

RECEIVED

AUG 27 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Clifton Newman, Circuit Court Judge

Case No. 2005-CP-26-3289
Appellate Case No. 2012-206066

Tony L. Pope and Lynn S. Pope, Individually and
Representing as a Class all Unit Owners for Riverwalk at
Arrowhead Country Club Horizontal Property Regime,

Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation,

Petitioners.

Case No. 2003-CP-26-7169

Riverwalk at Arrowhead Country Club Property Owners'
Association, Inc.,

Respondent,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation,

Petitioners.

Brief of Petitioner

C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
NELSON MULLINS RILEY & SCARBOROUGH LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

William L. Howard
Stephen L. Brown
Russell G. Hines
YOUNG CLEMENT RIVERS, LLP
Post Office Box 993
Charleston, SC 29402
(843) 720-5492

Attorneys for Petitioners

Table of Contents

Table of Authorities ii

Statement of Issues 1

Statement of the Case and Facts 2

Argument 4

 I. The Court of Appeals and trial court misapplied the “amalgamation of interests” theory in contravention of longstanding South Carolina law respecting the separateness of different corporate entities which requires a clear finding of injustice or unfairness to justify disregarding separate corporate forms 4

 A. The “amalgamation of interests” or “blurred identity” theory does not apply because there was neither misrepresentation nor third-party confusion 6

 B. The requirements for “piercing the corporate veil” must be met in order for a Court to disregard the corporate form 12

 C. HCI, HRI and Buildstar properly preserved the issue of the improper “amalgamation” and the failure to meet the universal requirement of a showing of fraud, wrong, or injustice to pierce the corporate veil under any theory 14

 II. The grant of directed verdict in favor of Respondents as to the entirety of the negligence claims was in error because there was evidence that the Petitioners were either not negligent or were not the proximate cause of some or all the construction deficiencies at issue, and the jury may have awarded punitive damages against a defendant who may not have been liable but for the amalgamation ruling 16

 A. There was evidence at trial that Petitioners were not negligent and were not the cause of at least some of the allegedly defective conditions at Riverwalk 17

 B. Neither Petitioners nor their counsel conceded liability as to the negligence claim and counsel’s statements did not constitute judicial admissions 19

Conclusion 22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>Brown v. State,</u> 383 S.C. 506, 680 S.E.2d 909 (2009)	21
<u>Colleton Cty. Taxpayers Ass’n v. Colleton Cty. Sch. Dist.,</u> 371 S.C. 224, 638 S.E.2d 685 (2006)	8, 11
<u>Drury Dev. Corp. v. Foundation Ins. Co.,</u> 380 S.C. 97, 668 S.E.2d 798 (2008)	7, 8, 9, 11, 12, 13
<u>Dumas v. InfoSafe Corp.,</u> 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995)	13
<u>Fields v. J. Haynes Waters Builders, Inc.,</u> 376 S.C. 545, 658 S.E.2d 80 (2008)	13, 18
<u>Guffey v. Columbia/Colleton Regional Hosp., Inc.,</u> 364 S.C. 158, 612 S.E.2d 695 (2005)	18
<u>Harper v. Bolton,</u> 239 S.C. 541, 124 S.E.2d 54 (1962)	21
<u>Hayes v. Xerox Corp.,</u> 718 P.2d 929 (Alaska 1986)	21
<u>Jones v. Enter. Leasing Co.,</u> 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009)	8, 11
<u>Kennedy v. Columbia Lumber and Manufacturing Company, Inc.,</u> 299 S.C. 335, 384 S.E.2d 730 (1989)	6
<u>Kincaid v. Landing Development Corp.,</u> 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986).....	6, 7, 8
<u>Lytle v. Reagan,</u> 256 S.C. 269, 182 S.E.2d 302 (1971)	20
<u>MacFarlane v. Manly,</u> 274 S.C. 392, 264 S.E.2d 838 (1980)	20
<u>Magnolia North Property Owners’ Assoc., Inc. v. Heritage Cmty., Inc.,</u> 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012)	6, 11

<u>Mid-South Mgmt Co. Inc. v. Sherwood Dev. Corp.</u> , 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007)	6, 7, 8, 9
<u>Oskin v. Johnson</u> , 400 S.C. 390, 735 S.E.2d 459 (2012)	8, 11
<u>Schenk v. National Healthcare, Inc.</u> , 322 S.C. 316, 471 S.E.2d 736 (1996)	6
<u>SSP Partners v. Gladstrong Investments Corp.</u> , 275 S.W.3d 444 (Tex. 2008)	9, 10
<u>Strange v. S.C. Dep’t of Hwys. & Pub. Transp.</u> , 314 S.C. 427, 445 S.E.2d 439 (1994)	16
<u>Sturkie v. Sifly</u> , 280 S.C. 453, 313 S.E.2d 316 (Ct. App. 1984)	12, 13
<u>Wilson v. Friedberg</u> , 323 S.C. 248, 473 S.E.2d 854 (Ct. App. 1996)	8, 11, 13
<u>Wright v. Gilbert</u> , 227 S.C. 334, 88 S.E.2d 72 (1955)	16
<u>Zitzmann v. Miller</u> , 551 N.E.2d 707 (Ill. App. 1990)	21
Statutes	
S.C. Code Ann. § 12-2-25	11
S.C. Code Ann. § 33-44-201	11
S.C. Code Ann. § 33-44-303(a)	11
Uniform Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33- 44-101 <i>et seq.</i>	11
Other Authorities	
Black’s Law Dictionary 48 (6th ed. 1990).....	20
Opinion 4888	4

Statement of Issues

- I. **Was it error to expand South Carolina's unique "amalgamation of interests" theory to ignore the status of the three Petitioners as separate corporations when each had observed corporate formalities, and where there was no evidence of misrepresentation or fraud regarding their status or confusion to third parties caused by Petitioners?**

- II. **Was it error to affirm the directed verdict against all three Petitioners when there was evidence that one or more of them did not proximately cause part or all the construction deficiencies in question and when one or more may not have been liable for part or all of the verdict?**

Statement of the Case and Facts¹

This is an appeal of two construction defect cases involving the Riverwalk at Arrowhead Country Club Horizontal Property Regime (“Riverwalk”) in Myrtle Beach. The same companies were named as defendants in both actions: Heritage Communities, Inc. (“HCI”) was the overall developer, Heritage Riverwalk, Inc. (“HRI”) was the site specific developer, and Buildstar Corporation (“Buildstar”) was the general contractor for the project. HCI is the parent corporation of both HRI and Buildstar. (R. 704-05, 724-25, 866-70; App. 711-12, 731-32, 873-77). The Riverwalk Property Owners’ Association (“POA”) filed the first suit (“POA Action”) to recover repair costs related to Riverwalk. (R. 60-71; App. 64-75). Tony and Lynn Pope filed a putative class action on behalf of unit owners at Riverwalk (“Class Action”), seeking damages for their “lost use” regarding their property during any alleged repair period. (R. 72-89; App. 76-93). The operative complaints contained the following claims: (1) negligence against HCI, HRI and Buildstar; (2) breach of express warranty against HCI; (3) breach of implied warranty of habitability and fitness against HRI; (4) breach of warranty of workmanlike service against Buildstar; and (5) breach of fiduciary duty against HCI and HRI.

The cases were consolidated for trial. It is Petitioners’ position that both liability and damages were disputed at trial. The evidence at trial established that Buildstar was the general contractor at Riverwalk and that all actual construction was performed by third party subcontractors. (R. 872; App. 879). Additionally, Petitioners’ witnesses offered testimony refuting the contention that HCI, HRI, or Buildstar caused the defective conditions, as well as the extent of the alleged defects. (R. 973-1306; App. 985-1314).

¹ HCI, HRI and Buildstar combine the Statement of the Case and the Statement of the Facts to eliminate repetition emanating from overlap of the procedural history with the facts of the case.

The evidence at trial with regard to the relationship among HCI, HRI and Buildstar established that each was properly formed as a separate South Carolina corporation and that they operated as separate entities with distinct purposes. (R. 725; App. 732). Buildstar was the general contractor, HRI was the site specific developer for Riverwalk, holding and transferring the title to the units, and HCI was the overall developer and parent corporation for HRI and Buildstar. (R. 704-11, 724-25, 866-70; App. 711-718, 731-32, 873-77). While there was evidence that the three entities shared officers, directors and office space, and were ultimately controlled by the same person, there was no evidence offered of any confusion caused by Petitioners, fraud, or other inequitable conduct with regard to the operation of these distinct entities. (R. 176, 704-05, 729; App. 180, 711-12, 736).

At the close of Respondents' case the trial court directed a verdict in favor of HCI on the express warranty claim and in favor of Buildstar on the warranty of workmanlike service claims. (R. 862-64; App. 869-71). At the close of all evidence, the trial court ruled that HCI, HRI, and Buildstar were "amalgamated" and were to be treated as "one and the same" – effectively stripping them of their separate corporate forms. (R. 1384-85; App. 1390-91). At that same time, the trial court granted Respondents' motion for directed verdict against the now "amalgamated" petitioners on the negligence claims. (R. 1384-93; App. 1390-99). This ruling by the trial court that "the condominiums were negligently constructed" did not separately address each of the specific defective conditions alleged, but rather operated as a blanket verdict finding that HCI, HRI and Buildstar were negligent as to all of the alleged defective conditions.

In the POA Action, the jury found against the Respondents on the breach of the warranty of habitability claim and found for Respondents on the breach of fiduciary duty claim, and awarded \$4,250,000 in actual damages and \$250,000 in punitive damages on the negligence and breach of fiduciary duty claims. In the Class Action, the jury found for Respondents in the amount of \$250,000 in actual damages and \$750,000 in punitive damages on the negligence and breach of warranty of habitability claims. (R. 58, 1506-09; App. 60, 1517-20). After the trial court granted a set off, the total combined judgment was \$4,471,178.31, and this judgment applied equally to HCI, HRI and Buildstar due to the “amalgamation” ruling. (R. 42-47; App. 46-51).

HCI, HRI and Buildstar timely sought review by the Court of Appeals. (App. 2104). The Court of Appeals affirmed the trial court in Opinion 4888. HCI, HRI and Buildstar filed a timely petition for rehearing and rehearing *en banc*, which was denied by the Court of Appeals Order dated December 12, 2011. This Court granted HCI’s, MRI’s and Buildstar’s petition for a writ of certiorari on certain issues on June 26, 2014.

Argument

I. **The Court of Appeals and trial court misapplied the “amalgamation of interests” theory in contravention of longstanding South Carolina law respecting the separateness of different corporate entities which requires a clear finding of injustice or unfairness to justify disregarding separate corporate forms.**

The evidence at trial established that HCI, HRI and Buildstar were properly formed as separate South Carolina corporations and that each operated as a separate entity with a distinct purpose. (R. 725; App. 732). While these separate entities shared officers, directors and office space, there was no evidence that any one of them failed to follow the corporate formalities, or that there was any misrepresentation or inequitable

conduct regarding their operation as separate corporate entities. (R. 176, 704-05, 729; App. 180, 711-12, 736). At the close of evidence, the trial court nevertheless held that HCI, HRI and Buildstar were “amalgamated” and thus would be treated as one. (R. 1384-85; App. 1390-91). Specifically, the trial court based its ruling on the following findings:

[T]he legal distinction between the entities are blurred, that they are in effect one and the same as far as their representation and operation and that the actions of one should apply to the others as far as the three entities because they are in effect one and the same but for the [sic], and that the case that was handed up to me notwithstanding outlines that stock ownership alone ordinarily doesn’t render a parent corporation liable for contracts of a subsidiary, that is something that is not applicable to this situation, would deal with the development and construction and marketing of this and sale of these properties, condominiums.

(Id.). This ruling was not based on any finding that there was any confusion, inequitable conduct, or fraud in the operation of these three distinct entities.

The application of the “amalgamation” theory under these circumstances ignores basic tenets of corporate law that permit the corporate form to be disregarded only in limited circumstances not presented here. If allowed to stand, this amalgamation ruling creates a slippery slope leading to a new form of corporate veil piercing – if corporations share officers, offices and common ownership, then their corporate separateness may be ignored based upon an individual fact-finder’s subjective perception that they shared common goals or purposes.

A. The “amalgamation of interests” or “blurred identity” theory does not apply because there was neither misrepresentation nor third-party confusion.

South Carolina’s unique “amalgamation of interests” or “blurred identity” theory² is an equitable theory, and thus the appellate court’s scope of review is broad. Mid-South Mgmt Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 604-05, 649 S.E.2d 135, 144 (Ct. App. 2007). Aside from the Court of Appeals’ opinion here, South Carolina courts had referenced this theory only a few times.³

The first case in South Carolina addressing the “amalgamation of interests” theory was Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). Kincaid involved three sister corporations, all owned by the same individual shareholders, that were involved in developing, building, and marketing a subdivision. Id. The marketing company tried to deny liability for faulty construction performed by its sister corporation, asserting that it was merely the marketing company. This argument was rejected and the trial court held 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.” Id., 289 S.C. at 96, 344 S.E.2d at 874.

In Kincaid, the Court of Appeals affirmed the trial court’s ruling, noting that the three corporations shared the same officers, directors, and corporate offices. Id. ***Additionally***, however, the Court of Appeals focused on evidence in which the marketing

² Petitioners have found no cases in any other jurisdictions that have discussed a theory by these names in the context of disregarding corporate form.

³ One such reference is in Schenk v. National Healthcare, Inc., 322 S.C. 316, 319, 471 S.E.2d 736, 737 (1996), in a footnote. The South Carolina Supreme Court in Kennedy v. Columbia Lumber and Manufacturing Company, Inc., 299 S.C. 335, 384 S.E.2d 730 (1989), alluded to the “blurring of legal distinction” theory in a lender liability situation. In Magnolia North Property Owners’ Assoc., Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Court of Appeals applied this theory under a virtually identical set of facts to this case. This Court granted a writ of certiorari in the Magnolia North at the same time as it did in this matter.

company identified itself as the “project developer” who would remedy construction defects. Indeed, the marketing company’s letterhead indicated it was “[a] Development, Construction, Sales, and Property Management Company.” *Id.* Moreover, there was evidence that the plaintiffs in Kincaid were confused by these representations which respect to which company was doing what. Thus, while the sharing of officers, directors and corporate offices were factors considered, the Kincaid Court’s affirmance of the amalgamation ruling was also critically based on the finding that the marketing company had, *through affirmative misrepresentations to the plaintiffs* in the case, blurred the legal distinction between it and its sister corporations. *Id.*

Subsequently, in Mid-South Mgmt Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007), the Court of Appeals again addressed the “amalgamation of interests theory,” reiterating the significance of the existence of confusion as to the separate nature of the corporate entities. Specifically, in Mid-South, the Court of Appeals refused to apply the “amalgamation of interests” theory where there was no evidence in the record that anyone had confused the subsidiary with its parent company. *Id.*, 374 S.C. at 605, 649 S.E.2d at 145.

The Court of Appeals opinion here treats “amalgamation” as a distinct legal theory separate and apart from other methods of “piercing the corporate veil” and not subject to the same limitations as the other methods. This is incorrect and represents an unwelcome and improper dilution of the law of corporate separateness in South Carolina. “Piercing the corporate veil” is the common phrase used to describe the procedure where a court determines grounds exist to disregard the corporate form of a party. Drury Dev. Corp. v. Foundation Ins. Co., 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008).

While the *remedy* of disregarding the corporate form may result from several different theories, such as traditional piercing of the corporate veil, the alter ego theory, the instrumentality rule, or the amalgamation of interests theory, certain limitations *always* apply to such theories. Specifically, the disregarding of the corporate form has always been limited to situations where there is some fraud, wrong or fundamental unfairness that justifies this drastic remedy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; Oskin v. Johnson, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (2012) (referring to the alter-ego theory as a method of piercing the corporate veil and refusing to apply it in the absence of fraud, injustice, or the contravention of public policy); Jones v. Enter. Leasing Co., 383 S.C. 259, 267-68, 678 S.E.2d 819, 824 (Ct. App. 2009) (requiring a showing that retention of corporate form would promote fraud, wrong or injustice before applying alter-ego theory); Colleton Cty. Taxpayers Ass'n v. Colleton Cty. Sch. Dist., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (holding that alter-ego theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice); Wilson v. Friedberg, 323 S.C. 248, 257, 473 S.E.2d 854, 859 (Ct. App. 1996) (noting that the instrumentality rule does not apply unless the retention of separate corporate personalities would promote fraud, wrong or injustice).

As is illustrated above, this requirement is equally applicable to amalgamation. The Kincaid Court based its amalgamation ruling, in part, on *evidence that the plaintiffs had been misled* as to the roles of the different corporate entities. Kincaid, 289 S.C. at 96, 344 S.E.2d at 874. The Mid-South Court clearly imposed this requirement by refusing to apply amalgamation *because there was no evidence of confusion* on the part of the plaintiffs as to the differing corporations and therefore, no fundamental unfairness

justifying disregarding the corporate forms. Mid-South, 374 S.C. at 605-06, 649 S.E.2d at 145.

In this case, the evidence established that HCI, HRI and Buildstar were properly formed as separate South Carolina corporations and that each operated as a separate entity with a distinct purpose. (R. 725; App. 732). There was *no evidence* that any one of them used their separate corporate status as an unfair device to achieve an inequitable result, or that there was any confusion, inequitable conduct, or misrepresentation in the separate operations of these three entities. Moreover, neither the trial court nor the Court of Appeals based their amalgamation rulings on any such finding. Thus, the complete disregarding of their separate corporate forms was improper, whether through “amalgamation,” or any other theory.

The creation of affiliated corporations to limit liability while pursuing common goals is well within the law and a common practice. No South Carolina court has previously held corporations liable for each other’s acts or obligations merely because of centralized control, mutual purposes, and shared offices; rather, the corporate form has been disregarded *only where retention of separate corporate personalities would promote fraud, wrong or injustice, or contravenes public policy*. Drury, 380 S.C. at 101, 668 S.E.2d at 800.

The Texas Supreme Court case of SSP Partners v. Gladstrong Investments Corp., 275 S.W.3d 444 (Tex. 2008), illustrates how, whatever the procedural theory used, a finding of “injustice” or “inequity” is a prerequisite to a court disregarding the corporate form. The SSP Court addressed, and ultimately rejected, a theory developing in Texas’ lower courts called “the single business enterprise” theory. This theory provided that

when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each corporation may be held liable for debts incurred in pursuit of that business purpose. *Id.* at 450. Under Texas’ “single business enterprise” theory, the courts considered factors such as: common employees; common offices; centralized accounting; payment of wages by one entity to the other’s employees; and services rendered by one entity’s employees on behalf of the other entity. *Id.* at 450-51. The SSP Court noted that, unlike theories such as “piercing the corporate veil” and “alter ego,” the “single business enterprise” theory which had developed in the Texas trial courts *did not include the requirement that the corporate form be used as an unfair device to achieve an inequitable result.* *Id.* at 451-52. Noting this anomaly, the Texas Supreme Court *expressly rejected* the “**single business enterprise theory**” as a basis for imposing liability despite the corporate structure. *Id.* at 455. Specifically, the SSP Court held:

Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each others obligations merely because of centralized control, mutual purposes, and shared finances. **There must also be evidence of abuse . . . injustice and inequity.** By “injustice” and “inequity” we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are . . . references for the kinds of abuse, specifically identified, that the corporate structure should not shield – fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. **Such abuse is necessary before disregarding the existence of a corporation as a separate entity.** Any other rule 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 liabilities.

Id. (emphasis added). In the past, South Carolina has followed these same established principles.

South Carolina's jurisprudence has been clear up until the Court of Appeals' decision in this matter and in Magnolia North Property Owners' Assoc., Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) (regarding which this Court has also granted *certiorari*) that, regardless of the theory used, the corporate form may be disregarded *only* where retention of separate corporate identities would promote fraud, wrong, or injustice or contravene public policy. Drury, 380 S.C. at 101-02, 668 S.E.2d at 800; see also Oskin, 400 S.C. at 400, 735 S.E.2d at 465; Colleton Cty. Taxpayers Ass'n, 371 S.C. at 237, 638 S.E.2d at 692; Enter. Leasing Co., 383 S.C. at 267-68, 678 S.E.2d at 824; Friedberg, 323 S.C. at 257, 473 S.E.2d at 859. As there was no evidence of such, here the trial courts' "amalgamation" ruling was error, and should have been reversed by the Court of Appeals.

In addition to conflicting with South Carolina's longstanding law with regard to piercing the corporate veil and other mechanisms for disregarding the corporate form, the "amalgamation" ruling in this case is also directly inconsistent with the provisions of the South Carolina Code which provide for the formation of separate legal entities. For example, the Uniform Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-101 *et seq.*, allows for the formation of South Carolina Limited Liability Companies ("LLCs"). LLCs are "a legal entity distinct from its members." S.C. Code Ann. § 33-44-201.⁴ Additionally, except as otherwise provided within the Code, the members of an LLC are "not personally liable for a debt, obligation, or liability of the company" S.C. Code Ann. § 33-44-303(a). Thus, a single person or persons may form LLCs for any lawful purpose, and the separate LLCs are treated under our law as separate entities

⁴ A single member LLC is not a separate legal entity for purposes of South Carolina *tax law*. S.C. Code Ann. §12-2-25. Otherwise, a single member LLC is to be treated as a separate legal entity from its member.

from each other and from their members with respect to liability. Under the “amalgamation” ruling in this matter, a court could ignore the separate status of such LLCs merely because they have the same members, use the same office space, and employ the same people. Such an outcome eviscerates the S.C. Code’s provision allowing the creation and governing of such entities.

Hence, as recognized previously in South Carolina case law and as affirmed by statutes passed by the General Assembly, the corporate form may be disregarded only where retention of separate corporate personalities would promote fraud, wrong, or injustice or contravene public policy. Here there was no such evidence. Additionally, there was no evidence or finding of any confusion cause by these separate entities that would amount to fraud or injustice justifying stripping them of their separate status.

B. The requirements for “piercing the corporate veil” must be met in order for a Court to disregard the corporate form.

It is a well-settled tenet that “a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears.” Drury, 380 S.C. at 101, 668 S.E.2d at 800. Only when the corporate entity is used to “protect fraud, justify wrong, or defeat public policy” will it be disregarded, thereby “piercing the corporate veil.” Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984). The phrase “piercing the corporate veil” refers to the remedy applied when a court permits the corporate form to be disregarded. Drury, 380 S.C. at 101 n.1, 668 S.E.2d at 800 n.1. Several rationales may serve as the basis for a party obtaining such equitable relief. See id. (explaining that the “alter ego” doctrine is merely a theory or means of obtaining the procedural relief of piercing the corporate veil). Whatever the theory, including “amalgamation,” there are limitations on the remedy of corporate veil piecing.

In South Carolina, the analysis of whether a corporate veil should be pierced is a two-pronged test. Drury, 380 S.C. at 102, 668 S.E.2d at 800. The first prong is an eight-factor analysis⁵ that examines the observance of corporate formalities. Sturkie, 280 S.C. at 457, 313 S.E.2d at 318. “The conclusion to disregard the corporate entity must involve a number of the eight factors, but need not involve them all.” Dumas v. InfoSafe Corp., 320 S.C. 188, 192, 463 S.E.2d 641, 644 (Ct. App. 1995). The second prong of the analysis requires the aforementioned element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual. Id.

The trial court and the Court of Appeals erred in ignoring this two-pronged analysis in this case. Respondent did not meet the traditional test outlined in Sturkie. There was insufficient evidence respecting the eight factors of the first prong. There was also no evidence of, nor a finding by the trial court of, any injustice or fundamental unfairness if the corporate form were not disregarded.

The amalgamation ruling resulted in significant unfair prejudice to HCI, HRI and Buildstar. Respondents were relieved of their burden of establishing the existence of all elements of the claims against each separate entity.⁶ Additionally, the ruling suggested to the jury that HCI, HRI and Buildstar had each engaged in some form of misconduct and were deserving of being stripped of their separate corporate entity status. Most

⁵ The eight factors are: (1) capitalization of the corporation; (2) observation of corporate formalities; (3) payment of dividends; (4) solvency of the corporation; (5) whether corporate funds were siphoned by a dominant shareholder; (6) whether other officers or directors are functioning; (7) maintenance of corporate records; and (8) whether the corporation is a facade for operations of a dominant shareholder. Friedberg, 323 S.C. at 252, 473 S.E.2d at 856.

⁶ For example, in the context of construction litigation, this Court has held that each defendant’s individualized standard of care must be addressed. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 560-61, 658 S.E.2d 80, 88 (2008) (holding that a general contractor is not automatically liable where a subcontractor performs negligent work, but rather the individualized standard of care of the general contractor must be addressed). No individualized determinations were ever made in this case as to the standards of care applicable respectively to HCI, HRI, and Buildstar. Hence, through the erroneous “amalgamation” ruling, Respondent was improperly relieved of establishing the elements of its claims.

significantly, the amalgamation ruling opened the door for the application of punitive damages against all *three* Petitioners without the requirement that Respondents prove by clear and convincing evidence that each separate Petitioner deserved such punishment. Further, certain claims (*e.g.*, the breach of fiduciary duty claim) supporting punitive damages, while made only against HRI and HCI, were wrongly sent to the jury as to all of the defendants by virtue of the amalgamation ruling. Because of this error, HCI, HRI and Buildstar should be granted a new trial.

C. HCI, HRI and Buildstar properly preserved the issue of the improper “amalgamation” and the failure to meet the universal requirement of a showing of fraud, wrong, or injustice to pierce the corporate veil under any theory.

The Court of Appeals erred in holding that HCI, HRI and Buildstar failed to preserve their “piercing the corporate veil” argument. This ruling overlooked the fact that Petitioners’ counsel expressly raised this point during his argument on the amalgamation of interests issue. (Tr. pp. 1622-1625; App. 1633-36). Specifically, in three successive sentences of his argument, counsel mentioned both the impropriety of piercing the corporate veil and the inapplicability of the “amalgamation of interests” theory as a method of doing so. (R. 1372; App. 1378). First, trial counsel argued that the Respondents were tying all wrongdoing to Mr. Van Wie, a central person to all three corporations. Counsel said he thought the Respondents were doing this so they could argue in closing that the jury should ignore any distinction between Mr. Van Wie and the three separate corporations because they all were essentially the same. (R. 1372; App. 1378). Counsel ended his first sentence with a statement that Respondents were essentially asking the Court to “**pierce a corporate veil [sic] without ever having any elements**” (*Id.*) (emphasis added). In the second sentence, counsel anticipated that

Respondents' closing argument would assert "it is all Roger Van Wie[']s fault," and "you need to punish him" by entering a verdict against the three corporations that he controlled. (*Id.*). Finally, in the third sentence, counsel explained why this was not permitted under South Carolina corporate law: "[t]hat (lumping them together) is improper, Your Honor, it doesn't follow that you jump to say they are all **amalgomated** [*sic*] together." (*Id.*) (emphasis added). It is clear from these three sentences, as well as the passages preceding and following them, that HCI's, HRI's and Buildstar's objections were sufficient to preserve the "piercing the corporate veil" argument and South Carolina's long-standing legal requirements for what must be established to justify disregarding the separate corporate forms.

The Court of Appeals incorrectly concluded that Petitioners' arguments focused solely on Mr. Van Wie. Rather, Petitioners' piercing the corporate veil argument was focused on Respondents' claim that the separate character of Mr. Van Wie *and his three corporations* should be disregarded. In addition to expressly raising issues related to piercing the corporate veil *and amalgamation* as mentioned above, (R. 1369-72; App. 1375-78), counsel also asserted that, under basic tenets of corporate law, each corporation is a separate entity and that shared officers, directors and office space is not sufficient to justify disregarding the corporate form. (R. 1371-72; App. 1377-78). Petitioners' argument related to far more than the "impugn[ing] [of Van Wie's] character," as the Court of Appeals put it. The corporate veil issue was clearly and expressly preserved for review.

II. The grant of directed verdict in favor of Respondents as to the entirety of the negligence claims was in error because there was evidence that the Petitioners were either not negligent or were not the proximate cause of some or all the construction deficiencies at issue, and the jury may have awarded punitive damages against a defendant who may not have been liable but for the amalgamation ruling.

The trial court erroneously granted Respondents' motion for a directed verdict as to the entirety of the negligence claims against all of the Petitioners. The stated basis for this ruling was: 1) the defense witnesses acknowledged the existence of construction defects; and 2) the "representation of counsel" that Petitioners were responsible and intended to engage in repairs. (R. 1385; App. 1391). This ruling was error and a new trial must be ordered.

"In ruling on motions for a directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "[I]f there is a scintilla of evidence, which is any material evidence that if true would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for consideration." Wright v. Gilbert, 227 S.C. 334, 337, 88 S.E.2d 72, 74 (1955).

A. There was evidence at trial that Petitioners were not negligent and were not the cause of at least some of the allegedly defective conditions at Riverwalk.

In this suit, Respondents alleged *numerous, and different, defective conditions* at Riverwalk, *i.e.*, improper trim installation, improper masonry work, improper sheathing, improper installation of decks, and improper installation of windows. Petitioners presented evidence that, when viewed in a light most favorable to Petitioners, warranted the denial of directed verdict. The grant of Respondents' directed verdict motion improperly resulted in the jury being told that Petitioners, who had been "amalgamated" into one entity, were responsible for each and every defective condition, and removed from their hands the numerous factual determinations that they should have been required to make before liability for every defect was imposed on any of the Petitioners.

For example, one of the disputed issues related to water infiltration damage on the decking. Respondents' contention was that this was caused because the decks were constructed with an improper slope. In contrast, Petitioners' expert testified that the damage was caused when, during the POA's maintenance, a carpet installer cut through the protective weatherproofing. (R. 970, 1002; App. 977, 1014). The lower courts erred in holding that this expert testimony was not sufficient evidence to submit the issue regarding this defect and negligence specification to the jury. This is obviously "*some evidence*" that Petitioners were *not* responsible for this alleged defect and its corresponding damage. Further, HCI and HRI were not responsible for constructing the decking in any event, yet were deemed responsible by virtue of amalgamation. Hence, the directed verdict ruling should have been denied as to this specification of negligence.

There was ample testimony regarding other disputed factual issues relating to alleged construction defects, including the following:

- Water damage issues with the decking was not a universal problem at Riverwalk; there was a evidence that at some buildings there was no design flaw (R. 987; App. 999);
- There was no damage as to the decking's framing (R. 993; App. 1005);
- Issues as to framing damage were not a universal problem at Riverwalk; there was evidence that at some buildings there were no framing problems (R. 1009; App. 1021);
- Sheathing damage would not extend to the framing except at certain areas around windows and a bore scope inspection showed the sheathing and framing were undamaged in many areas (R. 1010-11; App. 1022-23); and
- Slope issues with decks was not a universal issue at Riverwalk; where there was a negative slope, there was no evidence it was damaging the building (R. 1030; App. 1042).

The grant of directed verdict as to the entirety of the negligence claims resulted in each of the above defects disputes being conclusively determined by the court in Respondents' favor, and against *all* of the Petitioners (because of amalgamation). This was error, as the trial court should have tailored any directed verdict so that it was limited to solely those issues, if any, where there was no factual dispute or conflicting evidence. See Guffey v. Columbia/Colleton Regional Hosp., Inc., 364 S.C. 158, 164-165, 612 S.E.2d 695, 698 (2005) (stating that a directed verdict may be granted as to one of many specifications of negligence if there is no evidence to support one of the specifications). The issues regarding the existence and cause of these defects were for the jury to decide.

Further, there was no evidence that Buildstar breached its standard of care as the general contractor. The evidence in the record established that Buildstar did not engage in actual construction; instead, all construction was performed by subcontractors. (R. 872; App. 879). A general contractor is not "automatically" liable for the negligent work of subcontractors. J. Haynes Waters Builders, Inc., 376 S.C. at 560-61, 658 S.E.2d at 88.

Rather, a general contractor must only exercise the degree of care reasonably expected in the industry in constructing and supervising the construction of the home. Id. Respondents did not establish that Buildstar failed to properly supervise the subcontractors under this standard. Viewing the evidence in a light most favorable to Petitioners, the trial court should also have denied the directed verdict motion on this basis.

Significantly, because HCI, HRI, and Buildstar were improperly grouped together as one entity, they were also denied the necessary requirement that the trial court make independent determinations as to whether directed verdict on the issue of negligence was appropriate as to *each* individual Petitioner. Thus, in addition to the directed verdict being improper based on the existence of evidence supporting Petitioners, the denial of individual determinations that resulted from the amalgamation ruling requires that a new trial be granted to Petitioners. Finally, the jury awarded punitive damages. Such damages could have been awarded based on the breach of fiduciary duty claim, which was not even asserted by Respondents against Buildstar at all, but which nevertheless went to the jury as a basis for liability against Buildstar because of the amalgamation ruling.

B. Neither Petitioners nor their counsel conceded liability as to the negligence claim and counsel's statements did not constitute judicial admissions.

The Court of Appeals erred in finding that Petitioners' counsel conceded liability. (App. 2278). This "concession" was based on an acknowledgement in the opening statement by Petitioners' counsel that some defective conditions existed at Riverwalk, coupled with the fact that Petitioners also offered alternative damages evidence. It was

entirely permissible for Petitioners to defend this action by, among other things, challenging proximate causation while simultaneously challenging and offering alternative computations of Respondents' damages. MacFarlane v. Manly, 274 S.C. 392, 395, 264 S.E.2d 838, 840 (1980) (stating that defendants have the right to plead alternative or inconsistent defenses). Additionally, Petitioners' trial counsel specifically refuted the contention that Petitioners were conceding liability or damages during the trial. During the directed verdict argument, Petitioners' counsel refuted that he had made any concession on liability:

As to the negligence issue, Your Honor, I certainly got up there in opening and being nothing but frank with the jury acknowledged there were issues out there at Riverwalk and laying out the damages in an opening statement how the case will progress, we layed [sic] out that our defect experts and our estimator have identified there is \$2,391,619 in deficiencies out there and that I said to the jury was what are the real issues and what is it going to really cost to fix it, and I gave them a number.

Now, to say that means you automatically have bought into that, I don't believe it is fair under the pleadings, but under the pleadings we're allowed, we pled both affirmatively that there are third parties' responsibility [sic], there are other third parties. You can plead that in the alternative and plead inconsistent theories in the pleading process and at least offer alternative theories during the presentation of your case....

(R. 1377-78; App. 1383-84). In other words, while trial counsel may have admitted to the existence of some defects at Riverwalk in his opening statement remarks, he did not admit to liability for any of the specific three Petitioners with regard to those defects.

A judicial admission is an admission made in court by a person's attorney for the purpose of being used as a substitute for the regular legal evidence of the facts at trial. Black's Law Dictionary 48 (6th ed. 1990). South Carolina's courts have acknowledged the common view that judicial admissions must be clear, deliberate, unequivocal statements of fact, not conclusions of law or expressions of opinion. Lytle v. Reagan,

256 S.C. 269, 274, 182 S.E.2d 302, 305 (1971).⁷ The statements of Petitioners' counsel⁸ at best acknowledged that *some defective* conditions existed at Riverwalk, and that the cost of repairing them was in dispute. He did not admit Petitioners were negligent, or that Petitioners caused some (and certainly not *all*) of those defective conditions. Petitioners offered evidence at trial that some of the defective conditions were caused by the Property Owners' Association or the individual owners *subsequent* to the construction. Specifically, and by way of example, there was testimony that during a *subsequent* repair of the walkway carpeting, whoever performed that repair cut through the waterproofing and failed to repair the waterproofing damage. (R. 970, 1002; App. 977, 1014). The statements of Petitioners' counsel and the testimony of Petitioners' witnesses regarding *certain defective conditions* and the estimated costs to remedy them are certainly *not* an admission of liability as to *all of the specifications of negligence or all of the allegedly defective conditions*.

Despite Petitioners actively contesting these issues at the trial and producing evidence supporting their position, the trial court's grant of directed verdict erroneously established *all* of the defect disputes, including the clearly contested ones, in Respondents' favor. At the directed verdict stage, this issue should have been viewed in

⁷ Other states have held that statements such as those of Petitioners' counsel in this case do not constitute judicial admissions of liability. Zitzmann v. Miller, 551 N.E.2d 707, 709-10 (Ill. App. 1990) (holding that defense counsel's statement of the value of plaintiff's damages was not a judicial admission when considering the circumstances of the case and the context of the comment); Hayes v. Xerox Corp., 718 P.2d 929, 932-33 (Alaska 1986) (holding that defense counsel's statement that defendant owed plaintiff a lot of money, but the amount owed was for the jury to decide, was merely opinion, and not the clear, deliberate and unequivocal statements of fact necessary for a judicial admission).

⁸ As has been clearly stated by the South Carolina Supreme Court "[t]he contention that the statements of counsel are in effect testimony or evidence simply ignores reality and would substitute for it a figment of the imagination. Every trial judge knows as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views . . ." Harper v. Bolton, 239 S.C. 541, 561-62, 124 S.E.2d 54, 64 (1962); see also Brown v. State, 383 S.C. 506, 517-18, 680 S.E.2d 909, 915 (2009) (noting that statements of counsel are not to be considered as evidence).

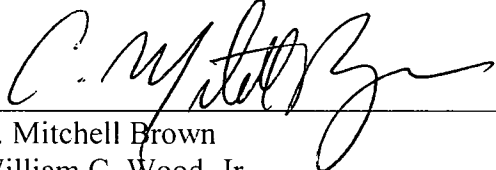
a light most favorable to Petitioners, which should have resulted in it being left to the jury for determination. Further, the trial court's amalgamation ruling meant that each of the Petitioners had a directed verdict for liability for negligence made against *all* of them as to *all* defects pled by Respondents. This was clear error. Hence, Petitioners should be granted a new trial.

Conclusion

Based on the foregoing, this Court should reverse the Court of Appeals and grant Heritage Communities, Inc., Heritage Riverwalk, Inc., and Buildstar Corporation a new trial.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: 
C. Mitchell Brown
William C. Wood, Jr.
Brian P. Crotty
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

YOUNG CLEMENT RIVERS, L.L.P.
William L. Howard
Stephen L. Brown
Russell G. Hines
Post Office Box 993
Charleston, SC 29402
(843) 720-5492

Attorneys for Petitioners Heritage Communities, Inc.,
Heritage Riverwalk, Inc., and Buildstar Corporation.

August 27, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2005-CP-26-3289
Appellate Case No. 2012-206066

Tony L. Pope and Lynn S. Pope, Individually and
Representing as a Class all Unit Owners for Riverwalk
at Arrowhead Country Club Horizontal Property
Regime,..... Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation, Petitioners.

Case No. 2003-CP-26-7169

Riverwalk at Arrowhead Country Club Property
Owners' Association, Inc.,..... Respondents,

v.

Heritage Communities, Inc., Heritage Riverwalk, Inc.,
and Buildstar Corporation, Petitioners.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Petitioners, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

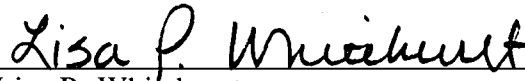
Pleadings:

Brief of Petitioners

Counsel Served:

John P. Henry, Esquire
Phillip C. Thompson, Esquire
Thompson & Henry, PA
P.O. Box 1740
Conway, SC 29528-1740

William L. Howard, Sr.
Stephen L. Brown
Russell G. Hines
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402-0993



Lisa P. Whitehurst
Administrative Assistant

August 27, 2014