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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM EDGEFIELD COUNTY  
Court of Common Pleas

Marth M. Rivers, Circuit Court Judge

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Appellate Case No.: 2025-002089

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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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**BRIEF OF APPELLANTS**

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John E. Parker  
John E. Parker, Jr.  
PARKER LAW GROUP, LLP  
Post Office Box 487  
Hampton, SC 29924  
Phone: (803) 903-1781  
jparker@parkerlawgroupsc.com  
[jayparker@parkerlawgroupsc.com](mailto:jayparker@parkerlawgroupsc.com)

AND

Neil E. Alger  
Post Office Box 2530  
Ridgeland, South Carolina 29936  
Phone: (843) 547-8011  
Fax: (843) 547-8028  
[nalger@parkerlawgroupsc.com](mailto:nalger@parkerlawgroupsc.com)  
ATTORNEYS FOR APPELLANTS

Colin T.L. Spangler  
FLOYD & SPANGLER,  
ATTORNEYS AT LAW  
1611 Augusta Road West  
Columbia, SC 29169  
Phone: (803) 739-1824  
colin@spanglerlawoffice.com  
ATTORNEY FOR APPELLANTS

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*All the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.*

— William Blackstone, 1 Commentaries on the Laws of England 456 (1992).

*The [successor's] position does not appeal to us; it is an attempt to dodge the damages that [the plaintiff] has sustained by a quirk and technical question of the law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of the deck . . . . By its action [the successor] . . . now proposes to let the [plaintiff] whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.*

— *Brabham v. S. Express Co.*, 124 S.C. 157, 117 S.E. 368 (1922).

## 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 an insurance policy by foreign corporate manufacturers 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 and

anticipatory measures to mitigate those risks, shoulder those costs? The public policy of this State provides the 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 manufacturer who has benefited in some way from the in-state sale and distribution of defective products, and the development of an in-state market for those products, should 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 to assimilate into its own distinct 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 brand continuity, goodwill, reputation, and customer relationships that were developed by the predecessor, including all other 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 products 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 Supreme Court of South Carolina's most recent decisions touching upon these questions, 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 the same shareholders, directors, and officers as a dissolved predecessor corporation, then the cost of injury must be solely borne by the injured party.<sup>1</sup>

The reasoning behind requiring a commonality of ownership and control, i.e., preservation of the corporate form, for liability to attach appears rather arbitrary when considering the economic philosophies underlying strict product liability

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<sup>1</sup> Or if the injured party happens to be working at the time of his injuries, as is the case here, the cost will also be partially borne by our workers' compensation scheme.

theory, as it does not 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 evidence of the continued corporate form through retained ownership and control, within the context of products liability, those benefits are directly relevant to a determination of who can anticipate and bear the costs associated with a product defect.

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 should 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 products 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.

## STATEMENT OF ISSUES ON APPEAL

Appellant Barry Lanham no longer has a left arm below his elbow. While cleaning an industrial fabric finishing machine at his employer's textile factory, Lanham's left hand was pulled between two heated rollers used to compress fabric under high heat and intense pressure. The machine lacked interlocking gates or other guarding that would have made it physically impossible for a user to be exposed to the nip point created by the two rollers. Lanham's arm was caught between the rollers of the machine, which only have a roll space in the range of millimeters. Lanham was partially compensated by workers' compensation insurance for his medical expenses, lost wages, and permanent impairment.

Unsurprisingly, Lanham sought to hold the manufacturer of the product that injured him, a German corporation, liable for his injuries. However, shortly after Lanham's injury, that corporation had become insolvent and its assets were sold to a successor corporation through German insolvency proceedings, which continued the business of the original manufacturer and adopted the exact same name and logo as its predecessor. On summary judgment, the circuit court essentially found that it lacked personal jurisdiction over the successor German corporation because, since it was not a successor-in-liability under the four traditional South Carolina corporate law successor liability exceptions, it could not be imputed with the jurisdictional contacts of the predecessor German corporation. Consequently, this finding would necessarily abrogate the successor corporation's liability.

The circuit court's finding did not take into account evidence in the record that the successor German corporation holds itself out to be the exact same business as its predecessor, that the successor corporation uses the predecessor's identity, trade names, and other intellectual property, that the successor manufactures substantially the same products as the predecessor, using the predecessor's employees and business name, and that the successor does so in the same commercial facility that was used by the predecessor, using the same equipment. The circuit court declined to use the successor liability test advocated by Lanham and endorsed by the dissent in *Simmons v. Mark Lift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005), known as the continuity of enterprise doctrine, to determine if the predecessor and successor were in fact one and the same and shared jurisdictional contacts because the successor had continued on with the predecessor's business, including its trademarks, brand names, employees, premises, and other assets, unchanged.

The issues presented are:

1.     **Adoption of Continuity of Enterprise Doctrine:** Whether the public policy of this State requires the application of some version of the continuity of enterprise doctrine when determining successor liability within the products liability context.
2.     **Continuity of Enterprise Test:** What the appropriate test under the continuity of enterprise doctrine should be.
3.     **Application of Record to the Test:** 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.

### **STATEMENT OF THE CASE**

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 products liability theories. (R. pp. 52-57). On January 11, 2021, “Wumag Texroll GmbH & Co. KG” was served through the South Carolina Secretary of State, and copies of the process were then sent by international registered mail to an address in Krefeld, Germany. (R. pp. 192-94). 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. (R. pp. 145-46).

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 that company, Defendant Wumag Texroll GmbH & Co. KG (“Wumag I”), through insolvency proceedings in Germany on September 18, 2019, after he was injured. (R. pp. 145, 165). The entity who was served with the complaint

was formerly known as Kelzenberg + Co.: GmbH & Co. KG (“Wumag II”).<sup>2</sup> Thus, the party identifying itself as “Wumag” was in reality the successor to Defendant Wumag Texroll GmbH & Co. KG (“Wumag I”), had changed its name to “Wumag Texroll GmbH & Co. KG”, and had acquired “Wumag Texroll” as its business name when purchasing the assets of Wumag I. (R. pp. 165-66; R. p. 76; R. p. 572).

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. (R. pp. 145-46). The parties briefed the issues for the circuit court, which came up for hearing on July 18, 2022. (R. pp. 195-227). In a Form 4 Order, on July 21, 2022, the circuit court denied the motion without prejudice to permit discovery on the issues. (R. pp. 1-3).

On May 2, 2023, Wumag II filed an amended answer and third-party complaint alleging an indemnity claim against Wumag I. (R. pp. 75-78). Lanham subsequently filed a motion to amend his complaint to substitute Wumag II for “Wumag” and to add Wumag I as a party. (R. pp. 288-290). 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. (R. pp. 4-7; R. pp. 79-87). The amended complaint alleges that Wumag II is the successor-in-liability to Wumag I. (R. p. 82). 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

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<sup>2</sup> For the sake of clarity, Wumag II is Respondent.

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. (R. pp. 103-04; R. p. 36, lines 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. (R. pp. 338-44). 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 of and in opposition to the motion. (R. pp. 504-25; R. pp. 345-79). 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. (R. pp. 359-64). 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. (R. pp. 605-08).

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. (R. p. 33, line 22 - p. 36, line 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. (R. p. 39, lines 4-24; R. p. 40, line 5 - p. 44, line 6; R. p. 45, line 17 - p. 46, line 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 the tort context. (R. pp. 596-98). Lanham argued that despite the supreme 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 products liability context public policy would support a continuity of enterprise rule as a tort principle, relying heavily on Justice Burnett's dissent in *Simmons*. (R. pp. 598-601).

Lanham further argued that the supreme court has not outright rejected the merits of the continuity of enterprise doctrine or addressed its public policy and economic implications within a majority opinion, that two members of the current supreme court had joined a majority opinion, *Nationwide Mutual Insurance Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018), noting there arguably could be merit to the continuity of enterprise theory, and that the District of South Carolina exercising diversity jurisdiction had applied the doctrine to a

products liability case.<sup>3</sup> (R. pp. 601-02). 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. (R. pp. 602-03).

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. (R. p. 14). 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

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<sup>3</sup> 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). Notably, as will be explained below, the Fourth Circuit endorses the continuity of enterprise test in CERCLA cases.

enterprise doctrine under the circumstances.<sup>4</sup> (R. pp. 610-11). 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. (R. pp. 17-19).<sup>5</sup> Lanham appealed the orders on October 10, 2025. (R. pp. 651-53).

## ARGUMENT

The circumstances of this case are illustrative of why the supreme court’s practice of analyzing the issue of successor liability in products liability cases under corporate law principles instead of tort principles can result in a windfall to foreign corporations while causing harm to South Carolina citizens and employers. 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 has now purchased the assets of that dissolved company with

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<sup>4</sup> 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), SCRPC.

<sup>5</sup> 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), SCRPC. *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. (R. pp. 20-24).

no provision for future personal injury claimants, holds itself out as being one and the same as that company, uses the dissolved company's goodwill, brand, logo, trademarks, factory, and employees to continue the dissolved company's business, and continues to use South Carolina's infrastructure to further its business within this State and the United States, due to a technicality of 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 has fallen to South Carolina's worker's compensation scheme as the *de facto* insurer of Wumag II. All the while, Wumag II benefits from the asset purchase and Wumag I's prior 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.

#### **I. Statement of facts.**

On January 22, 2018, Lanham was injured while working for his employer, Bondex, Inc., at its manufacturing facility located in Trenton, South Carolina. Bondex is a manufacturer of nonwoven textiles.<sup>6</sup> Bondex contracted with Wumag I, a now dissolved German designer and manufacturer of industrial textile machinery, for the sale of a laminating calender machine, used to heat set and finish fabrics, to place in its Trenton facility. (R. pp. 387). Wumag I worked with Bondex and its employees to design and manufacture a bespoke machine tailored to Bondex's needs. (R. p. 388). Bondex met with the sale director for Wumag I and discussed criteria such as roller

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<sup>6</sup> Bondex Home Page, <https://www.bondexinc.com/> (last visited Feb. 19, 2026).

temperature, speed, accessibility, and machine guarding. (*Id.*; R. p. 389; R. pp. 401-02). 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. (R. p. 402; R. pp. 403-04).

While cleaning the subject machine Lanham's arm was drawn into an unguarded nip point created by the heated rollers used to stabilize fibers. Lanham suffered a severe degloving injury due to the crushing force and rotation of the rollers, necessitating the partial amputation of his arm below the elbow after he was trapped in the machine for an extended period of time. (R. pp. 428; R. pp. 430-33). The machine lacked physical barriers or guarding and was only manufactured with a light curtain that could be deactivated by the user. (R. p. 389). 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.*).

The next year, on September 1, 2019, insolvency proceedings commenced in Krefeld, Germany concerning the assets of Wumag I. (R. p. 165). On September 18, 2019, Wumag II entered into an asset purchase agreement to purchase the assets of Wumag I. (*Id.*). Wumag II purchased the machinery, equipment, software licenses, commercial premises, and trademarks of Wumag I. (*Id.*; R. pp. 605-08). Wumag II acquired and uses the brand name of "Wumag Texroll", acquired Wumag I's logo, and continued Wumag I's business using Wumag I's employees, its telephone numbers, its email servers, and its individual email addresses. (*Id.*; R. p. 568). Wumag II changed its corporate name to "Wumag Texroll GmbH & Co. KG". (R. p. 166).

Ownership of the assets was transferred to Wumag II on October 1, 2019. (R. p. 165). To this day, Wumag II acknowledges that it is continuing the business of Wumag I, encouraging Wumag I's customers that they can reach the "usual" Wumag I employees at the telephone numbers and e-mail addresses they have always used, and holding itself out to the public as being "[m]ore than 70 years old". (R. pp. 605-08).

**II. Applying some version of the continuity of enterprise doctrine accords with the General Assembly's stated public policy of protecting consumers from defective products by shifting their accompanying costs away from the injured party.**

This case, in which the above facts are largely undisputed, raises specific questions of law that have never been directly 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 supreme 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* and whether the continuity of enterprise doctrine is a majority position. While the *Brown* test is adequate under existing corporate law, this case falls within a gap a majority of the supreme court has not yet directly addressed: whether a different rule to determine successor liability in the products liability context is a logical extension of existing strict liability policy. Because *Simmons'*

rationale is incomplete in this respect, it is not dispositive to the questions before the Court.

- A. **The decisions of this Court and the supreme court do not address Lanham’s precise arguments concerning strict liability, public policy, cost shifting, and fairness, and have only declined to expand *Brown*’s mere continuation exception of the general corporate successor liability rule because continuity of enterprise is a minority rule.**

In *Simmons*, on certification from the United States District Court for South Carolina, the supreme court addressed the question of what test is employed to determine successor liability in the products 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 found in *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:

- (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 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. Thus, *Simmons* did not directly reject continuity of enterprise on the merits.<sup>7</sup>

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 products liability context, or the conflict between modern strict liability principles and a narrowly construed “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, *Simmons* answered a different question. It only answered what the test is under existing corporate law and declined 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, i.e., cash sales. Therefore, the supreme court has left the door open for this Court to apply existing strict liability policy in a new factual context that is not governed by corporate law.

In *Nationwide*, the supreme court had a second opportunity to consider the continuity of enterprise doctrine as it relates to the mere continuation exception to the successor liability rule. There, the court noted Justice Burnett’s dissent in *Simmons* and its more flexible approach to successor liability within the products

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<sup>7</sup> Notably, Appellants advocate for a test that would include commonality of ownership as a factor. See generally Section III *infra*.

liability context, yet it declined again to expand the mere continuation exception to include the continuity of enterprise doctrine not because it rejected the doctrine on its merits, but because “that is not the question currently before the Court, nor is that the argument advanced by Respondents.” *Nationwide*, 424 S.C. at 267, 818 S.E.2d at 453. In doing so, the court made the passing observation that “there arguably may be merits to expanding South Carolina’s successor liability test to include the continuity of enterprise theory.” *Id.* Thus, South Carolina’s courts and legislature have not yet specifically addressed the problems of products liability plaintiffs within the context of this case.

**B. The continuity of enterprise doctrine should be applied 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 products 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 products 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 supreme court over 100 years ago. In *Brown*, the plaintiff brought a contract 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. *See Brown*, 128 S.C. at 431, 123 S.E. at 98 (recognizing that public policy could support holding a successor liable for the debts of its predecessor, and that “[t]he 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.”).

Finding no such policy evidenced by any then-existing South Carolina statute applicable to the facts before it, the *Brown* court fell back on the traditional corporate test created by courts. *Id.* at 431-32, 123 S.E. at 99. The *Brown* test’s four traditional exceptions are “founded in corporate and contract law”, were developed to protect creditors and shareholders in the corporate context and have no regard for the interests of products liability plaintiffs. *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455, 464 (3d Cir. 2006). Interestingly, the facts of *Brown* provide a similar backdrop to the first real discussions of corporate 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, a historical review of the case law makes clear that this successor rule was designed for the corporate transactional and contract world and protects creditors and dissenting shareholders, facilitates the assessment of taxes, promotes the alienability of corporate assets, and more importantly to this case, has nothing to do with tort principles. Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. Rev. 906, 909 (1983). 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 of the corporate form, it does not consider public policy in the arena of product safety that has arisen since the *Brown* decision. See *Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir. 1986) (noting that the general rule of corporate successor liability was “designed for the corporate contractual world where it functions well”). And bright-line standards creating liability in the corporate context, such as the one currently existing in *Brown*’s mere continuation exception, are easily avoided by sophisticated asset purchasers and their attorneys. Kuney, *supra* at 13. Therefore, “where tort liability is concerned, [a court] should look to factors relevant to the specific claim and not be bound by the factors that control where other debts and liabilities are concerned.” *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153 (1st Cir. 1974).

Strict liability was not recognized in the common law of this State at the time of *Brown*. See *Hatfield v. Atlas Enters., 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.

The General Assembly wrought a “profound” change on the concept of products liability by adopting strict product liability theory as defined by section 402A and its comments as the legislative intent behind South Carolina’s strict product liability statute. *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*, 802 F.2d at 78.

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 Prods. Corp.*, 358 S.C. 449, 454, 595 S.E.2d 493, 496 (2004); *see also Ray v. Alad Corp.*, 19 Cal. 3d 22, 31, 560 P.2d 3, 8, 136 Cal. Rptr. 574 (1977) (“[T]he paramount policy to be promoted by [strict liability] is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.”).

Importantly, for economic purposes these policy goals do not emphasize shifting costs to those most *responsible* for them, but to those *best equipped* to deal with them. Thus, the public policy within this State demands that if there is an entity who has benefited from the marketing and sale of defective products, for example, by

acquiring those assets associated with the distribution, marketing, and manufacture of defective products, and it is better equipped than an injured product user to account for the risks and costs, the loss should be shifted to it if the plaintiff can meet his burden of proof as to a product defect.<sup>8</sup>

Because this is purely a tort action, which seeks to impose liability on a defendant under the public policy considerations of Restatement (Second) of Torts § 402A, contract and corporate law principles are inapplicable and ill-suited for this task. Instead, South Carolina courts should rely on tort principles incorporating those State public policy considerations to determine the issue of successor liability within products liability cases. *See Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d 242, 247, 130 Misc. 2d 626, 633 (N.Y. Special Term 1985) (“[The continuity of enterprise] approach is grounded in traditional tort principles.”). 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 is not only best equipped to account for the risk but is also the entity most responsible for the defective product.

In what has been called “channeling” by one commentator, jurisdictions’ adoption of the continuity of enterprise rule results 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

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<sup>8</sup> For similar reasons, numerous federal circuits and district courts have applied the continuity of enterprise theory in CERCLA cases. *See generally* Section II.D. *infra*.

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.

*Id.* at 862-63.

There is no real conflict between the doctrine of corporate entity and the cost shifting policies underlying the continuity of enterprise doctrine and found within the comments of Restatement (Second) of Torts § 402A.

It is crucial not to accept as reality the metaphysics of the entity doctrine and, on the basis of that "reality," conclude that corporate entity theory stands as a bar to the liability of successor corporations. The doctrine of corporate entity is nothing more, nor less, than a legal fiction. This fiction may lead to sound results under most circumstances. But that is beside the point. Of importance is that the doctrine is a legal construct designed to serve certain interests. Only by analyzing, in a particular setting, whether the value of the interests served by treating the corporation as a legal entity exceeds the value of the interests adversely affected by upholding the legal construct can we discover whether the doctrine has been soundly utilized. Phrased differently, courts generally utilize the corporate entity doctrine when the resulting benefits exceed the costs.

David Morris Phillips, *Products Liability of Successor Corporations: A Corporate and Commercial Law Perspective*, 11 Hofstra L. Rev. 249, 257 (1982).

The benefit of utilizing the corporate form is that limited liability attracts necessary capital from those who do not necessarily have the time or expertise to manage their own enterprises. *Id.* at 258. In the traditional corporate and commercial successor liability context, the opposing interest is that of the contract creditor. In this setting, it is not unfair to maintain the separateness of corporate forms to limit liability because contract creditors have the opportunity to and will assess the risk that they may have no recourse for their claims and adjust their credit terms as needed. Therefore, when the interests are balanced against one another, the interest in the separateness of the corporate forms of the predecessor and successor, and limiting liability, prevails over the interests of the contract creditor in having recourse for its claims.

However, within the products liability context the same interests are not implicated, leading to a different outcome. Individuals who have been physically injured by a product, especially those who are injured in the workplace by defective industrial equipment, have not had any opportunity to assess and prepare for the risk that they may have no recourse for their injuries prior to using a product, nor do they have the experience or knowledge to do so. *Id.* at 259. And while the corporate form in this instance still protects a corporation's shareholders from personal risk, as the law considers attraction of capital to be an interest greater than the unfairness to the personal injury plaintiff, this does not mean that the corporate form eradicates

liability for the corporation itself. For example, the shareholders' equity in the corporation is not shielded by the corporate form, so that risk is accounted for by procuring insurance.

Therefore, there is no conflict between the purpose of the corporate form, limitation of liability, and fairness to the personal injury claimant in this context, and the interest of the injured person should prevail, because shareholders of predecessor and successor corporations, well aware that products liability claims will continue to arise in the future, can and should account for those costs through a number of different methods:

Such a false conflict occurs when, having manufactured and put products into the mainstream of commerce by means of the corporation, stockholders sell its assets and liquidate without providing for tort claims that can be expected to arise in the ordinary course of events. Based on past experience, a manufacturer knows that some number of claims of uncertain amount will arise in the future. While the identity of the claimants is unknown and perhaps unknowable, the fact that there will be claimants is ascertainable. Given the existence of a body of jurisprudence that would potentially make the manufacturer liable for the product liability claims of parties injured by its products, liquidation, without provision for tort claims, amounts to a failure on the stockholders' part to internalize all the costs of doing business. They have absconded with the fruits without paying all costs associated with the planting and harvest.

*Id.* at 259-60. In this scenario, there is unfairness to the personal injury plaintiff and no countervailing interest in the corporate form that cannot be accounted for in the asset purchase transaction, so the balance of the equities tilts in favor of successor liability. The attendant costs can and will be channeled back to the predecessor who manufactured the defective product, and the innocent plaintiff will have recourse for

his injuries, without unduly burdening our state health insurance and workers' compensation schemes.

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* in this context would in effect trample upon both. To be clear, 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.

Instead, the Court would be applying tort principles to corporate successors 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. *See Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 26, 434 A.2d 106, 111 (Pa. Super. Ct. 1981) ("By adopting a new exception, this impetus is acknowledged and made plain, the other exceptions then remaining, to deal with cases not so much affected by the policy considerations that have led to the rule of strict liability for defective products."). Within the context of this case, corporate law interests should give way to strict liability's policy objectives.

**C. The Supreme Court’s rationale for declining to apply the continuity of enterprise doctrine because a majority of jurisdictions adhere to the *Brown* test is likely misrepresented.**

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, and no majority opinion has ever done so. In the one case that has tangentially addressed the continuity of enterprise doctrine, the supreme 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*, 424 S.C. at 267, 818 S.E.2d at 453. 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. Those states adopting some form of the theory include Alabama, Alaska, California, Connecticut, Michigan, Mississippi, New Jersey, New Mexico, New York, Pennsylvania, and Washington. *E.g., Asher v. KCS Int’l, Inc.*, 659

So.2d 598 (Ala. 1995); *Savage Arms, Inc. v. W. Auto Supply Co.*, 18 P.3d 49 (Alaska 2001); *Ray v. Alad Corp.*, 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (Cal. 1977); *Chamlink Corp. v. Merritt Extruder Corp.*, 96 Conn. App. 183, 899 A.2d 90 (Conn. App. Ct. 2006); *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 873 (Mich. 1976); *Huff v. Shopsmith, Inc.*, 786 So.2d 383 (Miss. 2001); *Ramirez v. Amsted Indus., Inc.*, 86 N.J. 332, 431 A.2d 811 (N.J. 1981); *Garcia v. Coe Mfg. Co.*, 123 N.M. 34, 933 P.2d 243 (N.M. 1997); *Salvati v. Blaw-Knox Food & Chem. Equip., Inc.*, 497 N.Y.S.2d 242, 130 Misc. 2d 626, (N.Y. Special Term 1985); *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super. 15, 434 A.2d 106 (Pa. Super. Ct. 1980); *Martin v. Abbott Labs.*, 102 Wn.2d 581, 689 P.2d 368 (Wash. 1984).

This tally does not account for federal jurisdictions applying some form of continuity of enterprise to products liability actions, nor does it account for federal and state jurisdiction applying it to determine successor liability in other contexts, such as CERCLA. 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 predecessors' businesses to anticipate the cost of defective products and channel those costs back to the predecessors or spread them amongst their customers, weighing against any argument that adopting the doctrine would have severe economic ramifications for South Carolina :

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise . . . .

This argument, although compelling in theory, seems to paint an incomplete picture of the economic realities. If successor liability is expanded to include the “continuity of enterprise” exception, some companies indeed might be unable to find buyers for their ongoing businesses. But we have not been referred to any evidence that adopting this modern “continuity of enterprise” exception (or the marginally more popular “product line” exception) has in fact increased the number of corporate liquidations or piecemeal sales. And our research has not disclosed studies that have so concluded . . . . The posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects.

*Savage Arms*, 18 P.3d at 56-57. Therefore, the supreme 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 as stated by the General Assembly permits the continued application of the *Brown* test in products liability actions.

**D. The federal courts’ adoption of the continuity of enterprise test under the Comprehensive Environmental Response, Compensation, and Liability Act supports that the theory should also apply within the products liability context.**

As explained above, *Brown*’s corporate successor liability test is a poor fit within the products liability context. This is especially true in cases with facts similar to those presented by this case, where an employee is injured within his employer’s facility by defective industrial equipment that was designed and manufactured by a third party. Such equipment often becomes a part of the facility’s infrastructure and can be in active use for years or even decades after the entity who manufactured the equipment ceases to exist. Traditional corporate law is ill-suited for relatively modern forms of such “long-tail” products liability because they frequently involve scenarios in which the manufacturer no longer exists. An analogous “long-tail” setting in which

the continuity of enterprise doctrine has been found to offer a reasonable alternative to the four traditional successor liability exceptions is within the context of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 *et seq.*

CERCLA, much like South Carolina’s strict product liability doctrine, “mandates a strong liability scheme that dictates that those responsible for environmental contamination will, to the extent possible, pay the costs of cleanup.” Lynda J. Oswald and Cindy A. Shipani, *Legal Theory: CERCLA and the “Erosion” of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 265 n.27 (1992) (citing 126 Cong. Rec. 31,964 (1980) (remarks of Rep. Florio) (“[A] strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources.”); S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980) (“To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.”)).

Section 107 of CERCLA, 42 U.S.C. § 9607, authorizes the government and private parties to initiate lawsuits to recover environmental cleanup costs from the parties responsible for the release, or threatened release, of hazardous substances. 42 U.S.C. § 9607(a). The strict liability standard for CERCLA cases has been adopted by the courts. *See, e.g., U.S. v. Monsanto Co.*, 858 F.2d 160, 167 & n.11 (4th Cir. 1988) (“We agree with the overwhelming body of precedent that has interpreted section

107(a) as establishing a strict liability scheme.”). Section 107 provides four classes of persons potentially responsible for cleanup costs, including “the current owner and operator of a hazardous waste vessel or facility.” 42 U.S.C. § 9607(a)(1). CERCLA’s use of the phrase “current owner and operator” has required frequent judicial interpretation to determine the scope of CERCLA liability.

CERCLA contains no express provision for corporate successor liability or exclusion of such liability. Despite this, federal courts routinely enforce CERCLA against successor corporations which through asset purchase agreements acquire the business, facilities, employees, trademarks, product lines, equipment, and customers of a polluting predecessor, even if there is no evidence of a fraudulent transaction, de facto merger, commonality of officers, directors, and shareholders, or an assumption of liabilities. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2nd Cir. 1996) (“CERCLA is entitled to a construction that advances its primary goals. Because the substantial continuity test is more consistent with the Act’s goals, it is superior to the older and more flexible ‘identity’ rule.”); *U.S. v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (applying the continuity of enterprise doctrine to find a successor corporation liable even though it would not have met any of the traditional four exceptions); *U.S. v. Mexico Feed and Seed Co.*, 980 F.2d 478 (8th Cir. 1992) (adopting the “substantial continuation” test to impose successor liability in the CERCLA context); *City Env’t v. U.S. Chem. Co.*, 814 F. Supp. 624, 638 (E.D. Mich. 1993) (finding that the continuity of enterprise test would apply to CERCLA successor liability actions); *U.S. v. Peirce*, 83-CV-1623 (Lead Case), 91-CV-0039

(Member Case), 92-CV-0562 (Member Case), 1995 U.S. Dist. LEXIS 4042, at \*4 (N.D.N.Y. Feb. 18, 1995) (“After careful review of the case law, this Court will follow the ‘continuity of enterprise’ theory for the reasons stated herein.”); *Horsehead Indus. v. St. Joe Minerals Corp.*, No. 94-C-98-B, 1996 U.S. Dist. LEXIS 22493, at \*53 (N.D. Okla. April 2, 1996) (“The broad remedial purpose of CERCLA requires application of the more flexible continuity of enterprise theory of successor liability to prevent responsible parties from evading CERCLA liability through strategic behavior or transactional technicalities.”); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1287 (E.D. Pa. 1994) (“As we have explained above, CERCLA liability may exist even in the absence of such a ‘causal link’ between the defendant and the environmental harm.”); *Gould, Inc. v. A & M Battery & Tire Serv.*, 950 F. Supp. 653, 657 (M.D. Pa. 1997) (“We believe that the continuity of enterprise theory is the more appropriate theory for meeting the goals of CERCLA of holding responsible parties liable for cleanup costs.”); *Washington v. U.S.*, 930 F. Supp. 474, 480 (W.D. Wash. 1996) (“[T]he ‘substantial continuity’ or ‘continuity of enterprise’ theory is an appropriate test for successor liability in CERCLA cases . . . .”); *Hunt’s Generator Comm. v. Babcock & Wilcox Co.*, 863 F. Supp. 879, 883 (E.D. Wis. 1994) (“A broadened test of successorship is used in situations in which public policy dictates that traditional notions of successor liability should be overridden.”).

The logic for adopting the continuity of enterprise theory in CERCLA cases applies with equal if not more force to products liability cases. Because it is the public policy of South Carolina to shift the costs of a defective product to the entity best able

to prepare for the loss and spread the risk, the modern continuity of enterprise doctrine is preferable to the traditional corporate law exceptions because it looks beyond the form of any particular asset purchase transaction to determine whether a successor entity, through the circumstances of the purchase transaction, is better equipped than an innocent injured party to deal with the costs by purchasing insurance, adjusting product pricing, or negotiating a lower asset purchase price. And because strict product liability theory seeks to shift those costs to those best equipped to deal with them, and not necessarily those most responsible for them, the federal court's rationale in applying the continuity of enterprise doctrine to CERCLA cases seems to be even more compelling under South Carolina's stated public policy concerning defective products.

South Carolina's public policy with regards to strict product liability contemplates that the costs of defective products will be shifted at times to those who are not responsible for the design and manufacture of a defective product. *See* S.C. Code Ann. § 15-73-10 (imposing liability on product distributors and sellers, and not just manufacturers). Strict liability theory contemplates that those costs may be shifted to those who were not designers or manufacturers of the defective product, or that the costs could perhaps be shifted to all of society. *See Kealoha v. E.I. Du Pont de Nemours & Co.*, 844 F. Supp. 590, 595 (D. Hawai'i 1994) ("[A]s a policy matter, Hawaii courts impose liability through the entire chain of distribution and manufacture under strict liability law because manufacturers and distributors can best allocate the cost of injuries which result from their defective products – they can

insure against liability and then incorporate the insurance cost into the price of the product.”); *Ray*, 19 Cal. 3d at 33, 560 P.2d at 10, 136 Cal. Rptr. at 581 (“Immediately after the takeover it was Alad II, not Alad I, which was in a position to promote the ‘paramount policy’ of the strict product liability rule by ‘spreading throughout society . . . the cost of compensating [otherwise defenseless victims of manufacturing defects].”).

If it is fair to shift those costs not only to other entities in the chain of distribution but also to consumers in order to spread the cost throughout society, is it not just as fair to shift those costs to a successor entity who has the opportunity to analyze the enterprise it will acquire and its products, determine which if any products have defects that could potentially harm consumers, then negotiate a lower asset purchase price or procure insurance? It is, especially under the circumstances presented by this case, in which a South Carolina citizen was injured by the fruits of an enterprise now owned and operated by a German corporation for whom our worker’s compensation scheme is acting as its insurer, with South Carolina businesses paying the premiums. Wumag II has benefited from its acquisition and continuation of Wumag I’s business enterprise; it is only fair that it, and not South Carolina employers, should have to answer for the costs of defective Wumag products. Abandoning corporate formalism in this case is permissible because policy demands cost allocation over form.

**III. The Court should apply the *Simmons* dissent’s test for continuity of enterprise.**

For the foregoing reasons, the Court should apply some form of the continuity of enterprise doctrine to determine successor liability in products liability cases. There are two primary versions of the doctrine: the continuity of enterprise test, and the product line test.

In *Turner*, the Supreme Court of Michigan was confronted with the question of whether a successor corporation could be liable for a defective press manufactured by its predecessor when there had not been a de facto merger or other exception to the general rule of no successor liability. The court began its analysis by observing that modern products liability law required courts to “shake off various impediments associated with traditional concepts, which, while relevant to other problems, are inappropriate for this new area”, and that there may be liability “where the totality of the transaction demonstrates a basic continuity of the enterprise.” *Turner*, 397 Mich. at 416, 244 N.W.2d at 877. For example, the court noted that the requirement of privity had been abolished in products liability cases. *Id.*

For the same reasons, defendants’ reliance on the so-called “general rule of non-liability” whereby, with certain limited exceptions, the purchasing corporation is not liable for obligations of the transferor corporation, is inapposite. That rule developed not in response to products liability problems, but largely in the areas of creditors’ protection, and of tax assessments, or, in the case of the de facto merger, in the context of shareholder rights. Most of these policies may fairly be said to have arisen from case law, and are not specifically found in the statutes. While the Legislature has spoken directly to problems of creditors and shareholders, nonetheless the courts have had to fill in the interstices where legislation was lacking. Consequently, it is not surprising in the much newer field of products liability to find that legislatures have not yet come to grips with some of the problems of the victim of defective products and that therefore the courts must do so. Further, case law that developed to protect the rights of creditors and minority shareholders, in all probability is not applicable to meeting the

substantially different problems associated with products liability torts. Thus, not only do we operate in a relatively uncharted field when we explore the ramifications of products liability, but the facts of the instant case reveal a situation not previously dealt with in our jurisdiction.

*Id.* at 417-18, 244 N.W.2d at 877-78.

The *Turner* court's logic for abandoning the traditional corporate successor liability exceptions (assumption, merger, mere continuation, fraud) was as follows. To the injured person, it does not matter how the corporate transaction occurred. Because his problem is the same, i.e., the successor is the only place to turn for relief, "distinctions between types of corporate transfers are wholly unmeaningful." *Id.* at 419, 244 N.W.2d at 878. Likewise, these distinctions are also meaningless to the predecessor and successor corporations within the context of products liability, as a true corporate successor would be equally handicapped by any suits developing after the asset purchase agreement regardless of whether the transaction was a merger, a de facto merger, or a cash acquisition. *Id.*

The court then went on to reason that acquisitions that are the result of a stock transfer and result in a commonality of ownership are relevant to the successor liability question but not conclusive, observing that most corporate purchase transactions are purposefully structured so that the proportionate number of shares paid out is very small so that the strength of commonality of ownership is minimized. *Id.* at 422, 244 N.W.2d at 880. Therefore, it makes no sense in the product liability context to distinguish between the four traditional exceptions to the successor liability rule and other transaction types, especially de facto mergers and arms-length

cash transactions, when both transactions involve a continuity of the enterprise of the predecessor.

With that, the court applied strict liability theory to determine successor liability in the case based upon three principles: (1) products liability is grounded in tort, and not contract or corporate law, (2) *continuity* between the predecessor and successor, where the successor carries over the experience and expertise of the predecessor, places the successor in a better position than the consumer to gauge the risks and costs of the predecessor's defective products, and (3) the hazards of predicting and insuring for risk from defective products are better borne by the manufacturer than the consumer. *Id.* at 424, 244 N.W.2d at 881. "Where the successor corporation represents itself either affirmatively or, by omitting to do otherwise, as in effect a continuation of the original manufacturing enterprise, a strong indication of continuity is established. 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 Michigan court then articulated a list of factors which has come to be known as the continuity of enterprise test: (1) there is a basic continuity of the enterprise of the seller corporation, including a retention of key personnel, assets, general business operations, and corporate name, (2) the seller corporation ceased ordinary business operations, liquidated, and dissolved soon after a purchase agreement, (3) the purchasing corporation assumed those liabilities and obligations

of the seller ordinarily necessary for the continuation of the normal business operations of the seller, and (4) the purchasing corporation held itself out to the world as the effective continuation of the seller corporation. *Id.* at 430, 244 N.W.2d at 884.

The product line theory of successor liability on the other hand focuses on whether the successor continues the output of the predecessor's line of products. The test imposes strict liability upon a successor to a manufacturer when (1) the virtual destruction of the plaintiff's remedies against the original manufacturer was caused by the successor's acquisition of the business, (2) the successor has the ability to assume the original manufacturer's risk-spreading role, and (3) it is fair to require the successor to assume a responsibility for defective products as a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. *Ray*, 19 Ca. 3d at 31, 560 P.2d at 9, 136 Cal. Rptr. at 580.

Commentators have observed that "the product line exception creates the greatest potential for unanticipated successor liability since it is not necessary that the entire business be purchased: the purchase of a single product line would suffice." J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand That Relief Be Afforded Unknown and Unknowable Claimants*, 12 Bankr. Dev. J. 1, 14 (1995). This approach has also been criticized because it looks primarily to the destruction of remedies, thus potentially disproportionately shifting costs to in-state retailers and distributors while absolving the continued foreign enterprise, and its criteria are less clear than the factors enumerated within *Turner's*

continuity of enterprise test. *Salvati*, 497 N.Y.S.2d at 247, 130 Misc. 2d at 633-34. The *Turner* approach, on the other hand, bases its imposition of liability on the successor corporation's own acts in holding itself out to be the continuation of the original enterprise and is predicated on a continuity of the entire business enterprise. *Id.* at 247, 130 Misc. 2d at 633.

In *Simmons*, Justice Burnett advocated for a detailed, multi-factor continuity of enterprise test. The test was articulated as follows:

(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. at 323, 622 S.E.2d at 221. It is a flexible test, and no specific factor is required for or dispositive to the analysis. *Id.* This test will permit courts to decide its applicability on a case-by-case basis as justice might require, without pigeonholing the test to any specific, narrow criteria.

This approach recognizes that manufacturers (either the original manufacturer or successor) are in the best position to protect the public from defective products, encourages existing corporations to produce safer products by channeling

back the costs of defective products to the original manufacturer, and does not hang in-state retailers and distributors out to dry alone when there is a successor continuing the enterprise of the original manufacturer. It is fair because it shifts costs not only to the successor, who actively participated in the destruction of the innocent, injured plaintiff's remedies by purchasing a manufacturing enterprise without providing for future products liability claimants, but also to the predecessor who tortiously designed, manufactured, and sold the defective product.

**IV. There is a genuine dispute of fact as to whether Wumag II has continued the enterprise of Wumag I under Justice Burnett's test.**

“When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact . . . .” *Stokes-Craven Holding Corp. v. Robinson*, 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 v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is a drastic remedy that should be cautiously granted. *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005).

“In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Once the moving party carries its initial burden, the non-moving

party must come forward with specific facts showing that there is a genuine issue for trial. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Here, there are many reasonable inferences and conclusions that could be drawn from the facts, including an inference that Wumag II has continued the business enterprise of Wumag I such that it could have anticipated, provided for, and channeled the costs associated with Wumag I's products back to Wumag I. Wumag II uses the exact same name, same logo, same trademarks, same workforce, same equipment, same computer software, same telephone numbers, same email servers and addresses, same manufacturing facility, same products, and holds itself out as the same company as Wumag I, boasting that it is more than 70 years old, so it is not unfair to require it to be accountable for defective products manufactured by Wumag I. (R. pp. 605-08). Bondex was continuously in contact with Wumag I concerning the subject machine, so when Wumag II purchased the assets of Wumag I on September 18, 2019, Wumag had to have known that Lanham had been injured by the subject machine and had a products liability claim against it. (R. p. 406).

This would not be the first-time courts applying the law of South Carolina have embraced the rationale behind the continuity of enterprise doctrine in the tort context. In *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939), the plaintiff was injured in a motor vehicle collision involving a truck with the name "Carolina Baking Company" painted on its side. *Id.* at 376, 3 S.E.2d at 50. At trial, the defendant moved for a directed verdict, arguing that it was not Carolina Baking

Company, that Carolina Baking Company had dissolved, and that it instead was Columbia Baking Company. *Id.* at 375, 3 S.E.2d at 49. The motion was denied.

On appeal, the court noted that Carolina Baking Company had transferred all of its assets to the Columbia Baking Company, that Carolina Baking Company was dissolved, that Columbia Baking Company operated its facility under the trade name Carolina Baking Company, that the truck was licensed to Carolina Baking Company, and that Columbia Baking Company's business license was made in the name of Carolina Baking Company. *Id.* at 375-76, 3 S.E.2d at 49-50. Therefore, the court concluded that

[T]he evidence truly admits of no other reasonable inference but that the corporate entity which appeared and defended this action on the merits acquired the assets formerly owned by the corporation whose corporate name was Carolina Baking Company, and continued to do business in that name as a trade name; and hence the verdict and judgment against Carolina Baking Company is binding upon the existent corporate entity and its assets, by whatsoever name it may be known or called. 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.

*Id.* at 376-77, 3 S.E.2d at 50.

In *Holloway v. John E. Smith's Sons Co., Division of Hobam, Inc.*, 432 F. Supp. 454 (D.S.C. 1977), the plaintiff was injured at his place of employment while using a grinding machine that was manufactured by and purchased from John E. Smith's Sons Co. by his employer almost twenty years earlier. *Id.* at 454. Since the purchase, the assets of John E. Smith's Sons Co. were purchased by Hobam, Inc., at which point the defendant, John E. Smith's Sons Co., Division of Hobam, Inc. legally came into

existence. *Id.* The defendant moved for summary judgment on the basis that it was not the manufacturer of the grinding machine. *Id.* at 455.

The asset purchase agreement did not include an assumption of liability. *Id.* However, the district court found the rationale underlying the continuity of enterprise to be persuasive as to whether the successor corporation was liable for a defective product designed and manufactured by the predecessor:

[A] corporation itself cannot act. It can conduct its business only through its officers and employees. The negligence of employees in carrying out that business is the responsibility of the corporate body. If 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.

*Id.* This rationale closely parallels the test articulated in *Simmons*. Because the successor continued at the same address with the same employees, was responsible for performance of maintenance and repairs on machinery manufactured by the predecessor, continued manufacturing the same or similar products as the predecessor, and held itself out to the public as a business entity with the same name as its predecessor, there was a dispute as to whether it could be held liable as a successor for the defective product manufactured by the predecessor. *Id.* at 456.

Because residual benefits from the sale of the subject machine (including Wumag's ongoing relationship with Bondex) 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, and the circuit court should not have granted summary judgment on this specific issue.

## CONCLUSION

Critically, unlike *Brown*, this case does not concern a corporate dispute of successorship seeking to enforce shareholders' rights or recover damages in contract. 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 physical well-being of this State's citizenry. The vagaries of whether there is a continuation of the corporate form of the seller through an asset purchase by the continuity of some directors, shareholders, and officers has little bearing on any of the substantive justifications for holding a corporation liable for injuries caused by a defective product under a theory of strict liability.

To be clear, the Court need not create new law. Appellants are only asking the Court to apply established strict liability theory and public policy instead of corporate law to the facts of this case. 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 it has 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 products liability cases that does not take into account the legislative intent behind South Carolina's strict liability policy. For these reasons, Appellants respectfully 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.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

PARKER LAW GROUP, LLP

By: \_\_\_\_\_



John E. Parker  
John E. Parker, Jr.  
Post Office Box 487  
Hampton, South Carolina 29924  
Phone: (803) 903-1781  
Fax: (803) 903-1793  
[jparker@parkerlawgroupsc.com](mailto:jparker@parkerlawgroupsc.com)  
[jayparker@parkerlawgroupsc.com](mailto:jayparker@parkerlawgroupsc.com)

AND

Neil E. Alger  
Post Office Box 2530  
Ridgeland, South Carolina 29936  
Phone: (843) 547-8011  
Fax: (843) 547-8028  
[nalger@parkerlawgroupsc.com](mailto:nalger@parkerlawgroupsc.com)

AND

FLOYD & SPANGLER, ATTORNEYS  
AT LAW  
Colin T.L. Spangler  
1611 Augusta Road West  
Columbia SC 29169  
Phone: (803) 739-1824  
[colin@spanglerlawoffice.com](mailto:colin@spanglerlawoffice.com)

ATTORNEYS FOR APPELLANTS

October 13, 2026  
Hampton, South Carolina