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The Honorable Daniel E. Shearouse, Clerk
S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: ***Mendenall v. Walterboro Veneer, Inc., et al***
Civil Action No.: 2:11-cv-01291-DCN

Dear Mr. Shearouse:

Enclosed, please find the original plus fifteen (15) bound copies of the Final Brief of Plaintiff in the above referenced matter. Please file this and return a filed copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter to the attorneys of record, I am notifying them of this correspondence and also providing them with a copy of the same.

With kind regards, I am

Sincerely,

Stephanie M. Lewis
Office of Randolph Murdaugh, IV

sml
Enclosures

cc: Stephen L. Brown
Russell G. Hines
John P. Freeman
Paul Siegel

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIFICATION OF QUESTION OF LAW
From the United States District Court
For the District of South Carolina

The Honorable David C. Norton, District Judge

C/A No. 2:11-cv-01291-DCN

Suzanne Roerrig Mendenall, Personal Representative
Of the Estate of Everette Eugene Mendenall, ... Plaintiff

v.

Anderson Hardwood Floors, LLC, Shaw Industries, Inc.
and Shaw Industries Group, Inc., ... Defendants.

FINAL BRIEF OF PLAINTIFF SUZANNE ROERRIG MENDENALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF EVERETTE EUGENE MENDENALL

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STATEMENT OF QUESTIONS CERTIFIED

Does the "dual persona" doctrine allow an injured employee to bring an action against his employer as a successor in interest who, through a corporate merger, received all liabilities of a predecessor corporation that never employed the injured person but allegedly performed the negligent acts that later caused the employee's injuries, or is such an action barred by the exclusivity provision of the South Carolina Workers' Compensation Act?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Since this matter being considered by this Court arises from an Order for Certification pursuant to Rule 244, SCACR, the need for a separate Statement of the Case and a Statement of Facts does not seem appropriate. Rule 244(b) states that the "certification order shall set forth the questions of law to be answered, all findings of fact relevant to the question certified, and a statement showing fully the nature of the controversy in which the questions arose." Judge Norton's Order (the "Certification Order") contains a both a section entitled "Background and Factual Findings," and a section entitled "Nature of the Controversy."

Those sections provide factual background and describe the legal context from which the certified question arises. Those discussions, with slight supplementation (set off with brackets), are presented in the next two sections below. The chief reason for supplementation is to update the Certification Order's citations to the Complaint to reflect that, subsequent to the entry of the Certification Order, Plaintiff filed a Second Amended Complaint, a copy of which is attached as Exhibit 2. The citations to the Complaint below are to the pending Second Amended Complaint.

BACKGROUND AND FACTUAL FINDINGS

On February 28, 2011, plaintiff Suzanne Roerig Mendenall (Mendenall), as the personal representative of the estate of her deceased husband Everette Mendenall (Mr. Mendenall), filed an amended complaint in state court for wrongful death and a survival action against defendants Walterboro Veneer, Inc.; Standard Plywoods, Inc.; Anderson

Hardwood Floors, Inc.; Anderson Hardwood Floors, LLC; Shaw Industries, Inc.; and Shaw Industries Group, Inc. (collectively, defendants). Defendants removed the case to federal court on May 27, 2011. [The federal district] court denied a motion to remand. Defendants filed a motion to dismiss on June 3, 2011, to which plaintiff filed a response in opposition on July 1, 2011, along with a motion to certify a question on November 2, 2011.

On March 1, 2012, [the federal district] court held a hearing on the motion to dismiss and motion to certify a question. The court dismissed without prejudice defendants Walterboro Veneer, Inc., Standard Plywoods, Inc., and Anderson Hardwood Floors, Inc. Plaintiff has since [filed] a motion to amend her complaint to allege further allegations against Shaw Industries, Inc., Shaw Industries Group, Inc., and Anderson Hardwood Floors, LLC. The court granted plaintiff's motion to certify a question.

Walterboro Veneer, Inc. was a South Carolina corporation that owned and operated a wood products manufacturing plant. See Compl. ¶¶ 2, [13]. In 2003, Walterboro Veneer, Inc. constructed a cement vat, "Vat #3," for the purpose of soaking hardwood logs in a highly heated solution prior to milling. Id. ¶ [14]. On December 31, 2007, Walterboro Veneer merged with Standard Plywoods, Inc. Pl.'s Mem. Opp. Mot. to Dismiss 2. [That same day], Standard Plywoods, Inc. merged with Anderson Hardwood Floors, Inc. Id. ¶ 6.

Shaw Industries, Inc. is a Georgia corporation that did business in South Carolina. Id. ¶ 8. [Shaw Industries, Group, Inc. owns Shaw Industries as a wholly owned subsidiary. Second Amended Complaint ¶ 11.] On September 9, 2007, Shaw Industries Group, Inc. acquired Anderson Hardwood Floors, Inc. Id. ¶ [10].

On January 28, 2008, Anderson Hardwood Floors, Inc. hired Mr. Mendenall to work at a plant in Colleton County, South Carolina, the same plant that was formerly owned and operated by Walterboro Veneer, Inc. Id. ¶ 15. Four months into his employment, Mr. Mendenall fell into Vat #3 when he was attempting to access a steam leak for repairs. Id. The vat was filled with a solution heated to approximately 193 degrees Fahrenheit, which burned ninety percent of Mr. Mendenall's body and eventually caused his death on June 6, 2008. Id. [Plaintiff will prove, and the question certified reflects, that Mr. Mendenall never worked for Walterboro Veneer. Additionally, plaintiff has alleged that the tortious hazard that ultimately killed Mr. Mendenall "placed at risk persons walking in the vicinity of Vat #3, whether employed by one of the defendants or not," id. ¶ 23. Indeed, an email produced after the motion to certify was argued to the District Court by Defendants reflects recognition that the vats posed a serious hazard to those walking near them. The email reads in part, "[W]e have never had anyone fall into the vats, not saying it will never happen." Defendants' Production Bates stamped number 20110443 375, Copy attached as Exhibit 3.]

After these incidents, on August 8, 2009, Anderson Hardwood Floors, Inc., Mr. Mendenall's former employer, became Anderson Hardwood Floors, LLC. Pl.'s Mem. Opp. Mot. to Dismiss 2.

NATURE OF THE CONTROVERSY

The exclusivity provision of the South Carolina Workers' Compensation Act precludes an employee from maintaining an action in tort against the employer when the employee sustains a work-related injury. S.C. Code Ann. § 42-1-540. This exclusivity

doctrine creates a balance: "the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." Strickland v. Galloway, 348 S.C. 644, 560 S.E.2d 448, 449 (Ct. App. 2002). This case involves the application of the exclusivity doctrine in the corporate merger context, in which "every other corporation party to the merger merges into the surviving entity and the separate existence of every corporation except the surviving entity ceases," S.C. Code Ann. § 33-11-106(a)(1), and "the surviving entity has all liabilities of each corporation party to the merger," id. § 33- 11-106(a)(3).

At the time of his accident, Mr. Mendenall was employed by Anderson Hardwood Floors, Inc.; thus, the exclusivity doctrine bars a direct action against this defendant in tort based on a work-related injury. Moreover, as a result of the South Carolina merger statute, defendants Walterboro Veneer, Inc. and Standard Plywoods, Inc. have ceased their corporate existence and may not be sued directly. Plaintiff instead argues that Walterboro Veneer's inchoate liability in designing and constructing a defective vat passed to Anderson Hardwood Floors, Inc. (now Anderson Hardwood Floors, LLC) as a result of the merger.

Plaintiff relies on the "dual persona" doctrine to argue that the court should hold Anderson Hardwood Floors, LLC liable for the allegedly tortious acts of its predecessors. This doctrine renders an employer "vulnerable to a tort action by an employee if the employer has a second persona completely independent from and unrelated to its status as an employer that is legally recognized as a separate legal identity." 82 Am. Jur. 2d Workers' Compensation § 56. Plaintiff argues that Anderson Hardwood Floors, LLC has a "dual persona" both as Mr. Mendenall's employer as well as the successor in interest to

the liabilities of Walterboro Veneer, Inc. Based on this latter persona, plaintiff contends that Anderson Hardwood Floors, LLC should be held liable for the allegedly negligent acts of its corporate predecessors in designing and constructing Vat #3.

The dual persona doctrine has been recognized and applied by courts in other jurisdictions. See, e.g., Van Doren v. Coe Press Equip. Corp., 592 F. Supp. 2d 776 (E.D. Pa. 2008) (applying Pennsylvania law); Stayton v. Clariant Corp., 10 A.3d 597 (Del. 2010); Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934 (N.Y. 1980). However, not all jurisdictions have adopted the dual persona doctrine or applied it favorably to a plaintiff's case. See, e.g., Braga v. Genltye Grp., Inc., 420 F.3d 35 (1st Cir. 2005) (applying Massachusetts law); Corr v. Willamette Indus., Inc., 105 Wash.2d 217, 713 P.2d 92 (Wash. 1986).

The South Carolina Supreme Court has expressly rejected a related theory, the "dual capacity" doctrine, see Johnson v. Rental Unif. Serv. of Greenville, 316 S.C. 70, 447 S.E.2d 184 (S.C. 1994), but has neither accepted nor rejected the "dual persona" doctrine. In Tatum v. Medical University of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (S.C. 2001), the South Carolina Supreme Court reversed the Court of Appeals' decision that found the dual persona doctrine applicable to the facts of that case. The Supreme Court stated, "Even if we were to adopt the 'dual persona' doctrine, it is inapplicable in this situation." Id. at 25.[1]

Based on the lack of controlling precedent, and because the applicability of the

[1] The Supreme Court noted that several other jurisdictions "have adopted the 'dual persona' doctrine in the context of product liability suits by employees" and "have applied the 'dual persona' doctrine where the employer has other legally-recognized identities." Id. at 23-24. Rather than predict how a South Carolina court would rule in this case, the court finds it more prudent to certify this question to the South Carolina Supreme Court.

dual persona doctrine is determinative of this case, the court finds it necessary to certify a question to the South Carolina Supreme Court.

ARGUMENT

The answer to the Question submitted by Judge Norton calls for reconciling three competing policies, affecting injured workers' legal rights. The first policy is drawn from legislation, and it favors the defense. It is the exclusivity provision found in S.C. Code Ann. § 42-1-540, barring tort suits against employers based on employees' work-related injuries. The second policy favors plaintiff. It is based on an exception to the first. As stated in Fuller v. Blanchard, 358 S.C. 536, 595 S.E.2d 831 (Ct. App. 2004), workers compensation "immunity does not extend, however, to third-party tortfeasors who injure an employee acting within the course and scope of his employment; in such cases, the employee may file a claim for workers' compensation benefits for the injury and may also bring an action against the third party." For present purposes, the third-party tortfeasor is Walterboro Veneer, a company that has been merged out of existence. And that merger transaction provides the third competing policy to be reconciled, namely, the legislative policy that demands that the predecessor's tort liability not be extinguished by merger, but rather is assumed by its successor. S.C. Code Ann. § 33- 11-106(a)(3) ("the surviving entity has all liabilities of each corporation party to the merger").

If Anderson Hardwood Floors is regarded purely as Mr. Mendenall's employer, plaintiff loses due to workers compensation exclusivity. If Anderson Hardwood Floors is

regarded purely as tortfeasor Walterboro Veneer's successor by merger, plaintiff wins due to Anderson's assumption of tort liability. This half-empty/half-full conundrum is what gives life to the dual persona doctrine.

In its 2001 ruling in Tatum v. Medical University of South Carolina, 346 S.C. 194, 203, 552 S.E.2d 18, 23 (2001), this Court set forth the parameters of the doctrine that is at issue in this case:

> Under the "dual persona" doctrine, "[a]n employer may become a third person, vulnerable to suit by an employee, if-and only if-it possesses a second persona so completely independent from and unrelated to its status as employer that by the established standards the law recognizes that persona as a separate legal person." Larson's Workers' Compensation Law § 113.01[1] (1999). Larson suggests use of the term "persona" is dictated by the typical third-party workers' compensation statute which usually defines a third party as "a person other than the employer."

The facts presented by Plaintiff here fall precisely within narrowly drawn parameters set forth in Tatum. Etc. The twofold personas held by Anderson Flooring are indeed separate and independent. First Anderson has the persona of being Mr. Mendenall's employer. Anderson's second persona, arising entirely outside the employment context by operation of a legislative enactment, finds Anderson to be standing in the shoes of its tortfeasor predecessor, Walterboro Veneer. This second persona, created by operation of statute, is indeed "completely independent from and unrelated to [Anderson's] status as an employer."

Had Walterboro Veneer simply sold the Walterboro plant and the tortuously designed and constructed Vat #3 to Anderson and continued operations elsewhere,

Walterboro Veneer would be defending a third-party tort action right now. Only because it transferred assets by merger which extinguished its existence is there any question over plaintiff's ability to sue it as a third-party tortfeasor. Yet there should be no question of Walterboro's exposure, since S.C. Code Ann. § 33- 11-106(a)(3) commands that "the surviving entity has all liabilities of each corporation party to the merger," and Walterboro Veneer has no immunity since it was never Mr. Mendenall's employer.

The dual persona doctrine fits this case like a glove. There is no better factual setting for the operation of the dual persona doctrine than when a tortfeasor merges into a company that subsequently employs the injured worker. This was pointed out by the court in Van Doren v. Coe Press Equip. Corp., 592 F. Supp. 2d 776, 779-800 (E.D. Pa. 2008), the first dual persona case cited by Judge Norton in the Certification Order.

After surveying dual persona law in the different states, the district court in Van Doren observed: "Our review of cases around the country that address the workers' compensation exclusivity in the merger context reveal that the *vast majority* of courts have allowed the plaintiff's suit to proceed under the dual persona doctrine." (Emphasis added.) The court then proceeded to cite numerous cases supporting the employee's right to sue the third-party tortfeasor/merger predecessor,[2] noting:

> These cases invariably involve a plaintiff seeking to bring a tort action against his employer as successor in interest to a third-party tortfeasor that merged with his

[2] Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934 (1980); Schweiner v. Hartford Accident & Indem. Co., 120 Wis.2d 344, 354 N.W.2d 767 (Ct.App.1984); Kimzey v. Interpace Corp., 10 Kan.App.2d 165, 694 P.2d 907 (1985); Robinson v. KFC Nat'l Management Co., 171 Ill.App.3d 867, 121 Ill.Dec. 721, 525 N.E.2d 1028 (1988); Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 550 N.E.2d 127 (1990); Thomas v. Valmac Indus., Inc., 306 Ark. 228, 812 S.W.2d 673 (1991); Oliver v. N.L. Indus., Inc., 170 A.D.2d 959, 566 N.Y.S.2d 128 (N.Y.1991); Percy v. Falcon Fabricators, Inc., 584 So.2d 17 (Fla.Dist.Ct.App.3d Dist.1991); Petrocco v. AT & T Teletype, Inc., 273 N.J.Super. 613, 642 A.2d 1072 (N.J.Super.Ct.Law.Div.1994); Kern v. Frye Copysystems, Inc., 878 F.Supp. 660 (S.D.N.Y.1995); Herbolsheimer v. SMS Holding Co., 239 Mich.App. 236, 608 N.W.2d 487 (2000); Peterson v. Indus. Door Co., 2008 WL 131916, 2008 Minn.App. Unpub. LEXIS 46 (Minn.Ct.App.2008).

> employer. The courts that have applied the dual persona doctrine in this context generally base their rationale on the fact that plaintiff's ability to sue the third-party company in tort is not precluded by workers' compensation exclusivity and should therefore not be extinguished by the merger.

Van Doren, 592 F. Supp. 2d at 800.

The dual persona doctrine's essence, highlighted in the above quote, is that it provides a mechanism for reconciling the two legislative policies embedded in workers compensation acts: (1) that the employer, as employer enjoys immunity from suit; and (2) that the employee's rights are preserved as to third-party tortfeasors (here Walterboro Veneer). The third legislative policy in play, namely that the liabilities of a merger predecessor pass through to the successor, provide the catalyst for the reconciliation and give life to the dual persona doctrine.

The "vast majority" view cited by the Court in Van Doren, consist of cases that mirror the exact narrow fact situation presented here where a tort victim risks being deprived of the right to sue a third-party tortfeasor due to the tortfeasor's merger into the company that ends up employing the tort victim. Thus, in the leading dual persona case, Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934 (1980), the doctrine was applied when a 4,600-pound "ram" from a vertical boring mill broke loose and killed the employee in the plant. Billy, 51 N.Y.2d at 157, 432 N.Y.S.2d at 883, 412 N.E.2d at 937. In validating the "dual persona" doctrine, New York's highest court rejected the "dual capacity" doctrine as "fundamentally unsound," Billy, 51 N.Y.2d at 159, 432 N.Y.S.2d at 883, 412 N.E.2d at 938. The court in Billy explained the logic behind the doctrine:

> Conceptually, the deceased employee's executrix is suing not the decedent's former employer, but rather the successor to the liabilities of the two

> alleged tort-feasors. That USM also happens to have been the injured party's employer is not of controlling significance, since the obligation upon which it is being sued arose not out of the employment relation, but rather out of an independent business transaction between USM and Farrel. What distinguishes this case from the "dual-capacity" cases discussed above is that here the tort in question was not committed by the employer or any of its agents; instead, the tort, if any, was committed by third parties, which, as it appears on the present record, never had an employer-employee relationship with the injured party. Since these third parties would have had no basis for invoking [workers compensation immunity] as a defense in a common-law action brought against them by the employee or his dependents, USM, which stands in their shoes with respect to the question of liability, should similarly not be permitted to do so."

Billy, 51 N.Y.2d at 161, 432 N.Y.S.2d at 884-85, 412 N.E.2d at 940. Tortfeasor-successor USM's position in Billy (the tort victim's employer and the successor by merger of the third-party tortfeasor) mirrors Anderson's position before this Court.

The fact pattern presented in Billy and this case is the common theme in decisions upholding the dual persona doctrine. See, e.g., Kern v. Frye Copysystems, Inc., 878 F.Supp. 660, 666-67(S.D.N.Y. 1995) ("Copysystems may only be subject to a common law action under this "Billy" exception if two conditions are satisfied; 1) its potential liability must arise solely from its assuming liability by contract or operation of law; and 2) this assumption must deprive the Kerns of a viable third-party tort-feasor defendant. . . . Copysystems' liability, if any, is solely attributable to its independent assumption, "by contract or operation of law," of a third-party's liability. . . . These facts also support the proposition that Copysystems' assumption of liability left the plaintiffs without the means to hold the predecessor, Wheelabrator, directly accountable as a third-party tort-feasor for the initial design of the coating machine."); Gurry v. Cumberland Farms, Inc., 406 Mass. 615, 620, 550 N.E.2d 127, 131 (1990) ("It makes little sense to read [merger statute] as insulating an employer from obligations it inherited through corporate merger simply

because of the immunity for its own negligence it possessed as the employer of the insured employee. To avoid such a result, other courts and text writers have adopted the "dual persona" theory."); Petrocco v. AT & T Teletype, Inc., 273 N.J.Super. 613, 616, 642 A.2d 1072, 1074 (1994) ("What sets this case apart . . . is that fact that here we are dealing not with the dual capacity of one corporation but with the merger of formerly separate corporations, each of which acted in a different capacity. In that respect the facts of this case are much closer to those faced by the New York Court of Appeals in Billy v. Consolidated Machine Tool Corp., supra"); Percy v. Falcon Fabricators, Inc., 584 So.2d 17, 19 (Fla. App. 1991) ("An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person." Larson, supra, at § 72.81. The independent persona sued in this case is the corporate successor to the third-party tortfeasor—K.F.C. National. As corporate successor, K.F.C. National inherited even the nascent liabilities of K.F.C. Manufacturing. When a corporation voluntarily merges, "it will take the 'bad will' along with the 'good will.' We will not allow such an acquiring corporation to 'jettison inchoate liabilities into a never-never land of transcorporate limbo.'"); Schweiner v. Hartford Acc. & Indem. Co., 120 Wis.2d 344, 354 354 N.W.2d 767, 772 (1984) ("We conclude that the legislative purpose [providing for a corporate predecessor's liability surviving a merger] would remain unfulfilled if the language did not include the liability for the possible negligent acts of Universal regardless of the relationship of Thiem to the injured party. We further conclude that the legislature never intended the Worker's Compensation Act to immunize the employer from liability for

obligations arising from a source other than its role as an employer."); Kimzey v. Interpace Corp., Inc., 10 Kan.App.2d 165, 169, 694 P.2d 907, 912 (1985) ("When properly applied, [the dual persona doctrine] will be limited to those exceptional situations where the employer-employee relationship is not involved because the employer is acting as a second persona unrelated to his status as an employer, that confers upon him obligations independent of those imposed upon him as an employer. As such, it will not defeat the purposes or policies of the [workers compensation] act. . . . Plaintiff's action is essentially an attempt to recover from a third-party manufacturer of a defective machine through a suit against its successor corporation."); Robinson v. KFC Nat. Management Co., 171 Ill.App.3d 867, 872, 525 N.E.2d 1028, 1032 (1988) ("[W]here there has been a corporate merger prior to an employee's injuries, the successor corporation cannot rely upon the exclusive remedy provision of the Workers' Compensation Act to shield it from the tort liabilities of its predecessor if the employee was never employed by the predecessor manufacturing company."

To win a dual persona case requires the plaintiff to thread a factual needle with a very small hole. The claims presented in the foregoing cases qualified, and so do the claims presented in this one. So also do the facts in the recent and very important Delaware Supreme Court decision, Stayton v. Clariant Corp., 10 A.3d 597 (Del. 2010). In Stayton, the employee was injured "while he was an employee of Clariant. Stayton was manually moving a four-wheeled pelletizer machine, weighing nearly 1700 pounds, when it toppled over on him. The accident was allegedly due to defects in the floor and the top-heavy nature of the machine." Id. at 599. (Emphasis added.) The machine and plant had been owned by a company named Plastic Materials, Inc., and ownership had

passed by merger to another company Polymer Color, which then was merged into Clariant. Plaintiff never worked for the Clariant's predecessor companies, only for Clariant.

Delaware's Supreme Court held that the dual persona doctrine applied to permit Stayton to sue Clariant as merger successor to Polymer Color. The court explained, "Although the exclusivity provision prevents an injured employee from suing the employer for the employer's negligence, it does nothing to alter the injured party's right to bring a negligence action against a third-party tortfeasor." Id. at 600. The Delaware Court found that the dual persona doctrine provided a way to harmonize the two legislative policies embedded in the merger statute and the workers compensation law: "The dual persona doctrine gives effect to the legislative purposes of both the Workers' Compensation Act and the merger provisions of most state corporation statutes. Under New York law, Clariant, as the surviving corporation, voluntarily assumed the liabilities and obligations of Polymer Color when the two corporations merged." Id. at 602.

Stayton's significance to this case is three-fold. First, on its facts, the case mirrors the fact setting presented here. Secondly, Delaware's Supreme Court has a richly deserved reputation for rendering decisions that account for the business community's legitimate interest having statutes read in a way that fully honors the legislature's intent. *See e.g.,* Jed Rakoff, Lecture: Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise, 17 Fordham J. Corp. & Fin. L. 4, 5 (2012) ("[I]t is widely perceived that part of Delaware's attractiveness to business is not just its pro-business corporate laws themselves, but also the expertise of its courts in interpreting those laws."). Finally,

Delaware's Supreme Court recent opinion in Stayton is instructive in the way it distinguished authorities that have declined to apply the dual persona doctrine.

Stayton rejected the First Circuit's ruling in Braga v. Genlyte Group, Inc., 420 F.3d 35 (1st Cir. 2005), as inconsistent with the majority view, Stayton, 10 A.3d at 602-03, and because it relied on cases that had found "persuasive" the reasoning presented in the leading dual persona case, Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934 (1980). See Stayton, 10 A.3d at 602. The Braga decision offers no support for the defense in this case since it involved a distinguishable fact pattern. The plaintiff in Braga had worked at the machine that injured him for the merger predecessor company. Here, the facts recited by Judge Norton in the certified question make it clear that Mr. Mendenall never worked for Walterboro Veneer. Hence there can be no contention that Walterboro Veneer somehow would or should be cloaked with workers compensation immunity. Indeed, the Second Amended complaint is clear that the tortious hazard created by Walterboro Veneer did not just present a risk to employees; it threatened all "persons walking in the vicinity of the plant, whether employees or not." Second Amended Complaint, Exhibit 2, ¶ 34(K).[3]

One of the cases relied by the court in Braga is Herbolsheimer v. SMS Holding Co., Inc., 239 Mich. App. 236, 608 N.W.2d 487 (2000). In Herbolsheimer, a closely

[3] Another similar case is Griffin, Inc. v. Loomis, Fargo & Co., 979 So.2d 416 (Fla. App. 2008). As in Braga, the injured employee had worked for the predecessor. That this factor was outcome determinative is clear from the court's discussion of an earlier Florida appellate ruling in Percy v. Falcon Fabricators, Inc., 584 So.2d 17, 18 (Fla. 3d DCA 1991):

> Percy was the first Florida case to address the dual persona doctrine. In Percy, our sister district held that an injured employee could sue her employer in tort when that employer merged with the manufacturer of a defective product that caused her injury, and the product was made before the corporate merger. Id. at 18. *Significantly, the injured employee never worked for the manufacturer.* Under those circumstances, her employer, as successor through merger, could not claim workers' compensation immunity. Id. at 19.

Griffin, 979 So.2d 418 (2008) (emphasis added).

divided (2-1) court refused to apply the dual persona doctrine, finding that "there would be an identifiable legal obligation if [the predecessor company] had sold or leased the machine [to the successor] where the decedent was killed by it." Herbolsheimer, 239 Mich. App. at 254, 608 N.W.2d at 494. While not finding the holding in Billy "to be without reason,"[4] and while viewing "the dual persona doctrine to be "an entirely reasonable exception"[5] to workers compensation immunity, the majority in Herbolsheimer nonetheless refused to apply the dual persona doctrine. En route to rationalizing its refusal to apply the dual persona doctrine, the court characterized the predecessor company was a mere "conceptual third party," Herbolsheimer, 239 Mich. App. at 253, 608 N.W.2d at 496, that, in any event, had a ready-made defense since, "the machine was never used by anyone other than employees of SMT. Therefore, SMT only had an obligation to its own employees. Herbolsheimer, 239 Mich. App. at 253, 608 N.W.2d at 496.

In the majority's view, the predecessor (who had never employed the worker) was cloaked with workers compensation immunity because it "could never have been held to answer to the decedent for its conduct with regard to the modified machine at issue because only SMT employees could have been injured by the machine before the asset transfer." Herbolsheimer, 239 Mich. App. at 257, 608 N.W.2d at 498. Again, this case is different. To repeat, the tortious hazard created by Walterboro Veneer did not just present a risk to employees; it threatened all "persons walking in the vicinity of the plant, whether employees or not." Second Amended Complaint, Exhibit 2, ¶ 34(K). Indeed,

[4] Herbolsheimer, 239 Mich. App. at 249, 608 N.W.2d at 495.

[5] Herbolsheimer, 239 Mich. App. at 249, 608 N.W.2d at 495.

the fatal injuries suffered by Mr. Mendenall occurred while he was seeking to repair a steam leak, Second Amended Complaint, Exhibit 2, at 3, a task that could have easily been assigned by Anderson to an independent contractor-plumber.[6]

The dissent in Herbolsheimer took the majority to task for recognizing that the dual persona doctrine had already been adopted by Michigan's Supreme Court, but then refusing to apply it "as it is customarily and uniformly understood." Herbolsheimer, 239 Mich. App. at 257, 608 N.W.2d at 498. The dissent also criticized the majority for rationalizing that the dual persona doctrine requires that the predecessor company sell the harm-causing item first, and then merge later, on the ground there is no "meaningful distinction between buying a defective product on the market and buying it as a part of a merger." Herbolsheimer, 239 Mich. App. at 263, 608 N.W.2d at 501. In essence, the majority in Herbolsheimer paid lip service to the dual persona doctrine, while refusing to apply it. In so ruling, the majority turned a blind eye to the reality that the legislative policy in favor of workers compensation immunity is not the only legislative policy in play; it is one of two. The other, the legislative command that mergers not extinguish a tort-feasor's liability, needs to be given voice as well.

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[6] This reality also serves to distinguish this case from the Washington Supreme Court's decision in Corr v. Willamette Industries, Inc., 105 Wash.2d 217 , 713 P.2d 92 (1986). In Corr, the court found that that the only persons exposed to risk due to the predecessor company's torts were its own employees. "Corco never owed obligations or had liabilities to persons other than its own employees relative to these compressor units. Accordingly, Corco never could be subject to third person liability." Corr, 105 Wash.2d 222 , 713 P.2d 95. Here the facts are different. The Second Amended Complaint alleges that Walterboro's tortious conduct posed a risk to all persons walking in the vicinity of Vat #3, whether employed by Walterboro or not. The Corr case also proposed to limit the dual persona doctrine "in the merger context" to the narrow class of cases arising "when the corporate manufacturer sells the defective equipment to the successor corporation prior to merger or otherwise places the defective product somewhere other than in its own workplace." Corr, 105 Wash 2d at 223, 713 P.2d at 96. The requirement of a two-step transaction, first a sale, followed by a merger, is not mainstream dual persona law.

The court in Van Doren, was more measured and logical. It explained the small policy niche into which the dual persona doctrine fits:

> These cases invariably involve a plaintiff seeking to bring a tort action against his employer as successor in interest to a third-party tortfeasor that merged with his employer. . . . The courts that have applied the dual persona doctrine in this context generally base their rationale on the fact that plaintiff's ability to sue the third-party company in tort is not precluded by workers' compensation exclusivity and should therefore not be extinguished by the merger. . . ."

Van Doren, 592 F. Supp. 2d at 801. The court in Van Doren went on to note that, "Only a small minority of jurisdictions that have been faced with this narrow factual context have decided not to apply the dual persona doctrine. See Quick v. All Tel Missouri, Inc., 694 S.W.2d 757 (Mo.Ct.App.1985); Davis v. Sinclair Ref. Co., 704 S.W.2d 413 (Tex.Ct.App.1985); Hatch v. Lido Co., 609 A.2d 1155 (Me.1992)."

The three cases cited by Van Doren as rejecting the dual persona doctrine are each distinguishable. In Quick, the successor company's employee claimed he was injured due to the removal of warning signs on a pole he climbed by an employee of the predecessor company. The Missouri merger statute transferred only "existing" liabilities to the successor company. The court ruled that the plaintiff's liability was not transferred since under Missouri law, the element of injury was required for his tort claim to "exist," Quick, 694 S.W.2d at 759, and no injury arose until plaintiff was hurt after the merger. Hence, in Quick, no third-party tortfeasor's liability existed to be inherited by the successor. Quick thus does not fit into the narrow factual context in which the dual persona doctrine is honored.

In contrast with Quick, Hatch v. Lido Co. of New England, 609 A.2d 1155 (Me. 1992), reflects simply a straight-up rejection of the dual persona doctrine. "To allow a

resulting corporation to be held liable in this case would be the equivalent of upholding common law liability for workplace injuries caused by a condition on the premises that came into existence before the particular employee was hired. We recognize that there is a split of authority on this issue. *See generally* 2A A. Larson, supra, § 72.81(b) n. 13." As Van Doren and Stayton show, the split of authority referred to in Hatch, very strongly supports plaintiff's contentions here.

Unlike the Missouri court's ruling in Quick, and similar to Hatch, Davis v. Sinclair Ref. Co., 704 S.W.2d 413 (Tex App. 1985), a narrow (2-1) decision, also reflects simply a rejection of the dual persona doctrine. The employee in Davis was injured when defectively constructed piping in the refinery "gave way" covering him with hot asphalt. The majority's policy-driven result was questioned by the dissent: "[I]f a third-party tortfeasor has no right to immunity under the Workers' Compensation Act, why should an employer who stands in the shoes of the third-party tortfeasor be so protected?" Id. at 419. That question applies to this case as well. So does the dissent's observation in Davis that under the majority's analysis the employee's claim against the predecessor would have survived had the successor simply purchased the refinery rather than acquiring through merger. See Davis, 704 S.W.2d 419 ("Why should the cause of action by the employee be preserved by sale of the plant but lost by merger?"). The dissent had a point. Why should the *form* of corporate buy-out transaction control a tort victim's right of recovery from a third-party tortfeasor, particularly where the legislature has commanded that mergers not be allowed to eliminate the predecessor's tort liability?

As this Court recognized in Tatum v. Medical University of South Carolina, 346 S.C. 194, 204, 552 S.E. 2d 18, 23 (2001), the dual persona doctrine, in contrast to the

dual capacity doctrine, has received fairly wide acceptance. In Tatum, the Court indicated that the dual persona doctrine may offer protection to employees if facts arose fitting the doctrine's narrow scope. As noted earlier, the doctrine is tightly defined to cover a very limited set of facts:

> Under the "dual persona" doctrine, "[a]n employer may become a third person, vulnerable to suit by an employee, if-and only if-it possesses a second persona so completely independent from and unrelated to its status as employer that by the established standards the law recognizes that persona as a separate legal person." Larson's Workers' Compensation Law § 113.01[1] (1999). Larson suggests use of the term "persona" is dictated by the typical third-party workers' compensation statute which usually defines a third party as "a person other than the employer."

Id. at 203, 552 S.E.2d at 23. Unlike Tatum, this case furnishes an appropriate fact situation for application of the dual persona doctrine. Here, the required "second persona" is furnished by the presence within Anderson Hardwood Floors, Inc. of the identities of the third-party tortfeasor predecessors who had no employer-employee connection with Plaintiff whatsoever.

Unlike Tatum, where MUSC was only one entity, Anderson Hardwood Floors, Inc. holds a separate, legally distinct and legislatively sanctioned persona that holds within it accountability for all liabilities of the third-party tortfeasor, Walterboro Veneer, Inc. Anderson Hardwood Floors, Inc.'s liability in this case, arises not out of its own negligence for Mr. Mendenall's injuries – which would be precluded by S.C. Code Ann. § 42-1-540 – but instead for Walterboro Veneer, Inc.'s tortious wrongdoing, which Anderson Hardwood Floors, Inc. inherited by operation of statute. Whereas the dual capacity doctrine discussed in Tatum is inapplicable to the facts presented here, the dual

persona doctrine, never mentioned in any other South Carolina case, applies here with full force.

As has been shown, this case falls within what the district court in Van Doren called "the narrow factual pattern" permitting access to a legislatively constructed exception, via the merger statute, to employer immunity outside of workers compensation. If the dual persona doctrine applies, plaintiff will recover from Anderson Hardwood Floors, Inc., despite the exclusive remedy doctrine for injuries suffered by reason of torts committed by Walterboro Veneer, Inc. in its design and construction of Vat #3.

CONCLUSION

It is time for South Carolina to join the strong majority of courts employing the dual persona doctrine. On facts such as those present in this case, it is improper to "cloak the employer with absolute immunity from liability under any theory to an injured employee who is eligible for or has received workers' compensation even though the liability asserted arises outside the employment relationship." Stayton v. Clariant Corp., 10 A.3d 597, 603 (Del. 2010) (quoting Kimzey v. Interpace Corp. Inc., 10 Kan.App.2d 165, 169-70, 694 P.2d 907, 912 (1985).

The Certified Question should be answered in the affirmative.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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PERSONAL REPRESENTATIVE OF THE
ESTATE OF EVERETTE EUGENE
MENDENALL

June 8, 2012
Hampton, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. Supreme Court

CERTIFICATION OF QUESTION OF LAW
From the United States District Court
For the District of South Carolina

The Honorable David C. Norton, District Judge

C/A No. 2:11-cv-01291-DCN

Suzanne Roerrig Mendenall, Personal Representative
Of the Estate of Everette Eugene Mendenall, ... Plaintiff

v.

Anderson Hardwood Floors, LLC, Shaw Industries, Inc.
and Shaw Industries Group, Inc., ... Defendants.

CERTIFICATE OF SERVICE

This is to certify that I, Stephanie M Lewis, a paralegal with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Plaintiff, have this date mailed via the U.S. Postal Service, a true and correct copy of the ***Final Brief of Plaintiff*** with first class postage prepaid to:

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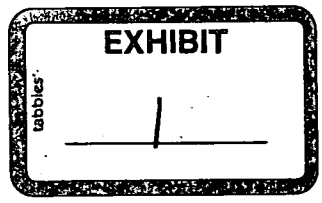


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SUZANNE ROERIG MENDENALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF EVERETTE EUGENE MENDENALL, Plaintiff, vs. ANDERSON HARDWOOD FLOORS, LLC, SHAW INDUSTRIES, INC., AND SHAW INDUSTRIES GROUP, INC., Defendants.	No. 2:11-cv-01291-DCN **ORDER**

This matter is before the court on plaintiff's motion to certify a question to the South Carolina Supreme Court. Because this case involves a question of South Carolina law that is determinative of the action and has not been addressed by the controlling precedent of the South Carolina Supreme Court, the court grants plaintiff's motion.

I. STANDARD

South Carolina Appellate Court Rule 244 provides that the South Carolina Supreme Court

> in its discretion may answer questions of law certified to it by any federal court of the United States . . . when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

SCACR 244(a). The certification order must set forth: (1) "the questions of law to be answered"; (2) "all findings of fact relevant to the questions certified"; and (3) "a

statement showing fully the nature of the controversy in which the questions arose." SCACR 244(b).

II. BACKGROUND AND FACTUAL FINDINGS[1]

On February 28, 2011, plaintiff Suzanne Roerig Mendenall (Mendenall), as the personal representative of the estate of her deceased husband Everette Mendenall (Mr. Mendenall), filed an amended complaint in state court for wrongful death and a survival action against defendants Walterboro Veneer, Inc.; Standard Plywoods, Inc.; Anderson Hardwood Floors, Inc.; Anderson Hardwood Floors, LLC; Shaw Industries, Inc.; and Shaw Industries Group, Inc. (collectively, defendants). Defendants removed the case to federal court on May 27, 2011. This court denied a motion to remand. Defendants filed a motion to dismiss on June 3, 2011, to which plaintiff filed a response in opposition on July 1, 2011, along with a motion to certify a question on November 2, 2011.

On March 1, 2012, this court held a hearing on the motion to dismiss and motion to certify a question. The court dismissed without prejudice defendants Walterboro Veneer, Inc., Standard Plywoods, Inc., and Anderson Hardwood Floors, Inc. Plaintiff has since indicated that she will be filing a motion to amend her complaint to allege further allegations against Shaw Industries, Inc., Shaw Industries Group, Inc., and Anderson Hardwood Floors, LLC. The court granted plaintiff's motion to certify a question.

Walterboro Veneer, Inc. was a South Carolina corporation that owned and operated a wood products manufacturing plant. See Compl. ¶¶ 2, 11. In 2003, Walterboro Veneer, Inc. constructed a cement vat, "Vat #3," for the purpose of soaking hardwood logs in a highly heated solution prior to milling. Id. ¶ 12. On December 31,

[1] In light of the procedural posture of this case, the facts set forth herein are essentially the allegations in the plaintiff's amended complaint, which, for the purposes of the instant motion, the court accepts as true.

2007, Walterboro Veneer merged with Standard Plywoods, Inc. Pl.'s Mem. Opp. Mot. to Dismiss 2. One minute later, Standard Plywoods, Inc. merged with Anderson Hardwood Floors, Inc. Id. ¶ 6.

On January 28, 2008, Anderson Hardwood Floors, Inc. hired Mr. Mendenall to work at a plant in Colleton County, South Carolina, the same plant that was formerly owned and operated by Walterboro Veneer, Inc. Four months into his employment, Mr. Mendenall fell into Vat #3 when he was attempting to access a steam leak for repairs. Id. ¶¶ 12-13. The vat was filled with a solution heated to approximately 193 degrees Fahrenheit, which burned ninety percent of Mr. Mendenall's body and eventually caused his death on June 6, 2008. Id. ¶ 13.

After these incidents, on August 8, 2009, Anderson Hardwood Floors, Inc., Mr. Mendenall's former employer, became Anderson Hardwood Floors, LLC. Pl.'s Mem. Opp. Mot. to Dismiss 2.

III. NATURE OF THE CONTROVERSY

The exclusivity provision of the South Carolina Workers' Compensation Act precludes an employee from maintaining an action in tort against the employer when the employee sustains a work-related injury. S.C. Code Ann. § 42-1-540. This exclusivity doctrine creates a balance: "the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." Strickland v. Galloway, 560 S.E.2d 448, 449 (S.C. Ct. App. 2002). This case involves the application of the exclusivity doctrine in the corporate merger context, in which "every other corporation party to the merger merges into the surviving entity and the separate existence of every corporation except the surviving entity ceases," S.C. Code Ann. § 33-11-106(a)(1), and

"the surviving entity has all liabilities of each corporation party to the merger," id. § 33-11-106(a)(3).

At the time of his accident, Mr. Mendenall was employed by Anderson Hardwood Floors, Inc.; thus, the exclusivity doctrine bars a direct action against this defendant in tort based on a work-related injury. Moreover, as a result of the South Carolina merger statute, defendants Walterboro Veneer, Inc. and Standard Plywoods, Inc. have ceased their corporate existence and may not be sued directly. Plaintiff instead argues that Walterboro Veneer's inchoate liability in designing and constructing a defective vat passed to Anderson Hardwood Floors, Inc. (now Anderson Hardwood Floors, LLC) as a result of the merger.

Plaintiff relies on the "dual persona" doctrine to argue that the court should hold Anderson Hardwood Floors, LLC liable for the allegedly tortious acts of its predecessors. This doctrine renders an employer "vulnerable to a tort action by an employee if the employer has a second persona completely independent from and unrelated to its status as an employer that is legally recognized as a separate legal identity." 82 Am. Jur. 2d Workers' Compensation § 56. Plaintiff argues that Anderson Hardwood Floors, LLC has a "dual persona" both as Mr. Mendenall's employer as well as the successor in interest to the liabilities of Walterboro Veneer, Inc. Based on this latter persona, plaintiff contends that Anderson Hardwood Floors, LLC should be held liable for the allegedly negligent acts of its corporate predecessors in designing and constructing Vat #3.

The dual persona doctrine has been recognized and applied by courts in other jurisdictions. See, e.g., Van Doren v. Coe Press Equip. Corp., 592 F. Supp. 2d 776 (E.D. Pa. 2008) (applying Pennsylvania law); Stayton v. Clariant Corp., 10 A.3d 597 (Del.

2010); Billy v. Consol. Mach. Tool Corp., 412 N.E.2d 934 (N.Y. 1980). However, not all jurisdictions have adopted the dual persona doctrine or applied it favorably to a plaintiff's case. See, e.g., Braga v. Genltye Grp., Inc., 420 F.3d 35 (1st Cir. 2005) (applying Massachusetts law); Corr v. Willamette Indus., Inc., 713 P.2d 92 (Wash. 1986).

The South Carolina Supreme Court has expressly rejected a related theory, the "dual capacity" doctrine, see Johnson v. Rental Unif. Serv. of Greenville, 447 S.E.2d 184 (S.C. 1994), but has neither accepted nor rejected the "dual persona" doctrine. In Tatum v. Medical University of South Carolina, 552 S.E.2d 18 (S.C. 2001), the South Carolina Supreme Court reversed the Court of Appeals' decision that found the dual persona doctrine applicable to the facts of that case. The Supreme Court stated, "Even if we were to adopt the 'dual persona' doctrine, it is inapplicable in this situation." Id. at 25.[2]

Based on the lack of controlling precedent, and because the applicability of the dual persona doctrine is determinative of this case, the court finds it necessary to certify a question to the South Carolina Supreme Court.

IV. CERTIFIED QUESTION

The court certifies the following question:

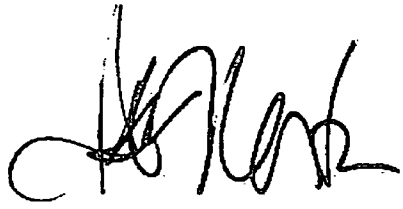
> Does the "dual persona" doctrine allow an injured employee to bring an action in tort against his employer as a successor in interest who, through a corporate merger, received all liabilities of a predecessor corporation that never employed the injured person but allegedly performed the negligent acts that later caused the employee's injuries, or is such an action barred by the exclusivity provision of the South Carolina Workers' Compensation Act?

[2] The Supreme Court noted that several other jurisdictions "have adopted the 'dual persona' doctrine in the context of product liability suits by employees" and "have applied the 'dual persona' doctrine where the employer has other legally-recognized identities." Id. at 23-24. Rather than predict how a South Carolina court would rule in this case, the court finds it more prudent to certify this question to the South Carolina Supreme Court.

V. CONCLUSION

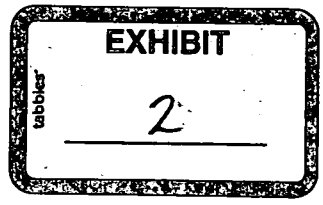
Based on the foregoing, the court **GRANTS** plaintiff's motion and **CERTIFIES** the foregoing question to the South Carolina Supreme Court. The clerk shall forward a copy of this order to the Supreme Court under this court's official seal.

AND IT IS SO ORDERED.



DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March 30, 2012
Charleston, South Carolina



SUZANNE ROERIG MENDENALL, PERSONAL REPRESENTATIVE OF THE ESTATE OF EVERETTE EUGENE MENDENALL, Plaintiff,	)	CIVIL ACTION NO.: 2:11-cv-01291-DCN
v.	)	
WALTERBORO VENEER, INC., STANDARD PLYWOODS, INC., ANDERSON HARDWOOD FLOORS, INC., ANDERSON HARDWOOD FLOORS, LLC, SHAW INDUSTRIES, INC., AND SHAW INDUSTRIES GROUP, INC., Defendants.	)	

SECOND AMENDED COMPLAINT

TO THE DEFENDANTS ABOVE NAMED:

The Plaintiff would show unto this Honorable Court:

1. That Suzanne Roerig Mendenall is the duly qualified and appointed Personal Representative of the Estate of the late Everette Eugene Mendenall, by virtue of the Order of the Probate Court for Colleton County, South Carolina, dated June 24, 2009. That Suzanne Roerig Mendenall is now serving in that capacity and brings this action on behalf of the statutory beneficiaries of the Estate of Everette Eugene Mendenall pursuant to § 15-51-10 et seq. and § 15-5-90 et seq., Code of Laws for South Carolina, 1976, as amended.
2. That the Defendant Walterboro Veneer Inc., is, or was, a corporation incorporated in the State of South Carolina on or about August 19, 1964.

3. That the Plaintiff is informed and believes that Walterboro Veneer, Inc., at some time prior to the acts alleged herein, became a subsidiary of Standard Plywoods, Inc., also a South Carolina corporation.
4. That the Defendant Standard Plywoods, Inc., is a South Carolina corporation, incorporated on or about March 7, 1997.
5. That the Defendant Walterboro Veneer, Inc. was formerly a subsidiary of Standard Plywoods, Inc. and merged with Standard Plywoods, Inc., subsequent to the tortuous acts alleged herein but prior to the hiring and death of the decedent, Everette Eugene Mendenall.
6. That on the same date of the merger of Standard Plywoods, Inc. and Walterboro Veneer, Inc., Standard Plywood, the surviving corporation, merged with Anderson Hardwood Floors, Inc., a Georgia corporation.
7. That the Defendant Anderson Hardwood Floors, Inc. was incorporated in the State of Georgia on or about September 4, 2007.
8. That the Defendant, Shaw Industries, Inc. is currently a Georgia corporation doing business in the State of South Carolina.
9. That the Defendant, Shaw Industries Group, Inc. is currently a Georgia corporation doing business in the State of South Carolina.
10. Further, that Shaw Industries Group, Inc. acquired Anderson Hardwood Floors, Inc. around September 9, 2007, prior to the hiring of the decedent but subsequent to the design and construction of an inherently dangerous cement vat described more particularly herein below.

11. That Shaw Industries Group, Inc. owns Shaw Industries, Inc. as a wholly owned subsidiary.

12. That Shaw Industries Group, Inc. owns Anderson Hardwood Floors, LLC as a wholly owned subsidiary.

13. That Walterboro Veneer, Inc. owned and operated a wood products manufacturing plant in Colleton County, South Carolina, commencing around the year 1964.

14. That during the year, 2003, Walterboro Veneer, Inc. constructed a cement vat, known as Vat #3, on the premises of the Walterboro Veneer plant on the Green Pond Highway in Colleton County, South Carolina. Vat #3 was constructed for the purpose of the soaking of hardwood logs in a highly heated liquid solution prior to milling. That Vat #3 contained liquids heated to temperatures in excess of 190 degrees Fahrenheit.

15. That the decedent, Everette Eugene Mendenall, was hired by Anderson Hardwood Floors, Inc. on January 28, 2008. That at the time of the hire Anderson Hardwood Floors, Inc. was a wholly owned subsidiary of Shaw Industries Group, Inc., a Georgia corporation. That on or about May 28, 2008, Everette Eugene Mendenall fell into Vat #3, at the Walterboro Veneer plant, said vat being filled with water heated to a temperature of approximately 193 degrees Fahrenheit. That at the time of the incident, Everette Eugene Mendenall was walking down the side wall of Vat #3 to access a steam leak. That Everette Eugene Mendenall's fall resulted from the unsafe and defective design of the vat as set forth below. That the immersion of the body of Everette Eugene Mendenall into the vat resulted in his

sustaining massive third degree burns over 90 percent of his body which ultimately resulted in his death which occurred on June 6, 2008.

16. That upon information and belief, Shaw Industries Group, Inc., and Shaw Industries, Inc., (hereinafter "these Shaw defendants") prior to, during, and after the merger of Walterboro Veneer, Standard Plywoods, and Anderson Hardwood Floors, LLC, were involved in the business acquisition of the Walterboro Veneer plant, and were involved in the management of the operations of Walterboro Veneer, and were involved in the inspection, evaluation, maintenance and management of the facilities and equipment at the Walterboro Veneer plant.
17. That these Shaw defendants conducted inspections and/or assessments of the Walterboro Veneer facility to identify, among other things, safety issues, and in doing so, determined that the vats, including Vat #3, as designed were unsafe because of their improper design.
18. That the improper design referenced above that made the vats unsafe later caused and contributed to Mr. Mendenall falling into Vat #3.
19. That these Shaw defendants provided the findings of the inspections or assessments of the Walterboro Veneer facility to management personnel of Walterboro Veneer, Standard Plywoods, and Anderson Hardwood Floors, Inc., thereby calling to their attention the dangerous design and condition of the vats, including Vat #3.
20. That upon receiving the findings of the inspection and assessment from these Shaw defendants, the management of Walterboro Veneer, Standard Plywoods,

and/or Anderson Hardwood Floors, Inc., formulated a plan to address the safety issues raised.

21. That the management of Walterboro Veneer, Standard Plywoods, and/or Anderson Hardwood Floors, Inc. conceived a remedy in the form of modifications to the vats, including Vat #3 to address the safety issue.

22. That the management for Walterboro Veneer, Standard Plywoods, and/or Anderson Hardwood Floors, Inc., requested from these Shaw defendants, monetary support for the modification, in the form of a capital budget line item adjustment or other monetary request.

23. That the request for monetary support from these Shaw defendants was not provided and the modifications to the vats, including Vat #3 were never made, until after the death of Mr. Mendenall. In refusing to financially support the modification of Vat #3, these Shaw defendants negligently, recklessly, or intentionally placed at risk persons walking in the vicinity of Vat #3, whether employed by one of the defendants or not

24. That the monetary support was not provided and the modifications were not made for three primary reasons: the Defendants were unwilling to pay for the costs of the modification, the Defendants were unwilling to shutdown to allow modifications, and as of the time of the decision to not modify the vats, no one had yet fallen into the vats.

25. That these Shaw defendants had the ability both financially and through its exercise of management over the Walterboro Veneer facility, to require the

modifications to the vats to make them safe for people in close proximity to the vats.

26. That because of the exercise of management authority and management decisions over Walterboro Veneer, Standard Plywoods, and Anderson Hardwood Floors, LLC these Shaw defendants had the duty to protect individuals walking in the vicinity of Vat #3, including Mr. Mendenall from the dangers posed by the condition of the vats by modifying the design of the vats, or by implementing other safeguards to protect people from falling into the vats.
27. That because these Shaw defendants undertook to analyze through inspection and/or assessment the safety of the Walterboro Veneer facility, these Shaw defendants had the duty to perform such undertakings in a reasonable manner.
28. That because these Shaw defendants undertook to make findings from such inspections and/or assessments known to the management of Walterboro Veneer, Standard Plywoods, and/or Anderson Hardwood Floors, LLC, these Shaw defendants had the duty to perform such undertakings in a reasonable manner.
29. That because these Shaw defendants undertook to consider recommendation made directly to those Shaw defendants by Walterboro Veneer, Standard Plywoods, and Anderson Hardwood Floors, LLC, these Shaw defendants had the duty to perform such undertakings in a reasonable manner.
30. That because these Shaw defendants undertook to make decisions about how to address the safety issues of the vats, including Vat #3, these Shaw defendants had the duty to perform such undertakings in a reasonable manner.

31. Because of its undertakings, and because of its activities as set forth herein, these Shaw defendants owed a duty to make the vats, including Vat #3, safe for people in close proximity to the vats, or to protect such people from the dangerous condition of the vats.

FOR A FIRST CAUSE OF ACTION
(Wrongful Death)

32. That each and every allegation contained in the proceeding paragraphs are incorporated, by reference, into this first cause of action as though repeated verbatim herein.

33. That the injuries sustained by Everette Eugene Mendenall, which resulted in his death, were the direct and proximate result of the careless, willful, wanton and reckless actions of Walterboro Veneer, Inc. and Standard Plywoods, Inc., in the following particulars:

    a) In designing and constructing Vat #3 upon the premises of the Walterboro Veneer plant, without the benefit of protective guardrails, fences, doors or other design elements for the protection of persons working in the vicinity of Vat #3.

    b) In failing to provide a lower working surface along the interior walls between the two rows of vats and around the external perimeter of Vat #3.

    c) In failing to post warnings or otherwise discourage or prohibit persons from traversing the walls of Vat #3.

    d) In failing to take the actions specified in paragraph 35(A) through (K).

34. That the injuries sustained by Everett E. Mendenall, which resulted in his death, were the direct and proximate result of the careless, willful, wanton, and reckless

actions of Shaw Industries Group, Inc., and Shaw Industries, Inc. in the following particulars:

A. In failing to modify the vats, including Vat #3, to make it safe for those in close proximity such as Mr. Mendenall.

B. In failing to modify the vats, including Vat #3, to meet the requirements identified by the Defendants as pertaining to the vats.

C. In failing to place or require safeguards to be placed or other measures restricting access to the vats, including Vat #3.

D. In failing to prevent the use of the vats, including Vat #3, until it could be modified and made safe.

E. In failing to provide adequate funds, directly, or by proper allocation, or by capital budget line item adjustment, to properly address the safety concerns of the vats, including Vat #3.

F. In failing to implement measures or alternate plans for conducting the operations of the Walterboro Veneer facility in a way to eliminate the use of the vats, including Vat #3 in the dangerous and unsafe condition in which they existed.

G. In not properly analyzing through inspection and/or assessment, the safety of the vats including Vat #3.

H. In failing to properly identify each of the safety concerns regarding the vats, including Vat #3.

I. In not properly providing all of the identified safety concerns regarding the vats, in not providing all of the conclusions regarding the

vats, in not providing all of the recommendations regarding the vats, to the management for Walterboro Veneer, Inc., Standard Plywoods, Inc., and Anderson Hardwood Floors, LLC.

J. In failing to properly consider the request from Walterboro Veneer, Inc., Standard Plywoods, Inc., and Anderson Hardwood Floors, LLC for money to make the appropriate modifications to the vat to address the safety concerns.

K. In failing to exercise its control power over its agents and instrumentalities, Walterboro Veneer, Inc., Standard Plywoods, Inc., and Anderson Hardwood Floors, LLC, to cause the known hazard existing at Vat #3 to be eliminated in order to protect persons walking in the vicinity of the plant, whether employees or not.

35. That as a direct and proximate result of the acts, delicts and omissions of the Defendants, Everette Eugene Mendenall was killed creating great hardship and damages to the statutory heirs-at-law of the decedent, including, but not limited to, pecuniary loss, loss of companionship, emotional distress and grief.

FOR A SECOND CAUSE OF ACTION
(Survival Action)

36. That each and every allegation contained in the proceeding paragraphs including the first cause of action, are incorporated, by reference, into this second cause of action as though fully repeated herein.

37. That as a direct and proximate result of the acts, delicts and omissions of the Defendants, Everette Eugene Mendenall was mortally injured; was grossly

disfigured; suffered great physical pain and suffering; suffered severe emotional distress and ultimately lost his life.

38. That further as a result of the acts, delicts and omissions of the Defendants the decedent sustained gruesome injuries which required intense medical care, treatment as well as hospitalization. That said medical care and attention resulted in substantial medical expenses for necessary care.

WHEREFORE, the Plaintiff prays unto this Honorable Court:

1. That the Plaintiff be granted judgment in its wrongful death action against the Defendants in an appropriate sum.
2. That the Plaintiff be granted judgment in the survival action against the Defendants in an appropriate sum.
3. That the Plaintiff be awarded punitive damages against the Defendants in an appropriate sum.
4. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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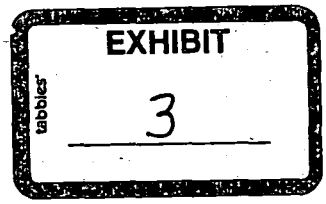
PERSONAL REPRESENTATIVE OF THE
ESTATE OF EVERETTE EUGENE
MENDENALL

April 26, 2012
Hampton, South Carolina



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From: Allen Bell
Sent: Wednesday, December 12, 2007 1:03 PM
To: Bryan Boggs; Bluford Vaughan
Cc: Don Finkell
Subject: RE: Vat Safety in ref; to shaw facility assessment recommendations

I agree with Bryan, we have never had anyone fall into the vats, not saying it will never happen, but I think if Shaw is so concerned it should be their money and not count against us. Additionally finding time to do it without shut down would be very difficult.

Allen

From: Bryan Boggs
Sent: Wednesday, December 12, 2007 1:00 PM
To: Allen Bell; Bluford Vaughan
Cc: Don Finkell
Subject: RE: Vat Safety in ref; to shaw facility assessment recommendations

I do not want to do this. Too expensive. I think Allen feels the same way.

From: Allen Bell
Sent: Wednesday, December 12, 2007 12:57 PM
To: Bluford Vaughan
Cc: Don Finkell; Bryan Boggs
Subject: Vat Safety in ref; to shaw facility assessment recommendations

Bluford, item no. 21 (Safety) identified veneer vat ground height as 1-1.5 feet above ground level, the requirement is min. 36" above ground. Our response to address this requirement is to request a major capital budget line item adjustment for 2008 to provide the engineering and contractual support to meet this safety requirement. Our conservative estimate is $$ 170.000.00. (steel support rebar and steel side extensions along with concrete will require engineering as well as professional contractor labor/skill to construct) also the huge doors/lids will have to be cut loose and repositioned/rewelded to accomadate the new vat height. A Major job.

If you need a capital project form let me know, but this is the only way we can address this finding that I know of!

Allen

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