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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.

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INTRODUCTION

Respondent's brief answers a question that Appellants have not asked.[1] From its statement of the case through its conclusion, Respondent characterizes this appeal as an "attempt to expand South Carolina successor liability law" through an enlargement of the mere continuation exception recognized in *Brown v. American Railway Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). (Resp't's Br. 2, 8-9). Appellants have expressly disclaimed any such request. As their initial brief states, Lanham "does not advocate for an expansion of the *Brown* test or creation of new corporate law, which is appropriately applied to corporate transactions such as mergers and consolidation." (Appellants' Br. 27). The *Brown* exceptions may remain precisely as they are, undisturbed, within the corporate transactional and creditor contexts for which they were designed. The question actually presented is whether the General Assembly's stated public policy of shifting the costs of defective products to those best equipped to bear them, S.C. Code Ann. §§ 15-73-10 *et seq.*, requires recognition of a separate but parallel tort rule of successor liability, applicable only in products liability actions, when a successor purchases and continues the business enterprise that developed, sold, and profited from the defective product.

The distinction is not semantic, and it is dispositive of Respondent's reading of the precedents. In *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005), the Supreme Court answered a certified question asking what test "is

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[1]Pursuant to Rule 208(b)(3), SCACR, this reply is confined to a discussion of the matters raised in Respondent's brief. Appellants rely upon their initial brief for all matters not addressed herein, and the absence of a reply to any particular assertion should not be construed as a concession.

employed" to determine successor liability "in accordance with *existing* South Carolina authority", and in a footnote it "decline[d] to extend the [mere continuation] exception." *Id.* at 312 n.1, 622 S.E.2d at 215 n.1 (emphasis added). In *Nationwide Mutual Insurance Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018), the court reaffirmed its historical corporate law rule while expressly observing that the continuity of enterprise doctrine was "not the question currently before the Court, nor is that the argument advanced by Respondents." *Id.* at 267, 818 S.E.2d at 453. Neither majority opinion considered whether the strict products liability statute and its incorporated comments supply, as a matter of tort law and public policy as evinced through legislative intent, their own rule of decision when a successor continues the enterprise of an insolvent manufacturer. No South Carolina court has.

Stripped of its mistaken framing, Respondent's brief reduces to two remaining contentions, and neither withstands scrutiny. *First*, Respondent argues that even under the *Simmons* dissent's test the record would not support liability, dismissing the evidence supporting each factor as "pure speculation." (Resp't's Br. 15). But the material facts are drawn from Respondent's own declarations, its own court submissions, and its own public statements, and Respondent's competing interpretation of those documents establishes only that reasonable minds could differ as to the conclusions to be drawn from them, which is precisely the circumstance in which summary judgment is forbidden. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 378-79, 534 S.E.2d 688, 692 (2000).

Second, Respondent offers insufficient service of process and lack of personal jurisdiction as alternative grounds for affirmance. Both depend entirely upon the premise that Wumag II[2] is a stranger to Wumag I. Indeed, the circuit court itself recognized that Wumag I's South Carolina contacts would be imputed to Wumag II for the purpose of service and personal jurisdiction if Wumag II was a successor. (Sep. 19, 2025 Order 3-4). The alternative grounds therefore rise and fall with the successorship question and cannot independently sustain the judgment. However, regardless of successor liability, the record contains evidence sufficient to establish that Wumag II was continuing Wumag I's business in South Carolina prior to service sufficient to confer the Secretary of State with authority to accept service on its behalf, and that Wumag II has sufficient related instate contacts of its own to confer a South Carolina court with personal jurisdiction.

ARGUMENT

I. Respondent defends a corporate law rule that Appellants do not challenge, and no majority opinion has expressly addressed the question Appellants actually present: whether the public policy underlying strict products liability supplies a separate but parallel tort rule of successor liability.

A. *Simmons* answered only what the successor liability test is under existing corporate law and declined to extend that test's mere continuation exception; it did not consider, much less reject, the

[2]For consistency, Appellants continue to use the designations "Wumag I" and "Wumag II" employed in their initial brief. "Wumag II" refers to Respondent, the entity Respondent's brief identifies as "Kelzenberg-Wumag."

policy rationale supporting a standalone tort rule grounded in the legislative intent of S.C. Code Ann. § 15-73-30.

Respondent contends that the continuity of enterprise doctrine "has already been rejected by the Supreme Court of South Carolina." (Resp't's Br. 8). The contention overreads *Simmons*. The question certified to the Supreme Court was: "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?" *Simmons*, 366 S.C. at 310, 622 S.E.2d at 214 (emphasis added). The question asked the court to identify existing law, not to evaluate whether existing law should yield to the policies underlying the strict liability statute, and the court answered it on those terms by restating the four exceptions from *Brown*. *Id.* at 312, 622 S.E.2d at 215.

The majority's only engagement with the dissent came in a single footnote, and the footnote's own language confirms the limited scope of its logic. The majority characterized the dissent as "advocat[ing] an expansion of the mere continuation exception" and "decline[d] to extend the exception to cases in which there is no such commonality" of officers, directors, and shareholders. *Id.* at 312 n.1, 622 S.E.2d at 215 n.1. Every operative word of that footnote, "exception," "expansion," "extend," speaks to the reach of a corporate law rule, and the stated rationale was numerical: "the majority of courts interpreting the mere continuation exception have found it applicable only when there is commonality of ownership." *Id.* Nowhere did the majority discuss S.C. Code Ann. § 15-73-30, the comments to Restatement (Second) of Torts § 402A that the General Assembly incorporated as its legislative intent, the risk allocation principles illuminated in *Madison v. American Home Products Corp.*, 358 S.C. 449, 454, 595 S.E.2d 493, 496 (2004), or whether the creditor protection rationales underlying the corporate rule have any application to an injured product user who never had the opportunity to bargain for his own protection.

Respondent insists that the *Simmons* majority "undoubtedly considered the dissent's position." (Resp't's Br. 11). It considered the dissent's position as the majority itself described that position: a proposed expansion of a corporate law exception. Considering whether to enlarge *Brown* is not the same as considering whether the strict liability statute supplies its own parallel rule, a theory that the certified question by its concise language did not specifically present and that the majority never mentioned. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 149, 69 L. Ed. 411 (1925). The question presented by this appeal did not even lurk in *Simmons*. Appellants take the majority at its word: it declined to extend a corporate law exception, and it did nothing more.

B. ***Nationwide* reaffirmed the commonality requirement of the corporate law exception while expressly stating that the continuity of enterprise doctrine was not before the Court, and Respondent's own characterization of *Nationwide*'s observations as dicta concedes that the question remains open.**

Nationwide is weaker still for Respondent. There, an insurer pursued a contribution claim and argued that the mere continuation exception could be satisfied without commonality of ownership. The circuit court and this Court agreed, and the

Supreme Court reversed because that analysis "f[ell] within the continuity of enterprise theory of successor liability that the *Simmons* majority flatly rejected." *Nationwide*, 424 S.C. at 267, 818 S.E.2d at 453. Read in context, the theory "flatly rejected" was the use of enterprise continuity reasoning to satisfy the mere continuation exception, the same corporate law question resolved in *Simmons*. The court said so itself in the very same paragraph: "[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.* A court does not reject a theory on the merits in the same breath that it declares the theory is not before it.

Respondent's own treatment of *Nationwide* concedes the point. Respondent dismisses the "arguably may be merits" observation as "dicta [that] cannot be construed as an endorsement of the continuity of enterprise doctrine." (Resp't's Br. 13 n.8). Appellants agree that the sentence is dicta. They cite it as the Supreme Court's own acknowledgment that the question remains open. But Respondent cannot have it both ways. If the court's favorable observation about the doctrine is dicta because the doctrine was not before the court, then the same decision cannot simultaneously stand as a binding merits rejection of that same doctrine. *Nationwide* reaffirmed the commonality requirement of the corporate exception, and nothing more.

Nationwide in fact demonstrates that the Supreme Court's successor liability jurisprudence is not the closed system Respondent describes. The court took pains to "temper" its holding, emphasizing that the mere continuation test "is not completely inflexible," that "control is an essential consideration," and that 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. That passage is a recognition that corporate formalities do not always capture economic reality, which is the animating premise of the tort rule Appellants propose.[3]

C. The Supreme Court's denial of Appellants' motion to certify and transfer implies no view on the merits and does not relieve this Court of its duty to decide the question presented.

Respondent's statement of the case suggests that significance should be attached to the Supreme Court's June 17, 2026 denial of Appellants' motion to certify and transfer this appeal pursuant to Rule 204(b), SCACR. (Resp't's Br. 2, 6). None should be. A discretionary refusal to take a case out of the ordinary appellate channel is not a ruling on any question the case presents. *Cf. United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."). If the denial signifies anything, it signifies the ordinary course of appellate practice: novel questions are heard first by this Court, and this Court is fully empowered to decide them. S.C. Code Ann. § 14-8-200. Appellants do not ask this Court to overrule *Simmons* or *Nationwide*. Those decisions govern the corporate

[3] *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 657 S.E.2d 67 (Ct. App. 2008), cited by Respondent, merely restated the *Simmons* footnote in the course of applying the corporate law exceptions. Like *Simmons* and *Nationwide*, it did not consider the question presented here.

law question they decided. Appellants ask this Court to answer a question of tort law and legislative intent that no South Carolina appellate court has answered in a majority opinion.

D. The out of state authorities cited by Respondent undermine its position, and Respondent offers no answer to the empirical and economic evidence discrediting the "majority rule" rationale.

In a footnote, Respondent declares that "[t]he legal and policy arguments in favor of the continuity of enterprise doctrine are without merit," citing *Johnston v. Amsted Industries, Inc.*, 830 P.2d 1141 (Colo. App. 1992), and *Polius v. Clark Equipment Co.*, 802 F.2d 75 (3d Cir. 1986). (Resp't's Br. 14 n.9). Neither authority survives contact with South Carolina's strict product liability statute. *Johnston* reasoned that the doctrine "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." *Johnston*, 830 P.2d at 1147. Whatever force that premise may carry in Colorado, it is not the law of this State: the General Assembly has imposed strict liability throughout the chain of distribution, upon sellers and distributors who neither designed nor manufactured the defective product. S.C. Code Ann. § 15-73-10.

South Carolina's policy allocates the risk of loss "among those best equipped to deal with it," not exclusively among those most responsible for it. *Madison*, 358 S.C. at 454, 595 S.E.2d at 496. And *Johnston*'s concern that liability would fall upon a successor with no control over products already in use ignores the channeling effect described in Appellants' initial brief: a successor that anticipates products liability exposure discounts the asset purchase price accordingly, forcing the ultimate cost of the defective product back onto the responsible predecessor. (Appellants' Br. 24-25) (citing Richard L. Cupp, *Article: Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 860-63 (1999)).

Polius fares no better. Respondent quotes its conclusion while omitting its reasoning. The *Polius* court acknowledged that the traditional rule of corporate successor liability was "designed for the corporate contractual world where it functions well." *Polius*, 802 F.2d at 78. That concession is the premise of Appellants' entire argument: the *Brown* rule functions well in the world for which it was designed, and Appellants would leave it undisturbed there. The dispute is over whether it should govern a world it was never designed for.

Finally, Respondent offers no answer at all to the evidence that the numerical premise underlying the *Simmons* footnote is overstated. Appellants' initial brief detailed a survey of state jurisdictions indicating that thirteen states had adopted some version of the continuity of enterprise or product line doctrine, that an additional state had signaled acceptance of the doctrine, and that a greater share of the nation's population resided in states following some form of the doctrine than in states following the *Brown* test. (Appellants' Br. 29) (citing Cupp, *supra*, at 853-56). Nor does Respondent respond to *Savage Arms, Inc. v. Western Auto Supply Co.*, 18 P.3d 49 (Alaska 2001), in which the Alaska Supreme Court examined the very economic objections Respondent now invokes and found them "too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects." *Id.* at 56-57. On the two points that actually test the doctrine's merits, its prevalence and its economic consequences, Respondent stands silent.

II. The record, much of it authored by Respondent, presents genuine issues of material fact under the six-factor test articulated by Justice Burnett in the *Simmons* dissent.

The standard of review is familiar and, on this record, dispositive. Summary judgment is proper only when there is no genuine issue as to any material fact. Rule 56(c), SCRCP; *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 524, 787 S.E.2d 485, 489 (2016). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692. The evidence and every reasonable inference which can be drawn from it must be viewed in the light most favorable to Appellants. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Nothing in *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023), cited by Respondent, alters those principles. That decision clarified the quantum of evidence required to create a genuine issue, not the direction in which inferences are drawn. Under Justice Burnett's flexible, six-factor test, in which no specific factor is required for or dispositive to the analysis, this record presents genuine issues for trial. *Simmons*, 366 S.C. at 323, 622 S.E.2d at 221 (Burnett, J., dissenting).

A. The material facts are drawn from Respondent's own declarations, court filings, and public statements, not from speculation.

Respondent characterizes Appellants' statement of the facts concerning Wumag II's operations as "pure speculation." (Resp't's Br. 15). The characterization cannot be squared with the provenance of those facts, nearly all of which Respondent placed in the record or has publicly asserted itself. The Hess affidavit establishes that on September 18, 2019, Wumag II entered into an asset purchase agreement to acquire the assets of Wumag I, including its machinery, equipment, and software licenses, and that ownership of the assets transferred on October 1, 2019. (Hess Aff. ¶¶ 8, 10). The record further establishes that the purchase encompassed Wumag I's commercial premises and trademarks. (*Id.* at ¶ 10; Pls.' Suppl. Mem. in Opp. to Mot. for Summ. J., Exs. 1, 2). The Hess affidavit establishes that Wumag II then changed its corporate name to "Wumag Texroll GmbH & Co. KG," a step Respondent's brief concedes was taken "for marketing reasons." (Hess Aff. ¶ 13, Resp't's Br. 4).

Respondent's brief likewise concedes that Wumag II "uses a portion of the prior Wumag I facility in Krefeld, Germany as part of its business." (*Id.*). Wumag I's own answer admits the asset purchase agreement and Wumag II's adoption of its brand name. (Wumag I Am. Answer ¶¶ 63-65, 67). And Respondent's September 2019 press release and public materials announce that Wumag II is continuing Wumag I's business, assure Wumag I's customers that they can reach the "usual" employees at the telephone numbers and e-mail addresses they have always used, and hold the company out to the world as "[m]ore than 70 years old," an age Wumag II can claim only by appropriating Wumag I's history. (Pls.' Suppl. Mem. in Opp. to Mot. for Summ. J., Exs. 1, 2). None of this is speculation. It is Respondent's own evidence, and a party cannot obtain summary judgment by characterizing its own affidavits, admissions, and publications as insufficient to permit inferences against it.

Those facts bear directly upon at least five of the six factors articulated by Justice Burnett. *First*, the continued use of the predecessor's "corporate identity, trade names, advertising, or other intellectual property," is established by the same name, the same logo, the acquired trademarks, the boast of a seventy-year history, and the direction of Wumag I's customers to the "usual" employees. *Simmons*, 366 S.C. at 323, 622 S.E.2d at 221 (Burnett, J., dissenting). Indeed, Respondent's concession that it adopted the Wumag name "for marketing reasons" is, in substance, an admission that it sought to "tak[e] lawful advantage of the predecessor's accumulated goodwill and reputation," which is the first factor stated in Respondent's own words. *Id.*

Second, continuation of "substantially the same product line" may readily be inferred from the acquisition and continued use of the same machinery, equipment, software, and manufacturing premises, and the factor itself "recogniz[es] that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items," so the press release's reference to planned new products cannot defeat the factor as a matter of law. *Id.*

Third, the retention of the predecessor's employees is conceded. Even on Respondent's account (without any reference to the record), approximately one-third of Wumag I's workforce continued with Wumag II, and the press release directs customers to the "usual" personnel. (Resp't's Br. 16 n.10). *Fourth*, the continued use of the predecessor's equipment and customer relationships, including the ongoing relationship with Bondex that began with the sale of the subject machine, is established by the asset purchase itself and by Wumag II's public assurances of continuity.

Fifth, the acquisition of the software licenses, premises, trademarks, and contact infrastructure necessary to carry on Wumag I's operations supports the inference that Wumag II assumed "those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations." *Id.* Only the sixth factor, commonality of ownership, is absent, and the test is flexible precisely so that no single factor, including that one, is dispositive. *Id.* Respondent's own brief acknowledges as much. (Resp't's Br. 9 n.5).

B. Respondent's competing interpretation of its own September 2019 press release confirms that summary judgment was improper.

Respondent reads its September 2019 press release differently. In its telling, the release demonstrates an arm's-length insolvency purchase, new management operating from a different city, retention of only a portion of the workforce, plans to manufacture new products, and a request for customer patience during a transition. (Resp't's Br. 15-16). Assume that reading is reasonable. What Respondent describes is a dispute over the conclusions to be drawn from documents whose contents are undisputed, and that is the precise circumstance in which summary judgment is forbidden: "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Brockbank*, 341 S.C. at 378, 534 S.E.2d at 692.

The same document Respondent reads as proof of discontinuity assures the predecessor's customers that the "usual" employees remain reachable at the telephone numbers and e-mail addresses they have always used, and the same enterprise advertises itself to the world as more than seventy years old. (Pls.' Suppl. Mem. in Opp. to Mot. for Summ. J., Exs. 1, 2). Viewing those materials, and every reasonable inference from them, in the light most favorable to Appellants, a jury could readily find that Wumag II "held itself out to the world as a continuation of the predecessor." *Simmons*, 366 S.C. at 323, 622 S.E.2d at 221 (Burnett, J., dissenting). Which characterization of the release is the correct one is a question for the factfinder at trial, not for the court on summary judgment.

C. Respondent's criticism that Appellants "never conducted substantive discovery" misstates both the record and the summary judgment standard.

Respondent repeatedly faults Appellants for having "never conducted substantive discovery into Kelzenberg-Wumag's ongoing operations." (Resp't's Br. 5, 15). The criticism misstates both the record and the law. As to the record, the circuit court denied Wumag II's initial motion to dismiss "without prejudice to permit discovery on the issues," and the record that thereafter developed, comprising the Hess and Derksen affidavits, Wumag I's admissions, the deposition testimony of Bondex's witnesses, and Wumag II's own public statements, is the very record upon which Respondent moved for and obtained summary judgment. (*See generally* July 21, 2022 Order). As to the law, a party opposing summary judgment must "come forward with specific facts showing that there is a genuine issue for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). The rule requires specific record facts. It does not prescribe the discovery devices by which they must be gathered, and it certainly does not require a plaintiff to depose adverse witnesses when the movant's own submissions supply the facts in dispute. Appellants carried their burden by identifying record evidence supporting each relevant factor.

There is, moreover, an unresolvable tension at the core of Respondent's position. Respondent argues in one breath that the record is too undeveloped to permit any assessment of its ongoing operations, and in the next that this same record entitles it to judgment as a matter of law upon precisely that question. If the extent of Wumag II's continuation of Wumag I's enterprise is genuinely unknowable on this record, then summary judgment, "a drastic remedy" that "should be cautiously" granted, was unavailable, particularly to the party holding superior, indeed exclusive, access to the facts of its own operations in Germany. *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Uncertainty of that kind is resolved by trial, not by judgment for the party best positioned to dispel it.

D. ***Long*, *Turner*, and *Holloway* supply the equitable principle that Respondent never engages: a corporation that holds itself out as its predecessor for the purpose of sales may not deny that identity for the purpose of liability.**

Respondent addresses *Holloway v. John E. Smith's Sons Co., Div. of Hobam, Inc.*, 432 F. Supp. 454 (D.S.C. 1977), only through the *Simmons* footnote, and it never mentions *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939), at all. That silence is understandable, because both decisions embody an equitable principle fatal to Respondent's position. In *Long*, the Supreme Court bound a successor corporation to a judgment rendered against its dissolved predecessor's name because the successor had acquired the predecessor's assets and continued its business under the predecessor's trade name, concluding that "[t]he 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." *Id.* at 376-77, 3 S.E.2d at 50.

In *Holloway*, the district court, applying the law of this State, reasoned that where "as a group the same employees continue, without pause to produce the same products in the same plant, with the same supervision, the ownership of the entity which maintains essentially the same name cannot be the sole controlling determinant of liability." *Holloway*, 432 F. Supp. at 455. And *Turner v. Bituminous Casualty Co.*, 397 Mich. 406, 244 N.W.2d 873 (Mich. 1976), upon which the *Simmons* dissent drew, states the principle in terms of estoppel: "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 product liability." *Id.* at 426, 244 N.W.2d at 882.

The record here, viewed in the light most favorable to Appellants, would permit a jury to find that Wumag II did exactly what those courts condemned. It purchased the name, logo, trademarks, customer lists, premises, equipment, workforce, and seventy-year history of Wumag I "for marketing reasons," directed its predecessor's customers to the "usual" employees at the usual addresses, and now insists, for liability purposes alone, that it is a stranger to the enterprise whose identity it bought. Nothing in Respondent's brief answers *Long*, and nothing in *Brown* or *Simmons* compels a court of this State to lend its aid to that result.

III. Respondent's alternative grounds for affirmance depend entirely upon the premise that Wumag II is a stranger to Wumag I and therefore cannot independently sustain the judgment.

Respondent correctly notes that Rule 220(c), SCACR, permits this Court to affirm upon any sustainable ground appearing in the record. (Resp't's Br. 16). But an alternative ground must be capable of sustaining the judgment independently, and neither of Respondent's proffered grounds can, because both rest upon the same premise as its merits argument: that Wumag II is a legal stranger to Wumag I. The circuit court said as much, confining its analysis to the "ultimate" question of "whether Kelzenberg-Wumag, by law or contract, now stands in the shoes of Wumag", 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. (Sep. 19, 2025 Order 4). Respondent nowhere challenges that imputation principle in its brief. Accordingly, if genuine issues of material fact exist as to successorship, and they do, the service and jurisdictional arguments fail together with the premise they share.

A. If Wumag II is Wumag I's successor, service through the Secretary of State was effective, and Respondent's statute of

limitations argument fails on its own terms because service occurred before the limitations period expired.

Respondent's service argument is that S.C. Code Ann. § 15-9-245 authorizes service through the Secretary of State only upon a foreign corporation doing business in this State, and that "[t]here is no evidence that Kelzenberg-Wumag did business in South Carolina" because Wumag I's business here "is irrelevant" as the two are "separate and distinct entities." (Resp't's Br. 17). That is not an independent argument. It is the successor liability argument restated in jurisdictional dress. Whether Wumag I's undisputed business in South Carolina is attributable to Wumag II is the very question that the continuity of enterprise test exists to answer. (Sep. 19, 2025 Order 3-4). If a jury finds that Wumag II continued Wumag I's enterprise, then Wumag II was doing in this State, through the enterprise it acquired and continued, the business its predecessor built here, and service under section 15-9-245 was proper.

Respondent's premise that there is "no evidence" of Wumag II doing business in this State before January 2021 also fails on this record. Section 15-9-245(a) reaches any foreign corporation "doing in this State, either itself or through an agent, any business," including activity requiring no certificate of authority under section 33-15-101, such as "selling through independent contractors" and "transacting business in interstate commerce." S.C. Code Ann. §§ 15-9-245(a), 33-15-101. United States Customs records identify "Wumag Texroll GmbH & Co. KG" as the shipper of textile machinery products into the Port of Charleston *both before and after* the asset purchase, consigned to companies with South Carolina addresses in Spartanburg, Trenton, and Fort Lawn, for distribution through in-state entities such as Zima Corporation and Morrison Textile Machinery, Inc., both registered with the South Carolina Secretary of State. (Pls.' Mem. in Opp. to Mot. for Summ. J., Exs. 2, 8, 9).

The record likewise documents the business the Wumag enterprise did here through the subject machine itself: selling and installing it at the Trenton facility, communicating with Bondex about the machine after its installation, sending technicians into South Carolina to service it on at least two or three occasions, and knowingly maintaining a continuous, ongoing relationship with a South Carolina customer, including after the asset purchase. (Walmsley Dep. 14:12-15:22, 69:19-70:21, 70:25-71:12, 77:21-78:12). If Wumag II is Wumag I's successor, those contacts are its own, for a successor "is the same corporate entity" as its predecessor, simply wearing a "new hat." *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653-54 (5th Cir. 2002). Both itself and through the enterprise whose identity it assumed, Wumag II was doing business in South Carolina, servicing the subject machine and continuing the Bondex relationship its sale created, well before process was delivered to the Secretary of State, and it was amenable to service under section 15-9-245.

The statute of limitations argument fails on its own terms. Appellants filed this action on January 6, 2021, and served process through the Secretary of State on January 14, 2021, with copies transmitted by international registered mail to Krefeld, Germany. (Compl.; Aff. of Serv.). Service under section 15-9-245 "is effective upon delivery of the [summons and complaint] to the Secretary of State," and "[o]nce a summons and complaint are delivered to the secretary of state, service is complete, regardless of whether the corporation actually receives notice of the suit." *Holman v. Warwick Furnace Co.*, 318 S.C. 201, 204, 456 S.E.2d 894, 896 (1995); *accord Peake v. Suzuki Motor Corp.*, No. 0:19-cv-00382-JMC, 2019 U.S. Dist. LEXIS 191295, at *18 (D.S.C. Nov. 4, 2019). Service was thus accomplished eight days after filing, and eight days before the three-year limitations period expired on January 22, 2021.

Mims v. Babcock Center, Inc., 399 S.C. 341, 732 S.E.2d 395 (2012), upon which Respondent relies, holds that "[w]hen service occurs outside of the statute of limitations, it must occur within 120 days of filing the complaint." *Id.* at 347, 732 S.E.2d at 398. Here, service occurred inside the limitations period, so the 120-day rule Respondent invokes was never implicated, much less violated. *Kinder v. City of Myrtle Beach*, No. 4:15-cv-01416-RBH, 2017 U.S. Dist. LEXIS 7483 (D.S.C. Jan. 19, 2017), where service never occurred within either period, is inapposite for the same reason. Respondent's limitations defense therefore has no independent content: it succeeds only if the method of service was invalid under section 15-9-245, and the validity of that method depends, once again, upon successorship.[4]

[4]Respondent's passing suggestion, in a footnote, that Appellants failed to comply with the proof of service requirements of section 15-9-245(c) is unsupported by the record. (Resp't's Br. 17 n.11). The record reflects that process was served upon the Secretary of State and that copies of the process were sent by international registered mail to Krefeld, Germany. (Aff. of Serv.). In any event, section 15-9-245 permits proof of service by a return receipt signed by the foreign corporation "or other official proof of delivery," and provides that "the refusal to accept delivery of the certified mail or to sign the return receipt shall not affect the validity of the service." S.C. Code Ann. § 15-9-245(c); *see Holman*, 318 S.C. at 205 n.3, 456 S.E.2d at 896 n.3. And our Supreme Court "has consistently overruled technical objections to service of process where the defendant has not been denied due process." *Patel v. Southern Brokers, Ltd.*, 277 S.C. 490, 494, 289 S.E.2d 642, 645 (1982). Regardless, Appellants filed with the circuit court an affidavit of compliance and an official proof of delivery in the form of a USPS Product Tracking and Reporting System receipt that demonstrates Wumag II received the summons and complaint. (Pls.' Mem. in Opp. to Mot. for Summ. J., Ex. 11).

Finally, whatever else may be said of service in this case, it cannot be said that Wumag II lacked notice. Appellants' original complaint named "Wumag Texroll GmbH & Co. KG," which was precisely the corporate name Wumag II had adopted some fifteen months earlier. (Compl.; Hess Aff. ¶ 13). The process reached Krefeld, and the entity appeared by motion on March 22, 2021, identifying itself as "Wumag," and has vigorously defended this action for more than five years, including by filing its own third-party complaint against Wumag I. (March 22, 2021 Mot. to Dismiss; Wumag II Am. Answer ¶¶ 53-79). The purposes of service of process, notice and the opportunity to be heard, were fully achieved.

B. If Wumag II continued Wumag I's enterprise, the exercise of personal jurisdiction over it comports with due process.

Respondent's personal jurisdiction argument suffers from the same circularity. *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), *BNSF Railway Co. v. Tyrrell*, 581 U.S. 402, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017), and *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), all address the contacts a defendant itself creates with the forum in the first instance. None concerns the attribution of a predecessor's forum contacts to its corporate successor, which is the principle the circuit court accepted, and a ruling that Respondent has failed to cross-appeal. (Sep. 19, 2025 Order 3-4). Respondent's only rejoinder, that Wumag II "is a separate legal entity" whose predecessor's contacts therefore "cannot be imputed" to it, once again assumes the answer to the successorship question. (Resp't's Br. 19).

The "great weight of persuasive authority permits imputation of a predecessor's actions upon its successor whenever forum law would hold the successor liable for its predecessor's actions." *Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 454 (4th Cir. 1990) (citation omitted). Since under successor liability principles Wumag I and Wumag II "are the *same entity*," "the jurisdictional contacts of one *are* the jurisdictional contacts of the other." *Patin*, 294 F.3d at 653. Under that principle, Wumag I's contacts, which include designing and manufacturing a bespoke machine for Bondex's Trenton facility, maintaining continuing communications concerning the machine after its installation, and dispatching technicians to South Carolina on at least two or three occasions, are attributed to Wumag II if Wumag II is found to be Wumag I's successor. (Walmsley Dep. 14:12-15:22, 70:25-71:12, 77:21-78:12). Where a successor has continued the predecessor's enterprise, the predecessor's purposeful contacts are the successor's own.

Nor, on this record viewed favorably to Appellants, is Wumag II without South Carolina contacts of its own. The long-arm statute reaches the "production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed," and under the stream of commerce theory, the law of this State, jurisdiction lies over a corporation that delivers its products into the stream of commerce with the reasonable expectation that they will be purchased by consumers in the forum State.

S.C. Code Ann. § 36-2-803(A)(8); *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 89 & n.5, 666 S.E.2d 218, 222 & n.5 (2008).[5]

The customs records identifying Wumag II as a shipper of textile machinery into the Port of Charleston, consigned to South Carolina companies and distributed through precisely chosen in-state distributors, reflect exactly that effort to serve this market, directly and indirectly. (Pls.' Mem. in Opp. to Mot. for Summ. J., Exs. 2, 8, 9). Wumag II also acquired and continues an enterprise whose value includes the customer relationships, brand recognition, and streams of commerce Wumag I developed within this State, including the ongoing relationship with Bondex arising from the sale of the subject machine, and it holds that enterprise out to those very customers as unchanged, so residual benefits from Wumag I's South Carolina sales continue to accrue to it. (Pls.' Suppl. Mem. in Opp. to Mot. for Summ. J., Exs. 1, 2; Appellants' Br. 45).

Respondent's related contention, that Appellants' claims "do not arise out of any South Carolina conduct by Kelzenberg-Wumag," rests on a causation-only conception of relatedness unanimously rejected in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021). A suit must "arise out of *or relate to* the defendant's contacts with the forum," and "the back

[5]The manufacturer in *NV Sumatra* was an Indonesian corporation that was not registered to do business in South Carolina, had no office here, had never sent a representative here, and sold its products abroad to an independent Singapore distributor for distribution outside Indonesia, yet the Supreme Court found minimum contacts established and held that it should have reasonably anticipated that it would be haled into court in a state such as South Carolina. 379 S.C. at 85-86, 90, 666 S.E.2d at 220, 222-23. Wumag II, whose products enter the United States through the Port of Charleston, stands on no better footing.

half, after the ‘or,’ contemplates that some relationships will support jurisdiction without a causal showing.” *Id.* at 362, 141 S. Ct. at 1026. Ford had not designed, manufactured, or sold the subject vehicles in the forum states, yet because it served the in-state market for the same products, it had clear notice of its exposure in those states to suits arising from local accidents involving its cars. *Id.* at 363-65. A finding of successorship places Wumag II in precisely that position.

The fairness factors Respondent invokes do not alter the analysis. They confirm it. South Carolina’s interest in providing a forum could hardly be stronger: a citizen of this State was permanently disabled at his workplace in this State by a machine designed, manufactured, and marketed for use here, and in the absence of a remedy the costs of his injuries fall upon South Carolina’s worker’s compensation scheme, with South Carolina employers paying the premiums. The inconvenience to Wumag II of litigating here is the inconvenience inherent in continuing an enterprise that purposefully served this market, and it is an inconvenience Wumag II has managed for more than five years of active litigation. And even were the case adjudicated elsewhere, the machine, the facility, and the witnesses would remain here, while Appellants have no practical means of pursuing relief against Wumag II in a German court. What would offend traditional notions of fair play and substantial justice is not the exercise of jurisdiction over a successor found to have continued Wumag I’s enterprise. It is a rule permitting that enterprise to retain the benefits of the South Carolina market while disclaiming its burdens.

CONCLUSION

Respondent has defended a corporate law rule that Appellants do not challenge, invoked precedents that decided a different question than the one presented, dismissed as speculation facts established by its own affidavits, admissions, and publications, and offered alternative grounds for affirmance that assume the answer to the only question that matters. The question presented remains what it was: whether the public policy of this State, as declared by the General Assembly in its adoption of strict products liability, requires recognition of a separate but parallel tort rule of successor liability when a successor purchases and continues the very enterprise that developed, sold, and profited from a defective product. For the reasons stated in Appellants' initial brief and herein, Appellants respectfully renew their request that the Court reverse the circuit court's orders and remand with instructions for the circuit court to apply the six-part continuity of enterprise test from the *Simmons* dissent, under which genuine issues of material fact preclude summary judgment.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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