South Carolina Law Review

Volume 70
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 5

Summer 2019

Pertuis v. Front Roe Restaurants, Inc.: Equity Restores the Corporate Veil in Single-Business Enterprise Theory

Adair B. Patterson

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Banking and Finance Law Commons

Recommended Citation

Adair B. Patterson, Pertuis v. Front Roe Restaurants, Inc.: Equity Restores the Corporate Veil in Single-Business Enterprise Theory, 70 S. C. L. REV. 891 (2019).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

PERTUIS V. FRONT ROE RESTAURANTS, INC.: EQUITY RESTORES THE CORPORATE VEIL IN SINGLE-BUSINESS ENTERPRISE THEORY

Adair B. Patterson*

---

* J.D. Candidate, May 2020, University of South Carolina School of Law. I would like to extend special thanks to Professor Jim Burkhard of the University of South Carolina School of Law for his extraordinary teaching, feedback, and support. I would also like to thank the numerous professors, mentors, and friends whose input greatly shaped this work. Lastly, I would like to thank the entire team of the *South Carolina Law Review* for their diligent work in editing. Any errors remain completely my own.

Published by Scholar Commons, 2019

I. INTRODUCTION

In *Pertuis v. Front Roe Restaurants, Inc.*,[1] the South Carolina Supreme Court declined to ignore the corporate form of a party and "amalgamate" three sibling corporations solely on the basis of a blurring of corporate identities.[2] Instead, the court adopted a new two-part test for determining when to disregard the corporate form and impose liability on corporations so connected as to render them a single business enterprise.[3] The court held that the single-business enterprise theory (formerly known as amalgamation) requires not only an intertwining of operations among corporations but also evidence of fraud or fundamental unfairness as a result of the corporations' connectedness.[4] This new test strengthens corporate protections by submitting single-business enterprise theory to the bedrock principle that courts can only ignore the corporate form if there is a substantial showing of injustice or fundamental unfairness.[5]

Thus, *Pertuis* modified existing standards derived from South Carolina case law permitting horizontal veil-piercing among corporations where there was merely blurring of corporate activities.[6]

Part II of this Comment discusses the state of the law in South Carolina governing corporation formation, including the rise of limited liability and methods of imposing extra-corporate liability as identified by South Carolina courts. Part III addresses the facts, procedural history, and holding of *Pertuis*. Part IV analyzes the court's adoption of the single-business enterprise theory. Part V discusses recent South Carolina cases applying the new rule for establishing single-business enterprise liability and other broader potential impacts the *Pertuis* decision may have on corporate liability. Part VI concludes by highlighting the strong equitable footing of the new test for establishing single-business enterprise theory while acknowledging the likely expansion of the doctrine in South Carolina courts.

---

1. 423 S.C. 640, 817 S.E.2d 273 (2018).
2. *See id.* at 655, 817 S.E.2d at 280–81.
3. *Id.* at 655, 817 S.E.2d at 280.
4. *Id.* at 655, 817 S.E.2d at 281.
5. *See id.*
6. *See, e.g.*, Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989); Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 359–60, 725 S.E.2d 112, 118 (Ct. App. 2012); Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986).

II. STATE OF CORPORATE LAW IN SOUTH CAROLINA

The concept of limited liability is among the most heralded innovations of the twentieth century. Regarded as "the basis of the prosperity of the West and the best hope for the future of the rest of the world,"[7] limited liability embodies an American ideal claimed with equal fervor as "typically reserved for motherhood, apple pie, and 4th of July celebrations."[8] The introduction of the limited liability concept decreased many barriers to the formation and prosperity of new enterprise.[9] Chief among the barriers eliminated was cost.[10] By reducing the overall cost of investment in new enterprise, demand for investment opportunity rose.[11] Thus, as more capital investment flooded into emerging enterprises, the multiplication and diversification of investors shook monopolistic foundations that had previously ruled American industry.[12]

The South Carolina Business Corporation Act[13] confers on corporations the identity and rights of a separate jural person.[14] One of those rights includes the right to "sue and be sued, complain, and defend in its corporate name."[15] Provided the articles of incorporation denote nothing to the contrary,[16] a shareholder of a corporation enjoys immunity from liability stemming from corporate acts or debts but for specific acts or conduct of the shareholder.[17] Despite this statutory protection, the common law doctrine of piercing the corporate veil to allow for the imposition of shareholder liability "is the most litigated issue in corporate law."[18]

---

7. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA xv (2003).

8. Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417, 420 (2006).

9. *See* Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 155–56 (1992).

10. *Id.* at 156 (quoting RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855, 186 (1982)).

11. *Id.* (quoting SEAVOY, *supra* note 10, at 256).

12. *Id.*

13. S.C. CODE ANN. § 33-1-101 to 20-105 (2006 & Supp. 2018).

14. *Id.* § 33-3-102 (2006).

15. *Id.* § 33-3-102(1).

16. *Id.* § 33-2-102, cmt. 3(e).

17. *Id.* § 33-6-220(b).

18. Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379, 383 (1999).

South Carolina has long recognized that equity permits the disregard of shareholder protection[19] where "recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and (would) produce injustices or inequitable consequences.'"[20] However, South Carolina courts have routinely held that the court's power to impose liability is only to be exercised "reluctantly"[21] and "cautiously."[22] Nevertheless, prior to the court's decision in *Pertuis*, there existed three doctrines for disregarding the corporate form with substantially varied standards in application, particularly in regard to equitable justification.[23]

A. Piercing the Corporate Veil

While the United States Court of Appeals for the Fourth Circuit first delineated a test for piercing the corporate veil in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*,[24] modern South Carolina jurisprudence recognizing the doctrine of piercing the corporate veil primarily derives from the South Carolina Court of Appeals' decision in *Sturkie v. Sifly*.[25] Subsequently, the South Carolina Supreme Court recognized the *Sturkie* decision as foundational doctrine regarding piercing the corporate veil in *Multimedia Publishing of S.C., Inc. v. Mullins*.[26] To set aside the corporate form on the basis of the traditional vertical piercing doctrine, two elements must be satisfied.[27]

First, the party seeking to disregard the corporate form has the burden of proving a substantial number of the eight factors delineated in *Sturkie* in

---

19. *See* Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008); Sturkie v. Sifly, 280 S.C. 453, 456, 313 S.E.2d 316, 318 (Ct. App. 1984).

20. DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976) (quoting Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973)).

21. *Id.* (quoting Pardo v. Wilson Line of Wash., Inc., 414 F.2d 1145, 1149 (D.C. Cir. 1969)).

22. *Id.* (quoting Country Maid, Inc. v. Haseotes, 299 F. Supp. 633, 637 (E.D. Pa. 1969)).

23. *See generally* Phillips L. McWilliams, Note, Magnolia North v. Heritage Communities: *The South Carolina Court of Appeals' End Run Around the Necessity of Equitable Justification When Disregarding the Corporate Form*, 64 S.C. L. REV. 825, 831–33 (2013).

24. *DeWitt*, 540 F.2d at 685.

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

26. 314 S.C. 551, 431 S.E.2d 569 (1993); *see* Shawn M. Flanagan, *Piercing the Corporate Veil in South Carolina*, S.C. LAW., Nov. 2006, at 35, 36.

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

order to then move to the second factor of the test.[28] Those eight factors include gross undercapitalization, lack of corporate formalities, non-payment of dividends, insolvency of debtor corporation, siphoning of funds by dominant shareholders, non-functioning officers or directors, lack of corporate records, and the use of the corporation as a façade for operation of a dominant shareholder.[29]

However, the court of appeals has clarified that subsequent to *Sturkie*, both "[t]he ability under state corporate law to adopt and operate under a statutory close corporation status" and the ability of a corporation to adopt S-corporation status under federal law have diminished the importance of some of the *Sturkie* factors, specifically the failure to observe corporate formalities, nonfunctioning of other officers or other directors, the absence of corporate records, and the nonpayment of dividends, as those factors are expressly permitted by statute.[30]

The modification of the *Sturkie* factors related to close corporations' formalities and liability was later codified in the South Carolina Close Corporation Supplement.[31] Specifically, the corresponding Official Comment provides that:

> [t]his section does not prevent a court from 'piercing the corporate veil' of a statutory close corporation if the circumstances should justify imposing personal liability on the shareholders were the corporation not a statutory close corporation. It merely prevents a court from 'piercing the corporate veil' because it is a statutory close corporation.[32]

Second, when a party seeks to set aside the corporate form there must be "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals."[33] In evaluating injustice or fundamental unfairness, the burden remains on the party seeking to set aside the corporate form to prove "(1) that the defendant was aware of the plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation

---

28. *Id.* at 457.
29. *DeWitt*, 540 F.2d at 685–87.
30. Hunting v. Elders, 359 S.C. 217, 225, 597 S.E.2d 803, 807 (Ct. App. 2004).
31. *See* S.C. CODE ANN. § 33-18-250 (2006).
32. *Id.* § 33-18-250 cmt.
33. *Sturkie*, 280 S.C. at 457–58, 313 S.E.2d at 318; *see also Dewitt*, 540 F.2d at 685; *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 420, 697 S.E.2d 558, 564 (2010).

and in disregard of the plaintiff's claim in the property."[34] South Carolina courts have recognized that a defendant is sufficiently aware of a claim if "he has notice of facts which, if pursued with due diligence, would lead to knowledge of the claim."[35]

However, the South Carolina Supreme Court has arguably liberalized the test for establishing fundamental unfairness by suggesting, "[t]he essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell."[36]

B. Alter Ego

The South Carolina Supreme Court identified a related second doctrine for setting aside corporate form, known as alter ego or instrumentality theory, as "merely a means of piercing the corporate veil."[37] Alter ego requires "total domination of the subservient corporation to the extent the subservient corporation manifested no separate corporate interests of its own and functioned solely to achieve the purpose of the dominant corporation."[38] Additional factors to consider include "stock ownership by parent; common officers and directors; financing of subsidiary by parent; payment of salaries and other expenses of subsidiary by parent; failure of subsidiary to maintain formalities of separate corporate existence; identity of logo; and plaintiff's knowledge of subsidiary's separate corporate existence."[39]

However, even in the presence of sufficient factors indicating control, the absence of fraud or lack of evidence suggesting misuse of corporate

---

34. *Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319 (citing 18 C.J.S. *Corporations* § 6 (Supp. 1982)); *see also* Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 420, 697 S.E.2d 558, 564 (2010) (citing *Sturkie*).

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

36. *Hartfield*, 388 S.C. at 420, 697 S.E.2d at 564 (quoting *Multimedia Publ'g of S.C.*, 314 S.C. at 556, 431 S.E.2d at 573).

37. Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101 n.1, 668 S.E.2d 798, 800 n.1 (2008) (quoting 18 C.J.S. *Corporations* § 23 (2008) (citation omitted)); *see also* Jones *ex rel.* Jones v. Enter. Leasing Co.-Se., 383 S.C. 259, 267, 678 S.E.2d 819, 823 (Ct. App. 2009) (quoting *Drury Dev. Corp.*).

38. Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 148, 425 S.E.2d 764, 774 (Ct. App. 1992) (quoting Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973)).

39. *Jones*, 383 S.C. at 268, 679 S.E.2d at 824 (citing 16 AM. JUR. 2D *Proof of Facts* § 679 (2006)).

control is fatal.[40] Without substantial equitable justification, a claim of alter ego liability must fail regardless of the evidence suggesting control.[41] Although alter ego theory is generally used in parent-subsidiary corporate contexts,[42] the court in *Mid-South Management Company Inc. v. Sherwood Development Corp.*[43] held that alter ego may apply in corporate contexts and is not exclusively confined to situations regarding attorney–client agency, employment, and lender liability.[44]

C. *Pre*-Pertuis *Amalgamation*

The doctrine of amalgamation as a means of setting aside the corporate form was first recognized briefly in 1986 by the South Carolina Court of Appeals in *Kincaid v. Landing Development Corp.*[45] In *Kincaid*, the court upheld a trial court decision to deny directed verdict where there was "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities."[46] Decisions involving claims of amalgamation as a theory for imposing extra-corporate liability pre-*Pertuis* were upheld solely on such bases as shared locations, phone numbers, board members, and corporate letterhead.[47] Furthermore, the requirement for any showing of fraud or fundamental unfairness in a claim of amalgamation remained entirely unaddressed until the South

---

40. *See id.* at 267–68, 679 S.E.2d at 824; *see also* Oskin v. Johnson, 400 S.C. 390, 400–02, 735 S.E.2d 459, 465–66 (2012) (declining to impose alter ego liability where defendant and his wife set up a limited liability corporation in order to secure defendant's claim to real property because plaintiffs failed to show defendants' actions constituted fraud, injustice, or violation of public policy).

41. Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty., 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006) (citing *Peoples Fed. Sav. & Loan Ass'n*, 310 S.C. at 148, 425 S.E.2d at 774).

42. *See* Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 652 n.5, 817 S.E.2d 273, 279 n.5 (2018) (quoting Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 1 Cal. Rptr. 2d 301, 318 (Ct. App. 1991)).

43. 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007).

44. *Id.* at 603–04, 649 S.E.2d at 143–44.

45. 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986).

46. *Id.*

47. Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 419–20, 717 S.E.2d 765, 773 (Ct. App. 2011) (upholding the trial court's finding of an amalgamation of interests on the basis of shared locations, phone numbers, and board members); *Kincaid*, 289 S.C. at 96, 344 S.E.2d at 874 (affirming the trial court's finding of amalgamation where all three corporate offices were in the same location and corporate letterhead expansively identified the marketing entity as a "Development, Construction, Sales, and Property Management Company," suggesting a blurring between three purportedly distinctive corporate entities: marketing, development, and construction).

Carolina Court of Appeals' decision in *Magnolia North Property Owners' Association, Inc. v. Heritage Communities* in 2012.[48]

Only in *Magnolia* did the court of appeals address the contention that amalgamation should be considered as a theory of relief under the doctrine of piercing the corporate veil, thus demanding a showing of fraud or fundamental unfairness before setting aside the corporate form.[49] The court of appeals declined to distinguish *Magnolia* from previous cases of amalgamation, upholding the rule that so long as there was blurring of corporate entities, that sole factor was a sufficient justification for imputing extra-corporate liability.[50] Thus, prior to *Pertuis*, the longstanding statutory right to limit liability by creating separate corporate entities remained precarious, albeit illusory, so long as any plaintiff could assert that multiple corporate entities shared minor features and practices.

III. PERTUIS V. FRONT ROE RESTAURANTS, INC.

A. Facts of Case

In 1998, defendants Mark and Larkin Hammond formed Lake Point Restaurants, Inc. (Lake Point), a North Carolina S-Corporation, and thereafter purchased a restaurant in Lake Lure, North Carolina.[51] The restaurant began operating as Larkin's on the Lake.[52] The Hammonds were Lake Point's exclusive shareholders and had equal ownership interests.[53] In 2000, the Hammonds employed plaintiff Kyle Pertuis as the "general manager" of the restaurant.[54] Pertuis's compensation agreement included a base salary, bonuses based on profitability benchmarks, and a ten percent ownership interest in Lake Point based on a five-year agreed upon graduated vesting schedule to encourage long-term employment.[55] In 2007, Pertuis acquired the agreed-upon ten percent interest in Lake Point.[56]

In 2001, the Hammonds formed a second North Carolina S-Corporation, Beachfront Foods, Inc. (Beachfront), in order to operate another restaurant in

48. *See* Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc., 397 S.C. 348, 358–60, 725 S.E.2d 112, 117–18 (Ct. App. 2012).
49. *See id.* at 358–59, 725 S.E.2d at 117–18.
50. *Id.* at 359, 725 S.E.2d at 118.
51. Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 645, 817 S.E.2d 273, 275 (2018).
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

Lake Lure, North Carolina.[57] As with Lake Point, the Hammonds were the exclusive shareholders with equal ownership interests in Beachfront.[58] The Hammonds and Pertuis agreed upon a similar compensation arrangement as with Lake Point, including awarding a ten percent ownership interest to Pertuis based on a five-year graduated vesting schedule.[59] Beachfront opened the restaurant, MaLarKie's, a combination of the names Mark Hammond, Larkin Hammond, and Kyle Pertuis.[60] However, the restaurant, MaLarKie's, was not successful.[61] As a result, Beachfront subsequently sold MaLarKie's in order to open and operate a different restaurant nearby, known today as Larkin's Carolina Grill.[62] At the time of trial, Larkin's Carolina Grill was the least profitable of the restaurants, reporting a negative net income in years 2008–2012.[63]

In 2005, the Hammonds formed Front Roe Restaurants Inc. (Front Roe), a South Carolina S-Corporation.[64] As with Lake Point and Beachfront at formation, the Hammonds were the sole shareholders with equal ownership interests in Front Roe.[65] Front Roe purchased a restaurant in Greenville, South Carolina, and subsequently opened as Larkin's on the River.[66] At the time of trial, Larkin's on the River was the most profitable of the three restaurants.[67]

After the incorporation of Front Roe, Pertuis relocated to Greenville, South Carolina.[68] However, unlike in his previous compensation agreements regarding Lake Point and Beachfront, the parties did not arrange for a similar graduated ten percent, five-year vesting schedule of Front Roe for Pertuis.[69] Rather, Pertuis's opportunity to earn a ten percent ownership interest in Front Roe was based on profitability benchmarks instead of length of service.[70] At trial, no party was able to provide an agreed-upon written vesting schedule.[71] Mark Hammond testified to the nature of the vesting agreement, indicating Pertuis was "to receive a 1% interest the year Front

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 645–46, 817 S.E.2d at 275.
63. *Id.* at 646, 817 S.E.2d at 275.
64. *Id.* at 646, 817 S.E.2d at 275–76.
65. *Id.* at 646, 817 S.E.2d at 276.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

Roe first became profitable and an additional 9% once the company achieved a net operating profit of $500,000."[72] Pertuis acquired a one percent ownership interest by 2007; however, both parties stipulated that as of trial, Front Roe never reached the requisite $500,000 benchmark for the remaining nine percent interest to vest.[73]

Between 2008 and 2009, the parties began discussing the possibility of different compensation packages in order to grant Pertuis a ten percent ownership interest in Front Roe.[74] However, at trial the parties disagreed as to whether an agreement was reached.[75] The parties ultimately parted ways, "although it is unclear from the record whether the decision was Pertuis's, the Hammonds', or a mutual one."[76]

B. Procedural History

Initial negotiations to buy out Pertuis's shares in Lake Point, Beachfront, and Front Roe, were unsuccessful as a result of disagreement regarding both the valuation of Pertuis's shares and Pertuis's entitlement to business records in order to estimate the value of those shares.[77] Defendants sought a protective order of confidentiality before permitting Pertuis access to corporate records on March 1, 2010.[78] Subsequent to the order, Pertuis counterclaimed, alleging he was an oppressed minority shareholder.[79] Pertuis sought relief in the form of a buyout of his shares, outstanding shareholder distributions, and compensation for termination of his employment.[80] The parties were subsequently realigned.[81]

---

72. *Id.*
73. *Id.*
74. *Id.*
75. *See id.* at 658–59, 817 S.E.2d 273 at 282.
76. *Id.* at 647, 817 S.E.2d at 276.
77. *Id.*
78. Br. of Pet'rs at 2, Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 817 S.E.2d 273, (2018) (No. 2010-CP-23-1646); Br. of Resp't at 4, Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 817 S.E.2d 273, (2018) (No. 2010-CP-23-1646).
79. Pertuis v. Front Roe Rests., Inc., No. 2010CP2301646, 2013 WL 8482353, at *1 (Ct. Com. Pl. S.C. July 2, 2013).
80. *Id.*
81. Br. of Pet'rs, *supra* note 78, at 2.

1. Trial Court

Following a bench trial,[82] the trial court found the three corporate entities should be amalgamated into a "de facto partnership" operating out of Greenville, South Carolina based on a blurring of corporate identities between corporate defendants—including movement of corporate funds between corporations without documentation, lack of shareholder meetings, and lack of board meetings.[83] Thus, the court elected to amalgamate the three corporations and impose liability for the "dearth of respect for proper corporate governance."[84]

In evaluating Pertuis's percentage ownership, the trial court concluded Pertuis was a ten percent shareholder in Lake Point and Beachfront.[85] With regard to Front Roe, the court concluded that despite plaintiff's introduction of an email exchange to suggest the parties reached an agreement to grant Pertuis a ten percent ownership interest, the absence of any documented vesting schedule required the court to use its equity power to "treat this disputed ownership issue as if there was a *graduated* vesting schedule in place."[86] Thus, because Front Roe's 2008 gross profit was only $361,498, or seventy-two percent of $500,000, the court declared Pertuis held a 7.2% ownership interest in Front Roe.[87]

The trial court found Pertuis was an oppressed minority shareholder and ordered the Hammonds to buy out Pertuis's interest in all three corporations,[88] relying entirely on the testimony presented by Pertuis's expert witness valuing Lake Point at $507,000, Beachfront at $0, and Front Roe at $1,376,000.[89] The court agreed with the expert for Pertuis, whose valuation factored in the high brand recognition value of Larkin's on the River, despite the Hammonds' expert who testified as to the "dismal future" of Front Roe.[90] The court highlighted that the Hammonds' expert's testimony was altogether suspect due to his failure to address Greenville's substantial growth, Larkin's on the River's brand value, and to conform to generally acceptable accounting principles.[91]

---

82. *Pertuis*, 2013 WL 8482353, at *1.
83. *Id.* at *1–2.
84. *Id.* at *2.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at *3, *4.
89. *Id.* at *3.
90. *Id.* at *3–4.
91. *Id.* at *4.

Additionally, the trial court ordered unpaid bonuses and distributions be paid to Pertuis as a result of the Hammonds' "shaky accounting."[92] The trial court declined to order compensation to Pertuis on the basis of the termination of his employment.[93] In total, the trial court ordered payment to Pertuis of $98,047 for ten percent interests in both Lake Point and Beachfront, $198,189 for a 7.2% interest in Front Roe, and $99,117 for unpaid distributions.[94]

2. *South Carolina Court of Appeals*

On appeal, the South Carolina Court of Appeals affirmed the trial court's decisions, emphasizing that the only argument preserved on appeal was appellant Hammonds' motion for directed verdict at the close of Pertuis's case.[95] Nonetheless, the court evaluated appellant defendants' argument that the trial court erred in amalgamating the three businesses with a locus of operation in Greenville, South Carolina.[96] The court of appeals held that in spite of the trial court's use of the term "de facto partnership" instead of "amalgamation" in its decision to impose liability, there was no reversible error.[97] The court of appeals indicated the trial court's imposition of liability for a "de facto partnership" was consistent with existing South Carolina case law imposing liability for amalgamation.[98]

Additionally, on appeal the Hammonds argued that the trial court erred by assigning separate values to each individual corporate entity, including a $0 value to Beachfront.[99] Defendants argued:

> Pertuis "cannot have it both ways—either [the three corporations] are an amalgamated entity that should be evaluated as one entity (thus pulling in the negative value of [BFI] to reduce the overall value) in which Pertuis owns something less than 10% of the whole, or they are indeed separate entities with separate values and ownership interests and governed by separate state laws."[100]

---

92. *Id.*
93. *Id.*
94. *Id.*
95. Pertuis v. Front Roe Rests., Inc., No. 2013-002257, 2016 WL 757503, at *1 (S.C. Ct. App. Feb. 24, 2016).
96. *Id.* at *1–2.
97. *Id.* at *2.
98. *Id.* at *2–3.
99. *Id.* at *1.
100. *Id.*

Specifically, both parties acknowledged that Beachfront had "negative equity."[101] Pertuis's expert assigned a negative value of $410,271, while the Hammonds' expert assigned a negative value of $620,000.[102] Nevertheless, the court of appeals indicated that not only was the valuation issue unpreserved on appeal, but that the Hammonds failed to cite any cases in support of their position.[103] Additionally, the court highlighted that the Hammonds' expert valued the entities separately, just as Pertuis's expert did.[104]

3. *South Carolina Supreme Court*

The Hammonds appealed to the South Carolina Supreme Court, arguing that the court of appeals erred both in finding the three corporations operated as a single-business enterprise in Greenville, South Carolina and in finding this argument unpreserved on appeal.[105] Additionally, the Hammonds argued the court erred in awarding Pertuis a 7.2% ownership interest in Front Roe, in ordering payment of $99,117 in unpaid shareholder distributions, in not assigning Beachfront a negative value in determining corporation valuation, and in finding Pertuis was an oppressed minority shareholder.[106]

C. Holding

The South Carolina Supreme Court adopted a new two-part test for establishing amalgamation,[107] indicating preference for the term "single business enterprise theory" instead of amalgamation.[108] The supreme court emphasized that the court of appeals erred in determining the issue of amalgamation was not preserved for appellate review and that:

> [I]t was an abuse of discretion for the court of appeals to raise this issue *sua sponte* then to deny Petitioners' request to supplement the record with materials in response to the court of appeals' questions

---

101. Brief of Petitioner, *supra* note 78, at 45.

102. *Id.*

103. *Pertuis*, 2016 WL 757503, at *2.

104. *Id.* The court did note that the issue of proper valuation of individual entities was preserved on appeal but ultimately deferred to the trial court's evaluation that investments in BFI were debt, not equity, despite strong evidence suggesting otherwise. *Id.* at *4.

105. Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 648, 817 S.E.2d 273, 277 (2018).

106. *Id.*

107. *Id.* at 655, 817 S.E.2d at 280–81.

108. *See id.* at 653–54, 817 S.E.2d at 279–80.

at oral argument, particularly where counsel for Pertuis conceded the Hammonds' challenge was preserved.[109]

As a result, the court vacated the court of appeals' decision as to the imposition of liability on the basis of single-business enterprise theory, first by indicating the trial court's use of the term "de facto partnership" was misleading, as the trial court was conceptually referring to single-business enterprise theory.[110] Second, the court held that there was insufficient evidence to establish the three corporations operated as a single enterprise operating out of Greenville, South Carolina and therefore, the corporations must be considered individually.[111] Thus, citing the internal affairs doctrine, the court vacated the court of appeals' decisions as to the two North Carolina corporations, Lake Point and Beachfront.[112]

Additionally, the court vacated the trial court's decision as to the proper valuation of Pertuis's ownership interest in Front Roe.[113] Lastly, the supreme court modified the amount of unpaid shareholder distributions ordered to be paid to Pertuis.[114]

IV. ANALYSIS OF THE COURT'S ADOPTION OF SINGLE-BUSINESS ENTERPRISE THEORY

A. Derivation of Single-Business Enterprise Theory Liability

The South Carolina Supreme Court cited the Texas Supreme Court case, *SSP Partners v. Gladstrong Investments (USA) Corp.*, as the basis of South Carolina's new test for establishing single-business enterprise theory.[115] In *SSP Partners*, the plaintiff brought a products liability action against both a foreign manufacturer-producer and a United States distribution entity.[116] In evaluating whether to set aside the corporate form, the court emphasized that existing Texas case law permitted disregard of the corporate form in cases where "corporations . . . engage in any sharing of names, offices, accounting, employees, services, and finances"; it further noted, however,

---

109. *Id.* at 648 n.3, 817 S.E.2d at 277 n.3.
110. *Id.* at 656, 817 S.E.2d at 281.
111. *See id.* at 656–57, 817 S.E.2d at 281.
112. *Id.* at 657, 817 S.E.2d at 282.
113. *Id.* at 660, 817 S.E.2d at 283.
114. *Id.*
115. *Id.* at 655, 817 S.E.2d at 280 (citing SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 455 (Tex. 2008)).
116. *SSP Partners*, 275 S.W.3d at 447.

that "[t]here is nothing abusive or unjust about any of these practices in the abstract."[117]

The *SSP Partners* court strongly criticized previous decisions setting aside the corporate form exclusively on the basis of a blurring feature between entities, stating that "while other courts have applied the theory, none to our knowledge has found sound jurisprudential footing for the theory."[118] The court expressed skepticism as to the legitimacy and necessity of single-business enterprise liability as an additional theory of relief for imposing corporate liability.[119]

Nonetheless, the Texas Supreme Court elected to adopt a middle ground approach to establishing single-business enterprise liability, strengthening corporate protections from extra-corporate liability by requiring equitable justification, yet acknowledging the presence of single-business enterprise liability as a viable theory of relief.[120] The court held that:

> 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 other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, . . . or 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 used . . . as shorthand 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 obligations.
>
> Disregarding the corporate structure involves two considerations. One is the relationship between two entities. . . . The other consideration is whether the entities' use of limited liability was illegitimate. . . . [The second consideration] must be based on a

117. *Id.* at 454.

118. *Id.*

119. *See id.* at 452; *see also* S. Union Co. v. City of Edinburg, 129 S.W.3d 74, 87 (Tex. 2003).

120. *See SSP Partners*, 275 S.W.3d at 454–55.

careful evaluation of the policies supporting the principle of limited liability.[121]

Thus, the court emphasized that imposing liability across separate corporate entities is only permitted where there is substantial equitable justification for disregarding the corporate rights afforded to limited liability entities.[122]

B. Evaluating Single-Business Enterprise Liability in Pertuis

In *Pertuis*, after expressly adopting the Texas Supreme Court's test from *SSP Partners* for single-business enterprise theory liability, the court reiterated that "single business enterprise theory requires a showing of more than the various entities' operations are intertwined."[123] Rather, "combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions."[124] Thus, similar to the Texas Supreme Court in *SSP Partners*, the South Carolina Supreme Court declined to follow existing case law that permitted disregard of the corporate form solely on the basis of a blurring of corporate activities.[125] Instead, the court indicated that justice demands the party seeking to set aside the corporate form in single-business enterprise liability to establish manifest fraud, injustice, or sufficient equitable reason to impose liability, as disregard for the corporate form revokes substantial and statutorily-conveyed corporate rights.[126]

In evaluating whether the three corporations in *Pertuis* were intertwined, the court highlighted that although the defendants failed to strictly comply with corporate formalities, such disregard for corporate formalities was expressly authorized by statute.[127] The court stated that, "the trial court's analysis not only failed to assign the burden of proof to Pertuis, as the party seeking amalgamation, but also overlooked the corporations' status as S-Corporations, which are statutorily permitted to disregard the very corporate formalities identified by the trial court as lacking."[128] However, the court

121. *Id.* at 455 (citation omitted).
122. *Id.* at 451 (quoting Castleberry v. Branscum, 721 S.W.2d 270, 271 (Tex. 1986)).
123. Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018).
124. *Id.* at 655, 817 S.E.2d at 281.
125. *See id.* at 655, 817 S.E.2d at 280–81.
126. *See id.*
127. *Id.* at 657, 817 S.E.2d at 281.
128. *Id.* at 656–57, 817 S.E.2d at 281.

then mistakenly cited to South Carolina's Statutory Close Corporation Supplement.[129] As an S-Corporation classification sounds in a tax distinction, not in a corporate statutory provision, it appears reasonably clear the court was mistaken in its use of the term S-Corporation instead of close corporation. However, in mentioning S.C. CODE ANN. § 33-18-200 to 230, the court failed to identify what corresponding North Carolina law would statutorily permit either Lake Point or Beachfront to disregard corporate formalities.[130]

The court suggested that in evaluating a claim of single-business enterprise liability, a court need not reach the second consideration of equitable justification if there is insufficient evidence to show an intertwining of corporate operations.[131] Thus, in evaluating *Pertuis,* the supreme court may not have even needed to consider the second equitable factor of the test in light of testimony that while the three corporations did share corporate officers and directors, the corporations did not share employees, bank accounts, loan obligations, or contracts with third parties.[132]

Nonetheless, the court elected to evaluate the second factor in light of a few facts that may have suggested a corporate-blurring, including movement of corporate funds without documentation and the conveyance of property without corporate formality.[133] The court emphasized that in considering the second factor, there was altogether no evidence of bad faith to support the trial court's imposition of single-business enterprise liability across the three separate corporate entities.[134]

However, the court did not clearly address whether plaintiff's evidence "that he was excluded from a real estate opportunity in connection with [Lake Point]" and that defendants "opened a new restaurant, 'Grill Marks,' using funds from [Front Roe], without offering to allow plaintiff to participate in the new venture" was considered—or would satisfy—the bad faith requirement under single-business enterprise theory.[135]

Additionally, *Pertuis* provided little guidance as to how the doctrine of single-business enterprise liability may intersect with the internal affairs

---

129. *Id.* at 657 n.8, 817 S.E.2d at 281 n.8.

130. *See id.* at 657, 817 S.E.2d at 282.

131. *See id.* at 655, 817 S.E.2d at 281 (quoting Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)).

132. Br. of Pet'rs, *supra* note 78, at 34.

133. *Pertuis*, 423 S.C. at 656, 817 S.E.2d at 281.

134. *Id.* at 657, 817 S.E.2d at 281.

135. Pertuis v. Front Roe Rests., Inc., No. 2010CP2301646, 2013 WL 8482353, at *3 (Ct. Com. Pl. S.C. July 2, 2013).

doctrine should a foreign corporation be subject to single-business enterprise liability.[136] However, it appears quite conceivable that "[p]iercing the veil cases may not be governed by the internal affairs rule even if that rule is applied to foreig[n] corporations," as such disputes are not between shareholders and managers, but rather those linked to corporate interests by tort or contract.[137]

V. IMPACT OF *PERTUIS*

A. Decisions Since Pertuis

The South Carolina Court of Appeals recently applied the new rule for establishing single-business enterprise liability in two cases, *Walbeck v. I'On Co., LLC.*,[138] and *Stoneledge at Lake Keowee Owners' Association, Inc. v. IMK Development Co., LLC.*[139]

In *Walbeck*, the plaintiff asserted a claim of amalgamation against the defendant developer where the developer promised "to convey certain amenities in a residential community to a homeowner's [sic] association."[140] The court emphasized the difference between actions to set aside corporate form in order to hold corporation's principals personally liable for corporate wrongdoing and the concept of single-business enterprise liability.[141] The court underscored that the test derived from *Sturkie* remains in effect for actions seeking to impose personal liability for corporate wrongdoing, requiring a showing of both, "(1) the failure to observe corporate formalities and (2) 'an element of injustice or fundamental unfairness if the' corporation's acts are 'not regarded as the acts of' its principals."[142] However, the court clarified that a party seeking to combine corporate entities into a single-business enterprise for the purposes of imposing liability need not show the failure to observe corporate formalities, but that (1) the entities' operations are intertwined or blurred and (2) "an element of

136. *See Pertuis*, 423 S.C. at 657, 817 S.E.2d at 282.

137. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1053–54 (1991).

138. No. 2015-001590, 2019 WL 1065928 (S.C. Ct. App. Aug. 8, 2018).

139. 425 S.C. 276, 821 S.E.2d 509 (Ct. App. 2018).

140. *Walbeck*, 2019 WL 1065928, at *1.

141. *Id.* at *15.

142. *Id.* (quoting Mid-S. Mgt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 597–98, 649 S.E.2d 135, 140–41 (Ct. App. 2007)); *see generally* Hunting v. Elders, 359 S.C. 217, 225–26, 597 S.E.2d 803, 807 (Ct. App. 2004) (indicating failure to observe corporate formalities is statutorily permitted, yet does not preclude an action to pierce the corporate veil in light of other factors supporting setting aside the corporate form).

injustice or fundamental unfairness, to place accountability where it belongs."[143] Thus, while both theories require a similar showing of equitable justification, the court emphasized that *Pertuis* pertains to actions imposing liability across corporations, not merely actions seeking to impose personal liability for corporate wrongdoing.[144]

The court declined to impose liability, stating "even though there is evidence showing the various entities' operations are intertwined, there is no evidence of 'bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.'"[145]

In *Stoneledge*, the court of appeals elected to impose single-business enterprise liability in a construction defect action by a homeowners' association plaintiff against a developer corporation and a builder corporation.[146] The court held that while the trial court made a finding of amalgamation of interests prior to the supreme court's decision in *Pertuis*, the record contained sufficient evidence upon which to base its decision to impose single-business enterprise liability because "of a unified operation between . . . the amalgamated parties as well as evidence of self-dealing that resulted from a blending of their business enterprises."[147] Specifically, the court emphasized that funds passed directly between entities and members operated as "dual agents without distinction as to who they represented."[148] Furthermore, parties shared profits, offices, and email addresses.[149] The court appeared to rely on these factors to satisfy the first element of the test for single-business enterprise theory liability.[150]

---

143. *See Walbeck*, 2019 WL 1065928, at *16.

144. *See id.* at *15.

145. *Id.* at *16 (quoting Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 655, 817 S.E.2d 273, 281 (2018)). However, the court's initial opinion elected to impose liability on the basis of a blurring of corporate entities. *See Walbeck v. The I'On Co., LLC.*, App. Case No. 2015-001590, 2018 WL 3748668 (Aug. 8, 2018). The court cited evidence of defendants' "common employees, principals, and activities as well as the confusion displayed by those who deal with [defendants] as to which entity they were dealing with." *Id.* at *18. Additionally, there was evidence the entities were referred to interchangeably. *Id.* at *19. In turning to the second prong of single-business enterprise liability, the court held that in light of defendants' control of property promised to the homeowners' association and defendants' coordinated profit at the expense of the homeowners' association, it would be "fundamentally unfair to assign liability to any one or more of these entities to the exclusion of others." *Id.*

146. Stoneledge at Lake Keowee Owners' Ass'n, v. IMK Dev. Co., 425 S.C. 276, 285–86, 821 S.E.2d 509, 514 (Ct. App. 2018).

147. *Id.* at 298, 821 S.E.2d at 520.

148. *Id.*

149. *See id.* at 298–99, 821 S.E.2d at 520–21.

150. *See id.* at 298, 821 S.E.2d at 520.

However, it appears unclear from the court's analysis precisely what evidence was relied upon to find the *Pertuis* test's second element satisfied, other than an indication of finding self-dealing.[151] Specifically the court cited "constructive knowledge of the pervasive construction defects that plagued the project,"[152] including water damage and rot to various structures.[153] The court found that because corporate success was dependent on selling units, including those constructively known by one individual to have damage, sufficient equitable justification existed for imposing single-business enterprise theory.[154] Thus, the court established that constructive knowledge in this case established the requisite bad faith, abuse, fraud, wrongdoing or injustice necessary to satisfy single-business enterprise liability.[155]

B. Strengthening the Veil

The court's adoption of the single-business enterprise theory in *Pertuis* realigns the former doctrine of amalgamation, now called single-business enterprise theory, with other recognized doctrines for imposing extra-corporate liability. Prior to *Pertuis*, the South Carolina Supreme Court had not recognized the doctrine of amalgamation as a justification for setting aside the corporate form.[156]

However, lower courts had long been willing to set aside the corporate barriers between sibling entities solely on the basis of a blurring or intertwining of corporate identities.[157] Thus, among lower courts, there existed significant disparity between doctrines permitting the disregard of the corporate form.[158] While traditional piercing doctrine and alter ego doctrine required a substantial showing of equitable justification, amalgamation required no equitable justification whatsoever.[159] As a result, in the eyes of corporate entities, limited liability was but an illusive right in the context of sibling entities.[160]

In effect, *Pertuis* restores the corporate veil to the extent that a corporation now retains the statutory right to remain a distinctive entity

151. *See id.* at 299–300, 821 S.E.2d at 521.
152. *Id.*
153. *Id.* at 285, 821 S.E.2d at 513.
154. *Id.* at 299–300, 821 S.E.2d at 521.
155. *See id.*
156. *See id.* at 297–98, 821 S.E.2d at 520.
157. *See* McWilliams, *supra* note 23, at 840.
158. *See id.* at 833.
159. *See id.* at 844.
160. *See id.* at 843–44.

unless substantial equitable justification exists for setting aside the corporate form, including in the context of actions to impose single-business enterprise liability.[161] By strengthening corporate protections that were previously more permeable under the former doctrine of amalgamation, *Pertuis* restores statutory corporate rights, including the limitation of liability, which may in the long-term serve to incentivize capital formation. Additionally, *Pertuis* eliminates the ability of plaintiffs to unwarrantedly aggregate corporate entities in the hopes of higher recovery without any showing of equitable justification.[162]

Pertuis's greatest impact is likely to be felt by close corporations exclusively, as publicly held corporations are rarely the subjects of actions to set aside the corporate form.[163] In an empirical study reviewing data of 1,583 cases asserting an action to pierce the corporate veil, piercing did not occur at all in a publicly held corporation, likely because:

> This universal respect for the separateness of the corporate entity in publicly held corporations reflects the different role that limited liability plays in larger corporations. All corporations can use the corporate form to allocate risk. Limited liability performs the additional function in larger corporations of facilitating the transferability of shares and making possible organized securities markets with the increased liquidity and diversification benefits that these markets make possible. The absence of these market-related benefits for close corporations explains, in part, why courts are more willing to pierce the veil of close corporations, but a piercing result still requires a combination of other factors. The total absence of piercing in public corporations permits a stronger positive statement for those corporations: the market-related benefits of limited liability are sufficient to prevail over all possible claims of those who have claims against the public corporation and cannot collect from its assets.[164]

Additionally, there appears reasonable correlation to suggest that the fewer corporate shareholders there are in a corporation the more likely a court is to impose liability in piercing actions.[165] Thus, small closely held

---

161. *See id.* at 844.

162. *See* Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 657, 817 S.E.2d 273, 281–82 (2018).

163. *See* Thompson, *supra* note 137, at 1047–48.

164. *Id.*

165. *Id.* at 1054–55.

corporations may, upon initial review, benefit from the heightened single-business enterprise theory standard.

It is unclear if the doctrine of single-business enterprise liability would conclusively extend to a limited liability company. The South Carolina Supreme Court acknowledged that it has not yet recognized the doctrine of piercing the corporate veil in the context of an LLC.[166] However, because of the sheer prevalence of the limited liability form in corporate practice and its similar rights compared to corporations,[167] a court would likely permit the imposition of single-business enterprise liability only upon the same showing of equitable justification as delineated in *Pertuis*.[168] Interestingly, in one case citing *Pertuis*, *Stoneledge*, the South Carolina Court of Appeals elected to impose single-business enterprise liability against a defendant LLC.[169] Additionally, the supreme court has suggested in dicta that assuming the doctrine applies, the court would be willing to impose extra-corporate liability should a case arise where the facts present sufficient equitable justification.[170]

C. Doctrinal Expansion and Legislative Intent

1. Prevalence of Single-Business Enterprise Theory

The South Carolina Supreme Court in *Pertuis* recognized that at least fourteen states around the country already recognize single-business enterprise theory in addition to traditional piercing doctrine.[171] However, prior to *Pertuis* the vast majority of South Carolina actions asserting claims

---

166. Oskin v. Johnson, 400 S.C. 390, 408 n.17, 735 S.E.2d 459, 469 n.17 (2012).

167. S.C. CODE ANN. § 3-44-201 (2006) (stating "a limited liability company is a legal entity distinct from its members"); *see id.* § 33-44-303(a)–(b) (indicating except as otherwise provided in the articles of organization, "a member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager," and the failure to observe corporate formalities is not a ground for imposing personal liability).

168. *See* Shawn Flanagan, *Piercing the Corporate Veil in South Carolina*, S.C. LAW., Nov. 2006, at 35, 41.

169. Stoneledge at Lake Keowee Owners' Ass'n, v. IMK Dev. Co., 425 S.C. 276, 300, 821 S.E.2d 509, 521 (Ct. App. 2018).

170. *Oskin*, 400 S.C. at 408 n.17, 735 S.E.2d at 469 n.17.

171. Pertuis v. Front Roe Rests., Inc., 423 S.C. 640, 654, 817 S.E.2d 273, 280 (2018); *see also* Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 422–23 (2006) (comparing and contrasting various jurisdictions' common law interpretations and implementations of single-business enterprise theory).

of amalgamation involved a blending of operations in construction defect cases.[172] Thus, *Pertuis* presents an example of the slow expansion of the doctrine of amalgamation into other areas of the law beyond merely construction defect.[173] This expansion also includes the seminal case of *SSP Partners*, a Texas products liability action, the precise case from which the South Carolina Supreme Court derived the new test for single-business enterprise liability.[174] This slow broadening of cases asserting amalgamation and single-business enterprise theory may suggest that this theory of relief provides a new arrow in the quiver of all corporate claimants.

Within merely four months of the *Pertuis* decision, the South Carolina Court of Appeals heard arguments asserting single-business enterprise liability in two cases.[175] Additionally, single-business enterprise theory has survived defendants' motion for summary judgment in a pending products liability action by plaintiffs against a defendant corporation and a defendant limited liability company.[176] Notably, courts more frequently impose liability in a sibling corporation context than in a parent subsidiary context.[177] Because single-business enterprise theory is statistically favored as a means of piercing the corporate veil compared to other methods of setting aside the corporate form, the stricter rule may still not deter claims.[178]

While *Pertuis* strengthens corporate protections, the court's recognition of a third doctrine of equitable relief beyond traditional vertical piercing and alter ego theory may signal the common law doctrine of setting aside the corporate form will continue to expand and find new ways to erode broad statutory rights bestowed upon corporate entities by the General Assembly.

---

172. *See, e.g.*, Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 100–01, 668 S.E.2d 798, 799–800 (2008); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 337–38, 384 S.E.2d 730, 732–33 (1989); Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 356–57, 725 S.E.2d 112, 116–17 (Ct. App. 2012); Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 410–11, 717 S.E.2d 765, 768–69 (Ct. App. 2011); Mid-S. Mgt. Co. v. Sherwood Dev. Corp., 374 S.C. 588, 592–95, 649 S.E.2d 135, 137–39 (Ct. App. 2007); Kincaid v. Landing Dev. Corp., 289 S.C. 89, 91–92, 344 S.E.2d 869, 871–72 (Ct. App. 1986).

173. *See Pertuis*, 423 S.C. at 644, 817 S.E.2d at 275 (an action to impose single-business enterprise liability against restaurant entities).

174. *See* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 446–47 (Tex. 2008).

175. *See* Walbeck v. I'On Co., No. 2015-001590, 2019 WL 1065928, at *15 (S.C. Ct. App. Aug. 8, 2018); Stoneledge at Lake Keowee Owners' Ass'n v. IMK Dev. Co., 425 S.C. 276, 300, 821 S.E.2d 509, 521 (Ct. App. 2018).

176. *See* Hulsizer v. Magline, Inc., No. 4:17-cv-00415-RBH, 2018 WL 5617873, at *9 n.16 (D.S.C. Oct. 29, 2018).

177. *See* Thompson, *supra* note 137, at 1055, 1056–57.

178. *See id.*

2. *The Necessity of Single-Business Enterprise Liability*

Despite the increased prevalence of the doctrine of single-business enterprise theory, some have gone so far as to suggest that single-business enterprise theory is not only "similar" to alter ego,[179] but perhaps need not even be permitted as another distinctive theory of relief.[180] In application:

> Just as in alter ego, the purpose of the single business enterprise theory is to allow the claimant to recover from another party when a corporation has insufficient assets. The effect of the two theories is also exactly the same. Both theories disregard a corporation's separate legal existence and hold one entity liable for another entity's debts or obligations.[181]

Because alter ego liability permits the imposition of liability in the presence of corporate control of another corporation so as to render no distinctive interests between entities, single-business enterprise theory may merely serve as old wine in a new bottle.[182]

Additionally, there are other methods of ensuring plaintiffs have greater protections against inadequate compensation than expanding piercing doctrine, "including mandatory capitalization laws, insurance requirements, product safety requirements, priority treatment in corporate bankruptcy cases, and employing 'gatekeeper' liability."[183] Thus, expanding the piercing doctrine may serve only to perpetuate the chaotic nature of the remedy.[184]

Contrastingly, an alternative view suggests the expansive use of corporate form among and between corporate entities may deviate substantially from the original intent of the creators of limited liability doctrine, namely of encouraging economic investment in single entities with numerous, unsophisticated, and individual shareholders.[185] Thus, in the context of cases where multiple corporate entities serve as shareholders:

---

179. Marilyn Montano, Note, *The Single Business Enterprise Theory in Texas: A Singularly Bad Idea?*, 55 BAYLOR L. REV. 1163, 1177–78 (2003).

180. *See* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 452 (Tex. 2008) (quoting S. Union Co. v. City of Edinburg, 129 S.W.3d 74, 87 (Tex. 2003)).

181. *See* Montano, *supra* note 179, at 1190.

182. *Id.* at 1189–90.

183. Presser, *supra* note 171, at 410–11 (citing Joseph A. Grundfest, *The Limited Future of Unlimited Liability: A Capital Markets Perspective*, 102 YALE L.J. 387, 419–23 (1992)).

184. *Id.* at 411.

185. *See* John H. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1101 (2009).

> In such a situation [where] there are no passive investors to be protected, there usually is no separation of ownership and control, there is no need to encourage widespread distribution of shares and there are no information and monitoring costs. Parent corporations are able to diversify their portfolio and spread the risks themselves; in addition, financial institutions as investors, contrary to individual investors, have the same ability to diversify. Also the argument relating to the efficiency of the capital markets is less relevant when all of the subsidiary's shares are owned by the parent. Finally, the enforcement costs of creditors are less in corporate groups since creditors can proceed directly against the parent instead of numerous stockholders. As a result, both from the historical and from the economic perspective, limited liability and corporate groups would not constitute a good marriage.[186]

Despite the presence of academic and economic analysis criticizing limited liability application to corporate shareholders, legislative intent appears firmly rooted to the doctrine of broad limited liability in a variety of corporate structures so long as use of the corporate form does not offend or abuse public policy.

Thus, as suggested by the Texas court in *SSP Partners*, single-business enterprise theory may present a middle ground between absolutely no recognition of a theory of relief where corporate entities are so intertwined and in furtherance of a fraudulent or abusive purpose and the imposition of limitless liability in the context of increasingly corporate structured entities with no individual investors.[187]

VI. CONCLUSION

The South Carolina Supreme Court's adoption of the two-part test for establishing single-business enterprise theory of liability in *Pertuis* restores foundational corporate rights conferred by the General Assembly in South Carolina Code § 33-6-220(b).[188] By expressly requiring equitable justification, single-business enterprise liability now closely parallels other equitable doctrines for setting aside the corporate form, specifically traditional vertical piercing and alter ego theories of liability. However, the

---

186. *Id.* at 1102–03 (quoting KAREN VANDEKERCKHOVE, PIERCING THE CORPORATE VEIL 9 (2007)).

187. *See* SSP Partners v. Gladstrong Invs. (USA) Corp., 275 S.W.3d 444, 454–55 (Tex. 2008).

188. S.C. CODE ANN. § 33-6-220(b) (2006).

sheer prevalence of cases citing the doctrine of single-business enterprise liability since the court's decision in *Pertuis*—and the steady expansion of the doctrine to areas of the law beyond construction defect cases—suggest that the new test for single-business enterprise liability may not substantially deter litigants seeking to horizontally pierce sibling entities in search of more sources of compensation.

The relief sought—albeit more elusive now due to the required showing of substantial equitable justification—still presents a compelling target for plaintiffs, affording them the opportunity to reach more corporate pockets. Nevertheless, while the use of increasingly sophisticated structures that utilize a layered approach to limiting liability by dividing or nesting entities appears reasonably certain to continue, in the presence of a compelling equitable justification, courts still appear willing to set aside the corporate form. Thus, while corporate entities may have won a small battle in the case for strengthening corporate statutory protections in the absence of equitable justification, the war between those against unbounded liability—and those in support of broad corporate rights promoting limited liability—will undoubtedly endure.