N.C.P.I.—Civil 103.40
DISREGARD OF CORPORATE ENTITY OF AFFILIATED COMPANY - INSTRUMENTALITY RULE ("PIERCING THE CORPORATE VEIL").
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103.40 DISREGARD OF CORPORATE ENTITY OF AFFILIATED COMPANY — INSTRUMENTALITY RULE ("PIERCING THE CORPORATE VEIL").[1]

NOTE WELL: The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form.[2]

The (*state number*) issue reads:

"Did the defendant control (*state name of affiliated company*) with regard to the [acts] [omissions] that [injured] [damaged] the plaintiff?"

You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff.[3]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:[4]

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1 "There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law." *State ex rel Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 439, 666 S.E.2d 107, 113 (2008). Nevertheless, "courts will disregard the corporate form or 'pierce the corporate veil' when 'necessary to prevent fraud or to achieve equity.'" *Id*. (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). The corporate form thus may not be utilized to "shield criminal wrongdoing, defeat the public interest, and circumvent public policy." *Id*. "[T]he instrumentality rule allows for the corporate form to be disregarded if 'the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State . . . [and] 'the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person.'" *Id*. at 441, 666 S.E.2d at 113-14 (citations omitted). *See also Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 546-47, 643 S.E.2d 410, 420 (2007), *disc. rev. improvidently allowed*, 362 N.C. 227, 657 S.E.2d 353 (2008) (discussing piercing of the corporate veil).

2 *Green v. Freeman*, __ N.C. __, __, 749 S.E.2d 262, 271 (2013).

3 The jury must first find that the affiliated company is or would be liable to the plaintiff. This is determined by submission of a prior issue dealing with the substantive wrong alleged as the basis for liability. Where two affiliated companies are parties, care should be given to make sure the jury clearly understands which party is referred to as "defendant" in the jury instructions.

First, that the defendant controlled the conduct of (*state name of affiliated company*) with respect to (*state event forming the basis for liability*) to such an extent that (*state name of affiliated company*) had no separate mind, will or existence of its own. Such control means more than mere majority or complete ownership. It means such complete domination of the finances, policy making and business practices of (*state name of affiliated company*) with respect to the event which [injured] [damaged] the plaintiff[5] that the (*state name of affiliated company*) had at the time no separate mind, will or existence of its own.[6] In determining whether such control existed at the time of the event, you may consider the following factors:[7]

[whether (*state name of affiliated company*) was inadequately capitalized]

[whether (*state name of affiliated company*)'s [shareholders] [directors] [officers] [members] [managers] [partners] complied with the formalities typical of organizations of its kind]

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4 *See Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985) and *Postell v. B & D Constr. Co.*, 105 N.C. App. 1, 11, 411 S.E.2d 413, 419 (1992).

5 *See State ex rel. Cooper*, 362 N.C. at 441, 666 S.E.2d at 113.

6 *Estate of Hurst v. Moorehead I,* LLC, __ N.C. App. __, __, 748 S.E.2d 568, 574 (2013) (citing *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330); *Henderson v. Security Mortgage & Fin. Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968) and *Huski-Bilt, Inc. v. First Citizens Bank & Trust Co.*, 271 N.C. 662, 670, 157 S.E.2d 352, 358 (1967). In the *Estate of Hurst* case, the court found that actual fraud or misrepresentation by an individual member of a limited liability company is not necessary to pierce the corporate veil and impose individual liability against the member. *Hurst*, __ N.C. App. at __, 748 S.E.2d at 575. "Rather, the requisite element for piercing the corporate veil under the instrumentality rule requires a finding that the individual member used his control over the entity 'to commit fraud *or wrong*, to perpetrate the violation of a statutory or other positive legal duty, *or a dishonest and unjust act in contravention of [the] plaintiffs' legal rights[.]*'" *Id.* (emphasis in original) (quoting *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330).

7 *See Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31; *see also Hurst*, N.C. App. at __, 748 S.E.2d at 574 (describing factors considered by North Carolina courts in piercing the corporate veil).

[whether the defendant completely dominated and controlled (*state name of affiliated company*) so that it had no independent identity]

[whether the defendant's business was a single enterprise that was excessively fragmented[8] into multiple companies]

[whether (*state name of affiliated company*) had [paid dividends] [made distributions]]

[whether (*state name of affiliated company*) was insolvent]

[whether the defendant had siphoned[9] funds from (*state name of affiliated company*)]

[whether the [officers] [directors] [members] [managers] [general partners] of (*state name of affiliated company*) were actually functioning and performing the duties of their respective offices in (*state name of affiliated company*)]

[whether (*state name of affiliated company*) was properly maintaining ordinary and necessary company records]

[whether (*state such other factor(s) as may be appropriate based upon the evidence*)].

Second, that the defendant used *his* control over (*state name of affiliated company*)[10] [to act] [to fail to act] in violation of the plaintiff's legal rights.[11]

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8 *NOTE WELL: The term "excessive fragmentation" is not defined in the* Glenn *decision. Although division of the functions of an integrated business operation may serve a legitimate business purpose, the term "excessive fragmentation," as used here, implies division which does not serve a substantial legitimate business purpose.*

9 "Siphoned" likewise is not defined in *Glenn*. As used here, the term means transfer or withdrawal of funds without a substantial legitimate business purpose.

10 The validity of the underlying agency claims must first be established; where agency claims serve as the underlying wrongs that proximately caused the plaintiff's harm,

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Third, that the defendant's control over (*state name of affiliated company*), and use of that control, [to act] [to fail to act] in violation of the plaintiff's legal rights proximately caused[12] the plaintiff's [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage] and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's conduct was a proximate cause.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant controlled the (*state name of affiliated company*) with respect to the [acts] [omissions] that [injured] [damaged] the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

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evidence of domination and control alone is insufficient to establish liability. *See Green*, __ N.C. at __, 749 S.E.2d at 271.

11 The "control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights." *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330-31. "Performance under a contract," for example, constitutes a "positive legal duty." *East Mkt. St. Square v. Tycorp Pizza IV, Inc.*, 175 N.C. App. 628, 633, 625 S.E.2d 191, 196 (2006). Further, "a shareholder may not utilize the corporate form to shield criminal wrongdoing, defeat the public interest, and circumvent public policy." *State ex rel. Cooper*, 362 N.C. at 439, 666 S.E.2d at 113.

12 "The third . . . element required for piercing the corporate veil is that the defendant's 'control and breach of duty must proximately cause the injury or unjust loss complained of.'" *East Mkt. St. Square*, 175 N.C. App. at 639, 625 S.E.2d at 200 (quoting *Glenn*, 313 N.C. at 455, 329 S.E.2d at 330). *See also Hurst*, __ N.C. App. at __, 748 S.E.2d at 575 (finding that a jury award of only nominal damages to plaintiffs on their fraud and Section 75-1.1 claims against the individual member of a limited liability company had no bearing on trial court's ability to pierce the corporate veil and hold the individual member liable for the breach of contract damages awarded by the jury against the company).

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.