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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

Appellate Case No.: 2025-002089

Barry Lanham and Obvia Gamble-Lanham,... Appellants,

v.

Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.:
GmbH & Co. KG and Wumag Texroll GmbH & Co. KG, ... Defendants,

of which Wumag Texroll GmbH & Co. KG f/k/a
Kelzenberg + Co.: GmbH & Co. KG is the ....Respondent.

APPELLANTS' MOTION TO CERTIFY CASE AND TRANSFER FROM THE COURT OF APPEALS

Appellants Barry Lanham and Obvia Gamble-Lanham, pursuant to Rule 204(b) of the South Carolina Appellate Court Rules and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, hereby move for certification of the above-captioned appeal for review by the Court. The Supreme Court has discretion to certify any case pending before the Court of Appeals and to transfer the appeal for handling and review by the Supreme Court before it has been determined by the Court of Appeals. "Certification is normally appropriate where the case involves an issue of

significant public interest or a legal principle of major importance." Rule 204(b), SCACR. This case involves both, and either is sufficient for the Court to grant the motion.

INTRODUCTION

When a South Carolina citizen suffers a permanent, disabling injury while using a defective product manufactured by a foreign corporation and marketed for sale and use within this State, who should bear the costs associated with that individual's medical expenses, lost wages, loss of earning capacity, pain, loss of enjoyment of life, and mental anguish? Should it be the individual, regardless of his financial status, family circumstances, and means to support himself in the future? Should our worker's compensation legislation be used as a liability insurance policy for foreign corporate entities when their defective products injure workers in an industrial setting? Or should a foreign corporation that has financially benefited and continues to benefit from the development and sale of the defective product, which is in the best position to assess the risks of that product and take remedial measures to mitigate those risks, shoulder those costs? The public policy of this State strongly indicates that there are already answers to these questions.

In modern times, our General Assembly has made a conscious choice to place South Carolina "in the vanguard of consumer protection." *Lane v. Trenholm Building Co.*, 267 S.C. 497, 504, 229 S.E.2d 728, 731 (1976). By adopting the comments to the Restatement (Second) of Torts § 402A as demonstrative of our public policy with regards to defective products, and by codifying the provisions of the Uniform Commercial Code, the General Assembly has strongly signaled that it is the public

policy of this State to provide the "maximum protection" to users of defective products. *Reynolds v. Ryland Grp., Inc.*, 340 S.C. 331, 338, 531 S.E.2d 917, 921 (2000). It follows that the ultimate answer to the questions posited above would almost certainly be that any foreign corporate entity who has benefited in some way from the in-state sale and distribution of defective products must bear at least some portion of the costs of any resulting harm.

But what if the foreign corporation is not the entity which designed and manufactured the product, and instead is a successor which has purchased the assets of the manufacturing entity? What if the successor did not just purchase a few random assets of the predecessor in piecemeal fashion and assimilate them into its own business, but purchased the predecessor's physical plant and machinery and continues to use those instrumentalities to produce similar if not identical products? What if it continued to employ the same workforce, trained by the predecessor, after the sale? What if it uses the same trademarks, same logo, and same business name? What if it represents to the public that it is the exact same company as its predecessor with the intent of benefiting from all the goodwill, reputation, and customer relationships that were developed by the predecessor, including those benefits, tangible and intangible, derived from the development and sale of the defective product that injured the South Carolina citizen. What then?

South Carolina precedent and public policy within the product liability context again strongly indicate that if the successor takes the benefit of those assets in what is essentially a *de facto* grant of the predecessor's franchise, then it should also take

the burdens. However, under the Court's most recent decision touching upon these questions, *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005), the analysis of whether a successor corporation is a continuation of its predecessor, such that it should be deemed to have assumed the predecessor's *tort* liabilities, has been cabined to a single, bright-line inquiry that relies solely on corporate formalities and not tort principles or any meaningful economic analysis. In short, under the current law, if a successor continuing the business of a predecessor does not have common shareholders, directors, and officers as a dissolved predecessor corporation, then the cost of injury must be solely borne by the injured party.[1]

The reasoning behind requiring a commonality of ownership and control for liability to attach appears rather arbitrary when considering the economic philosophies underlying strict product liability theory, as it fails to account for any evidence that the successor corporation has financially benefited from the predecessor's goodwill, brand recognition, customer relations, previous sales of defective products, and employee workforce in acquiring its assets and continuing its business. While those benefits may be irrelevant to successor liability within the corporate transactional or contract law context, which places a premium on corporate ownership and control, within the context of product liability, those benefits are directly relevant to a determination of who can anticipate and bear the costs associated with a product defect.

[1] Or if the injured party happens to be working at the time of his injuries, the cost will also be partially borne by our worker's compensation scheme.

When a corporation has benefited from the development and sale of defective products within this State, the costs of any physical harm caused by those products *must* be allocated to that entity, whether it is a predecessor or successor entity, because those entities are in the best position to assess the risks and mitigate the costs by bargaining for a better purchase price, purchasing insurance, spreading the costs amongst their customers, or taking remedial measures to minimize the risks. Otherwise, the goal of South Carolina's stated public policy and product liability law, which is to protect the end users of defective products, is easily thwarted by corporate practices that place form over substance, sidestep the traditional corporate successor liability rules, and maximize the benefits gained by a foreign successor corporation while eliminating the accompanying burdens, all at the expense of South Carolina citizens.

The Court should grant the motion to certify this matter to address, *inter alia*, (1) whether the public policy of this State permits the application of some version of the continuity of enterprise doctrine when determining successor liability within the strict product liability context, (2) what the appropriate test under the continuity of enterprise doctrine should be, and (3) whether the circuit court erred in granting summary judgment when there is evidence in the record supporting that Respondent Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.: GmbH & Co. KG ("Wumag II") purchased and continues to use its predecessor's physical plant, machinery, workforce, equipment, software licenses, trademarks, logo, and business name, and continues to represent to the public that it and its predecessor are one and the same.

The Court is best positioned to address these issues, which have significant public policy and tort law implications, and thus a transfer and certification of this matter from the Court of Appeals to the Supreme Court is warranted.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Barry Lanham was injured while working for his employer, Bondex, Inc., at its manufacturing facility located in Trenton, South Carolina. (Ex. 1, Compl. ¶¶ 6-8). Bondex is a manufacturer of nonwoven textiles.[2] Bondex contracted with Defendant Wumag Texroll GmbH & Co. KG ("Wumag I"), a now dissolved German designer and manufacturer of industrial textile machinery, for the sale of a laminating calender machine to place in its Trenton facility. (Ex. 2, Walmsley Dep. 11:11-12:4). Wumag I had worked with Bondex and its employees to design and manufacture a custom-made machine tailored to Bondex's needs. (*Id.* at 14:12-15:22). Bondex met with the sale director for Wumag I and discussed criteria such as roller temperature, speed, accessibility, and machine guarding. (*Id.* at 15:4-22, 18:10-21, 69:19-70:21). Communications with Wumag I concerning the machine continued after it was installed within the Bondex facility, and Wumag I sent technicians to South Carolina at least two or three times after the machine was installed. (*Id.* at 70:25-71:12, 77:21-78:6).

While cleaning the subject machine Lanham's arm was drawn into an unguarded nip point created by heated rollers used to stabilize fibers during the textile manufacturing process. (Ex. 1, Compl. ¶ 8). Lanham suffered a severe

[2] Bondex Home Page, https://www.bondexinc.com/ (last visited Feb. 19, 2026).

degloving injury due to the crushing force and rotation of the rollers, necessitating the partial amputation of his arm above the elbow after he was trapped in the machine for an extended period of time. (*Id.*, Ex. 3, Lanham Dep. 81:10-83:17, 90:9-102:20). The machine lacked physical barriers or guarding and was only manufactured with a light curtain that could be deactivated by the user. (Ex. 2, Walmsley Dep. 18:4-8). However, the light curtain as designed and installed by Wumag I was deactivated because it was interfering with the normal operation of the calender machine. (*Id.*).

On January 6, 2021, Lanham and his wife, Obvia Gamble-Lanham, brought this case against "Wumag Texroll GmbH & Co. KG", the manufacturer of the subject machine, in the Edgefield County Court of Common Pleas, asserting causes of action for negligence, strict liability, breach of warranty, and loss of consortium under general negligence and product liability theories. (*See generally* Ex. 1, Compl.). On March 22, 2021, a party identifying itself as "Wumag" filed a motion to dismiss with the circuit court pursuant to Rules 12(b)(2), 12(b)(5), and 12(b)(6), SCRCP. (Ex. 4, March 22, 2021 Mot. to Dismiss).

Unbeknownst to Lanham, the party he had identified and served as a defendant had not designed or manufactured the subject machine and had instead purchased the assets of the company who designed and manufactured the machine, Wumag I, through insolvency proceedings in Germany on September 18, 2019, after he was injured. (*Id.* at 1; Ex. 5, Hess Aff. ¶ 8). The entity identifying itself as "Wumag", which was formerly known as Kelzenberg + Co.: GmbH & Co. KG ("Wumag

II"), was in reality the successor to Wumag Texroll GmbH & Co. KG ("Wumag I"), had changed its name to "Wumag Texroll GmbH & Co. KG", and had adopted "Wumag Texroll" as a brand name when purchasing the assets of Wumag I. (*Id.* at ¶¶ 3, 8, 13; Ex. 6, Wumag II Am. Answer ¶¶ 61-67; Ex. 7, Derksen Aff. ¶ 6).

Wumag II argued that the Lanhams' claims should be dismissed because it was not subject to personal jurisdiction in South Carolina, service was ineffective under S.C. Code Ann. § 15-9-245 because it did not do business in South Carolina, and because it did not design, manufacture, or sell the machine. (Ex. 4, March 22, 2021 Mot. to Dismiss 1-2). The parties briefed the issues for the circuit court, which came up for hearing on July 18, 2022. (*See generally* Ex. 8, Mem. in Opp. to Mot. to Dismiss). In a Form 4 Order, on July 21, 2022, the circuit court denied the motion without prejudice to permit discovery on the issues. (Ex. 9, July 21, 2022 Order).

On May 2, 2023, Wumag II filed an amended answer and third-party complaint alleging an indemnity claim against Wumag I. (Ex. 6, Wumag II Am. Answer ¶¶ 53-79). Lanham subsequently filed a motion to amend his complaint to substitute Wumag II for "Wumag" and to add Wumag I as a party. (Ex. 10, Pls.' Mot. to Amend). The circuit court filed a formal order granting Lanham's motion to amend on December 19, 2023, and an amended complaint was filed on February 23, 2024. (Ex. 11, Dec. 19, 2023 Order; Ex. 12 Am. Compl.). The amended complaint alleges that Wumag II is the successor-in-liability to Wumag I. (*Id.* at ¶ 4). Despite the fact that it is undisputedly insolvent and no longer exists, on March 25, 2024, Wumag I filed its answer to Lanham's amended complaint, admitting that it sold the subject

machine to Bondex in 2016, that it entered an asset purchase agreement with Wumag II due to insolvency, and that Wumag II subsequently adopted its brand name. (Ex. 13, Wumag I Answer ¶¶ 3-4, 7; Ex. 14 July 7, 2025 Hr'g Tr. 12:12-25).

On June 13, 2025, Wumag II filed a motion for summary judgment, renewing the same arguments it made in its previously filed motion to dismiss. (Ex. 15, Mot. for Summ. J.). The motion was set for hearing by the circuit court on July 7, 2025. In the days prior to the hearing, the parties submitted memoranda in support and in opposition to the motion. (Ex. 16, Wumag II Mem. in Supp. of Mot. for Summ. J.; Ex. 17, Mem. in Opp. to Mot. for Summ. J.). Specifically, Lanham argued that Wumag II was the successor-in-liability to Wumag I under German corporate law, which codifies what is known in the United States as the continuity of enterprise doctrine, that German law would control the issue of whether Wumag II assumed the liabilities of Wumag I, that Wumag II has its own jurisdictional contacts with South Carolina, and that the jurisdictional contacts of Wumag I would also be imputed to Wumag II. (*Id.* at 15-20). Lanham also introduced evidence demonstrating that Wumag II holds itself out to the public as being the same entity as Wumag I and publicly claims that it has continued the business operations of Wumag I. (Ex. 18, Wumag II Website).

At the July 7, 2025 hearing, counsel for Wumag II argued that while the German Commercial Code did contain a statute providing for successor liability under a continuity of enterprise theory, the statute did not apply to asset purchases that were the result of insolvency proceedings, and regardless, under the doctrine of *lex loci delicti* South Carolina law would apply to determine any issues of successor

liability. Wumag II argued that under South Carolina law it could not be a successor to Wumag I because the two entities did not share officers, directors, and shareholders. (Ex. 14, July 7, 2025 Hr'g Tr. 9:22-12:7). Counsel for Lanham argued that while under a conflict of law analysis German law should apply to determine the successor liability issue, even if it did not, in prior decisions this Court had not rejected the merits of the continuity of enterprise doctrine outright. (*Id.* at 15:4-24, 16:5-20:6, 21:17-22:24).

After the hearing the circuit court granted permission for the parties to submit supplemental briefing. In his supplemental brief, Lanham conceded that after further research, South Carolina law would control the analysis of successor liability in this context. (Ex. 19, Suppl. Mem. in Opp. to Mot. for Summ. J. 1-3). Lanham argued that despite the Court's decision in *Brown v. American Railway Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924), and its historical limitation of four narrow successor liability exceptions under corporate law, in the modern product liability context public policy would support a continuity of enterprise exception as a tort principle, relying heavily on Justice Burnett's dissent in *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). (Ex. 19, Suppl. Mem. in Opp. to Mot. for Summ. J. 3-6).

Lanham further argued that the Court has not outright rejected the continuity of enterprise doctrine on its merits or addressed its public policy and economic implications within a majority opinion, that two members of the current Court had joined a majority opinion noting there arguably could be merit to the continuity of enterprise theory, and that the District of South Carolina had applied the doctrine to

a products liability case under South Carolina law.[3] (*Id.* at 6-7). Lastly, Lanham argued that Wumag II's conduct in using the exact same name, same logo, same manufacturing facility, same products, same equipment, same employees, and same trademarks to benefit from Wumag I's goodwill, business acumen, and trained workforce justified Wumag II's liability for the subject machine's defects, even if it did not have the same directors, officers, and shareholders as Wumag I. (*Id.* at 7-8).

On September 19, 2025, the circuit court filed an order granting summary judgment to Wumag II. In its order, the circuit court found that its analysis was solely confined to the question of whether Wumag II was a successor to Wumag I, as it was clear that Wumag I conducted business in South Carolina and its contacts would be imputed to Wumag II for the purpose of service and personal jurisdiction if Wumag II was a successor. (Ex. 20, Sep. 19, 2025 Order 4). Analyzing the issue under South Carolina law, the circuit court declined to apply the continuity of enterprise doctrine and found that the transaction between Wumag I and Wumag II did not meet any of the *Brown* exceptions. (*Id.*).

Lanham filed a motion for reconsideration on September 24, 2025, asking the circuit court to specifically address Lanham's tort law, public policy, cost shifting, and fairness arguments, and whether they supported application of the continuity of

[3] The Fourth Circuit Court of Appeals in an unpublished opinion has agreed with the *Nationwide* Court that there may be merit to the argument that South Carolina should expand successor liability to include the continuity of enterprise doctrine. *Lane v. New Gencoat, Inc.*, No. 22-1121, 2023 U.S. App. LEXIS 8599, at *18 (4th Cir. April 11, 2023).

enterprise doctrine under the circumstances.[4] (Ex. 21, Sep. 24, 2025 Mot. to Alter/Amend 2-3). On September 25, 2025, the circuit court filed a Form 4 order denying Lanham's motion to amend but certifying the summary judgment order as final as to Wumag II. (Ex. 22, Sep. 25, 2025 Order).[5]

ARGUMENT

The circumstances of this case are illustrative of why the Court's practice of analyzing the issue of successor liability in product liability cases under corporate law principles instead of tort principles results in a windfall to foreign corporations while causing harm to South Carolina citizens. It is undisputed that the conventional tortfeasor in this case, Wumag I, no longer exists, has gone through insolvency proceedings in Germany, and has divested itself of all assets. Wumag I financially benefited from the sale of a defective product in South Carolina and established an ongoing customer relationship within South Carolina as a result of that sale. This is undisputed.

A South Carolina citizen has now been permanently disabled and disfigured as a result of those commercial activities which greatly benefited Wumag I. Despite the facts that Wumag II (1) has now purchased the assets of that dissolved company,

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[4] Out of caution, as the order was technically an order granting partial summary judgment to some but not all of the parties, Lanham also requested that the circuit court certify the order as final pursuant to Rule 54(b), SCRCP.

[5] Lanham filed a consecutive motion for reconsideration on September 26, 2025, asking the circuit court to include "an express determination that there is no just reason for delay" as required to certify the order as final under Rule 54(b), SCRCP. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 468, 570 S.E.2d 197, 201 (Ct. App. 2002). On October 9, 2025, the circuit court filed an order explaining its rationale for certifying the order and staying the circuit court proceedings against Wumag I during the pendency of any appeal. (Ex. 23, Oct. 9, 2025 Order).

(2) holds itself out as being one and the same as that company, (3) uses the dissolved company's goodwill, brand, logo, trademarks, factory, and employees to continue the dissolved company's business, and (4) continues to use South Carolina's infrastructure to further its business within this State and the United States, due to a technicality of ancient corporate law the Lanhams have no means to seek compensation for their pain, suffering, loss of enjoyment of life, disfigurement, and loss of consortium. The cost of covering Lanham's medical expenses, lost wages, and loss of earning capacity will be shifted to South Carolina's worker's compensation scheme as the *de facto* insurer of Wumag I. All the while, Wumag II benefits from the asset purchase and Wumag I's efforts to develop a brand, products, a trained workforce, customer relationships, and the streams of commerce that Wumag II uses to distribute those products into this State to this day.

This case, in which the above facts are largely undisputed, raises novel questions of law that have never been addressed in a majority opinion. The Court is free to decide these questions of law with no particular deference to any lower court. *See* S.C. Const. art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330; S.C. Code Ann. § 14-8-200. It may appear that the question is not novel, and that the Court has definitively answered in *Simmons* what the proper successor liability exceptions are under South Carolina law, but in that decision the majority opinion did not determine the issues that have currently been raised by Lanham to the Court, and it simply confined its holding to the 100-plus year old rationale contained within *Brown*.

I. The majority opinion in *Simmons* did not address Lanham's precise arguments and only declined to expand *Brown*'s mere continuation exception.

In *Simmons*, on certification from the United States District Court for South Carolina, the Court addressed the question of what test is employed to determine successor liability in the product liability context. *Id.* at 309-10, 622 S.E.2d at 213. With minimal explanation the Court answered the question by stating that the proper test was *Brown*, which set forth four exceptions to the general rule that a successor corporation was not liable for the debts and obligations of its predecessor. *Id.* at 312, 622 S.E.2d at 215. In a footnote, the majority recognized the dissent's argument for "an expansion of the mere continuation exception", but perfunctorily concluded that because "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 substantially the same officers, directors, or shareholders**", it would decline to extend the exception to cases in which "there is no such commonality". *Id.* at 312 n.1, 622 S.E.2d at 215 n.1.

The majority opinion contains no analysis of public policy, the economic impacts of cost shifting, whether the historical corporate successor liability test sufficiently implements its supporting rationale in the modern product liability context, or the conflict between modern strict liability principles and the mere continuation exception. Further, the majority opinion does not hold that the continuity of enterprise doctrine is not valid as its own standalone tort principle creating successor liability where there was none under the corporate law, and it does not even consider this argument. Instead, it only declines to expand the *Brown*

corporate law test to encompass scenarios in which a successor continues the predecessor's business without retained ownership and control from the predecessor.

II. The continuity of enterprise doctrine should be adopted by the Court not as an expansion of *Brown*'s mere continuation exception, which is properly applied in the corporate transactional setting, but instead as a separate but parallel tort rule, only applicable in product liability actions, that is based upon policy considerations of cost shifting and product safety.

In the *Simmons* dissent, Justice Burnett noted the inadequacies of corporate law to promote the rationale of *Brown* within the modern product liability context:

> I disagree with the majority that the certified questions may be resolved by relying exclusively on a general rule of corporate law set forth in *Brown* more than eighty years ago. The *Brown* court did not resolve the meaning of the mere continuation exception in South Carolina. *Brown* should be the starting point of our analysis, not the beginning and end of it . . . . The mere continuation exception enunciated in *Brown* – while valid and sufficient under existing law in other settings such as a merger or consolidation – should be interpreted in a manner which encompasses product liability claims against a successor corporation in appropriate circumstances. An examination of the reasoning in *Brown*, as well as other precedent in this state, supports such an interpretation. The basic rationale of the general rule expressed in *Brown* is obvious. "It would be manifestly unfair, unjust, and contrary to equity that [the successor] should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. *If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it.*"

Simmons, 366 S.C. at 317-18, 622 S.E.2d at 217-18.

The facts of *Brown* were resolved by the Court over 100 years ago. In *Brown*, the plaintiff brought a claim for damages against a railroad company after it failed to deliver a shipment of goods received by the railroad company's predecessor. The Court in *Brown* tacitly acknowledged that public policy could justify creating an

exception to the general rule that a corporation is not liable for the debts of its predecessor. "The public policy of a state, properly cognizable by the Courts, is that derived, or derivable by clear implication, from its Constitution, statutes, and judicial decisions." *Brown*, 128 S.C. at 431, 123 S.E. at 98.

Finding no such policy evidenced by any South Carolina statute applicable to the facts before it, the Court fell back on the traditional corporate test created by courts, requiring:

> (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 of the transaction fraudulent in fact.

Id. at 431-32, 123 S.E. at 99. Interestingly, the facts of *Brown* provide a similar backdrop to the first real discussions of successor liability in other jurisdictions throughout the country, as at that time many railroads were failing and were reorganizing through asset sales and equity receiverships. George W. Kuney, *Article: A Taxonomy and Evaluation of Successor Liability*, 6 Fla. St. U. Bus. Rev. 9, 18 (2007).

Thus, this successor rule was designed for the corporate transactional and contract world and protects creditors and dissenting shareholders, facilitates the assessment of taxes, and promotes the alienability of corporate assets. Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906, 909 (1983). However, as noted by Justice Burnett, while this rule is valid in the world of corporate transactions such as merger and consolidation, where the

continuity of a corporate identity based on ownership and control is fairly considered to be a dispositive inquiry, it utterly fails to account for public policy in the arena of product safety that has arisen since the *Brown* decision. And bright-line standards creating liability in the corporate context, such as the one currently existing in the Court's mere continuation exception, are easily avoided by sophisticated asset purchasers and their attorneys. Kuney, *supra* at 13.

Strict liability was not recognized in the common law of this State at the time of *Brown*. *See Hatfield v. Atlas Enterprises, Inc.*, 274 S.C. 247, 248, 262 S.E.2d 900, 901 (1980) ("This passage clearly indicates the doctrine of strict liability in tort, imposed as a result of a product's defective condition, did not emerge until Code § 15-73-10 -- § 15-73-30 (1976) were enacted.").

> *Brown* did not involve a bankrupt predecessor corporation or a defective product implicating modern product liability law. *Brown* was decided in the nascent days of product liability law, a time preceding widespread acceptance of basic product liability principles now well established in this state and elsewhere. In those days, the analysis of product liability cases was grounded primarily in negligence; the concept of strict liability in tort was not even a gleam in the eye of attorneys, judges, and professors who would develop and endorse the concept in the 1960s.

Simmons, 366 S.C. at 317, 622 S.E.2d at 218.

By adopting strict product liability theory as defined by section 402A, and section 402A's comments as its legislative intent, the General Assembly wrought a "profound" change on the concept of product liability. *Schall v. Sturm, Ruger Co.*, 278 S.C. 646, 648-49, 300 S.E.2d 735, 736 (1983); *see* S.C. Code Ann. § 15-73-30 ("Comments to SECTION 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter."). Notably,

"[r]ecovery under Section 15-73-10, Code, does not rest upon any rights or duties framed by some *transaction* . . . ." *Id.* From the perspective of the injured plaintiff, "distinctions between types of corporate transfers" are therefore "wholly unmeaningful." *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 419, 244 N.W.2d 873, 878 (1976). These observations are "strongly influenced by the social and economic views espoused by the Restatement (Second) of Torts § 402A", which coincidentally happen to be the public policy of this State with regards to defective products. *Polius v. Clark Equip. Co.*, 802 F.2d 75, 78 (3d Cir. 1986).

By enacting S.C. Code Ann. §§ 15-73-10 *et seq.*, important policy determinations were made by the General Assembly. *See Schall*, 278 S.C. at 648-49, 300 S.E.2d at 736 (pointing to comment c. of Restatement (Second) of Torts § 402A). Comment c. to section 402A provides in pertinent part that the justification for strict product liability is that

> [P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A cmt.c (Am. Law Inst. 1965). "Strict liability for manufacturers exists in large part as a deterrent and a method of allocating the risk of loss among those best equipped to deal with it." *Madison v. Am. Home Products Corp.*, 358 S.C. 449, 454, 595 S.E.2d 493, 496 (2004). Thus, the public policy within this State *demands* that if there is an entity who has benefited from marketing and sales of the defective product by acquiring the assets used to distribute, market, and

manufacture the product, and it is better equipped than an injured product user to handle the risk and any accompanying loss, the loss must be shifted to it.[6]

The continuity of enterprise doctrine, while creating liability for the successor who did not manufacture or sell the defective product, is not inherently unfair because such a rule will ultimately force the costs of defective product injuries back onto the predecessor who was responsible for making the product. In what has been called "channeling" by one commentator, jurisdictions' adoption of the continuity of enterprise rule will result in successors scrutinizing the product lines of predecessors for defective products, then offering less in asset purchase agreements for the cost of insuring against future products liability claims related to those products. Richard L. Cupp, *Article: Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 860-62 (1999).

> In situations in which there appears to be low probability of harm and low potential damages, the price for the predecessor's assets will only be discounted slightly. For example, if a successor purchases the assets of a greeting card company from a predecessor, it likely would not feel compelled to discount the price significantly to account for potential future products liability, because greeting cards are rarely defective in a manner leading to serious injury. In situations where probability of harm and potential damages seem to be high, the price for the predecessor's assets will be discounted more significantly. A potential successor contemplating whether to continue the enterprise of a power press manufacturer with a history of product defect claims would consider future liability an important factor in pricing the predecessor's assets. Thus, imposing successor liability places the ultimate financial cost primarily on the responsible party who made the defective product rather than on the successor or on the injured consumer.

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[6] For similar reasons, numerous federal circuits and district courts have applied the continuity of enterprise theory in CERCLA cases. *E.g., B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478 (8th Cir. 1992); *Gould, Inc. v. A & M Battery & Tire Serv.*, 950 F. Supp. 653 (M.D. Pa. 1997); *Ekotek Site PRP Comm. v. Self*, 948 F. Supp. 994 (D. Utah 1996); *Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp.*, 195 B.R. 716 (N.D. Ind. 1996).

Id. at 862-63.

Wumag II uses the exact same name, same logo, same trademarks, same workforce, same equipment, same manufacturing facility, same products, and holds itself out as the same company as Wumag II, boasting that it is more than 70 years old, so it is also not unfair to require it to be accountable for defective products manufactured by Wumag I. (Ex. 24, Krafft-Walzen Website). *See Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939) ("The corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it."); *Andrews v. John E. Smith's Sons Co.*, 369 So. 2d 781, 785 (Ala. 1979) ("Justice would be offended if a corporation which holds itself out as a particular company for the purpose of sales, would not be estopped from denying that it is that company for the purpose of determining products liability."). Because residual benefits from the sale of the subject machine and other former manufacturing, marketing, and sales activities of Wumag I continue to accrue to Wumag II by virtue of the fact that it is continuing Wumag I's business, it is fair and equitable to hold it accountable for an innocent claimant's injuries, even if it did not design or manufacture the subject machine.

The goal of corporate law in the contract or creditor-debtor setting is to require a successor entity to take any burdens that are equitably attached to any benefits it receives from an asset purchase. The policy underlying strict liability requires that the risk of loss be shifted to those best equipped to prepare for or mitigate the risk.

Creation of a rule providing for successor liability in this instance does not offend either of these principles, whereas continuing to rigidly adhere to the rule from *Brown* would in effect trample upon both. To be clear, Lanham does not advocate for an expansion of the *Brown* test, which is appropriately applied to corporate transactions such as mergers and consolidation. Instead, the Court would be creating a new tort rule specific to product liability actions creating successor liability as a result of the continuance of the seller's business, which directly implicates the policy considerations of strict product liability, and not as a result of the continuation or survival of the corporate body itself, which has little relevance to strict liability's policy objectives.

III. Certification of this case is appropriate because the above-described public policy considerations mandate a determination of the issues from this Court, and the Court of Appeals cannot meaningfully address Lanham's arguments due to the holding of *Simmons*.

This case is of significant public interest and highlights a concerning conflict between corporate law and our State's public policy as adopted by the General Assembly under S.C. Code Ann. §§ 15-73-10 *et seq.* that has not been addressed by a majority opinion of this Court. While the Court has not outright rejected the precise arguments being made here, for practical purposes the Court of Appeals is unlikely to meaningfully address these arguments because of the holding and dicta of *Simmons*. *See Simmons*, 366 S.C. at 312, 622 S.E.2d at 215 ("Our opinion in *Brown* sets forth the proper test to determine, in a products liability action, whether there is successor liability of a company which purchases the assets of an unrelated company."). This is likely to hold true whether Lanham argues for an expansion of

the mere continuation exception under the *Brown* test or for a new continuity of enterprise test that stands apart from the *Brown* test. *Id.* at 312 n.1, 622 S.E.2d at 215 n.1 ("We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.").

Since *Simmons* was decided, in the intervening time no South Carolina decision has addressed the public policy arguments and conflict existing between the *Brown* test and strict product liability theory. In the one case that has tangentially addressed the continuity of enterprise doctrine, the Court mused that "there arguably may be merits to expanding South Carolina's successor liability test to include the continuity of enterprise theory", although the issue was not preserved or advanced by the parties in that appeal. *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 267, 818 S.E.2d 447, 453 (2018). Much like in *Simmons*, the Court in *Nationwide*'s disapproval of the continuity of enterprise doctrine was limited to its observation that the majority of jurisdiction adhered to the *Brown* test. *Id.*

However, the notion that a "strong majority" of courts favor the *Brown* approach is likely misrepresented: a 1998 survey of state jurisdictions indicated that while 18 states followed the *Brown* test, 13 states had adopted a version of the continuity of enterprise doctrine (either continuity of enterprise or product line), an additional state had signaled acceptance of the doctrine, and that 43 percent of the nation's population resided in the states following a continuity of enterprise theory, while 38 percent of the nation's population resided in states following the *Brown* test. Cupp, *supra* at 853-56. What this means is that there is a distinct possibility that the

majority of cases working their way through the court systems on a national basis already require asset purchasers wishing to continue the predecessor's business to anticipate the cost of defective products and channel those costs back to the predecessor to compensate for the cost of insurance coverage. Therefore, the Court's underlying rationale for rejecting the continuity of enterprise theory in *Simmons* appears to be on shaky and untested ground to begin with and requires a more thorough analysis of whether South Carolina's public policy permits the continued application of the *Brown* test in product liability actions.

Given the Court's prior decision in *Simmons*, any opinion of the Court of Appeals would necessarily have to be appealed to this Court, which will further delay a final resolution of this case and any other cases involving successor liability and strict product liability currently working their way through the circuit and federal courts, which will have obvious impacts on public concerns such as product safety. For the reasons set forth above, the case should be certified because it involves issues of significant public interest and legal principles of major importance under Rule 204(b), SCACR.

CONCLUSION

Ultimately, unlike *Brown* this case does not concern a corporate dispute of successorship. This lawsuit concerns physical injuries to an individual who was not in privity with either the predecessor or successor corporations. This begs the question of why summary judgment was granted via the application of a corporate law principle when the merits of this lawsuit are entirely governed by the policy

considerations of strict product liability and concerns for the well-being of this State's citizenry. The vagaries of whether there is a continuation of the corporate entity of the seller through an asset purchase by the continuity of some directors, shareholders, and officers has little bearing on any of the justifications for holding a corporation liable for injuries caused by a defective product under a theory of strict liability.

The policy behind strict liability is not predicated upon whether the asset purchase transaction is a sham or shuffling of corporate forms and instead is only concerned with whether it is fair to at least temporarily shift costs to the successor in light of the benefits that they have obtained from the sale of defective products and the continuation of the business of selling those defective products. Logic and fairness, as well as the separation of powers doctrine, dictate that the Court cannot continue to endorse a test to determine successor liability within product liability cases that does not take into account the legislative intent behind the strict liability cause of action. For these reasons, Appellants respectfully request that the Court grant their motion and transfer the appeal for review.

Respectfully submitted,

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Feb 23 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

Appellate Case No.: 2025-002089

Barry Lanham and Obvia Gamble-Lanham,... Appellants,

v.

Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.: GmbH & Co. KG and Wumag Texroll GmbH & Co. KG,.......................... Defendants,

Of which Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co.: GmbH & Co. KG is the ....Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Appellants' Motion to Certify Case and Transfer From the Court of Appeals has been served upon the following counsel of record by emailing a copy of the same this February 23, 2026.

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PARKER LAW GROUP

February 23, 2026

RECEIVED
Feb 23 2026
SC Court of Appeals

Via OneDrive & US Mail
The Honorable Patricia A. Howard
S.C. Supreme Court Clerk of Court
1231 Gervais Street
Columbia, SC 29201

Re: Barry & Olivia Lanham v. Wumag Texroll GmbH et al.
Appellate Case No.: 2025-002089

Dear Mrs. Howard:

Enclosed for filing with your office is Appellants' Motion to Certify Case and Transfer from the Court of Appeals, Exhibits and Certificate of Service, in regard to the above reference matter. In addition, our firm's check in the amount of $50.00 will go out in tomorrow's mail for the filing fee.

By copy of this letter Appellant's Motion is being served on all counsel of record.

With kind regards, I am

Sincerely,

Claudia Cartier
Claudia Cartier
Paralegal to John E, Parker, Jr.

/cc
Enclosures as stated

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