THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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JUN 18 2014
SC Court of Appeals

The Honorable J. Mark Hayes, Circuit Court Judge

Care No. 2007-CP-42-296

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

v,

Eagle Windows & Doors, Inc., Appellant.

MOTION FOR CERTIFICATION
By The Supreme Court for
Review By The Supreme Court,
And Memorandum in Support

The captioned case, which is now pending in the Court of Appeals, involves an issue of significant public interest and legal principles of major importance. At issue is the interpretation of the Supreme Court's decision in the case of Simmons v. Marklift Industries, Inc., 366 S.C. 308, 622 S.E. 2d 213 (2005).

In Simmons, the Supreme Court granted Certification from the United States District Court of South Carolina, to address three questions, the first two of which are pertinent to this appeal.

(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 approval 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?

After noting that Terex (the purchaser of the assets) had created a wholly owned subsidiary to implement the asset purchase agreement and that Telex did not have any business relationship with Mark until purchasing its assets in the bankruptcy court action and that: "There has never been any commonality of officers, directors, or stockholders between Mark and Terex", the Court found that the two certified questions could be answered in accordance with Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924).

In a footnote to their Decision, the Court discussed the dissenting opinion of Justice Burnett and held:

FN1. Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders. We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. (Emphasis added)

The Order of Judgment entered by the Trial Judge holds, at page 14, that:

"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 the same officers is sufficient to prove a mere continuation."

The Order of Judgment also holds that the corporation purchasing the assets and the corporation selling the assets are not the parties for the Court to focus upon. At page 15, the Order of Judgment states: "Eagle focuses on Linsalata (the purchaser) and the officers, shareholders or directors of Linsalata. Linsalata is not a party to this action. Plaintiff sued Eagle, not Linsalata. Eagle is the proper entity to be a mere continuation of Eagle." A copy of the Order and Judgment is attached.

Pursuant to Rule 204, SCACR, inasmuch as the decision of the Trial Judge involves the interpretation of the Supreme Court's decision in Simmons, it is respectfully requested that the Supreme Court certify this case for review and thereafter assume jurisdiction over this case for all purposes, pursuant to Rule 204, SCACR.

Respectfully submitted,

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Charleston, South Carolina

June 16, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) CA#: 2007-CP-42-296
)
Nationwide Mutual Insurance Company)
And Gilliam Construction Company Inc.)
)
) **ORDER OF JUDGMENT**
Plaintiff,)
)
vs.)
)
Eagle Windows & Doors, Inc.)
)
Defendant.)

Date of Trial:	December 9, 2013
Presiding Judge:	The Honorable J. Mark Hayes
Attorney for Plaintiff:	Jason M Imhoff
Attorney for Defendant:	G. Dana Sinkler

I. PROCEDURAL HISTORY

This case arises out of an arbitration proceeding commenced by Renaul Abel and Karen Abel against Gilliam Construction Company, Inc., alleging defective construction and/or materials in the home built for them by Gilliam Construction Company, Inc. located at 4 Lobelia Way in Landrum, South Carolina at the Cliffs of Glassy. Defendant, Eagle Windows & Doors, Inc. was invited to participate in that arbitration proceeding but elected not to participate. The underlying arbitration claim was settled prior to the arbitration and a release was executed between Gilliam Construction Inc., Nationwide Mutual Insurance Company, and Renaul and Karen Abel. That release expunged the

liability of Eagle Window and Door, Inc. The entire settlement amount was $235,000.00 which was paid by Gilliam Construction Inc., and it insurer Nationwide Mutual Insurance Company. Nationwide Mutual Insurance Company contributed $200,000.00 and Gilliam Construction Company, Inc., contributed $10,000.00 in cash and wrote off $25,000.00 still owed to Gilliam Construction Company, Inc., by Renaul and Karen Abel. Thereafter, Gilliam Construction Company, Inc. (hereinafter "Gilliam") and Nationwide Mutual Insurance Company (hereinafter "Nationwide") brought this contribution claim against Eagle Window and Door Inc., to recover the settlement amount paid to Renaul and Karen Abel. Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip Bender, Upstate Waterproofing Inc., and M. Dale Coleman were dismissed from the case prior to trial.

II. FACTS, EVIDENCE, AND TESTIMONY

A. Stipulations

Both Plaintiff and Defendant stipulated to the admissibility of several documents. Among the documents admitted were the following:

1. Affidavit of Stephen Perry;
2. Eagle's Answers to Plaintiff's Interrogatories date 10/28/2011;
3. Corrected affidavit of Andrew Wickham;
4. Eagle Window and Door websites dated 09/06/2007, 04/17/2007, and 09/06/2007;
5. Eagle Window's responses to Plaintiff's Request to Admit dated October 18, 2011.

Those documents include the following:

A. Eagle Website

The business presently known as Eagle Windows was founded as Cardaco and Company in 1886. It progressed "through this vast series of name changes" and "eventually became Caradco in 1958." At the time "it remained one of the largest Window and Door Manufactures in the country..."[1] Thereafter, Eagle was sold to Masco Corporation in 1987 and then to American Architectural Products Corporation in 1996.[2] In 2000, Eagle moved to a brand new 39,000 square foot manufacturing facility and continued manufacturing aluminum clad wood windows and doors.[3] In 2001, American Architectural Products Corporation filed for bankruptcy and sold "it's only profitable company" to Linsalata Capital Partners in April of 2002. During this time period, President and CEO, David Beeken worked at Eagle from high school through present day, including guiding Eagle through the bankruptcy of 2002.[4] "Throughout this tumult, one of Eagle's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make Eagle soar." [5]

Linsalata bought Eagle in 2002, and "to a great extent takes a handoff approach to running a successful companies like Eagle Window & Door".[6] "We work closely with management teams in developing and buying into the strategies, but it is up to management to utilize that strategy and manage that capital wisely to grow the business...without the appropriate level of autonomy it would be difficult for the team to approach that". [7]

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[1] Eagle Window and Door website history 09/06/2007.
[2] Eagle Window and Door website history 09/06/2007.
[3] Eagle Window and Door website history 09/06/2007.
[4] Eagle website news and announcements 04/17/2007.
[5] Eagle website news and announcements 04/17/2007.
[6] Eagle window July 10, 2002 news and announcements 09/06/2007.
[7] Eagle window July 10, 2002 news and announcements 09/06/2007.

B. Affidavit of Stephen B. Perry

The affidavit of Stephen B. Perry indicated that he personally met with and was the successful bidder to purchase Eagle and Taylor doing business as Eagle Window and Door Inc., on April 15, 2002 through EWD Acquisition Company. On April 30, 2002, EWD Acquisition Company changed its name back to Eagle Window and Door Inc. Prior to the sale David Beeken was the president of Eagle Window and Door Inc., Charles Daoud was the executive vice president of Eagle Window and Door Inc., Steven R. Stoppelmoor was the vice president of finance for Eagle Window and Door, Inc., Ronald Vander Weerd was the vice president of engineering for Eagle Window and Door Inc., and Andrew Wickham was the controller for Eagle Window and Door, Inc. All of those individuals remained in their positions during and after the sale. Further David Beeken was added as a director of Eagle Window and Door, Inc. David Beeken, Charles Daoud, Ronald Vander Weerd, and Andrew Wickham were also shareholders.

C. Affidavit of Andrew Wickham

The corrected affidavit of Andrew Wickham indicated that he is the financing business integration manager for Eagle Window and Door Manufacturing Inc. formerly known as EWD Acquisition Company and Eagle Window and Door. Again, Mr. Wickham's affidavit indicated that Charles Daoud, Ronald Vander Weerd, Steven R. Stoppelmoor, David Beeken and Andrew Wickham were all officers of Eagle prior to and after the sale. David Beeken also became a director of Eagle Window and Door Inc., sometime prior to January 27, 2003.

D. Discovery

Defendant's responses to requests for admissions dated October 18, 2011 admit that Mr. Beeken was the president of Eagle and Taylor Company doing business as Eagle Window and Door Inc., from 2000 through May 6, 2002. After May 6, 2002, Mr. Beeken was the president of Eagle Window and Door Inc. and subsequently became the president of Eagle Window and Door Manufacturing Inc. when it changed its name again on April 1, 2007. Mr. Beeken has been the president of Eagle Windows & Doors, Inc, in every incarnation, from 2000 to present.

The application form and certificate of authority of the Secretary of State of Iowa indicated that EWD Acquisition Company was created on April 10, 2002. It indicated that David Beeken, Charles Daoud, Steven R. Stoppelmoor, Ronald Vander Weerd, Gregory Taber, and Andrew Wickham were all directors and officers of EWD acquisition company.

Defendant's answers to interrogatories dated October 28, 2011 indicate that the above officers and directors were officers and directors from 2000 through the present day. Those discovery responses also indicated that David Beeken, Andrew Wickham, Ronald Vander Weerd, Charles Daoud, and Steven R. Stoppelmoor were shareholders of Eagle Windows prior to and after the sale of the company.

E. Testimony

In addition to the documents admitted by stipulation, Plaintiffs called three witnesses: Phillip Gilliam, Cindy Thomas, and Randy Still.

1. Testimony of Phillip Gilliam

Phillip Gilliam is the owner of Gilliam Construction Company. Mr. Gilliam testified about his construction with Renual Abel, the issues with the home, and the

subsequent lawsuit and arbitration. He testified that he purchased windows which were manufactured by Eagle Windows and Doors at the direction of Mr. Abel. Based upon his investigation, the investigation of experts, and water testing done on the house, it was determined that the windows purchased from Eagle Windows and Doors were defective and leaking. Mr. Gilliam testified that his contract with Mr. Abel required him to provide the Abels with a house free from defects. As the home contained defective windows, he was forced to defend himself in arbitration and ultimately settled the case. During the arbitration proceedings, Eagle Windows and Doors was offered an opportunity to participate and defend its Windows. They refused to do so.

During the investigation, testing was done on the windows. Eagle Windows and Doors was invited to attend and participate. Eagle Windows and Doors sent a technician who did not participate but observed the water testing. That person made no suggestions, complaints, or otherwise criticized the water testing at all. The results of the water testing on the windows indicated that the windows were defective and leaked. Due to the defective windows water was able to migrate behind the stucco on the home and destroyed and damaged framing and sheathing on the home. A substantial repair was necessary to repair the home due to those windows. Instead of removing and replacing all of the windows, the stucco, and the damaged framing of the home a scope of repair was created to repair any damaged framing and sheathing and created a copper window dam which would collect and expel any water running through the windows to the outside of house. Mr. Gilliam testified that this was a much cheaper, efficient and reasonable manner to repair the issues with the windows.

Mr. Gilliam further testified that any repair of the stucco and the window rough openings was necessitated due to the defective and leaking windows. Further, Mr. Gilliam testified that he and his company fulfilled their obligations as a general contractor because they did not know and could not have known that the windows selected by Mr. Abel were defective and would leak. He testified that the windows were installed pursuant to code and industry-standard and the installation of the stucco was installed and applied pursuant to industry-standard. Based upon his investigation and analysis, Mr. Gilliam testified that he attributed 100% fault for the repair to the defective windows and attributed no-fault for the repair to Gilliam or any other party.

Mr. Gilliam testified that the settlement was reasonable. He testified that the Abel's demand was in excess of $250,000. Based upon the demand and the fact that the windows were defective, the case was settled with the Abels for $235,000: Nationwide paid $200,000 cash, while Gilliam Construction paid $10,000 cash from Gilliam Construction, and waived $25,000 owed by the Abels to Gilliam Construction. A release was drafted and executed which extinguished the liability of Eagle Windows and Doors. Thereafter, the contribution suit was filed to recover from Eagle Windows and Doors.

Mr. Gilliam testified that other parties were sued in contribution for damages separate from the $235,000.00 settlement. He testified that Coleman Waterproofing was sued for a $5,000.00 repair to below grade waterproofing which was paid for directly by Gilliam Construction Company. That $5,000.00 was not included in the scope of repair implemented by the Abel's and was not a basis for the Abels $250,000.00 demand to Gilliam or the $235,000.00 settlement and should not be included in this contribution action. He testified further that any other Defendants in the contribution action were

similarly unrelated to the $235,00.00 settlement and their separate settlements and prior participation in the contribution action should not count against the $235,000.00 settlement.

Mr. Gilliam testified that his investigation revealed that Eagle Windows and Doors no longer considered itself Eagle Windows and Doors. Despite his knowledge of the construction industry and the materials used therein, he had never been notified at any point until after the lawsuit was filed that Eagle Windows and Doors had been "sold" to a new company and no longer honored its products manufactured prior to that sale or honored the warranties on those products.

2. Testimony of Cindy Thomas

Cindy Thomas is an adjuster for Nationwide Mutual Insurance Company. She testified that a lawsuit was filed by the Abels against Nationwide insured Gilliam Construction Company. After investigation, defense, and analysis and consultation with defense counsel, Nationwide determined that the best course of action was to settle the case for $200,000. Phil Gilliam added an additional $10,000 in cash and waived $25,000 owed to it by the Abels. Based upon her experience and knowledge of the file, she believed that the settlement was reasonable. She also testified that the release executed was drafted to expunge the liability of Eagle Windows and Doors.

3. Testimony of Randy Still

Randy Still testified on behalf of Plaintiffs although he was originally hired by the Abels to testify against Gilliam Construction. Randy Still is a professional engineer who worked with H2L Consulting Engineers. After giving his education, experience and

qualifications he was admitted as an expert in residential construction, building products, and building envelopes.

Mr. Still testified that he was hired by Gilliam Construction Company to investigate the allegations of construction defects at the Abel house. During his investigation a water test was performed on the windows to determine if they were leaking. The manufacturer of the windows, Eagle Windows and Doors was invited to participate. Although a representative of Eagle Windows and Doors attended the water testing they did not participate or add any observations or suggestions. The water testing on the windows revealed that the windows leaked, were defective, and caused damage to the framing and sheathing behind the stucco. Based upon that investigation and testing Mr. Still offered testimony that the windows were defective. He further testified that damage occurred due to the leaking windows which necessitated removal of stucco to repair the windows and damaged framing, repairs to the rough opening windows, and repair to damaged sheathing.

Mr. Still prepared a scope of repair which limited the amount of stucco removed so that the windows could be fitted with a copper window dam under each window which would collect and exit the water out of the building envelope. All damage was located and repaired. He testified that his scope of repair was the most efficient and economical repair and it was used by the Abels to repair the home.

Mr. Still also testified that Gilliam Construction did not breach any construction standard which caused any of the damages at the Abel household. He testified that a general contractor has a duty to oversee, coordinate, and supervise sub-contractors. The general contractor also has the obligation to select and purchase quality non-defective

materials. In his opinion, Mr. Still believed that Gilliam construction could not have suspected or known that the windows selected by Abel were defective and leaking. He testified that the defective windows were 100% at fault for all of the damage to the Abel house.

Randy still testified that reports of other experts, including Construction Science and Engineering and Summit Engineering, supported those findings. Both of those reports found that the windows were leaking and caused the damages. Randy still introduced photographs of the leaking windows, the installation of the windows, and the damage caused by the Windows.

III. FINDINGS OF FACT

Based upon the above, and defendant's failure to introduce any evidence, the court finds as follows:

1. The predecessors and successor Eagle companies shared directors, officers, and shareholders.

2. Eagle Windows and Doors, throughout its numerous incarnations and name changes, made no effort to notify the general public that it no longer considered itself Eagle Windows and Doors of the early 2000's. It made no effort to notify the public that it could not be sued for and was not responsible for any products sold prior to 2002. It did not notify customers that it was a brand-new company and not the 100 year old Eagle window manufacturer.

3. Gilliam Construction Company entered into a contract with Mr. and Mrs. Abel which required that the home built by Gilliam Construction Company be free from defects.

4. Gilliam Construction Company could not and did not know that the Windows sold to it by Eagle Windows and Doors were defective and leaked.

5. The windows were properly installed in the Abel home.

6. The windows leaked and caused damage to the sheathing and framing behind the stucco at the home.

7. The leaking windows in the home gave rise to an actionable claim by the Abels against Gilliam Construction Company for repair to the home and windows.

8. The contract between Mrs. and Mr. Abel and Gilliam required repair of the windows and damages to the Abel home.

9. Gilliam Construction Company invited Eagle Windows and Doors to participate in the investigation of the window defects and the scope of repair. Eagle Windows and Doors refused to participate in the investigation.

10. The Abels retained Randy Still of H2L Engineering to investigate the claims of construction defects at the Abel home and create a scope of repair that was economical and efficient.

11. Randy Still found that defective windows required repairs and he created a scope of repair which was economical, efficient, and implemented by the Abels

12. The Abels demanded over $250,000 from Gilliam Construction Company and Nationwide Mutual Insurance Company.

13. Nationwide Mutual Insurance Company and Gilliam Construction Company made a reasonable decision to settle the case for $235,000.

14. The defective windows were completely at fault for the construction defects and damages to the Abel's house which required the expenditure of $235,000.

15. Gary Churchill, Hobbit plastering, Coleman waterproofing and any other prior defendants and their settlements, if any, were unrelated to the $235,000 settlement between Gilliam Construction Company and Abel.

IV. FINDINGS OF LAW

A. SUCCESSOR LIABILITY

I find that defendant, Eagle Windows, is a mere continuation of its predecessor corporation. In South Carolina, a plaintiff may maintain a state-based product liability claim under successor liability theory against a successor corporation which purchased a predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005); Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). The South Carolina Supreme Court in Brown stated:

In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. Id. at 123 S.E.2d 97 (emphasis added). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).

The South Carolina Supreme Court has approved the instigation and continuation of a state based products liability action despite a Federal Bankruptcy Court Order prohibiting the action. Id. Regardless of the reasoning the Court used to deal with the issues of Full Faith and Credit, preemption and retention of jurisdiction, it is clear that the South Carolina Supreme Court will not honor or enforce a Federal Bankruptcy Court Order limiting South Carolina citizen's rights to sue a successor corporation in a state based liability case if that citizen can show that the successor is a mere continuation of the predecessor.

> This decision is in line with the majority of other jurisdictions and comports with the doctrines of fairness and justice. Justice Burnett strenuously opined that the stroke of a corporate pen or blind adherence to unfair rules out of touch with modern realities did not promote justice or allow intelligent adjudication of issues which touched upon the Bankruptcy Court's perceived jurisdiction. Justice Burnett stated:
> [t]he corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it. Id. at 323 (citing Long v Carolina Baking Co., 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939)).

In the case at bar, the Court finds that a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation. The President and CEO of Eagle, David Beeken, held the same position with the company prior to and after the sale. It is clear from that marketing material that Eagle considers itself a separate and autonomous entity which has designed and manufactured windows in the same city for a century and a half, despite its numerous parent companies. Eagle's parent company, Linsalata, is merely an investment firm which takes a "hands off" approach when dealing with Eagle. Based on the website alone, it is evident that Eagle's present incarnation is a

mere continuation of its former self and Eagle benefits from that name recognition and history.

As set forth above, a successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. Simmons v. Marklift Industries, Inc., 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005). 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. Id.

Eagle's President, David Beeken, was the President of Eagle prior to and after the sale. Further, prior to and after the sale, the following individuals were officers of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc.: Charles A. Daoud, David Beeken, Steven R. Stoppelmoor, Ronald Vander Weerd and Andrew Wickham.

Thus, post-sale, of the eight officers appointed to represent Eagle, five of the eight were officers of pre-sale Eagle. Specifically, individuals that were officers of Eagle prior to the bankruptcy sale held the following positions at Eagle post-bankruptcy: President, Vice President, Vice President of Finance, Vice President of Engineering and Controller. This information alone establishes that Eagle is a mere continuation of its predecessor as the successor is made up of substantially the same officers. Based upon the fact that Eagle is made up of substantially the same officers, under the standards set forth in Brown and Simmons, Eagle's successor corporation should be liable for its predecessor's product defects.

Eagle, by the stroke of a pen, attempted to end its liability globally, totally, and permanently by merely changing owners. Eagle was not forced into bankruptcy by economics, but rather was dragged though it by its parent company's bankruptcy. As such, the ordinary purpose of bankruptcy was not present for Eagle. Ordinarily bankruptcy's purpose is to provide the debtor with a fresh start, freeing it from the obligations and responsibilities consequent upon financial misfortune so that it may continue to survive. CJS Bankruptcy § 2. In this case, Eagle was American's only profitable company. Eagle did not require the intervention of the Bankruptcy Court or the protection afforded by it. Therefore, it should not be allowed to use its parent company's fortuitous bankruptcy as a sword with which to severe its entire pre-bankruptcy obligations. This would not serve justice, but would rather hinder or defeat it. Justice Burnett, citing another case with similar facts cited the strong language used by that Court:

> 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 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] has allowed the [predecessor] to go out of existence and 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.

Id. at 318 (citing Brabham v. Southern Express Co., 124 S.C. 157, 117 S.E. at 368 (1922)).

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.

The Court finds that Eagle Windows and Doors continued to occupy the same space, manufactured the same products with the same employees, and marketed, manufactured, and continues to sell the same products under the same company name.

I find that the Defendant accepted the goodwill and name recognition of the Eagle Window brand but has specifically attempted to extinguish any potential liability arising from that goodwill despite their complete failure to notify owners of Eagle Windows and Doors windows manufactured, marketed, and sold prior to April 2002 that it no longer honored those products or claimed them as its own.

I find that the analysis of whether the Brown and Simmons courts intended the analysis to require officers and directors or officers or directors is unnecessary because the Plaintiffs have proven, and the Defendant has not refuted, that officers, directors, and stockholders remained in the successor corporation from the predecessor corporation. Specifically, President and Director of both the predecessor and successor corporation was David Beeken. Therefore, this Court finds commonality of officers, directors, and stockholders in both the predecessor and successor sufficient to satisfy the mere continuation exception.

B. CONTRIBUTION

I find that a proper action for contribution was filed by Gilliam Construction Company and Nationwide Mutual Insurance Company under South Carolina Code Ann § 15-38-20. I further find that Plaintiffs expunged Defendant's liability through a release and the settlement was reasonable. I find that only two parties, Plaintiffs Nationwide

Mutual Insurance Company and Gilliam Construction and Defendant Eagle Window create the number of shares for a pro rata analysis of liability under the Contribution Act. Based upon principles of equity and fairness, the testimony and evidence, which was unrefuted by defense witnesses or evidence, and the Act I find that the entire $235,000 settlement is attributable solely to Eagle Windows and no other prior party or settlement should increase the number of parties for pro rata calculations or reduce the amount of the total damage.

The right of contribution exists in favor of a tortfeasor who has paid more than his pro-rata share of a common liability. The tortfeasors total recovery is limited to the amount paid by him in excess of his pro rata share. S.C. Code Ann § 15–38–20. The right to contribution exists only when a settling tortfeasor extinguishes the liability of the noncontributing tortfeasor by settlement. Further, a tortfeasor is not entitled to contribution for any amount paid in settlement which is in excess of what was reasonable. S.C. Code Ann § 15–38–20.

Based upon the Act, the evidence indicates that Plaintiffs paid more than their fair share of a common liability. Further, evidence was submitted that established that Plaintiffs extinguished Defendant's liability through a settlement and release and that settlement was reasonable and necessary.

The Court's determination of shares of liability is supported by the evidence and testimony and the language of the Act. For the purpose of determining shares of liability toward contribution under the Uniform Contribution Among Tortfeasors Act of 1955, if equity so requires, the collective liability of some tortfeasors as a group will constitute a single share. American Law Products Liability 3d. § 52:55. In determining the pro rata

shares of tortfeasors in the entire liability, the Court may consider, if equity requires, the collective liability of some as a group shall constitute a single share and principles of equity. S.C. Code Ann. 15-38-30.

The evidence and testimony support a finding that Eagle Window's defective windows were the sole cause of the damage and needed repairs. The record reflects that all prior defendants were dismissed from the action prior to trial. The testimony of Phillip Gilliam was that the prior defendants had liability and damages separate and apart from the liability and damage alleged against Eagle Window and therefore should not be included in the determination of shares of liability. Further, the testimony was that any prior settlements should not reduce the amount of damages because they were settlements unrelated to the liability and damages alleged against Eagle. Based on this testimony and evidence, and absent testimony or evidence to the contrary, the Court finds that the prior defendants should not be included in the determination of shares of liability or reduction in damages. Therefore, any joint liability for the settlement paid to Mr. Abel should be divided pro rata equally between Plaintiffs and Defendant.

V. DAMAGES

Based upon the above findings of fact and law the court awards $117,500.00 in this contribution action against Eagle Window. Additionally, the law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." *Smith-hunter Const. Co., v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "The fact that the sum due is disputed does not render

the claim unliquidated for the purposes of an award of prejudgment interest." *Id.* "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 time the claim arose." *Id.*

In this case, as set forth in the Complaint and as established at trial, the measure of recovery was fixed on the date the Complaint was filed. The measure of recovery was fixed by the conditions set forth in the settlement agreement between Plaintiffs and Renaul and Karen Abel. Thus, as the Court found in *Smith-Hunter Const. Co., Inc.*, the amount of damages in this case owed to Plaintiffs were "capable of being reduced to a sum certain." *Id.* The Court hereby finds that Plaintiffs are entitled to pre-judgment interest from the date the Complaint was served upon Defendants on February 2, 2007, to the date this Court ruled on this matter, December 19, 2013.

Pursuant to S.C. Code Ann. § 34-31-20, the legal interest shall be at the rate of eight and three-fourths (8.75%) percent per annum. Thus, the Court awarded damages to Plaintiffs in the amount of $117,500.00. Plaintiffs are entitled to 6 years and 10 months worth of pre-judgment interest (82 months). Thus, Plaintiffs are entitled to pre-judgment interest in the amount of $70,258.42.

Thus, the full judgment awarded to Plaintiffs is **$187,758.42.**

NOW, THEREFORE, IT IS ORDERED, ADJUDED AND DECREED that the Plaintiffs be awarded the amount of $187,758.42 which is hereby granted and that judgment be entered on behalf of Gilliam Construction Company and Nationwide Mutual Insurance Company.

IT IS SO ORDERED.

The Honorable J. Mark Hayes
Seventh Judicial Circuit

~~March~~ April 29, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Mark Hayes, Circuit Court Judge

Care No. 2007-CP-42-296

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

v,

Eagle Windows & Doors, Inc., Appellant.

PROOF OF SERVICE

I certify that I have served the Motion for Certification on Jason M. Imhoff, attorney for Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on June 16, 2014, addressed as follows:

Jason M. Imhoff, Esquire
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Attorney for Appellants

June 16, 2014

G. Dana Sinkler
Attorney for Appellant