot prevail against Developer under a corporate amalgamation or corporate veil piercing theory.

As set forth above, Petitioner adopted a new approach later in the life of the case and sought to impute the Association's alleged negligence to Developer by claiming that Developer had

“control” over the Association, the entity that actually owns and maintains the Park. Despite adopting this new approach, Petitioner continued using the term “control” as it is used in the context of premises liability. However, because the focus of his arguments is the relationship between two distinct corporate entities, Petitioner’s claims are *not* governed by premises liability law, but instead by the law of corporations.

It is axiomatic that corporations exist for one basic purpose: to shield their officers, directors, and shareholders from individual liability. *See Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018) (“[C]orporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that.”); *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980) (“Generally the reason for the creation of a corporation is to limit liability. While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees.”). Accordingly, under South Carolina law, the only way to impute one corporation’s negligence to a separate corporate entity is to either pierce the corporate veil on the vertical axis or amalgamate the entities on the horizontal axis. *See Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (“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. The party seeking to pierce the corporate veil has the burden of proving that the doctrine should be applied.”); *Walbeck v. I’On Co., LLC*, 426 S.C. 494, 528, 827 S.E.2d 348, 366 (Ct. App. 2018) (“the requirements for the single business enterprise theory as adopted by our supreme court overlap with the *Sturkie* requirements for piercing the corporate veil. The

single business enterprise theory does not require a showing of the corporate defendants' failure to observe corporate formalities. However, the theory dovetails with the second prong of the *Sturkie* test, i.e., an element of injustice or fundamental unfairness, to place accountability where it belongs.”).

Pursuant to South Carolina law, both the single business enterprise theory and the corporate veil piercing theory require a showing of some nefariousness or injustice. In this case, Petitioner himself has conceded that he cannot prevail under either of these theories and, in fact, expressly abandoned those claims. (*See* Final Brief of Appellant, at 2 n.1). Faced with a complete lack of proof to establish the necessary elements of a corporate amalgamation or corporate veil piercing claim, Petitioner now asks that this Court utterly ignore the body of law that governs the facts of this case: the law of corporations. However, for the reasons that follow, the Court of Appeals properly affirmed the trial court’s award of summary judgment to Developer because Petitioner cannot establish the necessary elements of the applicable claims in accordance with the governing law.

i. Developer’s ability to appoint the Association’s board members does not support Petitioner’s claim that the Association’s negligence should be imputed to Developer.

Petitioner contends “Developer had sufficient control over the Association by virtue of its appointed board members.” (Pet. for *Certiorari*, at 11). However, the evidence unequivocally establishes that there is nothing remotely nefarious in Developer’s ability to appoint the Association’s Board members. Prior to developing Daniel Island, and in compliance with the South Carolina Horizontal Property Act, Developer executed a master deed setting forth the necessary details of the development. That master deed expressly states that Developer, as the developer of the property, would retain the ability to appoint members to the boards of the property owners’ associations until that right was automatically and completely turned over to the individual

members of the association. In his deposition, Matt Sloan, a minority owner of Developer, explained Developer's role as developer and its level of control over the various associations:

Q We -- you know, we kind of talk -- talked about control and, you know, developer control and board control and all of these terms. I want to -- I want to dial down on this, to clarify. So Daniel Island Company is the developer, right?

A Yes, sir.

Q Three property owners' associations were created on Daniel Island, right?

A Yes, sir.

Q Including Daniel Island Town Association, that's one of them, correct?

A Yes, sir.

Q Okay. Daniel Island Company had the right to appoint the board members of those associations, right?

A Yes, sir.

Q Okay. But that -- but -- and this is -- this is kind of splitting hairs, but it's important because *the boards control those associations, right?*

A *Yes, sir.*

Q *Okay. Not -- not Daniel Island Company directly?*

A *Yes, sir.*

Q Okay. And so Daniel Island Company, we know, appointed you and Frank and David Crawford to those boards, right?

A Yes.

Q Okay. But it could have appointed anybody?

A It could have.

...

Q That's right. That's right. So, again, the Daniel Island Company, just to kind of close the loop, has the ability to appoint the people that have authority over those associations, but *Daniel Island Company does not have direct control over those*

associations?

A **No. The associations are turned over, and direct control is turned over** to the manager, and sometimes the manager's a third-party.

(See R. p. 1201, line 7-p. 1203, line 11 (emphasis added)). Mr. Sloan further explained the reason for having a developer-control period when developing a property:

Q Okay. Now, we've heard some -- we had some testimony in the record of this case about the fact that the Daniel Island Company, as part of the master deed or development plan, what have you, would have control of the boards of the various property owners' association for a given period of time or up till some triggering event. Can you tell me -- tell us why that is, why -- why the developer would keep control or the right to control those boards?

A Well, that's just how it is -- **that's industry standard in my world. The developer always controls up to a certain point.** Sometimes it's tied to you sold a certain percentage of your property, or sometimes there's an end date. So as an example, the Daniel Island Town Association, which this gentleman represents, has a turnover date of 2025, regardless of how many people own what, but as the developer, you're putting all of your assets into -- and all of your energy into building a community, and you want to be able to control what is built and how it is managed and add value to the community that way.

(See R. p. 1166, line 24-p. 1167, line 19 (emphasis added)).

Mr. Sloan's testimony clearly establishes that there is nothing unusual or nefarious about a developer maintaining control of the property owners' association's board for some period of time. Indeed, Petitioner conceded as much during the deposition of Kay Fabrizio, the finance manager for the Daniel Island Property Owners Association:

Q Right. So Daniel Island Company that, as Mr. Barfield said, conceived of the plan of Daniel Island and built it and sold the lots and created these -- these associations and hired the management and put its own people on the board of every single one. **Nothing wrong with that;**

right? That's the way it's done?

A Yes.

(See R. p. 1110, lines 19-25 (emphasis added)).

As both the Court of Appeals and the trial court have recognized, there is absolutely no evidence of bad faith or nefariousness in the record. (See Opinion, at 1 (“[Petitioner’s] argument ignores the lack of evidence of bad faith or nefariousness in the record.”); see also R. p. 6 (“There is nothing remotely nefarious about the formation or structure of the Daniel Island entities.”)). Nevertheless, Petitioner maintains that Developer, by selecting the Board members, had sufficient control over the Association such that it can be held liable for his injuries. This theory not only relies on entirely immaterial facts, but it also requires the incorrect application of the governing law. To hold Developer liable under Petitioner’s own “control” theory, Petitioner would first have to pierce the corporate veil up to the Board of Directors for the Association, and then pierce the corporate veil up to Developer. Despite his failure to assert a claim against the Board at any point over the course of this litigation, Petitioner now contends he should be entitled to impute the Association’s alleged negligence directly to Developer. Once again, Petitioner’s contention runs afoul to even the most fundamental principles of corporate law. This fatal flaw, combined with the complete lack of evidence of bad faith or nefariousness, further proves that the Court of Appeals was correct in affirming the trial court’s award of summary judgment in favor of Developer on Petitioner’s claims.

ii. The relationship between the Daniel Island entities does not support Petitioner’s claim that Developer can be held liable for the other entities’ negligence.

At some point in this litigation, Petitioner also seemed to claim that Developer is so intertwined with the various Daniel Island entities that he could hold Developer liable for the negligence of any one of those entities. In support of this theory, Petitioner argued that Matt

Sloan's involvement with the various Daniel Island entities and the relationship between those entities proves that Developer was able to control the entities, including the Association. However, the evidence clearly proves that the opposite is true: Developer is completely separate from the other Daniel Island entities and there is nothing remotely unusual or nefarious about Mr. Sloan, as an owner of Developer, acting as President on the property owners' association boards for a set period of time.

The evidence leaves no doubt that Developer is entirely separate from the various Daniel Island entities. Developer has always been a for-profit company, while the Daniel Island associations are non-profit entities. (*See* R. p. 1163, lines 5-15; p. 1164, lines 16-18). As a closely-held private company, Developer operates behind closed doors, while the board meetings for the Daniel Island associations are open to the public. (*See* R. p. 1167, line 22-p. 1169, line 4). Developer operates from a different office than the Daniel Island associations. (*See* R. p. 1166, lines 5-23). Developer's financials are kept completely separate from each of the other Daniel Island entities. (*See* R. p. 1169, lines 15-24). Given these key distinctions, it seems Petitioner's entire theory is based solely on the fact that Mr. Sloan has served on the boards of the various property owners' associations. However, as set forth in more detail above, Mr. Sloan's involvement in the development of Daniel Island is standard in the industry. His membership on the boards of the various Daniel Island associations does not even remotely suggest that either he or Developer controlled the associations in any way whatsoever. Again, without any evidence of nefariousness or injustice, Petitioner cannot claim that any negligent acts or omissions by the Daniel Island entities can be imputed to Developer based on the relationship between those entities.

Finally, it bears noting that Petitioner ultimately agreed to settle his claims against the Association, the entity that actually owns and maintains the Park. Petitioner's settlement agreement

with the Association makes his attempts to pin liability on a separate upstream corporate entity all the more inappropriate and, frankly, unusual. The legal concepts of corporate veil piercing and corporate amalgamation exist to provide injured parties with a path to recovery in situations where a corporate defendant has improperly attempted to shield itself from exposure to a judgment. In such instances, it may be necessary and appropriate to look to related entities either upstream on the vertical axis (veil piercing) or adjacent on the horizontal axis (amalgamation). In this case, it is neither necessary nor appropriate to look beyond the entity in the first position, the Association. Not only has Petitioner already recovered from the Association, but he has not presented *any* evidence to suggest that the Association was not run with the requisite corporate formalities or that it was underinsured or underfunded. Thus, the question of “control” of the Children’s Park begins and ends with the Association, and Petitioner has not presented any valid or compelling reasons for extending the Association’s liability up to an entirely separate corporate entity like Developer. For all of the foregoing reasons, the trial court properly awarded summary judgment to Developer on Petitioner’s purported corporate amalgamation and corporate veil piercing claims.

3. The Court of Appeals properly affirmed the trial court’s award of summary judgment in favor of Developer because Petitioner cannot prevail against Developer under a vicarious liability theory.

In realizing that he could not establish the nefariousness element required to assert a claim for corporate amalgamation or corporate veil piercing, Petitioner abandoned those theories. (*See* Final Brief of Appellant, at 2 n.1). Now, however, Petitioner is attempting to cloak his claim for corporate amalgamation or corporate veil piercing by simply calling it something else. He is attempting to hold one corporate entity liable for a separate corporate entity’s alleged negligence by utilizing basic vicarious liability arguments to get around the inconvenient fact that he could not prove the elements of any legitimate cause of action that would give rise to such liability. Once again, the trial court said it best:

‘Control’ is not a word with a single legal definition. In the context of horizontal property regimes, master deeds frequently refer to a “declarant control period.” That is simply common parlance for the time during which the original developer of a community may appoint the board members of a property owners association it has formed. That said, if proper corporate formalities are observed, the declarant does not actually exercise direct operational control over the POA, much less the common elements that are owned by its members. In the context of the kinds of premises liability cases upon which the [Petitioner] relies, “control” is used as a way to describe the circumstances under which a legal duty arises to protect occupants and visitors to a property. That is a very different analysis than what is appropriate to examine the relationships between separate corporate entities.

(See R. p. 10). Thus, when this case is examined through the proper lens of the law of corporations, it is clear that Petitioner’s claims fail. As set forth in more detail above, it is clear that in each instance of “control” that Petitioner cites, there is absolutely no evidence of nefariousness or injustice that would justify disregarding each entity’s status as a corporation. Therefore, because Petitioner is unable to establish the necessary elements of a corporate amalgamation or corporate veil piercing claim as is required to properly impute the Association’s negligence to Developer, Petitioner’s claims fail and Developer was properly awarded summary judgment.

CONCLUSION

For the reasons set forth herein, Developer respectfully requests that this Court deny the Petition for Writ of *Certiorari* and decline to review this matter.

Respectfully submitted,

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