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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS FROM
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Sherri A. Lydon, United States District Judge

Appellate Case No. 2025-001718

Jean Watkins, as Personal Representative of the Estate of Mildred Watkins, Plaintiff,

v.

Countrywood Nursing Center, LLC, Sterling Healthcare, Inc., Guardian Resources, LLC, Robert W. Hagan, LaDonna Hagan, Chadwick S. Hagan, and Brooke Hagan McGee, Defendants.

BRIEF OF DEFENDANTS

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CERTIFIED QUESTIONS

I. In an action to pierce the corporate veil, can defendants who were not parties to the underlying suit defend against liability on the grounds that they were not liable for the underlying claims? In other words, does South Carolina follow the rule outlined in *Minton v. Cavaney*?

II. Does the answer change where the underlying judgment resulted from default or from sanctions striking the corporate defendant's answer?

STATEMENT OF THE CASE

I. Factual Background

This matter arises out of a damages award issued in a wrongful death and survivorship lawsuit regarding the passing of Mildred Watkins (the "decedent"). (Order for Cert., pp. 2–3.) The damages award was entered by the Richland County Circuit Court ("Circuit Court") in the case of *Watkins v. Sterling Healthcare, Inc., et al.* (2014-CP-40-5160 & 2016-CP-40-4463)[1] (the "Underlying Suit"), which is currently on appeal in the South Carolina Court of Appeals. (Order for Cert., p. 3, n.3.) Defendants can best be sorted into two groups: those named in the Underlying Suit, and the current individual defendants. (Order for Cert., p. 2, n.1.) Countrywood Nursing Center, LLC, Sterling Healthcare, Inc., and Guardian Resources, LLC (collectively, the "Entity Defendants"), were parties to the Underlying Suit. (Order for Cert., p. 2, n.1.) Robert W. Hagan, LaDonna Hagan, Chadwick S. Hagan, and Brooke Hagan McGee (collectively, the "Individual Defendants") were ***not*** parties in the Underlying Suit. (Order for Cert., p. 2, n.1.) Defendants Robert W. Hagan and LaDonna Hagan were once married, but divorced years prior to the decedent's passing. Defendants LaDonna Hagan, Chadwick S. Hagan, and Brooke Hagan McGee

[1] The case was removed from the trial roster on July 31, 2015, pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure; the case was later restored to the docket on July 25, 2016.

were never controlling owners of any of the Entity Defendants and never controlled the defense of the Entity Defendants in the Underlying Suit. (*See* Order for Cert., p. 2, n.1.)

In the Underlying Suit, Plaintiff, the personal representative of the decedent, alleged the Entity Defendants were "grossly negligent, negligent, careless, reckless, willful and wanton" and that the Entity Defendants' "acts or omissions . . . were the proximate cause of the injuries and damages suffered by [decedent] which eventually lead [*sic*] to her death." *See* Complaint, *Watkins v. Sterling Healthcare, Inc. et al.* at ¶¶ 27–29, 32–34 & 37–39, No. 2014-CP-40-05160 (S.C. Ct. Com. Pl. Aug. 22, 2014) (Richland County). A discovery issue arose from Plaintiff's initial discovery requests served in August 2014, for which a motion to compel was not granted until November 2016, following a year-long removal and restoration of the case from the active roster pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure; later, Plaintiff filed a motion for rule to show cause and sanctions in January 2017, which was not ruled upon until April 2018. *See Watkins v. Sterling Healthcare, Inc. et al.*, No. 2016-CP-40-04463, 2018 WL 11651633, at *1–4 (S.C. Ct. Com. Pl. Apr. 19, 2018). Significantly, prior to the Circuit Court's ruling on Plaintiff's motion for rule to show cause and sanctions, no other substantive hearings or rulings occurred regarding any pleadings or motions apart from Plaintiff's motion to compel and Plaintiff's motion for rule to show cause and sanctions. The Circuit Court determined sanctions were warranted and struck the answers of the Entity Defendants. (Order for Cert., p. 2.)

Because Entity Defendants' answers were stricken from the docket, the Circuit Court proceeded directly to a damages hearing rather than determine the merits of the alleged underlying liability. (*See* Order for Cert., p. 3.) Therefore, the damages award to Plaintiff in the Underlying Suit was not the result of any determination on the merits of the alleged liability; instead, the damages award resulted from a sanction imposed on the Entity Defendants—represented by

separate counsel—for a discovery violation, leading to the striking of their Answers and the Circuit Court's order for a damages hearing. (*See* Order for Cert., pp. 2–3.) Tellingly, Plaintiff argued the following in support of her award of damages: "Because the [Entity] Defendants' Answers were stricken, the Plaintiff does not have to prove that the [Entity] Defendants [sic] actions were grossly negligent, willful, wanton, or reckless, nor does she have to prove proximate cause." *See* Plaintiff's Brief in Support of Award of Damages, *Watkins v. Sterling Healthcare, Inc. et al.* at 21, 2016-CP-40-04463 (S.C. Ct. Com. Pl. Nov. 28, 2022) (Richland County).

II. Procedural Background and Nature of the Dispute

In the instant action, Plaintiff seeks to pierce the corporate veil of the Entity Defendants to pursue collection of the damages awarded to Plaintiff against the Entity Defendants and hold the Individual Defendants personally liable for satisfaction of the judgment. (Order for Cert., p. 3.) During discovery in this case, Defendants requested information and documents relating to the alleged liability in the Underlying Suit. (Order for Cert., p. 3.) On April 16, 2025, because Plaintiff refused to produce responsive information and documents, Defendants moved to compel this requested discovery. (Order for Cert., p. 3.) Defendants—especially Defendants LaDonna Hagan, Chadwick S. Hagan, and Brooke Hagan McGee—contend they have the right to litigate the underlying liability of the Entity Defendants. (Order for Cert., p. 3.) Plaintiff opposes, asserting this case concerns only veil piercing claims, making the merits of the Underlying Suit irrelevant. (Order for Cert., p. 3.) The certified questions followed.

STANDARD OF REVIEW

> In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.

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

Peagler v. USAA Ins. Co., 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006)); *see also Thomerson v. DeVito*, 430 S.C. 246, 249, 844 S.E.2d 378, 380 (2020) (same).

ARGUMENT

The certified questions concern whether, in a subsequent proceeding to pierce the corporate veil, individual defendants—who were not parties to the original action and did not have control of the corporations' position in the underlying litigation—may challenge the corporations' liability in the subsequent proceeding, when the corporations' liability was the result of a judgment by default either for being unresponsive or for being sanctioned with a stricken answer. The answer that "best comport[s] with the law and public policies" of this State as well as the "sense of law, justice, and right" is that if the issue of liability has not been actually litigated and determined by a valid and final judgment, then individual defendants who were not parties to the original action and did not have control of the corporations' position in the underlying litigation possess the right to challenge the corporations' alleged underlying liability.

I. In an action to pierce the corporate veil, can defendants who were not parties to the underlying suit defend against liability on the grounds that they were not liable for the underlying claims? In other words, does South Carolina follow the rule outlined in *Minton v. Cavaney*?

The answer to the first certified question is "yes." Because a veil piercing claim inherently relies upon an existing liability, defendants who were not parties to the original action and did not have control of the corporations' position in the underlying litigation must be allowed to defend against liability on the grounds that they were not liable for the underlying claims. Due process commands this conclusion, because litigants possess the right to defend themselves. *See, e.g.*, Restatement (Second) of Judgments § 59 cmt. e. (Am. Law Inst. 1982) ("In a corporation whose management is a complex organization, moreover, many or all of the officers and directors often have such a remote connection with specific litigation that they cannot be said to have participated

in it beyond assuming official responsibility on behalf of the corporation. To hold them bound by determinations in litigation to which the corporation is a party ***would in effect deny them their own day in court***. The same is true of stockholders or members of such a corporation.") (emphasis added).

The argument proceeds as follows: (1) a veil piercing claim requires an underlying liability; and (2) that underlying liability must have been actually litigated by the defendants upon whom a plaintiff seeks to attach the underlying liability. If defendants who were not parties to the original action and did not have control of the corporations' position in the underlying litigation did not actually litigate the underlying liability, then they must be allowed to contest the underlying liability in the subsequent veil piercing proceeding. Otherwise, such defendants' due process rights are violated.

A. *Piercing the Corporate Veil First Requires an Underlying Liability.*

Plaintiff's argument is premised upon a fatal flaw. Plaintiff alleges "liability for the claims of the underlying suit . . . is not a relevant consideration in an equitable action seeking to pierce the corporate veil," because "[t]he sole focus" of a veil piercing claim is whether the corporate form may be disregarded. (Brief of Plaintiff, pp. 2–3.) However, Plaintiff ignores the difference between a veil piercing theory of liability and primary causes of action. A veil piercing claim is derivative of some other established wrong, rather than a claim to establish a direct wrong. *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 103, 668 S.E.2d 798, 801 (2008) ("an attempt to pierce the corporate veil is not itself a cause of action but rather a means of imposing liability on an underlying cause of action") (citing 1 William Meade Fletcher et al., Alter ego or mere instrumentality doctrine, Fletcher Cyc. Corp. § 41.10 (compiling cases)); *United States v. Bestfoods*, 524 U.S. 51, 65 (1998) ("direct, personal liability . . . is distinct from the derivative

liability that results from piercing the corporate veil").[2] Indeed, "an attempt to pierce the corporate veil is ***necessarily subsidiary*** to some primary cause of action." *Thomas v. Peacock*, 39 F.3d 493, 499 (4th Cir. 1994) (emphasis added), *rev'd on other grounds*, 516 U.S. 349 (1996).

A close review of *Drury Development Corp. v. Foundation Insurance Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008)—one of this Court's seminal opinions regarding veil piercing in South Carolina—is illustrative here.[3] As reflected in *Drury*, there is "a two[-]prong test for piercing the corporate veil." *Drury*, 380 S.C. 97, 102, 668 S.E.2d 798, 800 (citing *Sturkie v. Sifly*, 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984)). The "first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors," for example, whether there was an observance of corporate formalities; and "[t]he second prong requires the plaintiff to demonstrate that 'fundamental unfairness' would result from recognition of the corporate entity." *Id.* However, merely considering these factors is insufficient to identify the derivative nature veil piercing

[2] Courts nationwide agree. *See, e.g.*, *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986) ("personal liability is distinct from the derivative liability that results from 'piercing the corporate veil'"); *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472, 479 (W.D.N.C. 2003) ("piercing the corporate veil is derivative and is not an independent cause of action"); *United States v. Lax*, 414 F. Supp. 3d 359, 367 (E.D.N.Y. 2019) ("Veil-piercing is fundamentally a form of derivative liability.") (internal citations and quotation marks omitted); *In re Tronox Inc.*, 549 B.R. 21, 50 (S.D.N.Y. 2016) ("[T]he concepts of alter ego and veil piercing are largely remedial and derivative of the liability of another entity—they do not serve as independent causes of action. These doctrines are most commonly used where a plaintiff is unable to fully satisfy its claim against the direct wrongdoer, whose liability is established."); *Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 469 (D. Del. 2010) ("The alter ego doctrine for piercing the corporate veil allows derivative liability to be placed upon a corporation's individuals."); *Specialty Companies Grp., LLC v. Meritage Homes of Arizona, Inc.*, 251 Ariz. 365, 367, 492 P.3d 308, 310 (2021) ("alter ego claims are derivative of another cause of action"); *In re EGT Holdings, LLC*, 719 S.W.3d 673, 677 (Tex. App. 2025) ("Disregarding the corporate fiction—'piercing the corporate veil'—is a theory of derivative liability."); *Matter of Dougherty*, 482 N.W.2d 485, 491 (Minn. Ct. App. 1992) ("personal liability is distinct from derivative liability that results from piercing corporate veil"); *Rest. of Hattiesburg, LLC v. Hotel & Rest. Supply, Inc.*, 84 So. 3d 32, 46 (Miss. Ct. App. 2012) ("veil-piercing claim was not a direct action to recover on the open account but instead a derivative action based on the judgment").

[3] Of note, Plaintiff relies upon *Drury* in this case. (Brief of Plaintiff, pp. 2, 4–5.)

claims. The *Drury* opinion requires this conclusion though. In *Drury*, this Court considered a certified question from the Honorable Joseph F. Anderson, Jr., United States District Judge for the District of South Carolina. *Id.* at 100, 668 S.E.2d at 800. That certified question was: "Is a judgment against the corporation a prerequisite to an alter ego claim?" *Id.* at 101, 668 S.E.2d at 800. The procedural predicate to this certified question was a plaintiff filing an action against a corporation and the corporation's parents and shareholders. *Id.* at 99, 668 S.E.2d at 799. The specific causes of action were "breach of contract, fraudulent inducement of contract, negligence, conversion, and unjust enrichment." *Drury*, 380 S.C. at 100, 668 S.E.2d at 800. Additionally, and simultaneously with the causes of action for liability, the plaintiff sought to pierce the corporate veil of the corporation to hold its parents and shareholders liable for the corporation's "alleged obligation." *Id.* at 99–100, 668 S.E.2d at 799–800. The *Drury* Court held as follows:

> Were we to adopt the rule urged by Defendants, creditors seeking to pierce the corporate veil of an insolvent or unresponsive corporate defendant would be required to file a *pro forma* action against the corporation before seeking to pierce the corporate veil in a subsequent action. While it is undoubtedly true that the corporate veil is often pierced post-judgment, it is also true that South Carolina courts frequently consider these issues in one bifurcated action. We therefore decline to adopt a rule which would require South Carolina's trial courts to resolve in two separate actions what they now ably determine in one.

Id. at 102–03, 668 S.E.2d at 801 (internal citations omitted).[4] This Court continued: "Accordingly, we hold that so long as the plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, the trial court should move forward to

[4] When holding that a judgment was not "a prerequisite to an alter ego claim," this Court was merely holding as a procedural matter that it would not require a *pro forma* action and would instead allow for courts to consider the combined issues of an underlying liability against a corporate defendant alongside a veil piercing claim against one or more individual defendants. In so doing, this Court was ***not*** holding an existing liability is not required first before piercing the corporate veil.

determination of both matters." *Id.* at 104, 668 S.E.2d at 802. Thus, there are two scenarios. *First*, if piercing the veil in a post-judgment action, the piercing necessarily follows the underlying liability existing, because judgment has already occurred. *Second*, if piercing the veil in a bifurcated proceeding, the very fact bifurcation is necessary implies that liability must be resolved first, before proceeding to the veil piercing claim against one or more defendants in the latter portion of the bifurcated action.

Implicitly, then, there must first be an underlying liability, even if conducted within the same bifurcated action, before a plaintiff may proceed with piercing the corporate veil. Thus, in cases in which liability is alleged in addition to corporate veil piercing, the trial court should bifurcate the action to establish liability first. *See, e.g.*, *Mid–South Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) (ruling upon a case wherein the claims against a corporation and its parent companies proceeded to a bifurcated trial on issues of corporate liability and veil-piercing theories); *Hunting v. Elders*, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004) (ruling upon a case wherein the claims against a corporation and its shareholder proceeded to a bifurcated trial on issues of corporate liability and veil piercing).

Merely reviewing the veil piercing factors under the two-prong *Sturkie* test misses the forest for the trees. To argue an underlying liability "is not a relevant consideration" here (as Plaintiff does) would mean defendants could be sued in veil piercing actions on a whim, without the need to establish the primary liability first. *See Thomas*, 39 F.3d at 499 ("an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action"). Opportunistic plaintiffs would sue individuals and companies for doing nothing wrong other than potentially not following corporate formalities. Such a consequence is absurd, and absurdity must generally be avoided. *See, e.g.*, *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) ("All contracts

should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results."); *Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). Based on the foregoing, an underlying liability must first exist to pierce the corporate veil.

B. *In Order to Impose the Underlying Liability on Another, the Underlying Liability Must Have Been Actually Litigated by the Defendants Upon Whom a Plaintiff Seeks to Attach the Underlying Liability.*

For an underlying liability to attach in a subsequent veil piercing proceeding, the underlying liability must have been actually litigated by the parties in the subsequent proceeding. Due process requires this result. *See, e.g.*, Restatement (Second) of Judgments § 59 cmt. e. (Am. Law Inst. 1982) ("In a corporation whose management is a complex organization, moreover, many or all of the officers and directors often have such a remote connection with specific litigation that they cannot be said to have participated in it beyond assuming official responsibility on behalf of the corporation. To hold them bound by determinations in litigation to which the corporation is a party ***would in effect deny them their own day in court***. The same is true of stockholders or members of such a corporation.") (emphasis added).

i. <u>Ample Authority Exists that Individuals who did Not Actually Litigate an Underlying Liability Should Subsequently be Allowed to do so.</u>

Although the specific question of what circumstances are required to attach an underlying liability to other individuals and entities in a veil piercing action was not before this Court in *Drury*, this Court noted in support of its holding:

> at least one other court has gone so far as to hold that a judgment against an unresponsive corporate defendant ***must be set aside*** in a subsequent action to pierce the corporate veil if the shareholder defendant was not a party to the determination of corporate liability.

> In *Minton et al. v. Cavaney*, 56 Cal.2d 576, 15 Cal.Rptr. 641, 364 P.2d 473 (1961), the California Supreme Court held that ***a shareholder defendant had the opportunity to relitigate the legitimacy of the underlying corporate obligation***. Writing for the majority, Justice Traynor wrote that because the defendant was not a party to the action against the corporation, the defendant "cannot be held liable for debts of [the corporation] without an opportunity to relitigate these issues." *Id.* at 476.

Drury, 380 S.C. at 103 n.2, 668 S.E.2d at 801 n.2 (emphasis added).

As background, the plaintiffs in *Minton* sued a corporation in a separate action for the wrongful death of their daughter who drowned in a swimming pool operated by the corporate defendant. *Minton*, 56 Cal. 2d at 578, 364 P.2d at 474. However, the judgment the plaintiffs obtained went unsatisfied, which prompted plaintiffs to file a corporate veil piercing claim against Cavaney, the individual defendant and former director of the corporation. *Id.* Cavaney was eventually substituted for his widow as the executrix of his estate after the action was filed. *Id.* In the corporate veil piercing action, the trial court imposed personal liability on Cavaney, the individual defendant, and by extension his estate, and the estate appealed. *See generally id.* On appeal, the California Supreme Court found the "plaintiffs did not allege or present any evidence on the issue of [the corporation's] negligence or on the amount of damages sustained by plaintiffs," and instead, "[t]hey relied solely on the judgment against [the corporation]." *Id.* at 581, 364 P.2d at 476. The California Supreme Court also found that "Cavaney was not a party to the [underlying] action against the corporation," and thus held "the judgment in that [underlying] action is therefore ***not*** binding upon him unless he controlled the litigation leading to the judgment." *Id.* (emphasis added). The *Minton* Court ultimately held the defendant correctly contended "Caveney or his estate cannot be held liable for the debts of [the corporation] without an opportunity to relitigate these issues" of liability, resulting in the reversal of the veil piercing judgment of the trial court. *Id.* at 581–82, 364 P.2d at 476.

In coming to this conclusion, the *Minton* Court relied, in part, upon the case of *Motores De Mexicali, S. A. v. Superior Ct. In & ForLos Angeles Cnty.*, 51 Cal. 2d 172, 331 P.2d 1 (1958). In *Motores*, the California Supreme Court considered whether to impose a default judgment entered against a company, Erbel, Inc., against alleged alter egos. The constitutional right to due process compelled the holding that the alleged alter egos could not be bound to the underlying judgment without having had the opportunity to litigate the underlying liability. The *Motores* Court held:

> To summarily add Resnick and the Cowans [the alleged alter egos] to the judgment heretofore running only against Erbel, Inc., without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate this constitutional safeguard [of due process]. Nor is this difficulty overcome by the suggestion that Resnick and the Cowans should have intervened in the action brought solely against Erbel, Inc., if they desired to assert any personal defenses against the drafts. They were under no duty to appear and defend personally in that action, since no claim had been made against them personally. We therefore conclude that the respondent court properly declined to proceed further on the petition filed in that court.

Id. at 176, 331 P.2d at 3–4; *cf. Alexander v. Abbey of the Chimes*, 104 Cal. App. 3d 39, 45, 163 Cal. Rptr. 377, 380 (Ct. App. 1980) ("it is now settled that '. . . the authority of the court will be exercised to impose liability under a judgment upon the alter ego who has had control of the litigation.'").

By highlighting the *Minton* case, this Court has favorably signaled a post-judgment action for veil piercing ***can***—and, when appropriate, ***should***—subsequently transition to a bifurcated action that allows for the underlying liability to be revisited prior to proceeding to the corporate veil piercing claim. Although this Court made a more limited holding in *Drury*, it is counter to clear law, both in South Carolina and elsewhere, to allow for a judgment to bind either minority shareholders, non-shareholder officers/directors, or completely unrelated individuals from being able to litigate the underlying liability in a subsequent action—especially when the minority

shareholders, non-shareholder officers/directors, or completely unrelated individuals did not control the litigation in the underlying lawsuit or were not on notice that their rights may be affected by the underlying lawsuit. *See In re Est. of Brown*, 430 S.C. 474, 489 n.9, 846 S.E.2d 342, 349 n.9 (2020) (citing *E.I. Du Pont De Nemours & Co. v. Sylvania Indus. Corp.*, 122 F.2d 400, 405 (4th Cir. 1941) ("It has been quite generally held that while mere assistance in the defense of a case is insufficient to bind a person not joined as a party, participation in the trial and control of the litigation, openly avowed by the participant or at least known to the other side, will bind the participant as fully as if he had been a party to the record.")).

In addition to California in the *Minton* and *Motores* decisions, other states follow suit. *See, e.g.*, *N. Atl. Distribution, Inc. v. Teamsters Loc. Union No. 430*, 497 F. Supp. 2d 315, 326–28 (D.R.I. 2007) (declaring an underlying default judgment was unenforceable against non-parties to the underlying action that were alleged to be alter egos, because "the requirements of due process make it impossible . . . to extend a default judgment to a non-party, regardless of the non-party's relationship to the original party"); *Bates Mktg. Assocs., Inc. v. Lloyd's Elecs., Inc.*, 190 N.J. Super. 502, 508, 464 A.2d 1142, 1145 (App. Div. 1983) ("An injured party may seek his remedy in successive litigation from each of the separate parties who are liable to him for a single wrong, provided that no such party is itself compelled to defend more than once and provided, further, that no subsequently sued party is precluded from presenting its own defense on the merits."); *Dunbar v. Finegold*, 501 P.2d 144, 147 (Colo. App. 1972) ("Where a corporate director was not a party to an action against the corporation and did not control litigation therein, the director cannot be held personally liable upon the judgment against the corporation without an opportunity to re-litigate . . . .").

The *Dunbar* case is particularly instructive. As background, a corporation entered into a

consent judgment with the plaintiff, but the plaintiff could not collect, because the corporation was insolvent. *Dunbar*, 501 P.2d at 145. Thereafter, the plaintiff brought a separation action against divorcees—Harold Finegold and Shirley Finegold ("Ms. Finegold")—who were the alleged officers and directors of the insolvent corporation. *Id.* The status of Ms. Finegold "as an officer and director was disputed"; however, it was established Ms. Finegold "did not actively participate in the management or operation of the business as did her husband." *Id.* Although *Dunbar* considered attachment of personal liability upon Ms. Finegold on the basis of tortious conduct rather than via a veil piercing action, the principle remains the same: "plaintiff could not rely solely on the prior judgment as to the amount of her damages because the defendant Shirley Finegold was not a party to the earlier action against the corporation and thus was given no opportunity to litigate the issue of damages in the prior suit." *Id.* at 147. Therefore, reliance upon the prior judgment is "insufficient," because "[w]here a corporate director was not a party to an action against the corporation and did not control litigation therein, the director cannot be held personally liable upon the judgment against the corporation without an opportunity to re-litigate the issue of the amount of damages." *Id.*

This conclusion is also supported by the Restatement (Second) of Judgments:

> (3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them as to issues determined therein as follows:
>
> (a) The judgment in an action by or against the corporation is conclusive upon the holder of its ownership **if he actively participated in the action on behalf of the corporation, unless his interests and those of the corporation are so different that he should have opportunity to relitigate the issue**; and
>
> (b) The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation **except when relitigation of the issue is justified in order to protect the interest**

> **of another owner or a creditor of the corporation**.
>
> . . .
>
> (5) A judgment against a corporation that is found to be the alter ego of a stockholder or member of the corporation establishes personal liability of the latter **only if he is given notice that such liability is sought to be imposed and fair opportunity to defend the action resulting in the judgment**.

Restatement (Second) of Judgments § 59 (Am. Law Inst. 1982) (emphasis added). The Restatement contains the following commentary as well:

> It is beyond the scope of this Restatement to state the kind or degree of nonobservance of corporate form from which the conclusion may be drawn that the corporation is the alter ego of those who control it. When that conclusion is reached under the governing law of corporations, however, the consequence under the rules governing judgments is that a judgment nominally against the corporation creates a binding obligation upon those who have acted in corporate dress. The judgment is thus binding only on those individuals associated with the corporation who personally, or through some representative, had adequate opportunity to participate in the litigation leading to the judgment. If at the outset of the litigation the opposing party has manifested an intention to bind individually the persons associated with the corporation, and effects service of process addressed to those persons individually, adequate opportunity is afforded them to defend against the asserted liability. On the other hand, **if the claim of individual liability is made at some later stage in the action, the judgment can be made individually binding on a person associated with the corporation only if the individual to be charged, personally or through a representative, had control of the litigation and occasion to conduct it with a diligence corresponding to the risk of personal liability that was involved.**

Restatement (Second) of Judgments § 59 cmt. g. (Am. Law Inst.1982) (emphasis added). Based on the foregoing, ample authority exists that individuals who did not actually litigate an underlying liability should be allowed to do so in a subsequent veil piercing action.

ii. Plaintiff's Arguments are Without Merit.

Plaintiff argues the second prong of the *Sturkie* test, i.e. the fundamental unfairness prong,

provides for a party's defense if the party was not a part of the underlying lawsuit. (Brief of Plaintiff, pp. 3–4.) The burden of proving this prong "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." *Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319.[5] However, these factors do ***not*** include any requirement that the defendant controlled the litigation in the underlying lawsuit wherein liability was determined, which is a critical component based on the authority set forth above. Therefore, exclusively relying upon this prong of the *Sturkie* test does not fully safeguard a defendant's due process rights in defending oneself. After all, just because a defendant may possess one defense that it did not act in a self-serving manner, the separate defense of contesting the underlying liability is not precluded.

Presumably because the law is not on Plaintiff's side, Plaintiff improperly attempts to hammer the facts instead. Plaintiff avers the Individual Defendants "whether previously named parties or not—have demonstrated notice of the prior litigation and efforts to protect their interests therein." (Brief of Plaintiff, p. 4.) Plaintiff is improperly asserting an unresolved fact in dispute to answer a certified question that must be resolved as a matter of law. (*See* Order for Cert., p. 2, n.1 (noting this material fact is unresolved by stating "[a]lthough not clear at this juncture, Defendants claim LaDonna Hagan, Chadwick S. Hagan, and Brooke Hagan McGee were never controlling owners of any of the Entity Defendants").) Ultimately, Plaintiff's arguments as to the law and the facts are unavailing.

[5] It should be noted that *Sturkie* involved a veil piercing action following a default judgment. However, it does not appear the defendants contested the underlying liability.

iii. <u>The Authorities Cited in the Order for Certification are Either Not on Point or Support Defendants' Position.</u>

The authorities cited in the Order for Certification do not compel a different result, because they are either not on point or actually support Defendants' argument. *First*, the case of *Pyshos v. Heart-Land Development Company*, 258 Ill. App. 3d 618, 630 N.E.2d 1054 (1994), considered a distinct legal issue, i.e. whether a creditor could pierce the corporate veil in supplementary proceedings. The court there found that veil piercing could ***not*** occur in supplementary proceedings, because "[t]he inquiry in [] supplementary proceedings . . . is limited to considering the allegation that the shareholders and directors are holding assets of the judgment debtor corporation." *Id.* at 624, 630 N.E.2d at 1058. But the limitations of supplementary proceedings have no bearing on veil piercing claims, which is an alternative proceeding. As the court noted, if a party desires to pursue a veil piercing claim, that court found a new action was required:

> Alternatively, a judgment creditor may choose to file a new action to pierce the corporate veil to hold individual shareholders and directors liable for the judgment of the corporation. A new proceeding is proper because, where a party obtains a judgment against another party, the underlying claim merges with the judgment and the judgment becomes a new and distinct obligation of the corporation which differs in nature and essence from the original claim.

Id. at 624, 630 N.E.2d at 1058. Ultimately, the *Pyshos* Court issued no holding relative to what must be actually litigated in a veil piercing claim, because it considered a distinguishable issue.

Second, and similarly, the case of *Peetoom v. Swanson*, 334 Ill. App. 3d 523, 778 N.E.2d 291 (2002), does not address whether the corporate shareholders who were the subjects of the veil piercing claim controlled the underlying litigation or actually litigated the underlying liability, and it does not appear that such defenses were raised by those corporate shareholders.

Third, the District Judge noted the case of *American Star Energy & Minerals Corporation v. Stowers*, 457 S.W.3d 427, 434 (Tex. 2015), states: "This action to collect the judgment debt

from the Partners does not require relitigation of that claim. At issue is only whether the judgment exists and whether the Partners were in fact partners at the time of injury alleged." However, this holding was based on specific factual findings, including that the partners at issue had the opportunity to litigate the underlying liability: "First, each partner has a right to manage and conduct partnership business. When a partnership is sued, the litigation presumably becomes part of that business." *Id.* at 434 (internal citation omitted). Evidently, the opportunity to actually litigate the underlying liability is important, which even this purportedly contrary case law recognizes. Thus, the authorities cited in the Order for Certification either are distinguishable or actually favor Defendants' position. Based on the foregoing, there is ample precedent nationwide for allowing relitigation of an underlying liability when defendants did not have the opportunity to control the litigation in the underlying lawsuit, and there is a dearth of authority on point that provides otherwise.

II. Does the answer change where the underlying judgment resulted from default or from sanctions striking the corporate defendant's answer?

The answer to the second certified question is "no." Because the drastic remedy of striking an entire pleading is tantamount to a default judgment, the answer should be the same in either scenario—i.e., defendants who were not parties to the underlying suit and who did not control the litigation may defend against liability on the grounds that they were not liable for the underlying claims, regardless of whether the underlying liability was the result of a default judgment or the striking of a pleading.

Case law on collateral estoppel is instructive here. Under South Carolina law, "[t]he party asserting collateral estoppel must show that the issue of fact or law in the present lawsuit was: '(1) ***actually litigated in the prior action***; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'" *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*,

385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (emphasis added). In South Carolina, "[c]ollateral estoppel does ***not*** apply to default judgments because the factual issues were never actually litigated." *In re Est. of Brown*, 430 S.C. at 488, 846 S.E.2d at 349 (emphasis added); *see also State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) ("In the context of a default judgment, collateral estoppel or issue preclusion does not apply because an essential element of that doctrine requires that the claim sought to be precluded actually have been litigated in the earlier litigation.") (citing 50 C.J.S. Judgments § 797 (1997)); *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013) (stating the essential element requiring that the claim was actually litigated is not met where there is a default).

The sanction of striking an entire pleading has the same effect as a default judgment. *See, e.g.*, *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 548, 489 S.E.2d 679, 684 (Ct. App. 1997) (Anderson, J., concurring) ("The sanction of striking pleadings should not be lightly used, since it can amount to judgment against the delinquent party without an opportunity to be heard on the merits.") (quoting 23 Am. Jur. 2d Depositions and Discovery § 390 (1983)); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (noting the equivalence between a default judgment and a sanction that results in a default by holding "[w]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly").

Although not binding, ample case law nationwide provides extremely persuasive precedent that the drastic remedy of striking an entire pleading is tantamount to a default judgment.[6] *E.g.*,

[6] The sanction of striking an entire pleading is also tantamount to a dismissal. *E.g.*, *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972) ("We see no difference, in purpose and effect, between an order striking an entire pleading and a dismissal order predicated upon fatally defective pleading."); *Skolnick v. Hallett*, 350 F.2d 861, 862 (7th Cir. 1965), *cert. denied*, 382 U.S. 996 (1966) (affirming the lower court's striking of a complaint under Rule 12(f) because it did not state a claim upon which relief could be granted); *In re Shepard*, No. 09-17489, 2010 WL 98983, at *3

Wood v. Several Unknown Metro. Police Officers, 835 F.2d 340, 343 n.1 (D.C. Cir. 1987) (noting the striking of a pleading is tantamount to a default judgment or dismissal); *A.V. By Versace, Inc. v. Gianni Versace S.p.A.*, No. 01CIV.9645(PKL)(THK), 2005 WL 147364, at *3 (S.D.N.Y. Jan. 24, 2005) ("As the Court has indicated in the past, sanctioning [a party] by striking his pleadings is tantamount to a default judgment."); *Pastorello v. City of New York*, No. 95 CIV. 470(CSH), 2003 WL 1740606, at *8 (S.D.N.Y. Apr. 1, 2003) (holding "the extreme sanction of striking the defendants' answer [is] the functional equivalent of a default judgment on liability"); *Baker v. Soil Tech Distributors, Inc.*, No. 07-22254-CIV, 2008 WL 4844095, at *2 (S.D. Fla. Nov. 10, 2008) (holding the "striking of pleadings" is "tantamount to a default judgment" for a party's failure to obey a court order to provide discovery); *Hendrix Perryman v. Evenflo Co., Inc.*, No. 3:07CV133/MCR/EMT, 2008 WL 11344670, at *5 (N.D. Fla. Jan. 2, 2008) ("The primary sanction requested by Plaintiffs, striking of Defendant's pleadings, is tantamount to entering a default judgment against Defendant and is totally inappropriate in this case."); *Guessford v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, No. 1:12CV260, 2013 WL 2242988, at *1 n.1 (M.D.N.C. May 21, 2013) (finding, in a report and recommendation authored by a magistrate judge, a motion for sanctions expressly seeking the striking of an answer to be tantamount to a motion for default judgment); *Pinkstaff v. Black & Decker (U.S.) Inc.*, 211 P.3d 698, 700 (Colo. 2009) ("[W]e hold that striking an answer brief is tantamount to an entry of default judgment . . . ."); *Tracy v. Pow Wow Prod.*, 302 A.D.2d 211, 212, 755 N.Y.S.2d 76, 78 (2003) ("[T]he drastic remedy of striking defendants' pleadings . . . would have been tantamount to awarding plaintiff [a] default judgment.").

Plaintiff's citation to *In re Docteroff*, 133 F.3d 210 (3d Cir. 1997), stands alone and is

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(Bankr. D. Md. Jan. 7, 2010) ("[I]t is well established that an order striking a pleading has the same effect as an order of dismissal.").

overcome by the widespread authority above. Further, *Docteroff* represents a unique situation. The court there found the party "deliberately prevent[ed] resolution of a lawsuit." *Id.* at 215. Such an extreme factual predicate does not undermine the general principle that arises from the authority above, i.e. that defendants who were not parties to the underlying suit and who did not control the litigation may defend against liability on the grounds that they were not liable for the underlying claims, regardless of whether the underlying liability was the result of a default judgment or the striking of a pleading. Because the extreme sanction of striking a pleading is the functional equivalent of a default judgment, either situation results in a finding that an underlying liability was ***not*** actually litigated.[7]

CONCLUSION

Defendants who are not parties to an underlying litigation and did not control such litigation should not be precluded from defending themselves in a subsequent proceeding attempting to attach an underlying liability against them. Such a result does not comport with the law and public policies of this State as well as the "sense of law, justice, and right," *Drury*, 380 S.C. at 101, 668 S.E.2d at 800, because it would not only undermine due process rights, it would nullify such rights. Defendants who were never afforded the opportunity to actually litigate an underlying liability, regardless of whether such liability was the result of a default judgment or by the striking of a pleading, must be allowed the opportunity to relitigate the underlying liability. Based on the foregoing, this Court should answer the certified questions to vindicate defendants' right to challenge a corporation's alleged underlying liability when those defendants were not

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[7] Although Plaintiff argues differently now, Plaintiff originally agreed with this conclusion, because Plaintiff argued the following in support of her award of damages: "Because the Defendants' Answers were stricken, the Plaintiff does not have to prove that the Defendants [sic] actions were grossly negligent, willful, wanton, or reckless, nor does she have to prove proximate cause." *See* Plaintiff's Brief in Support of Award of Damages, *Watkins v. Sterling Healthcare, Inc. et al.* at 21, 2016-CP-40-04463 (S.C. Ct. Com. Pl. Nov. 28, 2022) (Richland County).

parties to the original action and did not have control of the corporation's position in the underlying litigation.

Respectfully submitted,

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