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## **Piercing the Corporate Veil ©**

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### **I. Preliminary Points**

- A. General rule: a corporation is treated as a separate legal entity; separate, distinct and apart from its shareholders. A liability shield is provided so the shareholders are **not** personally liable for the corporation's debts. Derbyshire v. United Builders Supplies, Inc., 194 Ga. App. 844 (1990).
- B. Exception: the "liability shield" may be pierced or disregarded in a number of different circumstances including when:
  - 1. Creditors of insolvent corporations may seek to hold the shareholders liable for corporate debts. Yukon Partners, Inc. v. Lodge Keeper Group, Inc., 572 S.E.2d 647 (Ga. Ct. App. 2002).
  - 2. Shareholders have disregarded the corporate entity; McKesson Corp. v. Green, 266 Ga.App. 157, 166 (2004)
  - 3. Corporation is being used to evade a statutory, contractual or tort responsibility. Custom Lighting & Decorating, Ltd. V. Hampshire Co., 204 Ga.App. 293, 296 (1992)
  - 4. A corporation is used to hinder, delay, or defraud creditors. Farmers Warehouse of Pelham, Inc. v. Collins, 220 Ga. 141, 149, 137 S.E. 2d 619 (1964).
  - 5. A fraud would result if the corporate structure were allowed to shield shareholders from liability. See Kissum v. Humana, Inc., 267 Ga. 419, 421 (1997)
  - 6. Shareholders have used it as a sham, or...to defeat a public convenience, to justify wrong, protect fraud, or defend crime. See Mark Six Realty Assocs., Inc. v. Drake, 219 Ga.App. 57, 61 (1995); Paul v. Destito, 250 Ga.App. 631 (2001)

7. Officers and directors may be held personally liable for corporate checks issued against insufficient funds.
  - a. See, Annotation, Personal Liability of Officers and Directors of Corporation on Corporate Checks Issued Against Insufficient Funds, 47 ALR 3d 1250.
  - b. See Kolodkin v. Cohen, 230 Ga. App. 384, 496 S.E. 2d 515 (1998).
- C. Piercing the corporate veil is an equitable doctrine that is only appropriate when there are no other adequate remedies at law. Courts are hesitant to pierce the corporate veil unless the factors strongly weigh in favor of doing so. FDIC v. U.S., 654 F.Supp. 794, 809 (N.D. Ga. 1986).

## II. Will the Corporate Veil be Pierced?

- A. Whether a corporation is to be disregarded depends upon the specific facts and circumstances. Many factors can be considered including:
  1. Commingling funds or failure to maintain separate bank accounts. Abbott Foods of Ga., Inc. v. Elberton Poultry Co., 173 Ga. App. 672, 327 S.E.2d 751 (1985); Fountain v. Burke, 160 Ga. App. 262, 287 S.E.2d 39 (1981). See also Annotation, Stockholder; Personal Conduct of Operations or Management of Assets as Factor Justifying Disregard of Corporate Entity 46 ALR 3d 428.
  2. Corporate formalities are not followed. See Saxton v. Lake, 164 Ga. App. 170, 296 S.E.2d 751 (1982).
    - a. Failure to keep corporate minutes. Ward-Truitt Co. v. Bryan & Lamb, 144 Ga. 769 (1916).
    - b. Are corporate titles used?
    - c. Is the corporation in “good standing” with the Secretary of State?
    - d. Failure to issue stock. See Annotation, Failure to Issue Stock as Factor in Disregard of Corporate Entity, 8 ALR 3d 1122.
  3. Corporation was not adequately capitalized if the undercapitalization is an attempt to avoid future debts of the corporation. Hickman v. Hyzer, 261 Ga. 38, 39-40 (1991).

- a. See Comment, Corporations – Piercing the Corporate Veil – Test of Inadequate Capitalization, 24 U of Cinn. Law Review 603 (1955).

B. Parent Corporation's Liability for Subsidiary's Debts

1. Generally, courts will respect the corporate entity of subsidiaries so the parent will not be liable for the subsidiary's debts.
2. The parent may be liable if:
  - a. The parent exercises "excessive control" over the subsidiary;  
or
  - b. The subsidiary was undercapitalized.
3. What is "excessive control"?
  - a. Consider who are the officers of each corporation; the more commonality, the more likely excessive control will be found but this factor alone may not be enough. See Gaskias v. A.B.C. Drug Co., 183 Ga. App. 518, 359 S.E.2d 364 (1987), Stark Electric R. Co. v. McGinty Contracting Co., 238 Fed. 657 (6<sup>th</sup> Cir. 1917) and Hollingworth v. Ga. Fruit Growers, Inc., 185 Ga. 873, 196 S.E. 766 (1938).
  - b. The manner of keeping books and records.
    - (i) See Foard Co. v. Maryland, 219 Fed. 827 (4<sup>th</sup> Cir. 1914).
  - c. Whether the subsidiary is operated solely for the benefit of the parent.
    - (i) See Trans. American Communications, Inc. v. Nolle, 134 Ga. App. 457, 214 S.E. 2d 717 (1975).
  - d. The manner of conducting corporate business.
    - (i) See Stock Electric R. Co. v. McGinty Contracting Co., 238 Fed. 657 (6<sup>th</sup> Cir. 1917).
  - e. The amount of the initial capitalization and the subsequent financial relationship of the parent to its subsidiary.

- (i) See Garden City Co. v. Burden, 186 F. 2d 651 (10<sup>th</sup> Cir. 1951).
4. A parent corporation has been found liable for its subsidiary's debts when:
    - a. The subsidiary has no employees but the subsidiary carries out all of its functions through the parent corporation's employees or subcontractors. Najran Co. v. Fleetwood Enterprises, Inc., 659 F. Supp. 1081 (S.D. Ga. 1986).
    - b. The subsidiary's revenues are deposited in the parent corporation's account. Brunswick Mfg. Co. v. Sizemore, 183 Ga. App. 482, 359 S.E.2d 180 (1987).
    - c. Employees are borrowed from the subsidiary without reimbursement or income is pooled. Trans-American Comm. Inc. v. Nolle, 134 Ga. App. 457, 214 S.E.2d 717 (1975).
    - d. The subsidiary carried on the parent corporation's former business using the parent's assets without charge. Bd. of Trustees v. Universal Enterprises, Inc., 751 F.2d 117 (11<sup>th</sup> Cir. 1985).
  5. If a subsidiary is so inadequately capitalized as to severely jeopardize the chances of successful existence such a undercapitalization takes on the characteristics of a badge of fraud and can be grounds to pierce the corporate veil.
  6. A parent corporation may be liable for the acts of its subsidiary under other legal theories such as principal-agent, apparent agency, or joint venture. See Kissun V. Humana, 267 Ga. 419, 479 S.E. 2d 751 (1997).

### III. Is the Doctrine Applicable to LLCs?

A Georgia's LLC statute provides, in part:

Georgia law provides: This chapter does not alter any law with respect to disregarding legal entities. The failure of a limited liability company to **observe formalities** relating to the exercise of its powers or the management of its business and affairs is **not** a ground for imposing personal liability on a member, manager, agent, or employee of the limited liability company for liabilities of the limited liability company.

#### **IV. Reverse Veil Piercing**

- A. Concept: The corporate veil is disregarded so its assets can be used to satisfy the debt of its owners.

#### **V. Practical Tips**

- A. To reduce the likelihood that the corporate veil will be pierced, the following should be done:
  1. Do not commingle corporate and personal funds.
  2. Do not pay personal expenses out of the corporate checking account.
  3. Follow corporate formalities; conduct shareholder and Board of Directors meetings after giving proper notice, issue stock certificates.
  4. Follow formalities regarding loans to shareholders – have them properly authorized, documented, arms-length interest rate and terms, require repayment
  5. Do not pay loans from shareholders before unrelated creditors
  6. Timely file the annual report with the Secretary of State.
  7. Officers should use corporate titles when signing on behalf of the corporation.
  8. Use “Inc.” or Corp.” on the company’s stationary, contracts, business cards, invoices, etc.
  9. File corporate income tax returns.
  10. Keep the corporation solvent.
  11. Do not let parent corporation to control a subsidiary’s operations; best to have separate officers and directors

## VI. Use of Multiple Entities

### A. General Points

1. Entities are often used to create a “liability shield” for the owners
2. One risk is that the “liability shield” is pierced
3. If one entity is good, is two or three better?
4. Cost of creating and maintaining a separate entity.
  - a. Is the cure worse than the disease?

### B. Advantages of Multiple Entities

1. Can (and perhaps should) separate disparate operations
2. May be easier to raise capital for one business
3. May be easier to sell the business
4. Can file a consolidated tax return if all are corporations

### C. Disadvantages

1. Administrative burden of maintaining separate entities
  - a. Separate bank accounts, records, tax returns, insurance, etc.
2. More expense to maintain

## VII. Corporate Veil is No Help

- A. When a personal guarantee has been given
- B. When a statute imposes liability See 6672 of the Internal Revenue Code
- C. In an action against directors of an insolvent corporation. When a corporation becomes insolvent, its directors are bound to manage the remaining assets for the benefit of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves. Hickman v. Hyzer, 261 Ga. 38, 40 (1991). Technically, the action against the directors does not pierce the corporate veil but simply

rescinds improper payments to shareholders or directors so that funds are available for the payment of corporate debts. Id. Abbott Foods of Ga., Inc. v. Elberton Poultry Co., 173 Ga. App. 672, 673 (1985).

1. Some courts may require a finding of insolvency first. In re Friedman's Inc., 385 B.R. 381, 415 (S.D. Ga. 2008).

### VIII. Illustrative Cases

Baillie Lumber Company v. Thompson., 279 Ga. 288; 612 S.E.2d 296 (2005)

This case is before the Court on certified questions from the United States Court of Appeals for the Eleventh Circuit, as follows: (1) Will Georgia law allow the representative of a debtor corporation to bring an alter ego claim against the corporation's former principal? (2) If so, what is the measure of recovery?

For the reasons which follow, we conclude that Georgia law does allow such a suit and that the measure of recovery against the corporation's former principal, upon a finding of liability, is the total of all debts of the corporation.

Bert F. Thompson ("Thompson") was the manager and sole shareholder of Piedmont Hardwood Flooring, LLC ("Piedmont"), a national manufacturer and distributor of hardwood flooring. Baillie Lumber ("Baillie") is an unsecured trade creditor of Piedmont that had sold lumber to the company but has not been paid.

After allegations surfaced that Thompson misappropriated Piedmont's assets to his own use, Thompson relinquished control of the company and divested himself from its management. n1 Shortly thereafter, Piedmont filed for bankruptcy protection under Chapter 11. Under the provisions of the Bankruptcy Code, Piedmont was allowed to operate its business as a debtor in possession, n2 and Icarus Holding LLC ("Icarus") was created to wind up the proceedings and to be a suable entity.

----- Footnotes -----

1 Thompson allegedly engaged in financial irregularities that harmed the company's liquidity, such as the use of company assets and resources to make improvements to his personal hunting lodge, and to fund a separate company.

2 A debtor in possession has essentially the same rights and duties as a trustee. **11 USC § 1107.**

----- End Footnotes-----

Following the bankruptcy filing, Icarus filed a complaint against Thompson in bankruptcy court asserting that Thompson's use of the company's assets constituted fraudulent transfers, and it sought to recover the misappropriated money. **Soon after, Baillie filed suit against Thompson in Bibb County State Court** alleging that Thompson is the alter ego of Icarus and thus personally liable for the debts owed to Baillie. **Thompson sought injunctive relief in bankruptcy court** to restrain Baillie from continuing the Bibb County action on the basis that the alter ego claim against him is the property of the bankruptcy estate; that, therefore, only Icarus has standing to bring such a claim; and that Baillie has violated the automatic stay by prosecuting the state court action. n3 In support of these contentions, Thompson argued that Baillie is attempting to circumvent the bankruptcy laws by depriving other unsecured creditors of their pro rata share of any recovery from Thompson. The **bankruptcy court agreed with Thompson** and ruled that any alter ego claims by an unsecured creditor against the principal of a corporation were property of the bankruptcy estate, and therefore, subject to the automatic stay. n4 **The district court adopted the decision and analysis of the bankruptcy court**, concluding that under Georgia law, an alter ego claim may be asserted by a corporation, and when a corporation files for bankruptcy, any alter ego claims become property of the estate. **Baillie appealed to the United States Court of Appeals for the Eleventh Circuit.**

----- Footnotes -----

3 See **11 USC § 362 (a) (3)** (petition operates as a stay of any act to obtain possession of property of the bankruptcy estate or to exercise control of property of the estate).

4 Because the bankruptcy court determined that Baillie's state court suit was subject to the automatic stay, it found it unnecessary to issue a separate injunction.

----- End Footnotes -----

In certifying its questions to this Court, the Eleventh Circuit noted that Icarus must have standing to bring its own alter ego action in order to stay Baillie's state court proceeding. The Eleventh Circuit further determined that “in order to bring an exclusive alter ego action under section 541 [of the Bankruptcy Code], a bankruptcy trustee's claim should (1) be a general claim that is common to all creditors and (2) be allowed by state law.” The Eleventh Circuit acknowledged that the first factor was satisfied here. However, the Court questioned the conclusion reached by the district court that Georgia courts would allow a corporation to bring an alter ego action against itself, and it certified that question of Georgia law to this Court.



**1. Under the alter ego doctrine in Georgia, the corporate entity may be disregarded for liability purposes when it is shown that the corporate form has been abused.**

In order to disregard the corporate entity because a corporation is a mere alter ego or business conduit of a person, it should have been used as a subterfuge so that to observe it would work an injustice. **To prevail based upon this theory it is necessary to show that the shareholders disregarded the corporate entity and made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.** [Cit.] **The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetuate fraud or to evade contractual or tort responsibility.**(Citation and punctuation omitted.) Heyde v. Xtraman, Inc., 199 Ga. App. 303, 306 (404 SE2d 607) (1991). See also Kissun v. Humana, Inc., 267 Ga. 419, 419-420 (479 SE2d 751) (1997) (one type of abuse is when the corporate entity serves “as a mere alter ego or business conduit of another”); Farmers Warehouse of Pelham v. Collins, 220 Ga. 141, 150 (137 SE2d 619) (1964). **“Plaintiff must show that the defendant disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control.** [Cits.]” (Punctuation omitted.) Heyde, supra at 306. See also Paul v. Destito, 250 Ga. App. 631, 639 (550 SE2d 739) (2001).

**In general, equitable principles govern the alter ego doctrine.** Acree v. McMahan, 276 Ga. 880, 882 (585 SE2d 873) (2003); Kissun, supra; Hester Enterprises v. Narvais, 198 Ga. App. 580, 581 (402 SE2d 333) (1991). “As a consequence, [a claim for piercing the corporate veil] is appropriately granted only in the absence of adequate remedies at law.” Acree, supra at 883 (quoting Floyd v. Internal Revenue Svc., 151 F3d 1295, 1300 (10th Cir. 1998)).

With these principles in mind, we turn to whether a corporation is entitled to recover from a principal under a veil-piercing theory. In Pickett v. Paine, 230 Ga. 786, 791 (199 SE2d 223) (1973), this Court stated a

reluctan[ce] to disregard the corporate entity except where third parties were involved in dealing with the corporation and director or shareholder liability was in question, *or* where public policy might require looking beyond the corporate structure in the public interest.(Emphasis supplied.) **The Court also acknowledged that the consequences**

**of malfeasance on the part of a majority shareholder “may result in a loss of limited liability and render the participants personally liable for the obligations of the corporation.”** Id. However, the *Pickett* Court preserved the fiction of the corporate entity in that case because it concluded that a minority shareholder plaintiff had an adequate remedy by means of a shareholder's derivative action. Id. at 792 (1).

In subsequent decisions, our Court of Appeals has been reluctant to confine the doctrine of veil-piercing to third parties. For example, in *Paul v. Destito*, supra at 639, the Court of Appeals rejected a broad assertion that “in all cases, Georgia law prohibits a director, officer, or shareholder from piercing the corporate veil.” See also *Cheney v. Moore*, 193 Ga. App. 312 (387 SE2d 575) (1989) (upholding trial court's directed verdict in favor of a 50 percent shareholder who sought to pierce the veil of a corporation that she had co-founded). Thus, **it is clear that Georgia courts have extended the veil-piercing doctrine beyond traditional suits by a third-party creditor, to cases where application of the doctrine is necessary “to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility.”** (Punctuation omitted.) *Cheney*, supra at 312-313.

Through its automatic stay provisions, federal bankruptcy law seeks “to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse.” *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F2d 711, 716 (5th Cir. 1985). If the alter ego claim is property of the estate, all creditors are prevented by the automatic stay from prosecuting individual alter ego claims, thus affording equal treatment to all. To rule otherwise would allow a creditor to circumvent the bankruptcy process and would “undercut the general bankruptcy policy of ensuring that all similarly-situated creditors are treated fairly.” In the *Matter of S. I. Acquisition*, 817 F2d 1142, 1153 (5th Cir. 1987).

Additionally, the usual requirement of third-party benefit for a veil-piercing claim is, in fact, met in the case of an insolvent corporation under federal bankruptcy law. In those circumstances, any alter ego claim asserted by the corporation itself will necessarily benefit third parties by providing more money with which to satisfy unsecured claims. See, e.g., *Corcoran v. Frank B. Hall & Co.*, 149 AD2d 165, 545 N.Y.S.2d 278 (S. Ct. N.Y. 1989) (where corporation is insolvent, any suit by corporation's representative necessarily benefits creditors and not the company's shareholders).

The Court of Appeals for the Third Circuit explained the rationale for allowing a corporation to pierce its own veil:

It may seem strange to allow a corporation to pierce its own veil, since it cannot claim to be either a creditor that was deceived or defrauded by the corporate fiction, or an involuntary tort creditor. In some states, however, piercing the corporate veil and alter ego actions are allowed to prevent unjust or inequitable results; they are not based solely on a policy of protecting creditors. [Cits.] **Because piercing the corporate veil or alter ego causes of action are based upon preventing inequity or unfairness, it is not incompatible with the purposes of the doctrines to allow a debtor corporation to pursue a claim based upon such a theory.** *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F3d 1228, 1240, n. 20 (3rd Cir. 1994). Also persuasive are the decisions of the federal bankruptcy courts within Georgia which have upheld a corporation's ability to assert an alter ego action. These decisions are predicated on the finding that equitable principles espoused in Georgia alter ego decisions merit the allowance of such a claim. See, e.g., *In re City Communications*, 105 B.R. 1018, 1022 (Bankr. N.D. Ga. 1989) (“emphasis under Georgia law appears to be equitable concerns rather than [sic] the specific relationships between the alter-ego and the creditors”); *In re Adam Furniture Indus.*, 191 B.R. 249, 254 (Bankr. S.D. Ga. 1996) (noting that under *City Communications*, *supra* and *Phar-Mor*, *supra*, Georgia courts would allow these claims). See also *In the Matter of S. I. Acquisition*, *supra* (under Texas law, an alter ego action was property of the bankruptcy estate, and any such suits by creditors ran afoul of the automatic stay). Compare *In re Rehabilitation of Centaur Ins. Co.*, 158 Ill.2d 166 (632 NE2d 1015, 198 Ill. Dec. 404) (1994) (holding that a corporation may not assert alter ego claim against its own shareholders but also reasoning that rehabilitator, unlike bankruptcy trustee, was not permitted by Illinois law to assert creditors' claims).

As we noted previously, Georgia alter ego law is not focused solely on the relationships between parties, but also is premised on equitable principles designed to prevent unjust treatment in appropriate circumstances. *Farmers Warehouse*, *supra*. We are convinced that this reasoning, when viewed in combination with the discussion above, compels that we recognize that in these circumstances, a corporation has a right to pursue an alter ego action. To fail to do so would result in potentially inequitable treatment of creditors under federal bankruptcy law.

Our conclusion is bolstered by two additional points. First, it is extremely unlikely that a corporation, outside of the bankruptcy context, would conclude that it is necessary to institute an alter ego action. Second, we are guided by the principle, as discussed above, that a claim for piercing the corporate veil is appropriately granted only in the absence of adequate remedies at law. *Acree*, *supra*. (2) Thus, while an alter ego claim may be asserted by a corporation in an action against its principals, trial courts must not

allow such claims when there are other appropriate remedies available to the corporation.

2. Baillie also argues that **OCGA § 23-1-22** provides grounds for refusing to allow a corporation to assert an alter ego cause of action. That Code section provides that “[a] diligent creditor shall not needlessly be interfered with in the prosecution of his legal remedies.” Baillie's assertion is that by recognizing that a corporation may pursue an alter ego action, its ability to assert the same cause of action is “interfered with” because it is taken away by the bankruptcy court. We find this argument unpersuasive. Key to this determination is the legislature's use of the word “needlessly.” Baillie's remedy is not “needlessly” interfered with in the current situation. To the contrary, as discussed above, Baillie's remedy is only interfered with for the valid reason that in bankruptcy, all unsecured creditors are to be treated equally with regard to like claims. Baillie chose to deal with Piedmont on an unsecured basis. To allow Baillie to circumvent the bankruptcy process to the detriment of other unsecured creditors in like positions would be inequitable.

3. Having answered the Eleventh Circuit's first question in the affirmative, we now address the appropriate measure of recovery. An alter ego claim is an assertion that “there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.” *Farmers Warehouse*, supra at 150 (quoting *Fletcher Cyclopedic Corporations*, Vol. 1 § 41.1). Thus, **it is readily apparent that where the corporate entity is disregarded, a principal found liable under an alter ego theory should be liable for the entirety of the corporation's debt.**

*Questions answered. All the Justices concur.*

## **Reverse Piercing**

*Acree v. McMahan*, 276 Ga. 880; 585 S.E.2d 873 (2003)

Dr. Russell Acree formed Memorial Health Services, Inc. (MHS) to manage various small hospitals. MHS entered into a management agreement with Irwin County Hospital (Hospital). Acree, Dr. Howard McMahan, and Dr. Gene Jackson formed AJM, Inc. in furtherance of their agreement for McMahan and Jackson to relocate and eventually become part of the management team at the Hospital. Due to subsequent disagreements, Acree, acting in his individual capacity, agreed to purchase McMahan's and Jackson's interest in AJM for \$ 750,000 each. For over a year, Acree caused MHS and the Hospital to make the payments for which he was obligated under the buyout agreement. After further conflict, however, Jackson discontinued his practice in the

area, and Acree later terminated the payments to McMahan. Although the agreement was with Acree, McMahan brought suit against both Acree and MHS (Appellants) to recover damages for breach of contract. The jury returned a verdict against both Appellants, on which the trial court entered judgment in favor of McMahan. The Court of Appeals affirmed, concluding, as to the judgment against MHS, that the concept of reverse piercing of the corporate veil is applicable in Georgia and that the trial court did not err in its charge thereon. *Acree v. McMahan*, 258 Ga. App. 433 (574 S.E.2d 567) (2002). **This Court granted certiorari to consider whether the doctrine of reverse piercing of the corporate veil can be applied in this state.** We reject reverse piercing, at least to the extent that it would allow an "outsider," such as a third-party creditor, to pierce the veil in order to reach a corporation's assets to satisfy claims against an individual corporate insider.

**An increasing number of courts have recognized the distinction between "insider" and "outsider" reverse piercing claims**, first articulated in Crespi, "The Reverse Pierce Doctrine: Applying Appropriate Standards," 16 J. Corp. L. 33, 37 (II) (A) (1990). Outsider reverse veil-piercing extends the "traditional veil-piercing doctrine to permit a third-party creditor to 'pierce( ) the veil' to satisfy the debts of an *individual* out of the corporation's assets. [Cit.]" (Emphasis in original.) *C.F. Trust v. First Flight*, 306 F.3d 126, 134 (III) (A) (4th Cir. 2002) (certifying the question to the Supreme Court of Virginia). Only a few jurisdictions have addressed this version of disregarding the corporate entity. Crespi, *supra* at 56 (II) (C) (1). Some jurisdictions permit such claims, but place strict limitations on its application, such as requiring the plaintiff to prove that no innocent third-party creditor or shareholder would suffer harm or prejudice as a consequence of reverse veil-piercing and that there is no other available remedy, such as the usual judgment collection procedures. *C.F. Trust v. First Flight*, *supra* at 138 (III) (A); *C.F. Trust v. First Flight*, 266 Va. 3, 580 S.E.2d 806 (IV) (Va. 2003) (answering the certified question from the Fourth Circuit).

**The issue is one of first impression in this state.** Certain opinions of our Court of Appeals have held that the evidence in the particular case would not support reverse piercing assuming that the doctrine were viable. *Plaza Properties v. Prime Business Investments*, 240 Ga. App. 639, 643 (2) (d) (524 S.E.2d 306) (1999); *Gwinnett Property, N.V. v. G+H Montage GmbH*, 215 Ga. App. 889, 893 (2) (453 S.E.2d 52) (1994); *Hogan v. Mayor & Aldermen of Savannah*, 171 Ga. App. 671, 673 (3) (320 S.E.2d 555) (1984) ("insider" reverse piercing claim). **However, we "find no authority under Georgia law and plaintiff[] [has] cited none for the 'reverse pierce.'"** *Hogan v. Mayor & Aldermen of Savannah*, *supra* at 673 (3). Furthermore, the Court of Appeals has ruled that reverse piercing of the corporate veil is improper where a plaintiff simply recasts a fraudulent

conveyances theory. *Gwinnett Property, N.V. v. G+H Montage GmbH*, supra at 893 (2).

**"Reverse alter ego is an equitable doctrine; it stretches the imagination, not to mention the equities, to conceive of how someone wholly outside the corporation may be used to pierce the corporate veil from within."** *Estate of Daily v. Title Guaranty Escrow Serv.*, 178 B.R. 837, 845 (Ill) (D. Hawaii 1995).

**The [outsider] reverse-pierce theory presents many problems.** It bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets. Moreover, to the extent that the corporation has other non-culpable shareholders, they obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder who is determined to be the corporation's alter ego are subject to attachment. [Cit.] *Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (I) (D) (2) (10th Cir. 1990).

Although in *Cascade* [the] particular concern was with non-culpable third-party shareholders of the corporation being unfairly prejudiced, no greater culpability should attach to ... third-party corporate creditors harmed by reverse-piercing .... There are reasons beyond those identified in *Cascade* to deny an alter ego claim of this kind. For one thing, the prospect of losing out to an individual shareholder's creditors will unsettle the expectations of corporate creditors who understand their loans to be secured—expressly or otherwise—by corporate assets. Corporate creditors are likely to insist on being compensated for the increased risk of default posed by outside reverse-piercing claims, which will reduce the effectiveness of the corporate form as a means of raising credit. Furthermore, as Judge Learned Hand suggested in what may be the earliest case to consider such a claim, outside reverse piercing is only appropriate in the rare case of a subsidiary dominating its parent. See *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929); see also *Crespi*[, supra] at 67 ("*Kingston* stands for the proposition that the highly unusual circumstance of a subsidiary dominating its parent is a virtual prerequisite for finding the kind of unity that would allow an outside( ) reverse pierce ...."); [cit.]

*Floyd v. I.R.S.*, 151 F.3d 1295, 1299-1300 (Ill) (10th Cir. 1998). See also *Olympic Capital Corp. v. Newman*, 276 F. Supp. 646, 655 (C.D. Cal. 1967). Furthermore, disregard of the corporate form rests on equitable principles. *Hester Enterprises v. Narvais*, 198 Ga. App. 580, 581 (1) (402 S.E.2d 333) (1991).

As a consequence, it is appropriately granted only in the absence of adequate remedies

at law. [Cit.] In cases where a corporation has been dominated by a controlling stockholder, an agency ... theory may suffice to hold the corporation liable for the actions of that stockholder. [Cit.] Standard judgment collection procedures may also suffice to cover shareholder liability without expanding equitable theories of corporate liability. [Cit.] *Floyd v. I.R.S.*, supra at 1300 (III). Accordingly, we are inclined to conclude that more traditional theories of conversion, fraudulent conveyance of assets, respondeat superior, and agency law are adequate to deal with situations where one seeks to recover from a corporation for the wrongful conduct committed by a controlling stockholder without the necessity to invent a new theory of liability. *Cascade Energy and Metals Corp. v. Banks*, supra at 1577 (I)(D) (2) . *Gwinnett Property, N.V. v. G+H Montage GmbH*, supra at 893 (2). **Allowing outsider reverse piercing claims would constitute a radical change to the concept of piercing the corporate veil in this state and, thus, should be created by the General Assembly and not by this Court.** See *Hogan v. Mayor & Aldermen of Savannah*, supra at 674 (3).

Under the rulings in Divisions 2 through 4 of the Court of Appeals' opinion, McMahan prevailed under the buyout agreement against Acree individually. *Farmers Warehouse v. Collins*, 220 Ga. 141, 151 (2) (d) (137 S.E.2d 619) (1964). "It is not necessary to disregard the corporate entity for [McMahan] to acquire his rights under his contract." *Farmers Warehouse v. Collins*, supra at 151 (2) (d). Therefore, we affirm the judgment of the Court of Appeals with respect to Acree, but reverse with respect to MHS. *Farmers Warehouse v. Collins*, supra at 151 (2) (d). See also *Plaza Properties v. Prime Business Investments*, 249 Ga. App. at 643 (2) (d).

*Judgment affirmed in part and reversed in part. All the Justices concur.*

## **Parent-Subsidiary Relationship**

*Ramcke v. Georgia Power Company*, 306 Ga. App. 736; 703 S.E.2d 13 (10-18-10)

Andrews, Presiding Judge.

Robert A. Podorsky died as result of injuries he suffered when he was struck by construction machinery while working as an invitee of a contractor hired by Georgia Power Company to perform work on a construction project at Plant Bowen, a Georgia Power-owned facility. Edna Ramcke, individually and as administratrix of Podorsky's estate, sued Georgia Power, Southern Company Services, Inc., and The Southern Company alleging that they were liable for Podorsky's wrongful death, pain and suffering, and other damages because, as owners or occupiers of the Plant Bowen premises, they negligently failed to comply with a duty imposed by OCGA § 51-3-1 to keep the project premises safe for invitees. The claims proceeded to a jury trial at which

the trial court granted a directed verdict in favor of all three defendants. Ramcke appeals, and for the following reasons, we affirm.

"[A] directed verdict is appropriate only if there is no conflict in the evidence as to any material issue and the evidence introduced, construed most favorably to the party opposing the motion, demands a particular] verdict." *St. Paul Mercury Ins. Co. v. Meeks*, 270 Ga. 136, 137 (508 SE2d 646) (1998); OCGA § 9-11-50 (a). It follows that, where there is no evidence to support an essential element of the nonmovant's claim, no factual issue exists for the jury and a directed verdict is appropriate. *Parsells v. Orkin Exterminating Co.*, 178 Ga. App. 51, 52 (342 SE2d 13) (1986). Construing the evidence presented in favor of Ramcke's claims, all three defendants were entitled to a directed verdict because the evidence showed that an independent contractor with control of the project premises had the duty to keep the premises safe for its invitees, and the defendants had no such duty.

Georgia Power, a subsidiary of The Southern Company, owned the Plant Bowen premises and entered into a contract stating that Brad Cole Construction Company was hired as an independent contractor to perform grading and site preparation services on a project located on a portion of the plant. Southern Company Services, another subsidiary of The Southern Company, engineered and designed the project, drafted the contract between Georgia Power and Brad Cole, and was responsible for ensuring that Brad Cole performed in accordance with the contract. Brad Cole subcontracted for Contour Engineering to perform soil density testing on the project, and Podorsky was working for Contour as a geologist performing a soil density test on the project premises when he was struck by a Brad Cole soil compacting machine operated by a Brad Cole employee.

Although Georgia Power owned the project premises and entered into the contract hiring Brad Cole to perform the work on the project, Ramcke's premises liability claim alleged that Southern Company Services and The Southern Company also occupied the project premises because all the defendants acted together in a joint venture, or as alter egos or agents of one another, to enforce the contract and to direct and control the work on the project. Thus, Ramcke claimed that all three defendants were liable under OCGA § 51-3-1 to keep the project premises safe because they owned or occupied the project premises and directed and controlled the work. She also claimed that all three defendants were third-party tortfeasors which, unlike Brad Cole and Contour, were not employers liable for compensation benefits to the injured employee, and were therefore not entitled to immunity from suit under the Workers' Compensation Act (OCGA § 34-9-1 et seq.).

1. Ramcke claims the trial court erred by ruling that Southern Company Services was entitled to a directed verdict in its favor on the basis that it was a statutory employer under OCGA § 34-9-8, and was therefore entitled to workers' compensation immunity from suit under OCGA § 34-9-11.

Although the trial court found no workers' compensation immunity in favor of Georgia



Power, the court reasoned that, because evidence showed Southern Company Services administered the contract on behalf of Georgia Power to ensure that Brad Cole complied with the contract specifications, Southern Company Services became the "defacto general contractor over the job," and a statutory employer entitled to workers' compensation immunity. We find no basis in the record for this ruling. Since Georgia Power undertook no contractual obligation to perform work on the project for another, but merely hired Brad Cole to perform the project work, Georgia Power was not a statutory employer liable for compensation to the injured employee under OCGA § 34-9-8, and had no immunity from suit under OCGA § 34-9-11. *Yoho v. Ringier of America, Inc.*, 263 Ga. 338, 339-342 (434 SE2d 57) (1993); compare *Holton v. Ga. Power Co.*, 228 Ga. App. 135, 136-137 (491 SE2d 207) (1997). There was evidence to support the trial court's finding that Southern Company Services acted on behalf of Georgia Power on the project premises to ensure Brad Cole's compliance with the terms of the contract. In so doing, Southern Company Services, like Georgia Power, undertook no contractual obligation to perform work on the project for another, so Southern Company Services was not a statutory employer under OCGA § 34-9-8 and had no immunity from suit on this basis under OCGA § 34-9-11. *Yoho*, 263 Ga. at 339-342.

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The contract between Georgia Power and Brad Cole specifically provided that "Southern Company Services, Inc. may act as [Georgia Power's] agent for soliciting bids and for certain administrative matters under the Contract."

----- End Footnotes-----

2. We find no error in the trial court's ruling that The Southern Company was entitled to a directed verdict on the premises liability claim on the basis that there was no evidence that it owned or occupied the project premises, and because it was not liable for alleged negligent actions with respect to the premises taken by its corporate subsidiaries, Georgia Power and Southern Company Services.

The trial court correctly found there was no evidence that The Southern Company occupied the project premises or otherwise exercised control over work on the project. To ensure that work on the project did not pose a security risk to the Plant Bowen facility, the contract between Georgia Power and Brad Cole required Brad Cole employees given access to the facility to submit to criminal background checks pursuant to guidelines established by The Southern Company and subject to audit by The Southern Company. But there was no evidence that The Southern Company occupied the project premises pursuant to these contract provisions, or that these provisions otherwise gave The Southern Company the right to control the time or manner of the project work.

**Because Georgia Power and Southern Company Services are corporate subsidiaries which maintain legal identities apart from their parent corporation, the general rule is that the parent corporation, The Southern Company, is not liable for their alleged negligence.** *Enduracare Therapy Mgmt. v. Drake*, 298 Ga.

App. 809, 812-815 (681 SE2d 168) (2009).

**Nevertheless, Georgia law recognizes that as a parent corporation, The Southern Company] could be liable for any negligence on the part of [its corporate subsidiaries] under any one of three intertwined theories: (1) piercing the corporate veil; (2) apparent or ostensible agency; or (3) joint venture. Kissun v. Humana, Inc., 267 Ga. 419, 420 (479 SE2d 751) (1997). Matson v. Noble Investment Group, 288 Ga. App. 650, 658 (655 SE2d 275) (2007). Ramcke points to no evidence sufficient to pierce the corporate veil between The Southern Company and its subsidiaries, and to no evidence sufficient to show that The Southern Company participated in a joint venture with its subsidiaries or acted as their agent or alter ego.**

3. Although there was evidence that Georgia Power and Southern Company Services (acting as Georgia Power's agent) owned the project premises or had employees or agents on the premises, the trial court did not err by directing a verdict in their favor.

**Where a property owner or occupier surrenders temporary possession and control of the property to an independent contractor to perform work on the property, the owner/occupier is generally not liable under OCGA § 51-3-1 for injuries sustained on the property by the contractor's invitees due to unsafe working conditions on the premises which the owner/occupier had no right to control. Grey v. Milliken & Co., 245 Ga. App. 804 (539 SE2d 186) (2000); Englehart v. OKI America, 209 Ga. App. 151 (433 SE2d 331) (1993), disapproved in part on other grounds, Baker v. Harcon, 303 Ga. App. 749, 755 (694 SE2d 673) (2010). Under these circumstances, the general rule is that the independent contractor has the duty to keep the work premises safe, and the owner/occupier has no such duty. Braswell v. Walton, 208 Ga. App. 610, 612 (431 SE2d 417) (1993); United States v. Aretz, 248 Ga. 19, 24-25 (280 SE2d 345) (1981). An exception to the general rule is recognized where the owner/occupier hires a contractor to perform work on the premises and "retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create a relation of master and servant or so that an injury results which is traceable to [the owner/occupier's] interference. OCGA § 51-2-5 (5)." Grey, 245 Ga. App. at 804.**

The contract by which Georgia Power hired Brad Cole to perform the project work stated that Brad Cole agreed to furnish all labor, materials, and supervision on the project in accordance with the project specifications; that Brad Cole worked as an independent contractor directing and controlling the project work; and that Georgia Power had no right to direct or control the project work. The contract also provided that Southern Company Services may act as Georgia Power's agent in administrative matters under the contract. Although there was evidence that Georgia Power, acting through Southern Company Services, exercised the right to require that Brad Cole comply with the contract provisions, there is no evidence that any of these provisions gave these defendants the right to direct or control the time and manner of the work, or that any defendant assumed such control. The fact that the contract provided that Georgia Power could inspect the work to ensure compliance with contract terms, or

even stop the work if it was not in compliance, did not amount to a right to control the time or manner of the work. Englehart, 209 Ga. App. at 152. Similarly, provisions in the contract allowing Georgia Power to modify work specifications in exchange for an equitable adjustment in the contract price provided a means to modify the work to be performed under the contract, but not a right to control the time or manner of the work done pursuant to the modification. A Brad Cole worksite foreman testified that he took no direction from Georgia Power or Southern Company Services as to how or when to do the work, and that it was Brad Cole's responsibility to hire qualified equipment operators and to ensure that Podorsky was protected from being hit by equipment when he was performing soil tests. Southern Company Services representatives at the project premises also testified that Brad Cole had complete control over the project premises; that they did not tell Brad Cole how or when to do the work, but were only concerned with seeing that the work was done according to the contract, including compliance with the work safety plan that the contract required Brad Cole to devise.

The record shows that Georgia Power and Southern Company Services surrendered possession and control of the project premises to Brad Cole to perform the work as an independent contractor; that none of the defendants interfered with Brad Cole's status as an independent contractor; and that Brad Cole had the duty to keep the project premises safe for its invitees, including Podorsky. On this record, there is no evidence that any defendant had a duty under OCGA § 51-3-1 to keep the project premises safe for Podorsky. n2

----- Footnotes -----

2 Although the trial court granted a directed verdict in favor of Southern Company Services for an incorrect reason (see Division 1, supra), we affirm under the right for any reason rule. See *City of Gainesville v. Dodd*, 275 Ga. 834 (573 SE2d 369) (2002).

----- End Footnotes-----

4. Because none of the evidence that Ramcke claims was erroneously excluded from the trial was relevant to the issue of whether the defendants had a duty under OCGA § 51-3-1 to keep the project premises safe, these claims are moot.

*Judgment affirmed. Ellington and Doyle, JJ., concur.*