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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Martha 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.

RESPONDENT'S INITIAL BRIEF

Robert H. Jordan (SC Bar No.: 13612)
Email: robertjordan@parkerpoe.com
Robert C. Osborne III (SC Bar No.: 101827)
Email: robertosborne@parkerpoe.com
Caroline E. McCracken (SC Bar No.: 106971)
carolinemccracken@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN LLP
850 Morrison Drive, Suite 400
Charleston, SC 29403
Phone: (843) 727-2650
Fax: (843) 727-2680

Attorneys for Respondent Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co. GmbH & Co. KG

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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court correctly held that Respondent is not liable to Appellants under any theory of successor liability recognized by South Carolina law?

2. Whether the circuit court correctly rejected Appellants' attempt to expand South Carolina successor liability law by declining to apply the continuity of enterprise doctrine?

3. Whether insufficient service of process and lack of personal jurisdiction provide additional grounds for the dismissal of Appellants' claims against Respondent?

STATEMENT OF THE CASE

This case involves claims asserted by Appellants Barry Lanham ("Lanham") and Obvia Gamble-Lanham (collectively, "Appellants") related to a workplace injury suffered by Lanham when his arm was caught in an industrial machine. Respondent Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co. GmbH & Co. KG ("Kelzenberg-Wumag") did not design, test, manufacture, market, sell, import, distribute, deliver or install the machine that allegedly caused Lanham's injuries. Rather, approximately 19 months after the accident, Kelzenberg + Co: GmbH & Co. KG purchased the assets of Wumag Texroll GmbH & Co. KG ("Wumag I") out of German insolvency proceedings, and it then adopted the "Wumag" name. As such, Appellants now seek to hold Kelzenberg-Wumag liable as Wumag I's successor. After more than four years of litigation, the circuit court granted summary judgment in favor of Kelzenberg-Wumag, holding it could not be liable to Appellants under any theory of successor liability recognized by South Carolina law.

As part of its order, the circuit court rejected Appellants' attempt to expand South Carolina successor liability law through the adoption of the continuity of enterprise doctrine. On appeal, Appellants continue to argue that South Carolina should depart from established precedent and adopt the doctrine. Recognizing that the current law results in the dismissal of their claims against Kelzenberg-Wumag, Appellants filed a motion to bypass this Court so the Supreme Court of South Carolina could address their request for a change in the law. The Supreme Court denied Appellants' motion to transfer and certify. Thus, this appeal presents a straightforward application of established South Carolina precedent. Under that precedent, Kelzenberg-Wumag cannot be held liable as Wumag I's successor.

STATEMENT OF FACTS

I. The Accident Giving Rise to the Complaint.

On January 22, 2018, Lanham was injured at work while cleaning a laminating calender line machine (the "Machine") at Bondex, Inc.'s ("Bondex") facility in Trenton, South Carolina. (Am. Compl., ¶ 9; R. p. ___). Wumag I manufactured and sold the Machine to Bondex. (Appellants' Motion, Ex. 17, Appellants' Memorandum in Opposition to Motion for Summary Judgment, at *3; R. p. ___). When the Machine was manufactured by Wumag I and first installed at Bondex's facility, it was equipped with a light curtain to prevent injuries.[1] (Walmsley Depo., 59:14 - 18; R. p. ___). Bondex deactivated the light curtain prior to Lanham's injury, claiming it interfered with production. (*Id.*; R. p. ___). Wumag I refused to participate in the deactivation of the light curtain. (*Id*. at 61:7 - 62:1; R. p. ___).

On the day of the accident, Lanham was instructed to clean the rollers of the Machine. (Am. Compl., ¶ 9; R. p. ___). According to Reece Walmsley, Bondex's Vice President of Technical Services at the time of the accident, Lanham attempted to clean the Machine while it was in the wrong operating mode. [2] (Walmsley Dep., 30:25-32:23; R. p. ___). The Machine's rollers pulled Lanham's arm into the Machine when he attempted to clean them. (*Id.*). Unfortunately, Lanham suffered severe injuries, including the loss of his left hand. (Am. Compl., ¶ 9; R. p. ___).

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[1] A light curtain is a safety device that uses a series of infrared beams to create an invisible barrier around areas of machinery. If any object, such as a person's hand or arm, interrupts the beams, the machine automatically stops to help prevent injury.

[2] Despite Walmsley's testimony of a specific operating mode for cleaning the Machine, the Operating Manual clearly states that the Machine should be turned off when performing any maintenance. Lanham acknowledged this fact during his deposition. (Lanham Depo., 158:16 - 159:1; R. p. ___).

II. Wumag I's Insolvency and the Asset Purchase by Kelzenberg-Wumag.

On September 1, 2019, approximately 19 months after the accident, Wumag I filed for insolvency in Germany.[3] (Memo in Support of Kelzenberg-Wumag's Motion for Summary Judgment, Declaration of Michael Hess ("Hess Declaration"), ¶ 6; R. p. ___). Insolvency proceedings commenced in the district court of Krefeld, Germany. (*Id.*). As part of the insolvency proceedings, on or around September 18, 2019, Kelzenberg + Co. GmbH & Co. KG ("Kelzenberg") entered into an asset purchase agreement to purchase the assets, but not the liabilities, of Wumag I. (*Id.* ¶¶ 8, 10–12). The purchased assets included machinery, equipment, and software licenses. (Hess Decl., ¶ 10; Declaration of Dr. Nils Derksen ("Derksen Decl."), ¶ 6; R. p. ___). Ownership of the purchased assets was transferred from Wumag I to Kelzenberg on October 1, 2019. (*Id.* ¶ 10). Dr. Peter Minuth, a German attorney and the insolvency administrator for the Wumag I insolvency proceedings, oversaw the asset purchase. (*Id.* ¶ 9).

Following the asset purchase, for marketing reasons, Kelzenberg changed its name to Wumag Texroll GmbH & Co. KG (identified in this brief as "Kelzenberg-Wumag") (Hess Decl., ¶ 13; R. p. ___). Kelzenberg-Wumag is registered at the district court of Düren, Germany under number HRA 224, and its principal place of business is in Düren. (*Id.*, ¶¶ 4-5; R. p. ___). Kelzenberg-Wumag operates as a subsidiary under the management of Carl KRAFFT & Söhne GmbH & Co. KG. (Kelzenberg-Wumag Sept. 2019 Press Release; R. p. __). Kelzenberg-Wumag uses a portion of the prior Wumag I facility in Krefeld, Germany as part of its business. (*Id.*). Although Kelzenberg-Wumag adopted the Wumag name, there is not now, and has never been, commonality of officers, directors, or stockholders between Wumag I and Kelzenberg-Wumag.

[3] Prior to being insolvent, Wumag I was registered at the district court of Krefeld, Germany under number HRA 3719. (Hess Declaration ¶ 7; R. p. ___). This is significant because it demonstrates that Wumag I and Kelzenberg-Wumag are now, and have always been, registered as separate and distinct companies.

(Hess Decl., ¶ 14; R. p. ___). Despite more than five years of litigation, Appellants never conducted substantive discovery into Kelzenberg-Wumag's ongoing operations.

III. Procedural History.

Appellants filed this action on January 6, 2021. (Compl.; R. p. ___). The original complaint named "Wumag Texroll GmbH & Co. KG" and made allegations relating to the design, manufacture, sale, delivery and installation of the Machine. (*Id.*). Appellants purported to serve Kelzenberg-Wumag pursuant to S.C. Code Ann. § 15-9-245 by mailing a copy of the Summons and Complaint to the South Carolina Secretary of State. (Kelzenberg-Wumag's Motion to Dismiss; R. p. __). At the outset, Kelzenberg-Wumag asserted that it was not the proper party to this action, and it also moved for dismissal based on insufficient service of process and lack of personal jurisdiction. (*Id.*). Following a hearing, Kelzenberg-Wumag's motion was denied, but the order expressly stated that Kelzenberg-Wumag could raise its arguments again following discovery. (Order Denying Motion to Dismiss; R. p. __).

After Kelzenberg-Wumag provided evidence demonstrating it purchased the assets of Wumag I approximately 19 months after the accident, Appellants filed an Amended Complaint naming Wumag I and Kelzenberg-Wumag. (Am. Compl.; R. p. __). The Amended Complaint alleges: "Wumag and Kelzenberg[-Wumag] designed and manufactured a Laminating Calender Line machine, machine number 206460, that was subsequently sold, delivered, and installed at Bondex, Inc. in Trenton, South Carolina." (*Id.* ¶ 7; R. p. __). Without any factual support, the Amended Complaint also alleges: "Kelzenberg[-Wumag] is liable for the acts and omissions of Wumag I under German principles of successor liability." (*Id.* ¶ 4; R. p. __).

On June 13, 2025, Kelzenberg-Wumag filed a motion for summary judgment renewing its service and personal-jurisdiction defenses and arguing that it was not liable to Appellants under any theory of successor liability recognized by South Carolina courts. (Kelzenberg-Wumag's

Motion for Summary Judgment; R. p. ___; Kelzenberg-Wumag's Memo in Support of its Motion for Summary Judgment; R. p. __). Following a hearing, the circuit court entered an order granting Kelzenberg-Wumag's motion for summary judgment. (Order Granting Summ. J., at *4; R. p. ___). The circuit court found all of the arguments raised by Kelzenberg-Wumag hinged on whether it could be liable under a theory of successor liability. (*Id*., at *3–4; R. p. __). As to successor liability, the circuit court held that none of the recognized exceptions to the general rule against successor liability were applicable.[4] Thus, the circuit court dismissed the claims against Kelzenberg-Wumag in their entirety. (Order Granting Summ. J., at *4; R. p. ___). Appellants filed a motion to reconsider pursuant to Rule 59(e), which was denied in a Form 4 Order. (*See* Sept. 25, 2025 Form 4 Order; R. p. ___). The circuit court subsequently entered another Order certifying the judgment against Kelzenberg-Wumag as final pursuant to Rule 54(b), SCRCP. (*See* Oct. 9, 2025 Order; R. p. ___).

Appellants filed their notice of appeal on October 10, 2025. (Appellants' Notice of Appeal; R. p. ___). After receiving multiple extensions to file their initial brief in this Court, Appellants moved pursuant to Rule 204(b), SCACR, to certify and transfer the appeal to the Supreme Court. The Supreme Court denied certification and transfer on June 17, 2026. (Order Den. Mot. to Transfer & Certify, June 17, 2026; R. p. ___).

STANDARD OF REVIEW

"Appellate courts apply the same standard of review applied by the trial court to review the grant of summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure." *Marlowe v. S.C. Dep't of Transportation*, 446 S.C. 309, 315, 919 S.E.2d 553, 556

[4] The circuit court correctly recognized that *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005) governs successor liability in products-liability actions and sets forth the limited exceptions to the general rule against successor liability.

(2025), *reh'g denied* (Sept. 10, 2025).

Rule 56(c), SCRCP, requires entry of summary judgment when the moving party shows there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 81, 502 S.E.2d 78, 85–86 (1998). Where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). When a party makes a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial." *Coker v. Cummings*, 381 S.C. 45, 54, 671 S.E.2d 383, 388 (Ct. App. 2008) (quoting *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc.*, 283 S.C. 182, 188–89, 322 S.E.2d 453, 457 (Ct. App. 1984)); *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (eliminating the "mere scintilla" standard and holding the proper standard is the "genuine issue of material fact" standard set forth in the text of Rule 56(c), SCRCP). "When a party makes no factual showing in opposition to a motion for summary judgment, the trial 'court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law.'" *Coker,* 381 S.C. at 54, 671 S.E.2d at 388.

ARGUMENT

The primary issue on appeal is whether Kelzenberg-Wumag may be held liable to Appellants under a theory of successor liability. There are no documents, testimony, or other record evidence showing that (1) Kelzenberg-Wumag expressly assumed Wumag I's liabilities, (2) that the transaction was a merger or consolidation, (3) that Kelzenberg-Wumag was a mere continuation of Wumag I, or (4) that the transaction was fraudulent. That absence of proof is dispositive, and the circuit court properly granted of summary judgment in favor of Kelzenberg-

Wumag.

Recognizing that current South Carolina law forecloses any successor liability claim against Kelzenberg-Wumag, Appellants claim a change in the law is needed. Specifically, Appellants argue that South Carolina should adopt the continuity of enterprise doctrine in products liability action involving claims of successor liability. This is not a novel argument. The continuity of enterprise doctrine has already been rejected by the Supreme Court of South Carolina in factually similar products liability cases. *See Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005); *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.,* 818 S.E.2d 447, 454 (2018). Regardless, even if this Court considers Appellants' position, there is no evidence to support a finding of liability against Kelzenberg-Wumag in this case. The record reflects an arm's-length transaction through German insolvency proceeding between unrelated parties. The record does not reflect Kelzenberg-Wumag carrying on as "a mere continuation of the defunct [Wumag I]." *See Simmons*, 366 S.C. at 323, 622 S.E.2d at 221 (arguing liability is appropriate under the continuity of enterprise doctrine if "the successor is determined to be, in effect, a mere continuation of the defunct predecessor." (J. Burnett, Dissenting)).

Finally, insufficient service of process and lack of personal jurisdiction provide alternate grounds to dismiss Appellants' claims against Kelzenberg-Wumag.

I. The Circuit Court Correctly Held that Kelzenberg-Wumag Cannot Be Liable Under Any Theory of Successor Liability Recognized Under South Carolina Law.

South Carolina law is clear. The "law generally favors the free transfer of assets and disfavors successor liability." *Eagle Window & Door, Inc.,* 424 S.C. at 269, 818 S.E.2d at 454. Thus, under South Carolina law, a "purchasing corporation is not liable for the debts of a predecessor" unless one of four exceptions applies:

> (1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to a consolidation or merger of the two

> corporations; (3) the successor company was a mere continuation of the predecessor; or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

Id. at 269, 818 S.E.2d at 454 (citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)).

None of the exceptions apply to this case. The circuit court correctly held:

> There is no evidence of an express agreement for Kelzenberg-Wumag to assume all debts and liabilities of Wumag. The purchase of Wumag was not a consolidation or merger of the two corporations, but a purchase of the assets. Kelzenberg-Wumag does not share officers, directors, and shareholders. There is no evidence that the transaction was entered into fraudulently. Therefore, the Court finds no exception is met and Kelzenberg-Wumag is not responsible for Wumag's potential liability.

(Order Granting Summ. J., at 4; R. p. ___). Appellants do not argue that these findings were in error. Applying binding precedent, the circuit court properly granted summary judgment in favor of Kelzenberg-Wumag.

II. The Supreme Court of South Carolina Has Previously Declined to Adopt the Continuity of Enterprise Doctrine in Products-Liability Cases.

The Supreme Court of South Carolina has repeatedly declined to adopt the continuity of enterprise doctrine in factually similar products liability cases.[5] *See Simmons*, 366 S.C. 308, 622 S.E.2d 213; *Eagle Window & Door, Inc*., 424 S.C. 256, 818 S.E.2d 447. Here, because there has never been, commonality of officers, directors, and stockholders between Wumag I and Kelzenberg-Wumag, Kelzenberg-Wumag cannot be held liable under the "mere continuation" exception to the general rule against successor liability. *Id.*; (*see also* Hess Decl., ¶ 14; R. p. ___). Established precedent controls, and this Court should affirm the circuit court's grant of summary judgment in favor of Kelzenberg-Wumag.

[5] Under the continuity of enterprise theory proposed by Justice Burnett, a entity could still be held liable as a successor even without commonality of officers, directors, or stockholders. *See Simmons*, 366 S.C. at 323, 622 S.E.2d at 221 (J. Burnett, Dissenting)).

Simmons presented the Supreme Court with a nearly identical factual scenario. In *Simmons*, the underlying suit involved an allegedly defective elevated scissorlift that collapsed and injured the plaintiff in a work-related accident. *Simmons*, 366 S.C. at 309, 622 S.E.2d at 213–14.[6] The scissorlift was designed, manufactured, and sold by Mark Industries, Inc. ("Mark Industries"). *Id*. at 310, 622 S.E.2d at 214. After selling the scissorlift, Mark Industries filed for bankruptcy, selling many of its assets to Terex Corporation ("Terex") at auction. *Id.* at 310–11, 622 S.E.2d at 214. To effectuate the asset purchase, Terex formed a wholly owned subsidiary, Mark Lift Industries, Inc., which continued to manufacture scissorlifts at the former Mark Industries plant for several months prior to relocating. *Id.* There was no commonality of officers, directors, or stockholders between Mark Industries and Terex. *Id.* at 311, 622 S.E.2d at 215. After his injuries, the plaintiff filed suit against Mark Lift Industries and Terex, seeking recovery under a theory of successor liability. *Id*. at 311–12, 622 S.E.2d at 215.

Based on these facts, the Supreme Court was tasked with the following question (among others): "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?" *Id.* at 310, 622 S.E.2d at 214. Answering the question, the Supreme Court held that *Brown v. American Ry. Express Co.* "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." *Id*. at 312, 622 S.E.2d at 215. Thus, the Supreme Court held:

> that in the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the

[6] In *Simmons*, the Supreme Court granted certification from the United States District Court of South Carolina to address issues of successor liability in the products liability context.

> predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims.

Id. (quoting *Brown*, 128 S.C. 428, 123 S.E. at 99).

Addressing Justice Burnett's dissent, which proposed some version of the continuity of enterprise doctrine, the Supreme Court wrote:

> 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 substantially the same officers, directors, or shareholders. ***We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.*** Further, we find no conflict with *Holloway v. John E. Smith's Sons Co.*, 432 F. Supp. 454 (D.S.C.1977). We do not find that the *Holloway* court established a new test of successor liability. Although the court in *Holloway* did not cite the test established in *Brown*, it applied the mere continuation exception. Unlike the present case in which Mark Lift and Terex did not share common officers, directors and shareholders, it appears from a reading of *Holloway* that there was, indeed, a commonality of ownership. Accordingly, the mere continuation exception was properly applied to that case.

Id. at 312 n.1, 622 S.E.2d at 215 n.1 (emphasis added). Appellants argue that the *Simmons* majority mechanically applied the *Brown* test without considering the approach proposed by Justice Burnett (and the Appellants here). That is not true. The *Simmons* majority undoubtedly considered the dissent's position. However, like most other jurisdictions, the majority declined to adopt the continuity of enterprise doctrine. *Id*. Instead, the Court held the mere continuation exception should only be applied when "there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Id.*

More recently, in *Eagle Window & Door, Inc.*,[7] the Supreme Court reaffirmed *Simmons*

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[7] Prior to *Eagle Window & Door, Inc.*, in *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008, this Court, citing *Simmons*, noted that the Supreme Court "declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser." The

and the mere continuation exception's requirement of commonality of officers, directors, and shareholders. 424 S.C. at 268, 818 S.E.2d at 453. In *Eagle Window & Door, Inc.*, an insurance company filed a contribution action against Eagle Window & Door, Inc. for allegedly defective windows manufactured by a company called Eagle & Taylor Company. *Id*. at 259, 818 S.E.2d at 449. At the time the windows were manufactured and sold, Eagle & Taylor was a wholly owned subsidiary of American Architectural Products Company. *Id*. A year later, the parent company filed for protection under the Bankruptcy Code, and substantially all of Eagle & Taylor's assets were sold to a hedge fund. *Id*. After the assets were conveyed, the acquiring company adopted the Eagle Window & Door name. *Id.*

After the asset purchase, Eagle Window & Door engaged in substantially the same business and used the same facilities as Eagle & Taylor. *Id.* Five of Eagle & Taylor's eight officers joined Eagle Window & Door. *Id*. at 260, 818 S.E.2d at 449. There was, however, little to no similarity of shareholders and directors. *Id*. Based on these facts, the insurer argued that Eagle Window & Door was a mere continuation of Eagle & Taylor because it retained a substantially similar name, produced the same products in the same facility, and benefited from Eagle & Taylor's history by holding itself out as a successor entity. *Id*. at 261, 818 S.E.2d at 450. It also argued that commonality of only officers, directors, or shareholders—not all three—was required. *Id.* The circuit court and Court of Appeals agreed with the insurer. In a unanimous decision, the Supreme Court reversed both the circuit court and Court of Appeals, finding their analysis "was error, as it [fell] within the continuity of enterprise theory of successor liability that the *Simmons* majority flatly rejected." *Id*. at 267, 818 S.E.2d at 453. The Court correctly found that *Simmons'* holding is inescapable—the mere continuation exception does not apply when there is no commonality

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Supreme Court of South Carolina denied the appellants' petition for certiorari. *See id*.

between officers, directors, and shareholders. *Id*. at 266–68, 818 S.E.2d at 452–54. It also found that this requirement "is consistent with the traditional application of the doctrine." *Id*. at 267, 818 S.E.2d at 453 (citing cases).

In *Eagle Window & Door, Inc.*, like *Simmons*, the Supreme Court addressed an argument in favor of expanding the mere continuation exception. And, once again, the Supreme Court declined to do so, writing "[w]hile some states have expanded successor liability to include enterprise continuity, the existence of these cases alone is not sufficient to override the express language contained in *Simmons* signifying that the Court declined to expand the doctrine where there is no commonality between officers, directors, and shareholders." *Id*. at 268, 818 S.E.2d at 454.[8] The Supreme Court's reasoning is well founded. "Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability." *Id*. at 269, 818 S.E.2d at 454. The purpose of the mere continuation exception is "'to prevent a change in legal obligations as a result of a transaction that is essentially a sham' – that is, to impose liability on a successor company when the asset sale 'is little more than a shuffling of corporate forms, lacking any fundamental change with independent significance.'" *Lane v. New Gencoat, Inc.*, No. 22-1121, 2023 WL 2888562, at *4 (4th Cir. Apr. 11, 2023) (quoting Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996)). Simply carrying on a similar business following an asset purchase is insufficient to impose

[8] Appellants rely on a single sentence in *Eagle Window & Door, Inc*., stating "[w]hile there arguably may be merits to expanding South Carolina's successor liability test to include the continuity of enterprise theory, that is not the question currently before the Court, nor is that the argument advanced by Respondents." *Id*. at 267, 818 S.E.2d at 453. The sentence is dicta and cannot be construed as an endorsement of the continuity of enterprise doctrine.

successor liability.[9]

Despite setting an intentionally high burden, the Supreme Court also recognized that the rigid application of the mere continuation test might not always be appropriate.

> We recognize the mere continuation test is a strict one, but we temper our holding by noting it is not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, we stress control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability.

Id. at 269, 818 S.E.2d at 454. Thus, contrary to what is argued by Appellants, South Carolina's "successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied." *Id.* at 270, 818 S.E.2d at 454.

In summary, this case does not present a novel issue. The Supreme Court of South Carolina has declined to adopt the continuity of enterprise doctrine on multiple occasions in factually similar products liability cases. Successor liability under the "mere continuation" exception requires establishing commonality of officers, directors, ***and*** shareholders. That undisputedly does not

[9] The legal and policy arguments in favor of the continuity of enterprise doctrine are without merit. *See e.g., Johnston v. Amsted Indus., Inc.,* 830 P.2d 1141, 1147 (Colo. App. 1992) (rejecting the continuity of enterprise doctrine because it (1) "defeats the legitimate expectations of the parties held during negotiation and sale" of the business; (2) "is inconsistent with the basic tenet of strict products liability that liability be imposed only on the manufacturer that manufactures or markets the product that caused the injury;" and (3) attempts to impose liability on "a successor corporation which had no control over products already in use, and which it neither marketed or manufactured."); *see also Polius v. Clark Equip. Co.,* 802 F.2d 75, 75 (3d Cir. 1986) ("We conclude that this continuity of enterprise theory, adopted by a minority of jurisdictions, is an unsound exception to the general rule of corporate successor liability.").

exist here. The current law fairly and effectively balances the need for the free transfer of assets while protecting against sham asset sales designed to avoid liability. Appellants' attempt to avoid well-settled and well-reasoned precedent fails.

A. Even Under The Test Proposed by Appellants, The Record Does Not Support Imposing Successor Liability Against Kelzenberg-Wumag.

Appellants ask this Court to apply the multi-factor continuity of enterprise framework set out in Justice Burnett's dissent in *Simmons*. Justice Burnett's proposed test examines:

> (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's.

Simmons, 366 S.C. 308, 323, 622 S.E.2d 213, 221 (2005) (J. Burnett, Dissenting). Even under this test, the evidence in the record does not support imposing liability against Kelzenberg-Wumag. After nearly five years of litigation, Appellants failed to conduct any discovery into Kelzenberg-Wumag's ongoing operations and failed to take a single deposition of any Kelzenberg-Wumag (or Wumag I) representative. The statements in Appellants' brief regarding Kelzenberg-Wumag's operations, product lines, equipment, computer software and employees are pure speculation. (*See* Appellants' Brief, *42). Had Appellants conducted discovery, it would have plainly revealed that Kelzenberg-Wumag is not a mere continuation of Wumag I's business.

Appellants' argument for successor liability is based on a press release issued in September 2019 (six years prior to the grant of summary judgment in favor of Kelzenberg-Wumag).

(Kelzenberg-Wumag Sept. 2019 Press Release; R. p. __). Notwithstanding the lack of testimony and other evidence, the press release demonstrates that Kelzenberg-Wumag purchased Wumag I's assets in a legitimate, arm's-length transaction conducted through German insolvency proceedings. (*Id*.). The press release is clear that Kelzenberg-Wumag would operate as an independent company under new management. (*Id*.). While it references that certain employees would be retained, it also states that other employees would not remain with the company.[10] (*Id*.). The press release is clear that the administrative operations of the company would be carried out by different management in an entirely different city. (*Id*.). The press release also highlights Kelzenberg-Wumag's plan to expand its market presence by manufacturing new products not previously made by Wumag I. (*Id*.). Finally, further demonstrating that Kelzenberg-Wumag's operations were not a mere continuation of the prior operations, the release requests patience from its customers during the transition period. (*Id*.).

"A product liability plaintiff seeking to hold a company liable based on a successor liability theory bears the burden of proving" an exception to the general rule applies. *Eagle Window & Door, Inc.,* 424 S.C. at 269, 818 S.E.2d at 454. The press release relied on by Appellants is insufficient to create a genuine issue of material fact, especially in light of the uncontested declaration demonstrating Kelzenberg-Wumag's independence from Wumag I. (*See generally* Hess Decl.; R. p. __). Thus, even applying the test proposed by Appellants, they cannot meet their burden based on the evidence in this case.

III. Appellants' Claims Against Kelzenberg-Wumag Should be Dismissed for Insufficient Service of Process and Lack of Personal Jurisdiction.

Pursuant to Rule 220(c), SCACR, this Court may affirm the circuit court's decision on any grounds appearing in the Record on Appeal. Insufficient Service of Process and Lack of Personal

[10] Kelzenberg-Wumag only retained approximately one-third of the employees of Wumag I.

Jurisdiction provide additional grounds to dismiss Appellants' claims against Kelzenberg-Wumag. (*See* Kelzenberg-Wumag's Motion for Summary Judgment; R. p. __ and Kelzenberg-Wumag's Memorandum in Support of its Motion for Summary Judgment, at * 6 – 16; R. p. __).

A. Appellants Did Not Properly Serve Kelzenberg-Wumag, and Their Claims Are Now Barred by the Statute of Limitations.

Appellants' only attempt to serve Kelzenberg-Wumag was through the South Carolina Secretary of State pursuant to S.C. Code Ann. § 15-9-245. Section 15-9-245(a) provides a means for service on a foreign corporation not authorized to do business in the State of South Carolina but that does, in fact, conduct business within the state. Under section 15-9-245(a), "[e]very foreign business or nonprofit corporation which is not authorized to do business in this State, ***by doing in this State, either itself or through an agent, any business***,…is considered to have designated the Secretary of State as its agent upon whom process against it may be served...." (emphasis added). The plain language of section 15-9-245 clearly provides that a foreign corporation must do business in South Carolina, "either itself or through an agent," in order to be subject to service under the statute. *See* S.C. Code Ann. § 15-9-245.

Appellants' attempt at service under section 15-9-245 is ineffective. There is no evidence that Kelzenberg-Wumag did business in South Carolina prior to the time it was purportedly served in January 2021. The fact that Wumag I may have done business in South Carolina prior to that date is irrelevant. Kelzenberg-Wumag and Wumag I are separate and distinct entities. Kelzenberg-Wumag is not subject to service pursuant to section 15-9-245, and it has not been properly served.[11]

Appellants cannot cure their failure to serve Kelzenberg-Wumag. Appellants filed this

[11] Appellants have also failed to comply with section 15-9-245(c), which sets forth specific requirements for demonstrating proof of service, including the filing of an affidavit of compliance and a return receipt signed by Kelzenberg-Wumag evidencing actual delivery of the Summons and Complaint. Appellants have not satisfied (and cannot satisfy) the requirements of section 15-9-245(c).

action on January 6, 2021, shortly before the three-year limitations period expired for claims arising from the January 22, 2018 incident. (Compl., filed Jan. 6, 2021; Compl., ¶ 8; S.C. Code Ann. § 15-3-530(5); R. p. ___). Interpreting section 15-3-20(B) and Rule 3(a), SCRCP, our Supreme Court has held that "[w]hen service occurs outside of the statute of limitations[,] it must occur within 120 days of filing the complaint." *Mims ex rel. Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347, 732 S.E.2d 395, 398 (2012). Appellants filed this action on January 6, 2021, just 14 days prior to the expiration of the statute of limitations. To timely commence an action, Appellants were required to serve Kelzenberg-Wumag on or before May 6, 2021. That did not occur, and Appellants' claims are now time barred. *See Kinder v. City of Myrtle Beach*, No. 4:15-cv-01416-RBH, 2017 WL 227969 (D.S.C. Jan. 19, 2017) (applying S.C. Code Ann. § 15-3-20(B) and Rule 3(a), SCRCP, and dismissing plaintiff's complaint, with prejudice, because the complaint was not served within the statute of limitations or within 120 days of the filing of the summons and complaint).

B. Appellants' Claims Against Kelzenberg-Wumag Should Be Dismissed For Lack of Personal Jurisdiction.

Lack of personal jurisdiction provides an alternative basis to dismiss Appellants' claims against Kelzenberg-Wumag. Kelzenberg-Wumag is not subject to general jurisdiction because it is not incorporated in South Carolina, does not maintain its principal place of business here, and has no affiliations with South Carolina that would render it essentially at home in this State. (Hess Decl., ¶¶ 4–5; R. p. __; Mem. Supp. Mot. Summ. J. 10–11; R. p. ___). *See Daimler AG v. Bauman*, 571 U.S. 117, 137–39 (2014); *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 413 (2017).

Specific jurisdiction is also lacking. Appellants' claims do not arise out of any South Carolina conduct by Kelzenberg-Wumag. Kelzenberg-Wumag purchased certain assets of Wumag I in German insolvency proceedings, and it did not design, test, manufacture, market, sell, import, distribute, deliver, or install the Machine. (Hess Decl., ¶¶ 6, 8–10, 18–19; Mem. Supp. Mot. Summ. J. 12–15; R. p. ___). The relevant contacts must be contacts that Kelzenberg-Wumag itself created with South Carolina, not contacts created by Wumag I or any other entity. *See Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("Minimum contacts must arise out of contacts that the 'defendant [itself]' creates with the forum State."). The Supreme Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 284. Moreover, the record reveals that Kelzenberg-Wumag is a separate legal entity than Wumag I. As such, any prior contacts of Wumag I with the State of South Carolina cannot be imputed to Kelzenberg-Wumag.

Even if Appellants could establish that Kelzenberg-Wumag has sufficient minimum contacts with the State of South Carolina, which it cannot, this Court must also consider the "fairness" prong, which examines whether the exercise of personal jurisdiction over Kelzenberg-Wumag comports with "traditional notions of fair play and substantial justice." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. at 491, 611 S.E.2d at 508 (citing *Burger King Corp.,* 471 U.S. at 464). Plainly stated, the court must find that the exercise of jurisdiction is "reasonable" or "fair." Under the fairness prong, "the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction." *Id*. (citing *Clark v. Key,* 304 S.C. 497, 405 S.E.2d 599 (1991)).

The relevant factors weigh heavily against a South Carolina Court exercising personal jurisdiction over Kelzenberg-Wumag. Kelzenberg-Wumag has no contacts in South Carolina related to this case. No act or omission of Kelzenberg-Wumag gives rise to Appellants' claims.

The analysis relating to the third element is moot. Appellants have already named Wumag I, and their claims against that entity will continue in South Carolina. The inconvenience of forcing Kelzenberg-Wumag to defend a suit in which it has no contacts is readily apparent. Finally, South Carolina has no legitimate interest in exercising jurisdiction over a nonresident defendant that has no connection to the injuries alleged by Appellants. For all of these reasons, it would be unfair for this Court to exercise jurisdiction over Kelzenberg-Wumag.

CONCLUSION

For the reasons set forth herein, Kelzenberg-Wumag respectfully requests that this Court affirm the circuit court's grant of summary judgment.

s/ Robert C. Osborne, III

Robert H. Jordan (SC Bar No.: 13612)
Email: robertjordan@parkerpoe.com
Robert C. Osborne III (SC Bar No.: 101827)
Email: robertosborne@parkerpoe.com
Caroline E. McCracken (SC Bar No.: 106971)
Email: carolinemccracken@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN LLP
850 Morrison Drive, Suite 400
Charleston, SC 29403
Phone: (843) 727-2650
Fax: (843) 727-2680

Attorneys for Respondent Wumag Texroll GmbH & Co. KG f/k/a Kelzenberg + Co: GmbH & Co. KG

June 29, 2026

Charleston, South Carolina