THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

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

v.

Eagle Windows & Doors, Inc., ... Appellant.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

WITH RESPECT TO SUCCESOR LIABILITY

1. WAS THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGE 14 OF HIS ORDER OF JUDGMENT IN ERROR WHEN HE RULED: ". . . A SUCCESSOR CORPORATION IS A MERE CONTINUATION OF ITS PREDECESSOR WHEN THE PREDECESSOR AND SUCCESSOR CORPORATIONS HAVE SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS. (CITING SIMMONS V. MARKLIFT INDUSTRIES, INC., 366 S.C. 308, 622 S.E.2d 213, 216 (2005). (EMPHASIS ADDED) BASED ON THE LANGUAGE USED BY THE COURT IN SIMMONS, TO PROVE THAT A MERE CONTINUATION EXISTS, A PARTY NEED ONLY SHOW THAT THE SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS; THUS PROVING THAT A SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS IS SUFFICIENT TO PROVE A MERE CONTINUATION."

2. WAS THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGES 15, 16 OF HIS ORDER OF JUDGMENT IN ERROR WHEN HE RULED: "EAGLE FOCUSES ON LINSALATA AND THE OFFICERS, SHAREHOLDERS OR DIRECTORS OF LINSALATA. LINSALATA IS NOT A PARTY TO THIS ACTION. PLAINTIFFS SUED EAGLE, NOT LINSALATA. EAGLE IS THE PROPER ENTITY THAT SHOULD BE ANALYZED IN DETERMINING THAT EAGLE IS A MERE CONTINUATION OF EAGLE."

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1. WERE THE RESPONDENTS ENTITLED TO ANY RECOVERY AT ALL FROM THE APPELLANT WHEN THEY FAILED TO PLEAD OR PROVE A DESIGN OR MANUFACTURING DEFECT IN THE WINDOWS?

2. WERE THE RESPONDENTS ENTITLED TO RECOVER $25,000.00 FOR WAIVER BY GILLIAM CONSTRUCTION OF AMOUNTS CLAIMED IN THEIR COMPLAINT TO BE STILL DUE AND OWING WHEN THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE ATTACHED TO THE COMPLAINT, RELEASED THE ABELS FROM ANY AND ALL OBLIGATIONS TO PAY ANY MONIES AT ALL?

3. DID COUNSEL FOR RESPONDENTS HAVE THE RIGHT TO UNILATERLY RELEASE APPELLANTS' CO-DEFENDANTS?

4. DID THE TRIAL JUDGE PROPERLY DETERMINE THE AMOUNT THE APPELLANT SHOULD PAY IN CONTRIBUTION GIVEN THE PROVISIONS OF THE APPLICABLE STATUTE AND SETTLEMENTS FROM BOTH THE SELLER OF THE WINDOWS AND THE STUCCO APPLICATOR?

5. DID THE TRIAL JUDGE ERR IN ALLOWING PREJUDGMENT INTEREST WHEN, AT THE TIME THE CLAIM WAS MADE, THE SUM WAS NOT DEMANDABLE NOR WAS THE MEASURE OF RECOVERY FIXED?

STATEMENT OF CASE

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

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

Thereafter, pursuant to S.C. Code § 15-28-20, Nationwide and Gilliam instituted the present action seeking contribution from the Defendants for "their share" of the settlement proceeds paid by Nationwide on behalf of Gilliam. The Defendants included American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman and Gary Churchill. All of the

Defendants subsequently settled, with the exception of Eagle, Inc., which denied its responsibility for any part of the settlement based on the terms of the Asset Sale Agreement approved by the Bankruptcy Court for purchase of the assets of the company which had originally sold the windows to a distributor which, in turn, sold them to Gilliam for the Abels' home; the windows were not manufactured or sold by the Defendant Eagle, Inc.

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

The windows, which are the subject of this claim for the imposition of successor liability, were sold to the Defendant Window and Door Concepts, Inc. by a Delaware corporation chartered under the name of Eagle & Taylor Company, which then did business as Eagle Window & Door, Inc. (a fictitious name). (See Affidavit of Andrew Wickham, Exhibit A-2 to Appellant's Memorandum in Support of Motion for Summary Judgment)

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

During the years August 1997 through August 1, 2003, Jonathan K. Schoenike was employed by AAPC as its General Counsel. During all relevant times he was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, he became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003.

(See Affidavit of Jonathan K. Schoenike, Exhibit B-2 to Appellant's Memorandum in Support of Motion for Summary Judgment)

Commencing in August 1997, the officers of Eagle & Taylor Company included Frank Amedia as CEO, Dale Tucker as President, Joseph Dominijanni as Treasurer and James Phillips as Secretary. In October 1997, Jonathan Schoenike replaced James Phillips as Secretary. In 1999, David Beeken replaced Dale Tucker as President. In 1999, David Wolfe became the Assistant Secretary. In May 2001, Joseph Dominijanni replaced Frank Amedia as CEO and became CEO and Treasurer. (See Exhibit B-6 to Appellant's Memorandum in Support of Motion for Summary Judgment)

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

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

In December of 2000, AAPC filed for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. As part of the bankruptcy case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company sought and obtained permission from the Bankruptcy Court to sell to EWD Acquisition Co., a Delaware

corporation wholly owned by Linsalata Capital Partners Fund IV, L.P. ("LinCap IV"), an Ohio Limited Partnership, substantially all of the assets of its division, Eagle Window & Door, Inc. (See Order of Bankruptcy Court dated April 19, 2002, Exhibit C to Appellant's Memorandum in Support of Motion for Summary Judgment) In May of 2002, the assets of Eagle & Taylor were sold to EWD Acquisition Co., wholly owned by LinCap IV. At that time, there were only two Directors of AAPC, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister owned between 72% and 73% of the company. Mr. Dominijanni owned 5% of the company. Neither David Beeken, nor any of the other officers of the fictitiously named division Eagle Window & Door, Inc. had any control of AAPC and if any of those officers had any stock in AAPC at all, it would not have amounted to more than between one tenth of one-hundredth percent to one-hundredth percent of AAPC. (See Exhibit B-9-11 to Appellant's Memorandum in Support to Motion for Summary Judgment)

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

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

or ownership of Eagle & Taylor Company or AAPC. (See Exhibit A-11 and Exhibit B-14 to Appellant's Memorandum in Support of Motion for Summary Judgment).

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

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

ARGUMENTS

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

> In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) that there was an agreement to assume such debts; (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; (c) or that the purchasing

> corporation was a mere continuation of the selling corporation; or (d) that the transfer was pretensive or the transaction fraudulent in fact." 123 S.E. 98,99.

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

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

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

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

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

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

1. Simmons brought a product liability action in state court against Mark Industries, Inc., Terex Corp. (Terex), Lift Industries, Inc. and BPS. The case was removed to Federal Court.

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

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

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

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

6. Terex submitted the highest bid at public auction.

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

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

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

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

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

Based on these facts, the Supreme Court advised the United States District Court that it could decide the case in accordance with existing South Carolina authority, assigning a footnote to Exception (3) (the successor company

was a mere continuation of the predecessor). The footnote referenced the 12 page dissent of Justice Burnett and held:

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

The second sentence of this paragraph beginning with "only when" is an exact replica of Justice Burnett's Dissent at page 316.

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

> In the present case, there is no commonality of officers, directors, and shareholders. The parties have certified that Terex did not have any business relationship with Mark until the purchase of assets supervised by the Bankruptcy Court. In addition, there is no, nor has there ever been, commonality of the officers, directors or stockholders between Terex or Lift Industries and Mark. Therefore the facts cannot support a finding that a 'mere continuation' exception applies. (Emphasis added)

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

The rulings of law articulated by Judge Hayes are in error and completely eviscerate the opinion of the Supreme Court in Simmons by establishing a test for successor liability which would allow a finding of successor liability based on

the existence of any one of the three tests enumerated by the Supreme Court, i.e. commonality of officers or commonality of directors or commonality of shareholders. The Supreme Court did not use the disjunctive or but instead used the conjunctive and as did Judge Perry. Obviously, commonality of ownership could not be determined without consideration of stockholders who usually own all of the corporation.

The Court of Appeals in Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (2008) confirmed the Supreme Court's holding, stating: "In Simmons v. Marklift Industries, Inc. the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors and shareholders of the sellers and purchasers." This was binding precedent for the lower court, but not even mentioned.

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

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

AAPC owned all of Eagle & Taylor Company and determined to sell its assets to generate sufficient capital to pay its creditors and continue in business. It was the predecessor or seller. LinCap IV owned all of EWD Acquisition and

was the successor or purchaser. (See Asset Sale Agreement attached as Exhibit 1 to Corrected Exhibit A to Appellant's Memorandum in Support of Motion for Summary Judgment)

PROOF SUBMITTED BY EAGLE

Eagle obtained and filed with the lower court, 3 affidavits establishing that, pre-bankruptcy, there was no relationship between AAPC and its' wholly owned subsidiary, Eagle & Taylor Company or any of their employees and Linsalata Capital Partners Fund, IV, (LinCap) which, through its wholly owned subsidiary, EWD Acquisitions Co., on April 15, 2002 became the successful bidder for substantially all the assets of Eagle & Taylor Company for $64,750,000.00. The facts set forth in the affidavits have never been questioned and the Plaintiff has offered no affidavits or taken any discovery to dispute them.

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The first affidavit was from Andrew Wickham. He is currently the Finance and Business Integration Manager of Eagle Window & Door Manufacturing, Inc., a Delaware corporation originally created on April 10, 2002 by Linsalata Capital Partners Fund, IV, L.P. as EWD Acquisition Co. After the asset purchase, by amendment dated May 1, 2002, EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. (Eagle Inc.).

Mr. Wickham's affidavit establishes that:

"7. None of the officers of Eagle were officers, directors or shareholders of LinCap or any of the three corporations created by it in conjunction with the Eagle asset purchase until after the sale of the assets to EWD Acquisition, Inc. which changed its name to Eagle Window & Door, Inc." (Emphasis Added).

This was identical to what happened in the Simmons case as confirmed by the Supreme Court's findings in the last paragraph of the Court's Factual/Procedural Background.

"8. Effective May 6, 2002, Stephen B. Perry, the Senior Vice President and CFO of Linsalata Capital Partners Fund IV, LP, the then sole Director of Eagle Window & Door, Inc. (Eagle, Inc.), which was the successor by name change of EWD Acquisition, Inc., removed the existing officers of Eagle, Inc. and appointed himself as Chairman and the following officers:

David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller"

(See Exhibit 2)

"9. Effective May 7, 2002, Stephen B. Perry then removed from office the Directors of Eagle, Inc. and appointed himself, Chairman, and Frank N. Linsalata and Ronald H. Neill, an attorney for Linsalata, as Directors. (See Exhibit 3)"

"10. Not until sometime prior to January 27, 2003 was David Beeken made a Director of Eagle Window & Door, Inc. (See Exhibit 4)"

"11. There was no commonality of ownership between LinCap and AAPC or Eagle & Taylor Company, nor did AAPC or Eagle & Taylor Company and LinCap have substantially the same officers, directors and shareholders."

The second affidavit obtained and offered to the court was given by Jonathan Schoenike, a 51 year old attorney at law, living and practicing law in Mahoning County, Ohio. His affidavit establishes:

"2. During the years August 1997 through August 1, 2003, I was employed by American Architectural Products Company ("AAPC") as its General Counsel, a publically traded corporation organized and existing under the laws of the State of Delaware. During all relevant times I was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, I became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003."

"4. At all relevant times, Eagle & Taylor Company, a corporation organized and existing under the laws of the State of Delaware, was a wholly owned subsidiary of AAPC, doing business as Eagle Window & Door, Inc., a fictitious name."

"9. In December 2001, AAPC filed a petition for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Bankruptcy Case".)"

"10. As part of the Bankruptcy Case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company, sought and obtained permission from the Bankruptcy Court to sell substantially all of the assets of Eagle Window & Door,

Inc. to Linsalata Capital Partners Fund IV, L.P. in May 2002 (the "Bankruptcy Sale".)"

"11. At the time of the Bankruptcy Sale, AAPC had only 2 directors, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister, either personally or through a series of trusts or other holding companies, owned between 72% and 73% of AAPC. Mr. Dominijanni owned approximately .5% of AAPC. At the time of the Bankruptcy Sale, neither David Beeken nor any of the other officers of the fictitiously named, Eagle Window & Door, Inc., had control of AAPC, and if such persons had any ownership interest in AAPC at all, such ownership interest would not have amounted to more than between one-tenth to one one-hundredth percent of AAPC."

"12. All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy Case for the benefit of the creditors of AAPC."

"13. I am not aware of any relationship between David Beeken and each of the officers of the fictitiously named Eagle Window & Door, Inc. on the one hand and the Officers and Directors of Linsalata Capital Partners Fund IV, L.P. on the other."

"14. There was no commonality of ownership between AAPC and Linsalata Capital Partners Fund IV, L.P."

The third affidavit was given by Stephen B. Perry. He is 57 years old and a resident of Bentleyville, Ohio. He is Co-President and Senior Managing Director of Linsalata Capital Partners, which is a Cleveland, Ohio middle market private

equity buyout firm. He has firm responsibilities for administration of investment partnerships including Linsalata Capital Partners Fund IV, L.P. (LinCap), which was the successful bidder for a substantial portion of the assets of Eagle & Taylor Company (E&T), which was a wholly owned subsidiary of American Architectural Products Company (AAPC).

In paragraph 2 and 3 of his affidavits, Mr. Perry recounts the events leading to LinCap's decision to become involved in the bankruptcy sale proceedings.

His affidavit at paragraph 4 establishes the complete absence of any prior connection between LinCap and Eagle & Taylor Company or its parent AAPC. "4. Prior to this, LinCap had had no business dealings, nor any contact with Eagle & Taylor d/b/a Eagle Window & Door, Inc., or its parent, AAPC. Further, LinCap had played no role in approving of, participating in, causing or contributing to AAPC's bankruptcy."

"5. The Bankruptcy Court issued an Order on March 19, 2002 "(1) Scheduling Date and Time for Hearing on Sale of Eagle Assets: (2) Approving Procedures for Notice and Submission of Competing Bids: and (3) Approving Break-Up Fee" (the "Bidding Procedures" Orders), which provided, among other things, for the solicitation and submission of competing bids for the assets by no later than April 9, 2002. LinCap submitted a Qualified Bid of $50,150,000 and was thus entitled to participate in the auction of the assets."

"6. Thereafter, an auction conducted by or on behalf of the Bankruptcy Court was held in Cleveland, Ohio on April 15, 2002."

"7. He, personally, was the bidder for LinCap and, after a considerable period of time and at least 15 competing bids, he emerged as the successful bidder on behalf of LinCap at a price of $64,750,000. Immediately after the conclusion of the bidding, the parties, LinCap, by its affiliate EWD Acquisition Co., and AAPC/Eagle& Taylor d/b/a Eagle Window & Door, Inc., entered into an Asset Sale Agreement. (See page 2 of Bankruptcy Order). The Asset Sale Agreement did not assume and specifically excluded "any liability for damage to third parties resulting from acts, events, or omissions occurring prior to the Closing Date,. . ." ¶ 2.3(a)".

His affidavit also recounts the mechanics of the bidding process in paragraphs 5-7 culminating in the execution of an asset sales agreement which was signed only by Mr. Perry for LinCap and Mr. Dominijanni, the CEO of Eagle & Taylor and President and CEO of AAPC. At paragraph 17, Mr. Perry again confirms that at pre-bankruptcy there was no commonality of ownership between the two companies.

At paragraph 16, his affidavit also established that LinCap through its wholly owned subsidiary, EWD Acquisition Co. was the successor to AAPC/Eagle & Taylor Company d/b/a Eagle Window & Doors, Inc. which was its predecessor.

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

ownership, i.e. the same officers, director and shareholders before the bankruptcy.

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

> The mere continuation exception applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [citing authority] In other words, the purchasing corporation is merely a 'new hat' for the seller, with the same or similar management and ownership. [citing authority] In determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the seller - - not whether there is a continuation of the seller's business operation. [citing authority] Therefore, "the key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporation." Leannais v. Cincinnati, Inc., 565 F2d 437, 440 (7th Cir., 1977) (Emphasis added)

* * *

> Although some of B&B's officers may have been employed by Eastern, mere employment is insufficient to warrant application of the continuation exception. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11 Cir. 1985)

* * *

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

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

* * *

In the instant case there was presumably a continuity of actual manufacturing operations. The lands, buildings, machinery and trade names were sold, and it is apparent that the purchaser intended to make use of all these in the manufacture of the same type of product. It was also stipulated in the contract of sale that the purchaser would employ the vice-president, secretary and treasurer of Seybold at the respective individual's request. The length of required employment was one year. However, this provision was merely to insure the economic stability of those officers immediately after the transfer. The contract did not state the capacity in which they were to be employed. In short, there is no evidence of continuity of management. As stated previously, there was also no continuity of stockholder investment, and the selling corporation retained its separate identity well after the sale took place. Neither were there common directors or officers at the time of the sale. When one company purchases all the assets of another, it is to be expected that the purchasing corporation will continue the operations of the former, but this does not by itself render the purchaser liable for the obligations of the former. For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller. *Bergman & Lefkow Insurance Ag. v. Flash Cab Co.,* 110 Ill. App. 2d 415, 24 N.E.2d 729 (App. Ct. 1969). The purchaser-movant was not such a continuation of Seybold as to render it liable for the latter's torts. McKee v. Harris-Seybold Company, 264 A.2d 98, 106 (NJ 1970)

* * *

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

* * *

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

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

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

* * *

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

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

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

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

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

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

COMMENTS & ILLUSTRATIONS: Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: 'one . . . who sells or distributes a

> defective product is subject to liability for harm . . . caused by the defective product.' (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not 'sell or distribute' the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

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

CONTRIBUTION - AMOUNT INVOLVED

THE PLAINTIFFS NATIONWIDE INSURANCE COMPANY, PHILLIP GILLIAM AND GILLIAM CONSTRUCTION COMPANY, INC. CANNOT RECOVER COMPENSATION FOR AMOUNTS CLAIMED IN THEIR COMPLAINT AS "WAIVER BY GILLIAM CONSTRUCTION OF AMOUNTS STILL DUE AND OWING UNDER THE CONTRACT."

The Settlement Agreement and Mutual Release, attached to the Complaint filed by Nationwide and Gilliam Construction Company, was entered into on the 21st day of March 2006, by and between the Plaintiffs, Renaul N. Abel and Karen V. Abel, and Defendants Gilliam Construction Company, Inc. and Phillip A. Gilliam. This was more than 10 months before the Complaint in this action was filed on January 26, 2007. The sole consideration for the Settlement

Agreement and Mutual Release was $210,000.00. (See Settlement Agreement and Release attached to Respondents' Complaint) There was no mention whatsoever of any further consideration and the allegations in the Complaint that the consideration included the "waiver by Gilliam Construction of amounts still due and owing under the Contract" is a complete fabrication. Not only was there no mention of such consideration, but in Paragraph 2 of the Settlement Agreement And Mutual Release, both Phillip Gilliam and Gilliam Construction Company, Inc. totally released the Abels from any and all obligations to pay any monies at all. In short, there were no claims against the Abels that survived the Settlement Agreement And Mutual Release and the testimony of witnesses to the contrary is without legal credibility.

CHANGE OF CAPTION – UNILATERAL RELEASE OF DEFENDANTS

The Plaintiffs after receiving settlements of two of the named Defendants, Hobbit Plastering, Inc., the stucco applicator, for $41,000.00 and Window and Door Concepts, the window seller, for $24,000.00, (Trial Transcript, pp. 45-46), apparently, without notice to Eagle or Eagle's counsel, began unilaterally dismissing Defendants named in its Complaint, for the sole purpose of isolating Eagle as the only Defendant.

First, SCRCP Rule 5(a) Service: When Required provides that: "unless otherwise ordered by the Court because of numerous Defendants or other reasons, all (1) written Orders; (2) Pleadings subsequent to the original Summons and Complaint, which includes (3) written motions, other than ones which may be read exparte; shall be served on each of the parties of record".

Eagle never received a copy of any Motion filed by the Plaintiffs to dismiss Defendants. Second, it is apparent from the testimony of Plaintiffs' witness Cindy Thomas that the dismissal of Defendants, other than those who settled, was for the purpose of isolating and exaggerating the pro rata share of liability of Eagle and attempting to avoid the proscription against considering relative degrees of fault mandated by S.C. Code §15-38-30. Ms. Thomas, when asked by counsel for Eagle, whether the Defendant Churchill wasn't a part of the joint liability, responded: "Well, we only collected from the plastering and then the distributor because those were the only ones, other than you guys, that we felt we needed to." (Trial Transcript, p. 47).

Furthermore, § 15-38-20(A) provides: (A) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, <u>there is a right of contribution among them</u> even though judgment has not been recovered against all or any of them. (Emphasis Added)

Counsel for Plaintiffs in colloquy with the Court expressed his belief that even though he had initially joined at least 5 other Defendants and alleged in Paragraph 13 of the Complaint that "the Plaintiffs and Defendants have a common liability to the Plaintiffs in the underlying action," Plaintiffs had a right to pursue whomever they pleased. Apparently, this strategy was extended to the unilateral release of other Defendants without notice to Eagle. §15-38-20 (A) of the contribution Act specifically recognizes that there is a right of contribution <u>among all of the Defendants</u> and in no event could any of them be released

without notice to the others including Eagle. On this basis, Eagle requests that the caption of the case remain as officially filed.

PRO-RATA SHARE OF EAGLE'S LIABILITY, IF ANY

The case of Southeastern Freight Lines v. City of Hartsville, 443 SE 2d. 395 (S.C. 1994), established that, in a contribution action, the pro rata share of any liability must be shared equally by all those responsible for the common liability. Plaintiff's having alleged that all of the defendants share a common liability with the Plaintiffs, may not ignore the limitations imposed by prior settlements of those sharing the same exposure and particularly the ones which are exposed to the same liability such as the window Seller, Window and Door Concepts, Inc., Gilliam Construction Company, Inc. and Framer of the windows (Gary Churchill).

§ 15-38-30. Factors determining pro rata liability of Tortfeasors provides:

> In determining the pro-rata share of Tortfeasors in the entire liability (1) "their relative degree or fault shall not be considered; (2) If equity requires the collective liability of some as a group shall constitute a single share; and (3) principles of equity applicable to contribution generally shall apply."

It is uncontradicted that the Plaintiffs settled with the Seller of the windows involved in this proceeding, the Defendant, Window and Door Concepts, Inc. for the sum of $24,000.00. The South Carolina Uniform Commercial Code, §36-2-714, Buyer's Damages for breach in regard to accepted goods and § 36-2-715 give the assignees of the Purchasers of the windows the same rights as they would have against the manufacturer and, the fact that the assignees settled with the Seller for $24,000.00, is the best evidence of the applicable pro-rata share.

After having identified the parties sharing the common liability for the damages to the Abels' house and purchasing their release from the claims by the Abels without allocating liability for the trades included, the Plaintiffs cannot equitably decide to isolate Eagle as the only party liable for the damages to the Abels' house. Nor can they attempt to eliminate their liability by allocating the damages to Eagle and dividing by two. S.C. Code §15-38-30 specifically provided that "**In determining the pro rata shares of tortfeasors in the entire liability (1) their relative degrees of fault shall not be considered." Applying principles of equity applicable to Contribution generally, there is no basis for exceeding the pro-rata share of the window seller which was $24,000.00.**

PREJUDGMENT INTEREST

Prejudgment Interest cannot be awarded to the Plaintiffs in this case. "The law allows prejudgment interest on obligations to pay money from the time when, <u>either by agreement of the parties or operation of law, the payment is demandable</u>, if the sum is certain or capable of being reduced to certainty...The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the <u>time the claim arose</u>." <u>Babb v. Rothrock</u>, 310 S.C. 50, 426 S.E. 2d. 789 (S.C. 1993) (Emphasis added). <u>Keaner v. Lowcountry Pediatrics</u>, 372 S.C. 136, 642 S.E. 2d. 53 (S.C. App., 2006).

The Plaintiffs' claim arose when they filed and served their Complaint against Eagle, American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate

Waterproofing, Inc., Dale Coleman, and Gary Churchill. At that time, the mediation had not even taken place and no one knew what settlements might be reached.

In response to Eagle's Requests to Produce for all settlement agreements, only the Settlement Agreement and Mutual Release with the Abels was produced. However, Cindy Thomas testified at the hearing that the Plaintiffs settled with the stucco applicant for $41,000.00 (Trial Transcript, p. 45, lines 14-17) and with the window seller for $24,000.00. (Trial Transcript, p. 46, lines 3-7)

The claim has never been demandable nor liquidated and has been substantially reduced by the two settlements which Plaintiffs contend should not be considered because they say they are unrelated to the water damage which they seek to pin on Eagle. It is difficult to understand their position with respect to the settlements already consummated as they both were made by members of the class for which the Plaintiff purchased releases from any claim of the Abels. In their Complaint for Contribution, they create a single class for contribution composed of all the subcontractors and material providers who were involved in the construction of the Abels' house. The settlements have to be considered and are proof that the payment of the claim was not demandable at the time of Plaintiffs' suit and still is in question at this time. Furthermore, the measure of recovery is still very much in doubt as the statute allows a number of alternatives. This is simply a joint tortfeasor claim and is not "an obligation to pay money either by agreement of the parties or by Operation of Law" as required by Babb. If Prejudgment Interest were payable in a case like this, it would be payable in

any tort claim and it is not.

CONCLUSION

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

> EWD Acquisition is a "good-faith purchaser" within the meaning of Bankruptcy Code § 363(m), as the Court is unaware of any evidence in the record that would tend to demonstrate that EWD Acquisition engaged in anything other than arm's length negotiations in good faith or in any conduct that would permit the Final Agreement to be avoided under Bankruptcy Code § 363(n).

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

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

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

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

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

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

Obviously Linsalata would not have paid $64,750,000 for the assets of AAPC/Eagle & Taylor Company if it was not going to continue the operation of the company. But the predecessor had nothing to do with the operation after the purchase of assets, which was held by the Bankruptcy Court to be an arms-length transaction for value.

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

On the basis of the arguments with respect to successor liability submitted to the Court, it is respectfully submitted that this Court should reverse the decision of Judge Hayes and enter judgment for the Appellant. Failing in that, it is respectfully submitted that the monetary Judgment imposed by Judge Hayes is

flawed by all of the issues set forth on the issue of Contribution and should be dismissed or drastically reduced. It should certainly not exceed the settlement of the window seller, $24,000, since the statute mandates that degrees of fault shall not be considered.

Respectfully submitted,

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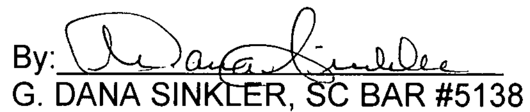
By: 
G. DANA SINKLER, SC BAR #5138

Attorney for Appellant

Charleston, South Carolina

July 24, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

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

v.

Eagle Windows & Doors, Inc. .... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Jason M. Imhoff, attorney for Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on July 24, 2014, addressed as follows:

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July 24, 2014

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July 24, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211-1629

Re: Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc. v. Eagle Windows & Doors, Inc., Appellate Case No. 2014-001151

Dear Ms. Kitchings:

I am enclosing herewith the original and one copy of the Initial Brief of Appellant, Proof of Service of the Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service of the Designation. Please file the documents in the captioned appeal and return our stamped copies in the envelope provided.

By copy of this letter, I am serving counsel for Respondents with copies of the same.

Yours very truly,

G. Dana Sinkler

GDS/jd
Enclosures
cc: Jason M. Imhoff, Esquire

RECEIVED
JUL 25 2014
SC Court of Appeals