> [I]n addition, the [c]ourt finds [] by the preponderance of the evidence or the lack of evidence shows that the [PMP] as contracted for the seven year period of time was little or non[-]existent until the seventh year . . . . Therefore the [c]ourt awards . . . [appellee] [$249,500] which is equal to that which was contracted for the original contract for said roofing plus six of the seven years of the [PMP] at [$5,429].

Thus, the court entered judgment in favor of appellee in the amount of $282,074.

As discussed above, the appropriate measure of damages in a breach of contract action for defective construction is generally the cost of repair and not the amount paid under the original contract. Accordingly, the trial judge erred in ordering restitution. On remand, the trial court must calculate damages by determining the cost of repair. However, this measure of damages, standing alone, may be insufficient, because it fails to take into consideration the fact that appellee actually benefitted from the use of the roof for nine years and seven months – the period during which the defect remained uncorrected. Recognizing that the particular facts of this case may warrant a modified method of calculating damages, we examine two out-of-state cases for guidance.

In *525 Main Street Corp. v. Eagle Roofing Co., Inc.*, 34 N.J. 251, 168 A.2d 33 (1961), the appellant roofer entered into a written contract with plaintiff building owner's assignor, agreeing

to repair a roof. The appellant provided a five-year guarantee and covenant to repair leaks, which it breached. The trial court determined damages based on the difference between the value of the entire building with the defective roof and the value of the building if the contract had been performed, ultimately awarding nominal damages of six cents. On appeal, the Supreme Court of New Jersey held that the cost of repairs, or the cost of replacement if necessary to obtain the promised performance, is the appropriate method of determining damages. The court opined that reference to the value of the building as an entity was inappropriate. *Id.* at 255-56, 168 A.2d at 35.

The court further set forth an alternative damages approach. Noting that the parties contracted for a five-year result, the court stated that "plaintiff should at least receive a portion of the contract price paid to defendant, prorated for the balance of the five-year period." *Id.* at 258, 168 A.2d at 36. Thus, because the roof was defective for two and one-half years, damages would be prorated at 2.5/5 of the replacement cost.

In rejecting the trial court's determination that damages should be based on the value of the entire building with the defective roof and the value of the building if the contract had been performed, the New Jersey Supreme Court held:

> In *Cimineili [v. Umland Bros., Inc.*, 236 A.D. 154, 258 N.Y.S. 143 (N.Y. App. Div. 1932)], where damages were sought for improper performance of a roofing contract, the New

> York court held the measure of damages was the loss of value in terms of the total structure, with the costs of repair being merely evidential of the amount of the loss. It may be doubted the case remains authoritative in that state. *See Bellizzi v. Huntley Estates, Inc.*, 3 N.Y. 2d 112, 164 N.Y.S. 2d 395, 143 N.E. 2d 802 *(Ct. App.* 1957); Annotation, 123 A.L.R. 515. 525 (1939). At any rate, the general rule with respect to building contracts is [that] the disappointed owner may recover the costs of completing the promised performance or making necessary repairs, unless under the facts it is impossible to do so or the costs of completion or repairs would constitute unreasonable economic waste, in which event, reference would be made to the difference in value formula. 1 Restatement, Contracts § 346 (1)(a) (1932); 5 Corbin, Contracts § 1089, p. 408 (1951); McCormick, Damages § 168, p. 648 (1935); 5 *Williston, Contracts (rev. ed.* 1937), § 1363, p. 3825; Annotation, 123 A.L.R. 515 (1939).
>
> In the present case, the cost of repairs, or the cost of replacement if replacement is necessary to obtain the promised performance, is the appropriate approach without reference to the value of the building as an entity. *See Van Dusen Aircraft Supplies, Inc. v. Terminal Const. Corp.*, 3 N.J. 321, 329 (1949); *Drummond v. Hughes*, 91 N.J.L. 563, 565(E. & A. 1918); *Brown v. Nevins*, 84 N.J.L. 215 (Sup. Ct. 1913); *North Bergen Board of Education v. Jaeger*, 67 N.J.L. 39 (Sup. Ct. 1901).

Id. at 255-56, 168 A.2d at 35. (emphasis added; footnotes omitted).

In contrast to the case *sub judice*, there was no testimony as to the actual work which was done nor a description of its nature in *525 Main Street Corporation*, 31 N.J. at 257, 168 A.2d. at 36. Consequently, the court resorted to the alternate method of pro-

rating the costs. In the case *sub judice*, however, appellant produced evidence that clearly set forth the amount it would cost to replace the roof.

The facts in *Allied Chemical Corp. and The Travelers Indemnity Co. v. Van Buren School District*, 264 Ark. 810, 575 S.W.2d 445 (1979), on the other hand, are more applicable to the case *sub judice*. *In Allied Chemical Corp.*, the appellants installed a twenty-year guaranteed roof in 1965. In 1967, the roof began leaking. Repairs were made intermittently until a portion was replaced in 1976 and the remainder was replaced in 1978. Repair costs were proven at trial and the trial court awarded damages based on a pro rata recovery; however, it only gave appellants a two-year credit. *Id.* at 816-17, 575 S.W.2d at 449.

On appeal, appellants argued that the appropriate basis for determining damages on a cost of replacement was as follows: "the allowance of a nine years' credit (11/20) of the first replacement and an eleven years' credit (9/20) for the second and larger replacement," plus intermittent cost of repairs. *Id.* at 816, 575 S.W.2d at 449. The Supreme Court of Arkansas agreed, noting that, because the roof did not immediately begin to leak after installation, necessitating prompt replacement, the total replacement cost is not the proper measure of damages. Accepting appellants' formula for damages, the court explained:

> The purpose of "awarding any damages for a breach of contract is to place the injured

> party in as good a position as he would have been had the contract been performed." *Carter v. Quick, supra.* Here we agree with appellants that their asserted pro rata basis, plus cost of any repairs and damages caused by leaks before replacement of the roof, is a reasonable basis for the recovery of damages by appellee. It is undisputed that appellee had the use of one portion of the roof for 9 years and of another portion for 11 years. Repairs up until those times were paid for by appellants. *To allow appellee 18/20 of the replacement costs would be to ignore appellants' attempted repairs and appellee's continued use of the first replacement costs and 9/20 of the original roof.* We view prorating of damages at 11/20 of the first replacement costs and 9/20 of the second as being the fairer measure of assessing recovery. However we do not agree with appellants that appellee's installation of a more expensive roof than was provided for in the original contract was error. It appears that the 2-ply roof was represented to be equal in quality to that of the more expensive 4-ply roofing used in reroofing. Appellee was entitled to a roof that would meet the quality of a 4-ply roof.

Id. at 817, 575 S.W.2d at 450 (emphasis added; footnotes omitted).

In the instant case, an award of damages based solely upon the cost of repairing the roof would create a windfall. Specifically, this amount does not take into account appellee's continuous use of the roof for nine years and seven months. Therefore, a pro rata recovery for costs of reroofing, as set forth in *Allied Chemical Corp.*, is appropriate.

On remand, the trial court should determine the impact of the PMP on the ten-year roof guarantee. Upon determination of how long the roof should have lasted under the contract, the court must

credit appellant for the nine years and seven months that appellee benefitted from the roof. The court must also consider the fact that an entire third of the roof has not been replaced or significantly repaired.

IV

On cross-appeal, appellee contends that the trial court erred in dismissing its claim against appellant's owner and sole shareholder, General Roofing. According to appellee, the trial court's ruling was erroneous "because the evidence established that General Roofing set up Roofers as an alter ego corporation to avoid liability." General Roofing states that we may not address this issue because appellee failed to plead or allege the theory at trial. We will address the issue, however, because the record indicates that appellee raised the issue in its opposition to motion for summary judgment.

Generally, shareholders are not personally liable for the debts and obligations of the corporation. *Starfish Condominium Assoc. v. Yorkridge Serv. Corp., Inc.*, 295 Md. 693, 714 (1983). Nevertheless, a court will pierce the corporate veil when necessary to prevent fraud or to enforce a paramount equity. *Choice Hotels Int'l, Inc. v. Manor Care of Amer., Inc.*, 143 Md. App. 393, 401 n.2 (2002); *Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc.*, 126 Md. App. 294, 306-07 (1999)

In discussing the concept of preventing a paramount inequity, we have noted that

> when substantial ownership of all the stock of a corporation in a single individual is combined with other factors clearly supporting disregard of the corporate fiction on grounds of fundamental equity and fairness, courts have experienced "little difficulty" and have shown no hesitancy in applying what is described as the "alter ego" or "instrumentality" theory in order to cast aside the corporate shield and to fasten liability on the individual stockholder.

Travel Committee, Inc. v. Pan American World Airways, Inc., 91 Md. App. 123, 158-59 (1992) (quoting *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 685 (4th Cir. 1976)). In analyzing whether a paramount equity should be enforced, courts use the following factors: "whether the corporation was grossly undercapitalized, . . . the dominant stockholder's siphoning of corporate funds, . . . the absence of corporate records, and the corporation's status as a facade for the stockholders' operations." *Id.* at 159 (citing *DeWitt*, 540 F.2d at 686-87).

Despite the commonly stated rule that a court may pierce the corporate veil to enforce a paramount equity, arguments urging a piercing of the veil "for reasons other than fraud" have failed in Maryland courts. *See Residential Warranty*, 126 Md. App. at 307. For instance, in *Residential Warranty*, we refused to pierce the corporate veil, even though the plaintiff alleged that the shareholders intentionally and secretly impoverished the

corporation and siphoned its funds to prevent it from making proper repairs required under the warranty agreement. *Id.* We opined that the absence of factual evidence to link the distributions to fraudulent actions was fatal to plaintiff's claims.

Similarly, in *Bart Arconti, & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295 (1975), plaintiff urged the trial court to pierce a corporation's veil because actions taken by the two principals of a corporation, i.e., causing the corporation to make loans to themselves and subsequently reducing their indebtedness by crediting the loan against apparent unpaid salaries that were due them, were "designed to evade legal obligations during the pendency of an action against the corporation." *Residential Warranty*, 126 Md. App. at 309-10. These actions ultimately rendered the corporation nearly insolvent. Nevertheless, the Court of Appeals held that "the corporate entity [may not] be disregarded merely because it wished to prevent an 'evasion of legal obligations' - absent evidence of fraud or similar conduct." *Bart Arconti & Sons*, 275 Md. at 312.

In the case *sub judice*, appellee alleges that General Roofing siphons appellant's profits at the expense of creditors. Appellee further asserts that appellant is a mere alter ego because it allegedly does not observe corporate formalities, such as holding regular board meetings. However, the trial judge found that there had "been no showing by proof that there was fraud, proof that it

is necessary to enforce the [] equity to pierce the corporate vail [sic] to that of the primary if not sole stockholder, General Roofing." Although the court acknowledged that it was curious that the President of Roofing, Inc. did not know of any corporate activities, such as board meetings, it stated that evidence was not produced to conclusively prove that such meetings and activities do not take place. Considering the evidence submitted by appellee, we cannot say that the court's finding was clearly erroneous; we therefore agree that the corporate veil should not be pierced.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR NEW TRIAL AS TO DAMAGES CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID ONE-HALF BY APPELLANT AND ONE-HALF BY APPELLEE.