THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2007-CP-42-296

Nationwide Mutual Insurance Company, Inc., and Gilliam Construction Company, Inc. ..... Respondents,

v.

Eagle Windows & Doors, Inc., American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman and Gary Churchill ..... Defendants,

Of whom, Eagle Windows & Doors, Inc. is ..... Appellant.

INITIAL BRIEF OF APPELLANT

G. Dana Sinkler
S.C. Bar No. 5138
Warren & Sinkler, L.L.P.
Post Office Box 1254
Charleston, SC 29402
(843) 577-0660
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

This appeal is brought pursuant to the provisions of S.C. Code § 14-3-330(1) and (2) which provide in pertinent part:

> The Supreme court shall have appellate jurisdiction for correction of errors of law in law cases and shall review upon appeal:
>
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the Court of Common Pleas . . .;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken.

In the course of dismissing the Appellant's Motion for Summary Judgment, the Honorable Roger A. Couch, Presiding Judge of the 7th Judicial Circuit, under a section of his order entitled LAW & FINDINGS OF THE COURT, at pages 5 and 6, made the following rulings of law:

> [A] successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).
>
> Based upon the holdings set forth in *Simmons*, it appears that a question of fact exists as to whether Eagle Window & Door, Inc. is a mere continuation of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. There is sufficient evidence to suggest that the two corporations may have substantially the same officers and/or directors.
>
> Eagle's President, David Beeken, was the President of Eagle prior to and after the bankruptcy (as noted in the Affidavit of Stephen B. Perry submitted by the Defendant). Post-bankruptcy, of the eight new officers appointed to represent Eagle, five of the eight were officers of the pre-bankruptcy Eagle.

Eagle, in its Motion to this Court, focuses on its parent company Linsalata. Eagle focuses on Linsalata in an attempt to persuade the Court that it should focus on the officers, shareholders or directors of Linsalata. Lansalata is not a party to this action. Plaintiffs sued Eagle, not Linsalata. Eagle is the proper entity analyzed by this Court in determining that post-bankruptcy Eagle may be a mere continuation of pre-bankruptcy Eagle.

STATEMENT OF ISSUES ON APPEAL

1. WAS THE RULING OF JUDGE COUCH IN ERROR BY HOLDING THAT THE TEST FOR ESTABLISHING SUCCESSOR LIABILITY REQUIRES ONLY A FINDING THAT, POST-BANKRUPTCY, IF THERE IS SUFFICIENT EVIDENCE TO ESTABLISH THAT EAGLE WINDOW & DOOR, INC. HAS SUBSTANTIALLY THE SAME OFFICERS AND/OR DIRECTORS AS EAGLE & TAYLOR COMPANY D/B/A EAGLE WINDOW & DOOR, INC., THAT WOULD ESTABLISH SUCCESSOR LIABILITY.

2. DID JUDGE COUCH ERR IN RULING THAT, IN ESTABLISHING SUCCESSOR LIABILITY, IT WAS NOT NECESSARY FOR THE COURT TO CONSIDER THE IDENTITY OF THE PREDECESSOR AND SUCCESSOR COMPANIES AND THAT "EAGLE IS THE PROPERTY ENTITY ANALYZED BY THIS COURT IN DETERMINING THAT POST-BANKRUPTCY EAGLE MAY BE A MERE CONTINUATION OF THE PRE-BANKRUPTCY EAGLE."

STATEMENT OF CASE

By their complaint, Nationwide Mutual Insurance Company (hereinafter "Nationwide") and its insured, Gilliam Construction Company, Inc. (hereinafter "Gilliam"), seek to impose successor liability on Eagle Window & Door Manufacturing, Inc. (hereinafter "Eagle, Inc.") for alleged manufacturing defects in windows installed in a home constructed by Gilliam in 1999 and 2000 in Spartanburg, South Carolina for Renaul Abel and Karen Abel (hereinafter "the Abels").

After the project was completed and the named Defendants, as subcontractors and material suppliers, had completed their work, the Abels allegedly discovered deficiencies and defects in the home and its components and invoked the arbitration clause of the construction contract with Gilliam. None of the named Defendants participated in the arbitration proceedings, which were ultimately settled by Nationwide and Gilliam for $210,000.00, as established by the Settlement Agreement and Mutual Release attached to the Plaintiffs' complaint as Exhibit A.

Thereafter, pursuant to S.C. Code § 15-28-20, Nationwide and Gilliam instituted the present action seeking contribution from the Defendants for "their share" of the settlement proceeds paid by Nationwide on behalf of Gilliam. All of the Defendants subsequently settled, with the exception of Eagle, Inc., which denied its responsibility for any part of the settlement based on the terms of the Asset Sale Agreement approved by the Bankruptcy Court for purchase of the assets of the company which had originally sold the windows to a distributor which, in turn, sold them to Gilliam for the Abels' home; the windows were not manufactured or sold by the Defendant Eagle, Inc.

History Leading to the Sale of the Assets of Eagle to its Present Owner

The windows, which are the subject of this claim for the imposition of successor liability, were sold to the Defendant Window and Door Concepts, Inc. by a Delaware corporation chartered under the name of Eagle & Taylor Company, which then did business as Eagle Window & Door, Inc. (a fictitious

name). (See Affidavit of Andrew Wickham, Exhibit A-2 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Eagle & Taylor Company, the Delaware corporation, was one of a number of wholly owned subsidiaries of American Architectural Products Company ("AAPC"), a publicly traded Delaware corporation. (See Exhibit A-2 to Appellant's Memorandum in Support of Motion for Summary Judgment)

During the years August 1997 through August 1, 2003, Jonathan K. Schoenike was employed by AAPC as its General Counsel. During all relevant times he was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, he became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003. (See Affidavit of Jonathan K. Schoenike, Exhibit B-2 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Beginning in 1996, AAPC was headquartered in Boardman, Ohio until 2000 when the headquarters were relocated to Miami, Florida. In May 2001, AAPC returned its headquarters to Boardman, Ohio. (See Exhibit B-3 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Commencing in August 1997, the officers of Eagle & Taylor Company included Frank Amedia as CEO, Dale Tucker as President, Joseph Dominijanni as Treasurer and James Phillips as Secretary. In October 1997, Jonathan Schoenike replaced James Phillips as Secretary. In 1999, David Beeken replaced Dale Tucker as President. In 1999, David Wolfe became the Assistant Secretary. In May 2001, Joseph Dominijanni replaced Frank Amedia as CEO and

became CEO and Treasurer. (See Exhibit B-6 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Throughout all relevant times, Eagle & Taylor Company operated two separate divisions; Eagle Window & Door, Inc. and Taylor Building Products, Inc., both fictitious entities. Neither division was ever incorporated. (See Exhibit B-7 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Other individuals were identified as officers of Eagle Window & Door, Inc., but none of those officers, except for David Beeken, served as an officer of Eagle & Taylor Company. (See Exhibit B-8 to Appellant's Memorandum in Support of Motion for Summary Judgment)

In December of 2000, AAPC filed for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. As part of the bankruptcy case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company sought and obtained permission from the Bankruptcy Court to sell to EWD Acquisition Co., a Delaware corporation wholly owned by Linsalata Capital Partners Fund IV, L.P. ("LinCap IV"), an Ohio Limited Partnership, substantially all of the assets of its division, Eagle Window & Door, Inc. (See Order of Bankruptcy Court dated April 19, 2002, Exhibit C to Appellant's Memorandum in Support of Motion for Summary Judgment) In May of 2002, the assets of Eagle & Taylor were sold to EWD Acquisition Co., the Delaware corporation created and wholly owned by LinCap IV. At that time, there were only two Directors of AAPC, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister owned between 72% and

73% of the company. Mr. Dominijanni owned 5% of the company. Neither David Beeken, nor any of the other officers of the fictitiously named division Eagle Window & Door, Inc. had any control of AAPC and if any of those officers had any stock in AAPC at all, it would not have amounted to more than between one tenth of one-hundredth percent to one-hundredth percent of AAPC. (See Exhibit B-9-11 to Appellant's Memorandum in Support to Motion for Summary Judgment)

All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy case for the benefit of the creditors of AAPC. (See Exhibit B-12 to Appellant's Memorandum in Support of Motion for Summary Judgment)

The purchaser of the assets of Eagle & Taylor was LinCap IV through EWD Acquisition Co. (See Exhibit C, page 2 and Press Release of AAPC dated May 8, 2002, Exhibit D to Appellant's Memorandum in Support of Motion for Summary Judgment). None of the partners of Linsalata had any connection with or ownership of Eagle & Taylor Company or AAPC. (See Exhibit A-11 and Exhibit B-14 to Appellant's Memorandum in Support of Motion for Summary Judgment).

Title to the assets was conveyed to EWD Acquisition Co. ("EWD"), a Delaware corporation created by LinCap IV. Thereafter, EWD changed its name to Eagle Window & Door, Inc.

In 2005, Andersen Corporation purchased Eagle, Inc. from Linsalata and it is now a wholly owned subsidiary of Andersen. In 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc.

ARGUMENTS

Successor liability was first considered by the Supreme Court of South Carolina in the case of Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). In that suit, Brown, a customer of the Southern Express Company, brought an action against American to recover damages for the failure of Southern to deliver part of a shipment of automobile tires received by Southern for delivery to him. The trial court "held substantially that because the defendant [American] had acquired and taken over the business of [Southern] it should be held liable as a matter of law for the delicts and debts of its predecessor on grounds of public policy." 123 S.E. 98. The Supreme Court reversed, holding that:

> In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) that there was an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; (c) or that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transfer was pretensive or the transaction fraudulent in fact." 123 S.E. 98,99.

Not until 2005 did the Supreme Court have another occasion to consider the issue of successor liability. In Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005), in response to a request from Judge Perry of the United States District Court of South Carolina, pursuant to Rule 228, SCACR, the Court granted certification from the District Court to address the following questions which are pertinent to the Motion for Summary Judgment filed by counsel for Eagle, Inc.

1. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause, or contribute to the selling company's bankruptcy?

2. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

In Simmons, Plaintiff brought a products liability suit in Federal Court for injuries he sustained on August 9, 1999, when an elevated scissorlift aerial work platform supporting him collapsed. The platform had been designed, manufactured and sold in 1990 by Mark Industries, Inc. (Mark), a California corporation.

In July of 1991, Mark had filed for bankruptcy and the bankruptcy court entered an order on November 6, 1991 granting Mark's motion to sell specified assets for adequate consideration. Terex Corporation (Terex) was the winning bidder of the assets at an auction the next day. Following the auction, Mark and Terex entered into a purchase agreement providing, inter alia, that the sale was free and clear of liens and claims and there was no assumption of liability for products manufactured or sold to Mark. The assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill and all intellectual property, such as drawings, designs, blueprints, patents, licenses and technology.

In considering the two questions posed by Judge Perry, the Supreme Court found the following facts:

1. Simmons brought a product liability action in state court against Mark Industries, Inc., Terex Corp. (Terex), Lift Industries, Inc. and BPS.

2. Simmons was injured in a construction accident which occurred on August 9, 1999, when an aerial work platform collapsed.

3. The aerial work platform was designed, manufactured and sold by Mark Industries, Inc. (Mark) in 1990.

4. On July 15, 1991, Mark filed for Chapter 11 Bankruptcy.

5. The Bankruptcy Court entered a written order dated November 6, 1991 granting Mark's motion to sell certain assets and proceeded to hold a court-supervised public auction of assets.

6. Terex submitted the highest bid at public auction.

7. Terex and Mark entered into an arms-length Purchase Agreement for specified assets. Under the Agreement, the assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property such as drawings, blueprints, patents, licenses and technology.

8. On November 13, 1991, the Bankruptcy Court approved the auction.

9. On December 5, 1991, Terex created Lift Industries, a separately incorporated subsidiary, and assigned its rights under the Purchase Agreement to Lift Industries.

10. Between December 10, 1991 and September 1992, Terex, through its wholly owned subsidiary Lift Industries, rehired many former Mark employees and started the construction of aerial work platforms that were comparable to the one involved in Simmons' accident.

11. Prior to the bankruptcy auction and order, neither Terex nor Lift Industries had any business relationship with Mark until purchasing its assets in the Bankruptcy Court auction. There has never been any commonality of officers, directors, or stockholders between Mark and Terex. (Emphasis the Court's)

Based on these facts, the Supreme Court advised the United States District Court that it could decide the case in accordance with existing South Carolina authority, assigning a footnote to Exception (3) (the successor company was a mere continuation of the predecessor). The footnote referenced the 12 page dissent of Justice Burnett and held:

> Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership,** *i.e.*, **the predecessor and successor corporations have the same officers, directors, or shareholders.** (Emphasis the Court's) We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. (Emphasis added)

In Simmons, after the certified questions were answered by the Supreme Court, Judge Perry granted the motion of Terex for summary judgment, holding, on the basis of Simmons:

> The 'mere continuation' exception arises in situations where the purchasing company is merely a

> continuation of the selling entity. This exception is 'applicable **only when there is commonality of ownership, *i.e.,* the predecessor and successor corporations have substantially the same officers, directors or[1] shareholders.'** Simmons (Emphasis in original).
>
> In the present case, there is no commonality of officers, directors, and shareholders. The parties have certified that Terex did not have any business relationship with Mark until the purchase of assets supervised by the Bankruptcy Court. In addition, there is no, nor has there ever been, commonality of the officers, directors or stockholders between Terex or Lift Industries and Mark. Therefore the facts cannot support a finding that a 'mere continuation' exception applies. (Emphasis added)

(See Opinion of Judge Perry, Exhibit A to Appellant Supplemental Memorandum in Support of Motion for Summary Judgment).

The rulings of law articulated by Judge Couch are in error and completely eviscerate the merits of Appellant's summary judgment motion by establishing a test for successor liability which would allow a finding of successor liability based on the existence of any one of the three tests enumerated by the Supreme Court, i.e. commonality of officers or commonality of directors or commonality of shareholders. The Supreme Court did not use the disjunctive or but instead used the conjunctive and. Obviously, commonality of ownership could not be determined without consideration of stockholders who usually own all of the corporation.

[1] Actually, the Supreme Court in Simmons held "substantially the same officers, directors, and shareholders." (Emphasis added)

The Court of Appeals in Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (2008) confirmed the Supreme Court's holding, stating: "In Simmons v. Marklift Industries, Inc. the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors and shareholders of the sellers and purchasers."

But not only did the Circuit Judge apply the wrong test to the evidence before him, he compounded the error by refusing to recognize the identity of the predecessor and the successor, i.e. AAPC/Eagle & Taylor Company and LinCap IV/EWD Acquisition.

It does not matter that Linsalata is not a party to the suit. The Court has to focus on the "predecessor and successor" in order to determine whether there existed commonality of ownership between those two parties before the bankruptcy.

American Architectural Products Company owned all of Eagle & Taylor Company and determined to sell its assets to generate sufficient capital to pay its creditors and continue in business. It was the predecessor or seller. LinCap IV owned all of EWD Acquisition and was the successor or purchaser. (See Asset Sale Agreement attached as Exhibit 1 to Corrected Exhibit A to Appellant's Memorandum in Support of Motion for Summary Judgment)

In both Simmons and Walton, the Supreme Court and the Court of Appeals focused on whether there was any pre-bankruptcy connection between the predecessor and successor companies. The affidavits of Messrs. Wickham, Shoenike and Perry conclusively establish that there was no commonality of

ownership, i.e. the same officers, director and shareholders before the bankruptcy. "Where a party makes no factual showing in opposition to a motion for summary judgment the Court must grant Summary Judgment to the moving party if under the facts presented, it is entitled to Summary Judgment as a matter of law." Lauthridge v. Parkinson, 304 S.C. 51, 403 S.E. 2d 120 (S.C. 1991). The Respondents offered no affidavits and did not contest the affidavits of the Appellant which conclusively establish that there was no commonality of ownership between AAPC/Eagle & Taylor Company and Linsalata/EWD Acquisition prior to the bankruptcy.

Excerpts from additional cases from other jurisdictions and treatises amplify the reasoning for the test enumerate in Simmons

> The mere continuation exception applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [citing authority] In other words, the purchasing corporation is merely a 'new hat' for the seller, with the same or similar management and ownership. [citing authority] In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the seller - - not whether there is a continuation of the seller's business operation. [citing authority] Therefore, "the key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporation." Leannais v. Cincinnati, Inc., 565 F2d 437, 440 (7th Cir., 1977) (Emphasis added)
>
> * * *
>
> Although some of B&B's officers may have been employed by Eastern, mere employment is insufficient to warrant application of the continuation exception. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11 Cir. 1985)

* * *

In support of his contention that Thuxmore was a "mere continuation" of Thuxmore Industries, the executor alleges that Thuxmore acquired all of its predecessor's assets, including the goodwill; undertook essentially the same manufacturing operation as that of its predecessor, and at the same location; held itself out to the world as the ongoing concern of its predecessor; maintained, for a time, essentially the same personnel; made an active effort to maintain the same customers; required its predecessor to cease its ordinary business operation and to liquidate its business as soon as practicable; and assumed some of its predecessor's liabilities.

A common identity of the officers, directors, and stockholders in the selling and purchasing corporation is the key element of a "continuation." [citing precedent] When, however, the purchaser of all the assets of a corporation is a bona fide arm's-length transaction the "mere continuation" exception does not apply." Harris v. T.I., Inc., 413 S.E.2d 605, 609 (VA. 1992) (Emphasis added)

* * *

In the instant case there was presumably a continuity of actual manufacturing operations. The lands, buildings, machinery and trade names were sold, and it is apparent that the purchaser intended to make use of all these in the manufacture of the same type of product. It was also stipulated in the contract of sale that the purchaser would employ the vice-president, secretary and treasurer of Seybold at the respective individual's request. The length of required employment was one year. However, this provision was merely to insure the economic stability of those officers immediately after the transfer. The contract did not state the capacity in which they were to be employed. In short, there is no evidence of continuity of management. As stated previously, there was also no continuity of stockholder investment, and the selling corporation retained its separate identity well after the sale took place. Neither were there common directors or officers at the time of the sale. When one company purchases all the assets of another, it is to

be expected that the purchasing corporation will continue the operations of the former, but this does not by itself render the purchaser liable for the obligations of the former. For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller. *Bergman & Lefkow Insurance Ag. v. Flash Cab Co.,* 110 Ill. App. 2d 415, 24 N.E.2d 729 (App. Ct. 1969). The purchaser-movant was not such a continuation of Seybold as to render it liable for the latter's torts. McKee v. Harris-Seybold Company, 264 A.2d 98, 106 (NJ 1970)

* * *

It is equally well settled when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, . . . equal to the fair value of the property conveyed by it, the purchasing corporation will not, in the absence of a contract obligation or actual fraud of some substantial character, be held responsible for the debts or liabilities of the selling corporation. West Texas Refining & D. Co. v. Comm'r of Internal Revenue, 68 F.2d 77, 81 (10 Cir. 1933).

* * *

Continuation or reincarnation of the predecessor in the successor, such as would warrant imposition of liability for products liability claims on the successor, exists when there is such a continuity of ownership and control between the corporations that the transfer constitutes an arrangement whereby the same persons establish another corporation in order to take over and concentrate the control of the predecessor's property, or when the successor merely represents a new hat for the predecessor. The gravamen of the mere continuation exception to nonliability of a successor entity is continuation of the corporate entity rather than continuation of business operations. The focus is almost wholly on what happens to the corporate forms of the parties participating in the asset transaction; continuity of business, name, and management alone is not a sufficient basis for imposing liability.

The indicia of continuation include a common identity of the officers, directors, and stockholders in the selling and purchasing corporations; continuation of the business operations of the predecessor, evidenced by the use of the same name, the same location, and the same employees; and the existence of only one corporation at the conclusion of the transaction, that is, the predecessor corporation must be extinguished. In order to recover under the mere continuation theory, it must appear that the successor corporation is the same legal entity, or the same legal person, as the predecessor.

AMERICAN LAW OF PRODUCTS LIABILITY 3D: Liability of Successor for Injury Caused by Product of Predecessor (Chapter 7) (Emphasis added)

* * *

§ 12 Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

(a) is accompanied by an agreement for the successor to assume such liability; or

(b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or

(c) constitutes a consolidation or merger with the predecessor; or

(d) results in the successor becoming a continuation of the predecessor.

COMMENTS & ILLUSTRATIONS: Comment:

> a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: 'one . . . who sells or distributes a defective product is subject to liability for harm . . . caused by the defective product.' (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not 'sell or distribute' the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, § 12

CONCLUSION

In this case, Linsalata paid $64,750,000.00 for the assets, and the Bankruptcy Court found in its order authorizing the sale that:

> EWD Acquisition is a "good-faith purchaser" within the meaning of Bankruptcy Code § 363(m), as the Court is unaware of any evidence in the record that would

> tend to demonstrate that EWD Acquisition engaged in anything other than arms length negotiations in good faith or in any conduct that would permit the Final Agreement to be avoided under Bankruptcy Code § 363(n).

See Order Approving Asset Sale, Exhibit C, page 6, ¶ (n), to original memorandum in support.

Eagle & Taylor Company did not survive. Indeed its demise was required by Article 14 § 14.2 of the Asset Sale Agreement which provided:

> 14.2 **Change of Name of Seller.** Immediately upon the occurrence of the Closing, each Seller Party shall cease using, and thereafter refrain from using, all names that include the word 'Eagle' including the names 'Eagle and Taylor Co.' and 'Eagle Window and Door, Inc.' and all derivatives thereof, and as soon as possible after the Closing, Seller will take all actions necessary to change its corporate name to a name that does not include the word 'Eagle' or 'Eagle and Taylor Co.' or any derivation thereof and its assumed name to a name that does not include the word 'Eagle' or 'Eagle Window & Door, Inc.' or any derivation thereof.

§ 14.3 also contains an agreement not to compete as to each of the seller parties.

In short, this case is identical to the Simmons case and the case of Walton v. Mazda of Rock Hill et al., 376 S.C. 301, 657 S.E.2d 67 (2008). Both require this Court to dismiss the case against Eagle for contribution.

What the Respondents advocate and the Judge embraced is the "Continuity of Enterprise" or "Product Line" exceptions which were precisely what Justice Burnett urged and were soundly rejected.

Obviously Linsalata would not have paid $64,750,000 for the assets of AAPC/Eagle & Taylor Company if it was not going to continue the operation of

the company. But the predecessor had nothing to do with the operation after the purchase of assets, which was held by the Bankruptcy Court to be an arms-length transaction for value.

The purpose of the test enunciated by the Supreme Court was not to prevent the continued operation of the company whose assets were purchased in the bankruptcy proceeding but to make sure that the company filing for bankruptcy was not using the bankruptcy court for the purpose of defrauding creditors. That is best explained by the Supreme Court of Virginia in the case of Harris v. T.I., Inc., supra.

The tests espoused by Judge Couch are the tests espoused by Justice Burnett in his dissent in Simmons and are known as the "Continuity of Enterprise" or "Product Line" exceptions. Those exceptions were summarily dismissed by the majority of the Court.

Proper application of the Simmons case required the grant of Appellant's Motion for Summary Judgment and the Court should so hold.

Respectfully submitted,

WARREN & SINKLER, L.L.P.
Post Office Box 1254
Charleston, SC 29402
(843) 577-0660

By: _____
G. DANA SINKLER, SC BAR #5138

Attorney for Appellant

Charleston, South Carolina

May 15, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Roger L. Couch, Circuit Court Judge

Case No. 2007-CP-42-296

Nationwide Mutual Insurance Company, Inc.,
and Gilliam Construction Company, Inc. ..... Respondents,

v.

Eagle Windows & Doors, Inc., American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman and Gary Churchill ..... Defendants,

Of whom, Eagle Windows & Doors, Inc. is ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Jason M. Imhoff, attorney for Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on May 15, 2013, addressed as follows:

Jason M. Imhoff, Esquire
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304-5663

May 15, 2013

G. Dana Sinkler