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August 20, 2012

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: Mendenall v. Shaw Industries, Inc., Shaw Industries Group, Inc., et al.
Case No.: 2:11-CV-01291-DCN
Claim No.: 002812-039107-WE-01
Date of Loss: 5/29/2008
YCR File: 5251-20110443

Dear Mr. Shearouse:

Enclosed please find the original and sixteen (16) copies of the Brief of Defendants along with the original and two (2) copies of a Proof of Service for the same. Please return a stamped copy of the brief and proof of service to me in the envelope provided. Of course, if you have any questions or concerns, please let me know.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Aimee M. Justman
Legal Assistant

/amj
Enclosures
cc: Randolph Murdaugh, IV, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Ronnie Crosby, Esquire, Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Paul N. Siegel, Esquire
John P. Freeman, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION
From the United States District Court
For the District of South Carolina, Charleston Division

David C. Norton, United States District Judge

C.A. No. 2:11-cv-012910-DCN

Suzanne Roerig Mendenall, Personal Representative of the Estate of Everette Eugene Mendenall,

Plaintiff,

v.

Anderson Hardwood Floors, L.L.C., Shaw Industries, Inc., and Shaw Industries Group, Inc.,

Defendants.

BRIEF OF DEFENDANTS

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INTRODUCTION

To be sure, this case arises out of a most unfortunate and tragic accident that took the life of the Plaintiff's decedent, Everette Eugene Mendenall ("Mr. Mendenall"). It is likewise certain, however, that the subject accident occurred in the course and scope of Mr. Mendenall's employment. And, without such employment, the subject accident would not have happened, because it was only through Mr. Mendenall's employment that he had any contact with the allegedly unsafe and defective Vat #3. It must be remembered that the inchoate, predecessor liability upon which the Plaintiff relies does not relate to an allegedly defective product placed into the stream of commerce, but to a cement vat, alleged to have been negligently designed and/or constructed by Anderson's corporate predecessor, Walterboro Veneer Company, Inc. ("Walterboro Veneer"); permanently affixed to the premises; and of a utility peculiar to the function of soaking hardwood logs prior to milling, i.e., the business of Anderson and its predecessor Walterboro Veneer.[1] For the Court's edification, pictures of

[1] Anderson Hardwood Floors, Inc. was Mr. Mendenall's employer at the time of the subject accident. Following the accident, but prior to the commencement of the present action, Anderson Hardwood Floors, Inc. converted to the limited liability company Anderson Hardwood Floors, LLC. With respect to the certified question now before the Court, Anderson Hardwood Floors, Inc.'s conversion to Anderson Hardwood Floors, LLC is immaterial, with Anderson Hardwood Floors, LLC being deemed, as a matter of law, to be the same entity as Anderson Hardwood Floors, Inc. for all purposes. *See* O.C.G.A § 14-11-212; S.C. Code Ann. §§ 33-11-111 and -112. In this brief, Anderson

the vat are attached hereto as Exhibits 1A and 1B.

The Plaintiff concedes that the subject accident is covered under the South Carolina Workers' Compensation Law, S.C. Code Ann. §§ 42-1-10 to -19-50 (the "Workers' Compensation Act" or the "Act").[2] Mr. Mendenall's employer is therefore ostensibly immune from civil suit, with workers' compensation being the Plaintiff's exclusive remedy pursuant to S.C. Code Ann. 42-1-540.[3] Nonetheless, the Plaintiff urges this Court to allow her to proceed with this action by adopting and applying (in a manner favorable to the Plaintiff's case) a common-law exception to workers' compensation exclusivity known as the "dual persona" doctrine.

Although it has not been adopted in this State, the "dual persona" doctrine is a judicially-created exception to statutory workers' compensation exclusivity, which provides that "'[a]n employer may become a third person, vulnerable to suit by an employee, if—and only if—it possesses a second

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Hardwood Floors, Inc. and Anderson Hardwood Floors, LLC will be referred to collectively as "Anderson." The other defendants herein are Shaw Industries Group, Inc. and Shaw Industries, Inc. Shaw Industries, Inc. and Anderson are wholly owned by Shaw Industries Group, Inc. (Plaintiff's Second Amended Complaint ¶¶ 11-12 [a copy of which is attached to the Plaintiff's brief].)

[2] Indeed, it cannot be disputed that substantial workers' compensation benefits have already been paid.

[3] In pertinent part, § 42-1-540 provides: "The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, **shall exclude all other rights and remedies** of such employee, his personal representative, parents, dependents or next of kin **as against his employer**, at common law or otherwise, on account of such injury, loss of service or death." (emphasis added).

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.'" Tatum v. Med. Univ. of S.C., 346 S.C. 194, 203, 552 S.E.2d 18, 24 (2001) (quoting Larson's Workers' Compensation Law § 113[1] (1999)).

Respectfully, the instant suit against Mr. Mendenall's employer is rightfully barred by the exclusive remedy doctrine; it runs headlong into both its plain, statutory language and the policy endorsed thereby. Consequently, as a threshold matter, adoption of the "dual persona" doctrine to circumvent and/or override the legislature's clear directive would be an undue invasion of the province of that co-equal branch of government.

But even if the Court is inclined to adopt the "dual persona" doctrine, it should find that the doctrine is not applicable to allow the Plaintiff to prosecute this action against Mr. Mendenall's employer, because, under the circumstances, the requisite duality of personas unrelated to employer status does not exist. Rather, application of the "dual persona" doctrine under the circumstances would sanction an unjust distortion of the doctrine; utilizing it not to preserve inchoate liability following corporate merger but to improperly increase such liability, and to simply evade the exclusive remedy doctrine.

While the subject accident is heartrending, as against Mr. Mendenall's employer, the exclusive remedy therefore is workers' compensation. Most respectfully, this Honorable Court should answer the certified question favorably to the defense.

CERTIFIED 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?

(Certification Order p. 5 [a copy of which is attached hereto as Exhibit 2].)

STATEMENT OF THE CASE

Rule 244, SCACR, addresses certification of questions of law to this Court. Pursuant to Rule 244(b), the certification order is to "set forth the questions of law to be answered, all findings of fact relevant to the questions certified, and a statement showing fully the nature of the controversy in which the question arose." With respect to factual findings, it must be noted that the Plaintiff's motion for certification was filed in response to a prior-filed motion to dismiss pursuant to Rule 12(b)(6), FRCP. (Exhibit 2 p. 2.)

Of course, such a motion to dismiss "challenges the legal sufficiency of a complaint, considered with the assumption that the facts alleged are true." *E.g.* Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009) (internal citation omitted). Indeed, the certification order expressly notes, "[i]n light of the procedural posture of this case, the facts set forth herein are essentially the allegations of plaintiff's amended complaint, which, for the purposes of the instant motion, the court accepts as true." (Exhibit 2 p. 2, n. 1.)

Understanding, then, that the certification order arose at the Rule 12(b)(6) stage of this litigation, and reserving and without waiving any and all rights in defense of the Plaintiff's claims, the defense contends that even the facts set forth in the certification order are sufficient to show that the "dual persona" doctrine is inapplicable under the circumstances and, limited to that end, the certification order is incorporated herein by reference.[4] To the extent, however, that the Court may disagree, the defense should not be prejudiced by any conclusive finding that the "dual persona" doctrine is applicable under the circumstances where such finding is reliant upon the Plaintiff's own, unchecked version of the facts. Respectfully, if the Court is

[4] Out of an abundance of caution, the Defendants expressly note that, via responsive pleading in this action, they have denied the Plaintiff's material allegations against them, to include those stemming from or related to the single, context-free page of email

not inclined to agree with the defense in answering the certified question, there should be some appropriate allowance made for the prospect that the factual basis upon which the certified question is now presented to this Court may not materialize.

ARGUMENT[5]

I. The Court should answer the certified question favorably to the defense.

Respectfully, answering the certified question calls for this Court to consider not merely whether the "dual persona" doctrine should be adopted in this State, but whether, even if the Court may be inclined to adopt the doctrine, it is applicable under the present circumstances. The Defendants, of course, contend that the Court should not adopt the "dual persona" doctrine, and, if the Court agrees, no further analysis is needed to find that the Plaintiff's suit against Mr. Mendenall's employer is barred by the exclusive remedy doctrine. But, even if the Court is inclined to adopt the "dual persona" doctrine, the Defendants contend that the doctrine does not apply and should not be applied under the circumstances presented here.

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correspondence that the Plaintiff has attached to her brief.

[5] Though separately set forth, the analysis/argument presented herein necessarily contains some overlap. To the extent that the argument/analysis contained in any particular

A. The Court should not adopt the "dual persona" doctrine because to do so would be to unduly intrude upon the province of the legislature.

1. The "dual persona" doctrine is in direct conflict with clear, statutory language providing that, where the Workers' Compensation Act covers an employee's work-related accident, the exclusive remedy against the employer is workers' compensation.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature," and where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). Our State's appellate courts have repeatedly recognized the properly limited judicial role of statutory construction, not statutory creation. *See* Adkins v. Comcar Indus., 316 S.C. 149, 151-52, 447 S.E.2d 228, 230 (S.C. Ct. App. 1994) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. The court cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute; to legislate and not to interpret. However,

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portion of this brief is relevant to any other portion, the same is hereby incorporated

this court has no legislative powers. Our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature while the responsibility for the justice or wisdom of legislation rests exclusively with the legislature, whether or not we agree with the laws it enacts. There is a marked distinction between liberal construction of statutes by which the court determines their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced.") (emphasis added) (internal citations omitted); *see also* Layman v. State, 376 S.C. 434, 450, 658 S.E.2d 320, 328 (2008) ("Although a court may issue the final judgment with regard to the constitutionality or enforceability of a law currently in effect, there is no similar judicial authority for reviewing the basis for the legislature's enactment of a law in the first instance."); Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) ("We do not sit as a super legislature to second guess the wisdom or folly of decisions of the General Assembly."); Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("it is not the province of this Court to perform legislative functions."); State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("when a court is called upon to determine the constitutionality of a legislative enactment, it

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therein by reference.

must be careful not to usurp the legislative function."); Hadden v. S.C. Tax Comm'n, 183 SC. 38, 46, 190 S.E. 249, 253 (1937) (Supreme Court is not a lawmaking body.).

"In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides **the exclusive remedy against the employer**. The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and **the employer receives immunity from tort actions by the employee**." Strickland v. Galloway, 348 S.C. 644, 646-47, 560 S.E.2d 448, 449 (Ct. App. 2002) (emphasis added) (citing S.C. Code Ann. § 42-1-540).

Prior to the enactment of workers' compensation laws, an injured employee was forced to sue the employer at common law. In order to recover compensation the employee had to prove his injury was the fault of the employer and had to withstand the employer's common-law defenses, such as contributory negligence. Cook v. Mack's Transfer Storage, 291 S.C. 84, 86, 352 S.E.2d 296, 298 (Ct. App. 1986). In contrast, an employee whose injury is covered by workers' compensation is entitled to compensation regardless of fault. Id. at 87, 352 S.E.2d at 298. In exchange,

the employee forfeits his right to sue the employer at common law:

> In some cases, the amount of compensation available under the Act may be substantially less than could be recovered in a successful common law action; but in other cases the employee will receive benefits he would not otherwise have enjoyed because of his inability to establish the employer's common law liability. This is a balance struck by the Legislature in order to afford the widest practical coverage for work related injuries.

Id. Indeed, this Court has recognized that compensating injured employees regardless of fault, but limiting their recovery to statutorily set amounts "has worked to the advantage of society as well as the employee and employer." Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524 526 (1980).

In Tatum, this Court expressly acknowledged that "[t]he plain language of the Workers' Compensation Act precludes suit by an employee against her employer." 346 S.C. at 202-03, 552 S.E.2d at 23 (citing Lester v. S. C. Workers' Comp. Comm'n, 334 S.C. 557, 514 S.E.2d 751 (1999) (if a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning)). In other words, the plain language of the Act, in fact, precludes the present civil action by the Plaintiff against Mr. Mendenall's employer.

As the Tatum Court acknowledged, at least two other jurisdictions have declined to adopt the "dual persona" doctrine "on the basis that any exceptions to the workers' compensation exclusivity doctrine must be adopted by the legislature." 346 S.C. at 205, 552 S.E.2d at 24, n. 8.[6] This Court should likewise decline to adopt the "dual persona" doctrine, which is patently contrary to the clear and policy-based legislative directive that, "[i]n circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident," such as the present circumstance, "the Act provides **the exclusive remedy against the employer** workers' compensation is the exclusive remedy against the employer." Strickland, 348 S.C. at 646-47, 560 S.E.2d at 449 (emphasis added).

Moreover, contrary to the Plaintiff's suggestion, and notwithstanding the undeniably sympathetic nature of the subject accident, the present circumstance does not present a compelling legal reason to adopt the "dual persona" doctrine. Attempting to persuade the Court that the "dual persona" doctrine is needed to prevent injustice, the Plaintiff argues: "Had Walterboro Veneer simply sold the Walterboro Plant and the tortuously [sic] designed

[6] The Tatum Court itself appeared to be lukewarm on the doctrine, describing it as only "more tolerable" than the "dual capacity" doctrine, which it had previously rejected. 346 S.C. at 204, 552 S.E.2d at 23.

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 questions over plaintiff's ability to sue it as a third-party tortfeasor." (Plaintiff's Br. pp. 12-13.) In other words, the Plaintiff contends that inequity exists because, but for the merger, which resulted in the cessation of Walterboro Veneer's existence and capacity to be sued, in the scenario suggested by the Plaintiff, involving a hypothetical extraordinary sale of corporate assets, the Plaintiff would have a third-party claim against Walterboro Veneer for the negligent design and/or construction of the vat. The Plaintiff's reasoning is unavailing, however.

Initially, as a matter of fact, the circumstances presently before the Court do not involve an extraordinary sale of corporate assets, but a valid corporate merger, which, unlike in the case of a sale of assets, ended the separate legal existence of every corporate party to the merger except the surviving entity. S.C. Code Section 33-11-106(a)(1) (providing that, when a merger takes effect, "every other corporation party to the merger merges **into** the surviving entity and the **separate** existence of every corporation except the surviving entity ceases." (emphasis added); id. at official cmt. ("Section 11.06(a) (Section 33-11-106(a)) describes the effect of a merger.

On the effective date every disappearing corporation that is a party to the merger **disappears into the surviving corporation** . . . .") (emphasis added).

Moreover, the Plaintiff's reasoning is unduly self-serving. Suppose, for example, that, instead of the hypothetical presented by the Plaintiff, Mr. Mendenall and another employee fell into Vat #3 at the same time, but the other employee had been working at the facility for a number of years and that employee had been an employee of Walterboro Veneer before the merger. Under the Plaintiff's suggested "dual persona" theory, of the two simultaneously-injured employees, only Mr. Mendenall would have a "third-party" claim against his employer (in addition to a claim for workers' compensation) because the other injured employee, having been an employee of Walterboro Veneer, would be barred from civil suit by the exclusive remedy doctrine. Suppose, for another example, that the merger never happened and Walterboro Veneer did not sell the plant (as the Plaintiff posits) but simply continued its operations and employed Mr. Mendenall at the time of the accident. If this was the case, the "dual persona" theory would be of no avail to the Plaintiff and her exclusive remedy would be workers' compensation.

The Plaintiff's hypothetical has not unearthed any latent injustice in

the law of merger and should not be persuasive to this Court. Indeed, as further addressed, *infra*, the Plaintiff advocates for a position, which seeks to unjustly expand liability via the "dual persona" doctrine by simply evading the exclusive remedy doctrine.

2. Adoption of the "dual persona" doctrine is not necessary to resolve a conflict between the statutory law of merger and the Workers' Compensation Act, because there is no such conflict.

The Plaintiff contends that there is a conflict between § 33-11-106, which, among other things, provides that "the surviving entity [(i.e., Anderson)] has all liabilities of each corporation party to the merger . . ." and the Workers' Compensation Act, which provides that the workers' compensation remedy is exclusive as against the employer but allows an injured employee to bring a civil action for damages against third-party tortfeasors other than the employer. According to the Plaintiff, the "dual persona" doctrine is required to reconcile these allegedly competing policies, so that, in keeping with the demands of legislative policy, where the alleged third-party tortfeasor has been merged out of existence, "the predecessor's tort liability [is not] extinguished by merger, but rather is assumed by its successor." (Plaintiff's Br. p. 11.)

Respectfully, the Plaintiff asks the Court to remedy a problem that does not exist. As an initial matter, our court's are reluctant to accept a

construction that would result in statutory conflict, with this Court having expressly noted that "[i]t is the duty of the court to harmonize statutory conflicts." Neel v. Shealy, 261 S.C. 266, 276, 199 S.E.2d 541, 547 (1973). And, of course, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hardee v. McDowell, 381 S.C. 445, 453, 673 S.E.2d 813, 817 (2009) (internal quotation omitted). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay, 381 S.C. at 345, 673 S.E.2d at 420.

Sections 33-11-106 and 42-1-540 are not mutually exclusive, and § 42-1-540 does not extinguish the liability created by a merged corporate predecessor. While § 33-11-106 speaks in terms of "liability," § 42-1-540 does not; it speaks in terms of "remedy." Section 42-1-540 does not prevent the operation of § 33-11-106; it restricts only the remedy for a work-related accident falling within the purview of the Workers' Compensation Act.

Section 33-11-106 operates to end the separate corporate existence of the merged corporation, such corporation being, along with its liabilities, merged into the surviving entity, which entity is the only separate, surviving entity subject to suit going forward. Section 33-11-106 does not address the

situation wherein an employee of the surviving entity thereafter sues the surviving entity for injury arising out of the course and scope of employment (i.e., within the purview of the Act). This situation is directly addressed by § 42-1-540, which makes clear that such an employee's exclusive remedy as against the employer (i.e., the surviving entity, and the only entity then subject to suit) is through workers' compensation. *Cf.* Spectre, LLC v. S.C. Dep't of Health and Envtl. Control, 386 S.C. 357, 688 S.E.2d 844 (2010) (a specific statute prevails over a more general statute). Section 33-11-106 does not in any way speak to the defenses available to the surviving corporation, and it cannot reasonably be construed to prevent the surviving corporation's reliance on § 42-1-540 where that section is otherwise applicable; nor is there any indication that the legislature intended to upset the policy considerations upon which § 42-1-540 is based via § 33-11-106. The Plaintiff's construction, which leads to a supposed conflict between § 33-11-106 and § 42-1-540 finds no support in the plain language of either statute or the policies they reflect.

Indeed, the Plaintiff's attempt to separate inchoate liability allegedly created by the predecessor corporation and defenses available to the successor corporation when that liability later ripens is patently incongruent with the very concept of merger recognized by § 33-11-106. As noted

above, § 33-11-106(a)(1) plainly provides that, when a merger takes effect, "every other corporation party to the merger merges **into** the surviving entity and the **separate** existence of every corporation except the surviving entity ceases." (emphasis added). Accordingly, by virtue of the mergers, Walterboro Veneer is inseparable and indistinguishable from the surviving entity, Anderson, in so far as § 33-11-106 is concerned. Id. at official cmt. ("Section 11.06(a) (Section 33-11-106(a)) describes the effect of a merger. On the effective date every disappearing corporation that is a party to the merger **disappears into the surviving corporation** . . . .") (emphasis added). The Plaintiff's argument, therefore, relies upon a distinction between Anderson and the previously-merged entities that is directly at odds with § 33-11-106.

The alleged liability of Walterboro Veneer upon which the Plaintiff bases her suit was inchoate until after the merger. With Walterboro Veneer having been merged into and become indistinguishable from Anderson, Anderson possessed this inchoate liability as if Anderson had created it. If someone that was not an employee of Anderson's had fallen into the vat, Anderson may be subject to civil liability for the allegedly defective and unsafe design and/or construction—but Anderson would not be subject to workers' compensation liability. Conversely, as was the case with Mr.

Mendenall, when one of Anderson's employees fell into the vat, Anderson is subject to workers' compensation liability—but Anderson is not subject to civil liability.

There is no conflict between § 33-11-106 and the Workers' Compensation Act for the "dual persona" doctrine to reconcile. The Plaintiff's invitation for this Court to adopt the "dual persona" doctrine need not be accepted.

B. Even if the Court were inclined to adopt the "dual persona" doctrine in South Carolina, the doctrine does not apply and should not be applied under the present circumstances to allow the Plaintiff to maintain a tort action against Mr. Mendenall's employer arising out of the subject accident.

While not adopting the "dual persona" doctrine, in Tatum, this Court addressed its contours. Here, again, as was the case in Tatum, it is not necessary for the Court to adopt the "dual persona" doctrine to determine that it is inapplicable under the circumstances.

The Tatum Court endorsed the view that "[u]nder the 'dual persona' doctrine, 'an 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 an unrelated to its status as employer** that by the established standards the law recognizes that persona as a separate legal persona." 346 S.C. at 203, 552 S.E.2d at 23 (emphasis added) (citing

Larson's Workers' Compensation Law § 1113.01 [1] (1999)). The Tatum Court further explained that "[t]he 'dual persona' concept is applied in situations **where the law clearly recognizes 'the duality of legal persons**, so that it may be realistically assumed that a **legislature would have intended** that duality to be respected.'" Id. (emphasis added).

Here, the Plaintiff would define Anderson's "dual persona" nature as (1) Mr. Mendenall's employer and (2) the successor in interest to Walterboro Veneer, the entity allegedly responsible for the negligent design and/or construction of Vat #3. As an initial matter, as explained above, in the context of corporate merger, our law does not recognize the duality of these personas following merger so that it may be realistically assumed that our legislature would have intended that duality to be respected. Again, the plain language of § 33-11-106, along with its official commentary, provides that the duality ceases to exist when the merger takes effect, with the merged entity ceasing its separate existence and disappearing into the surviving entity.

Again, it must be remembered that the alleged liability of Walterboro Veneer upon which the Plaintiff's suit against Anderson is based is inchoate. As the Tatum Court noted, "Courts have declined to apply the 'dual persona' doctrine in situations where the employer does not have separate legal

identities at the time of the work-related injury." 346 S.C. at 205, 552 S.E.2d at 24. Here, at the time of the work-related injury, by law, Walterboro Veneer had no legal identity separate from Anderson. § 33-11-106(a)(1); id. at official cmt.

The Plaintiff places much emphasis on Van Doren v. Coe Press Equipment Corp., 592 F.Supp.2d 776 (E.D. Penn. 2008). Respectfully, the Van Doren decision is, indeed, supportive of the defense, and shows that, even if the Court were inclined to adopt the "dual persona" doctrine, it is inapplicable to the present situation.

The Van Doren Court surveyed cases from a number of jurisdictions that addressed workers' compensation exclusivity in the merger context and allowed the plaintiff's suit to proceed under the "dual persona" doctrine. 592 F.Supp.2d at 779-80.[7] The Van Doren Court explained these cases thusly:

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[7] Specifically, these cases were: Billy v. Consol. 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 Mgmt. 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).

> These cases invariably involve a plaintiff seeking to bring a tort action against his employer as a successor in interest to a third-party tortfeasor that merged with his employer. **In each of these cases the plaintiff's injury was caused by a product conveyed or produced by the third-party prior to the merger**. The courts that have applied the dual person 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 merger.

Id. at 800 (emphasis added). The Van Doren Court explained that these cases "fall[] within a very narrow factual pattern . . . ," which mirrored the case then before that court. Id.

In contrast, the case now before this Court does not fall within the very narrow factual pattern identified by the Van Doren Court. Here, the Plaintiff's case is not based upon an injury caused by a product conveyed or produced by the third-party prior to the merger.[8] The Plaintiff's case is based upon an injury allegedly caused by an unsafe and defective cement vat, which was not a product placed into the stream of commerce, but designed and constructed by Anderson's corporate predecessor, Walterboro Veneer; permanently affixed to the premises and not conveyed or transferred

[8] The Van Doren Court's recognition that the "dual persona" doctrine had been applied in product liability cases is consistent with this Court's observation in Tatum. 346 S.C. at 204, 552 S.E.2d at 23 ("While this Court has not considered the 'dual persona' theory, several states have adopted the 'dual persona' doctrine in the context of product liability suits by employees.").

to Anderson prior to merger; and of a utility peculiar to the function of soaking hardwood logs prior to milling, i.e., the business of Anderson and its predecessor Walterboro Veneer.

The Van Doren Court recognized that "the dual persona doctrine should not be applied to allow 'a merger to increase, rather than preserve, inchoate liability'"[9] and that "**courts consistently find the dual persona doctrine inapplicable in cases where the plaintiff would not have been able to bring suit against the predecessor company even if a merger had never occurred.**" Id. (emphasis added). The Van Doren Court explained that such situations "arise where the product in question was used exclusively by the predecessor corporation's employees and was never transferred before the merger." Id. at n. 10. "In these situations," the Van Doren Court continued, "courts have found that a plaintiff could not have brought a separate claim against the predecessor because, had the merger not occurred, only employees of the predecessor could have been injured by the machine and they would be barred from suing their employer." Id. "The question that courts focus on in deciding whether to apply the dual persona doctrine is whether the plaintiff could have brought suit against the predecessor if there had never been a merger with the plaintiff's employer."

[9] 592 F.Supp.2d at 801 (quoting Braga v. Genlyte Group, Inc., 420 F.3d 35, 44-45 (1st

Id. at n. 11.

The Plaintiff cites Billy v. Consolidated Machine Tool Corp., 51 N.Y. 2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980) as the "leading dual persona case." (Plaintiff's Br. p. 14.) (Notably, Billy was one of the cases cited by the Van Doren Court as falling within the very narrow factual pattern where, unlike the present case, the plaintiff's injury was caused by a product conveyed or produced by the third-party prior to the merger. It was also noted by the Tatum Court as being among the decisions of several states to have "adopted the 'dual persona' doctrine in the context of **product liability** suits by employees." 346 S.C. at 204, 552 S.E.2d at 23 (emphasis added).) Material to the reasoning of the Billy Court—and also to the Supreme Court of Delaware in Stayton v. Clariant Corp., 10 A.3d 597, 601 (2010), another case cited by the Plaintiff—was a recognition that had the merger not occurred, the employee could have brought a civil action against the product manufacturer, i.e., that merger should not operate to deprive the employee of a third-party claim that it would have otherwise had in the ordinary course of events. As the Billy Court reasoned, "[i]n effect, USM stands in the shoes of these two defunct corporations and, **in the ordinary course of events**, would be fully answerable to plaintiff for their tortious

---

Cir. 2005)).

conduct. Under the circumstances of this case, we cannot accept USM's contention that the obligations it inherited through corporate merger may be avoided simply because of the **fortuity that the injured party was an employee** covered by the provisions of the Workers' Compensation Law." 51 N.Y. at 161, 412 N.E.2d at 940 (emphasis added).

Here, in light of the nature of the allegedly unsafe and defective cement vat and its use in the milling operation, the only way that Mr. Mendenall would have come into contact with it in the ordinary course of events would have been as an employee. Thus, it was not "fortuity that the injured party was an employee," it was certainty. If the mergers had not taken place, and Mr. Mendenall simply worked for Walterboro Veneer—or else had no contact with the vat in the ordinary course of events, mooting the issue entirely—the Plaintiff's exclusive remedy would be workers' compensation.

Apparently recognizing this problem with applying the "dual persona" doctrine to the present case, the Plaintiff, relying on language from her own Second Amended Complaint, states that it "is clear that the tortious hazard created by Walterboro Veneer [(i.e., Vat #3)] did not just present a risk to employees; it threatened all 'persons walking in the vicinity of the plant, whether employees or not.'" (Plaintiff's Br. p. 19.) Respectfully, the

Plaintiff's suggestion that Vat #3 posed any significant threat in the ordinary course of events to nonemployees is patently disingenuous. Even the language of the Plaintiff's Second Amended Complaint acknowledges that Vat #3 was a walled, cement vat and that, at the time of the accident, Mr. Mendenall—who was unquestionably acting within the course and scope of his employment—was not merely "walking in the vicinity of the plant" but was "walking down the side wall of Vat #3 to access a steam leak." (Plaintiff's Second Amended Complaint ¶ 15; *see also* Exhibits 1A and 1B.)

Under the circumstances here, the Plaintiff could not have brought suit against the predecessor, Walterboro Veneer, if there had never been a merger with Mr. Mendenall's employer, Anderson. In the absence of merger, Mr. Mendenall would have worked for Walterboro Veneer—or, if he did not work for Walterboro Veneer, he would have had no contact with the allegedly unsafe vat in the ordinary course and there would have been no accident to begin with. Had he worked for Walterboro Veneer, the Plaintiff's exclusive remedy would have been workers' compensation. The Plaintiff's argument here seeks not to preserve liability following merger but to extend it, and to evade the exclusive remedy doctrine. The "dual persona" doctrine is plainly unavailable to the Plaintiff's to accomplish this result.

Additionally, the Defendants would note the strong dissent in Billy,

which exposed flaws in the majority's reasoning. The dissent noted that the inchoate tort liability the predecessor incurred after installation of the subject defective equipment for its own use was "to anyone injured by the defect *other than an employee*, as to whom [workers'] compensation law immunized it from common-law liability." Billy, 51 N.Y.2d at 165, 412 N.E.2d at 942, 432 N.Y.S.2d at 887, (Meyer, J., dissenting) (emphasis in original). In other words, the fact that a later-hired employee of the successor had not been an employee of the predecessor was irrelevant. The Billy dissent reasoned that the successor company inherited the predecessor's immunity from liability, including immunity from an employee's suit. As a result, the merger provided no basis for liability; it was not the equivalent of a sale or transfer of assets (with the concomitant legal obligations this would entail), and the act of merging itself did not, as a matter of law, create liability. 51 N.Y.2d at 164-68, 412 N.E.2d at 942-44, 432 N.Y.S.2d at 886-89; *see* id. at 164, 432 N.Y.S.2d at 886, 412 N.E.2d at 942 ("[E]ven under the most liberal application of the [dual persona] doctrine a manufacturer-employer is held protected by compensation immunity when the product was manufactured solely for his own use and not for distribution to the general public.").

Also, one of the cases cited by the Van Doren Court as exemplifying

the situation—such as is the case here—where the plaintiff could not have brought a separate claim against the predecessor had the merger not occurred is the Supreme Court of Washington's decision in Corr v. Willamette Industries, Inc., 105 Wash.2d 217, 713 P.2d 92 (1986). Similar to the present case, in Corr, it was only by virtue of merger that the allegedly defective plant equipment became owned by the successor entity. Id. at 222, 713 P.2d at 95. "Thus," the Corr Court observed, "absent the merger, Corr could have been injured by this machinery only if he had been an employee of [the predecessor]." Id. And, "[a]s an employee of [the predecessor], Corr would have been limited to the exclusive remedies of the workers' compensation act." Id.

The Corr Court expressly criticized Billy, among other "dual persona" decisions, for "fail[ing] to carry through the analysis of the dual persona doctrine to its reasonable conclusion." Id. Though not essential to its holding, the Corr Court went on to espouse the following view of the applicability of the "dual persona" doctrine:

> Although we need not decide this issue, third person liability under the dual persona doctrine arguably should arise in the merger context only 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, i.e. in the stream of commerce. Under

> these circumstances, the corporate manufacturer would have existed as a third person subject to liability prior to the merger. Because an individual could have been injured by the defective machinery outside the manufacturer's workplace, an injured employee of the manufacturer's corporate successor arguably should be permitted to maintain a cause of action against his employer for resulting injuries.
>
> Put simply, the formalities of a corporate merger should not extinguish the liability of the manufacturer whose assets and obligations have been transferred to another corporate entity. In this case, however, the injured claimant has not been precluded from bringing suit against the manufacturer of the product due to merger. No obligation or liability would have existed prior to the merger, and none should be created by the merger that could not have existed independently. Thus, although the court might apply the dual persona doctrine in the proper case, this is not such a case.

Id. at 223, 713 P.2d at 96.

In a footnote, the Plaintiff suggests that Corr does not reflect "mainstream dual persona law." (Plaintiff's Br. p. 21, n. 6.) Respectfully, the defense responds that the reasoning of the Corr Court is persuasive whether or not it is "mainstream" and is rightfully instructive to this Court. Moreover, the reasoning of the Corr Court is entirely consistent with the notion that the "dual persona" doctrine should not be allowed to increase liability or to simply evade the exclusive remedy doctrine, which is an

entirety "mainstream" position.

Now, some attention must be paid to the dissent in Tatum authored by Chief Justice Toal and joined by Justice Pleicones as well as the underlying Court of Appeals' opinion authored by now-Justice Hearn. Although these opinions express support for the adoption of the "dual persona" doctrine, the Defendants submit that, by contrast, the circumstances presented in Tatum help to show the inapplicability of the "dual persona" doctrine to the present case.

The facts of Tatum were particularly unique. Mrs. Tatum worked for MUSC, which was both a healthcare provider and also a governmental entity covered under the South Carolina Tort Claims Act ("SCTCA"). When she suffered an on-the-job injury, MUSC directed Mrs. Tatum to be treated by Dr. Patel, another MUSC employee, who allegedly committed medical malpractice. Under South Carolina law, the employer directs the employee to a particular treating physician for a work-related injury and the employee cannot chose her own treating physician without risking being barred from further compensation. S.C. Code Ann. § 42-15-60; 25A S.C. Code Ann. Reg. 67-509(A). Additionally, pursuant to S.C. Code Ann. § 42-15-70, "the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him . . . but the consequences of any such malpractice

shall be deemed party of the injury resulting from the accident and shall be compensated for as such." Because, Dr. Patel was an employee of a governmental entity, however, under the SCTCA, Mrs. Tatum could not sue Dr. Patel individually, but had to name MUSC as the party defendant pursuant to S.C. Code Ann. § 15-78-70(c). Of course, as against MUSC, Mrs. Tatum's exclusive remedy was workers' compensation. § 42-1-540.

Under the circumstances presented in Tatum, the Court of Appeals found that Ms. Tatum was the "victim of circuitous statutory logic,"[10] which would lead to a result that could not have been intended by the legislature and held that "South Carolina recognizes the dual persona doctrine in cases where the employer-hospital and its physicians negatively treat an employee for a work-related accident and in so doing, exacerbate the injury." 335 S.C. at 511, 517 S.E.2d at 713. Although the Court of Appeals's decision was thereafter reversed by a majority of this Court, Chief Justice Toal and Justice Pleicones dissented, explaining that, in their view, the Court of Appeals' holding was correct, and that "[o]nce MUSC undertook to act as Mrs. Tatum's medical provider, it took on a persona legally distinct from its status as her employer." 346 S.C. at 208-09, 552 S.C.2d at 26 (Toal, C.J., dissenting).

[10] 335 S.C. 499, 506, 517 S.E.2d 706, 710 (Ct. App. 1999).

The Defendants respectfully submit that the reasoning of the Court of Appeals in Tatum, which was later endorsed via Chief Justice Toal and Justice Pleicones in dissent, is not supportive of the Plaintiff's attempt to utilize the "dual persona" doctrine here. The facts of Tatum cannot reasonably be said to be analogous to the present situation, nor, as explained above, is the Plaintiff the victim of circuitous statutory logic. And, clearly, the present case is outside the bounds of the Court of Appeals' holding in Tatum, which pertained specifically to "cases where the employer-hospital and its physicians negligently treat an employee for a work-related accident and in so doing, exacerbate the injury." 335 S.C. at 511, 517 S.E.2d at 713.

Unlike Mr. Mendenall, Mrs. Tatum was not working in the capacity for which she was hired by her employer when she was injured by Dr. Patel's alleged malpractice. And, unlike the case of Mrs. Tatum, in the case of Mr. Mendenall, there is no basis upon which to find any transmutation of duties owed by Mr. Mendenall's employer to independent, non-employer duties so that Mr. Mendenall's employer can reasonably be viewed as a separate legal person. It simply cannot be said here that Walterboro Veneer is a persona of Anderson so completely independent from and unrelated to its status as an employer that by established standards the law recognizes that persona as a separate legal person. The liability alleged here cannot

reasonably be viewed as arising sufficiently outside the employment relationship so as to permit application of the dual persona doctrine. *Cf.* Hatch v. Lido Co. of New England, 609 A.2d 1155, 1157 (1992) (reversing a lower court's application of the "dual persona" doctrine in the context of the alleged negligent maintenance and installation of a gas tank, explaining as follows: "In the present case, however, plaintiff's claim against Lido as successor to T-M is premised on a breach of the identical duty owed to him by Lido as his employer-the failure of an employer to provide a safe workplace. There is no separate and unrelated duty here nor is there any independent persona. 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. We are unable, however, to accept the argument that when dealing with an identical duty, the legislature intended the statutory process of merger to strip the resulting corporation of the immunity conferred on it by the Workers' Compensation Act. Such a result serves no purpose other than to avoid the limitations imposed by the Act."); Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, at 42, 533 S.E.2d 3123, 317 (2000) (stating

that "[a]n employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools").

Assuming, *arguendo*, that it is at all appropriate to adopt the "dual persona" doctrine in spite of the clear, statutory language of § 42-1-540, the impetus for doing so should arise only where strict application of the exclusive remedy doctrine would inequitably extinguish liability that would have otherwise existed. *See, e.g.* Thomas v. Valmac Indus., Inc., 306 Ark. 228, 812 S.W.2d 673 (1991) (finding that an injured employee that already had a valid cause of action against a then-existing third-party torfeasor at the time that he sustained his injury, should not lose that claim because the tortfeasor later mergers with the injured worker's employer); Tatum, 346 S.C. at 205, 552 S.E.2d at 24 (observing that "[c]ourts have declined to apply the 'dual persona' doctrine in situations where the employer does not have separate legal identities **at the time of the work-related injury**") (emphasis added). But such a situation is not presented here. In the absence of any merger, barring some extraordinary circumstance beyond the rational scope of the circumstances now presented to the Court, the only way that Mr. Mendenall could have been injured by the allegedly defective Vat #3 (which vat presented an allegedly dangerous condition/risk solely related to his work) was as an employee, whether of Walterboro Veneer or Anderson.

As an employee, his sole remedy against his employer is and should be workers' compensation. To find otherwise is to unduly extend liability and to evade the exclusive remedy doctrine. Even to the extent that the Court may be inclined to adopt the "dual persona" doctrine, the doctrine does not apply and should not be applied under the circumstances presented here.

CONCLUSION

For the foregoing reasons, this Honorable Court should answer the certified question favorably to the defense.

Respectfully submitted,

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By: _____

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Dated: 8/20/12

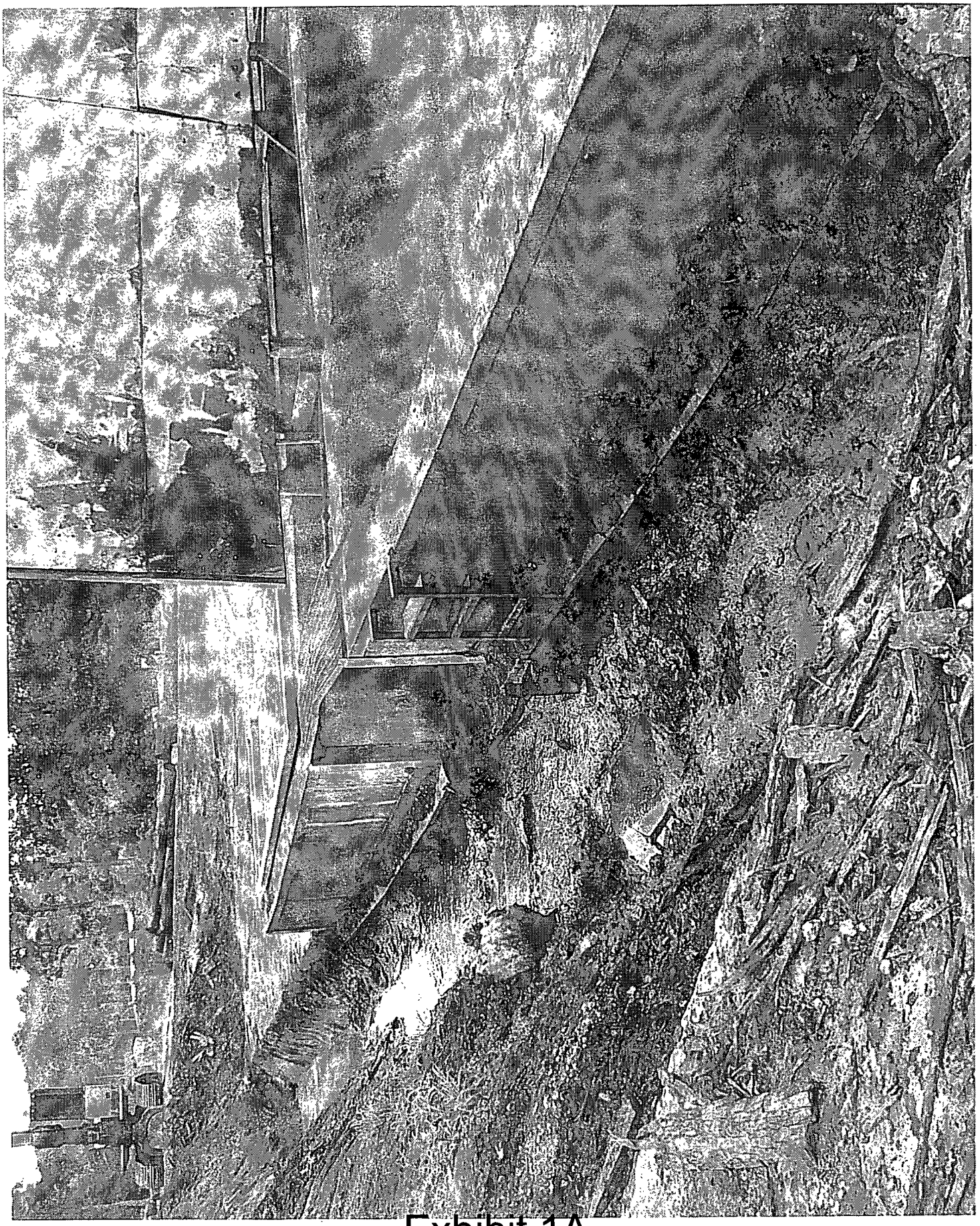


Exhibit 1A

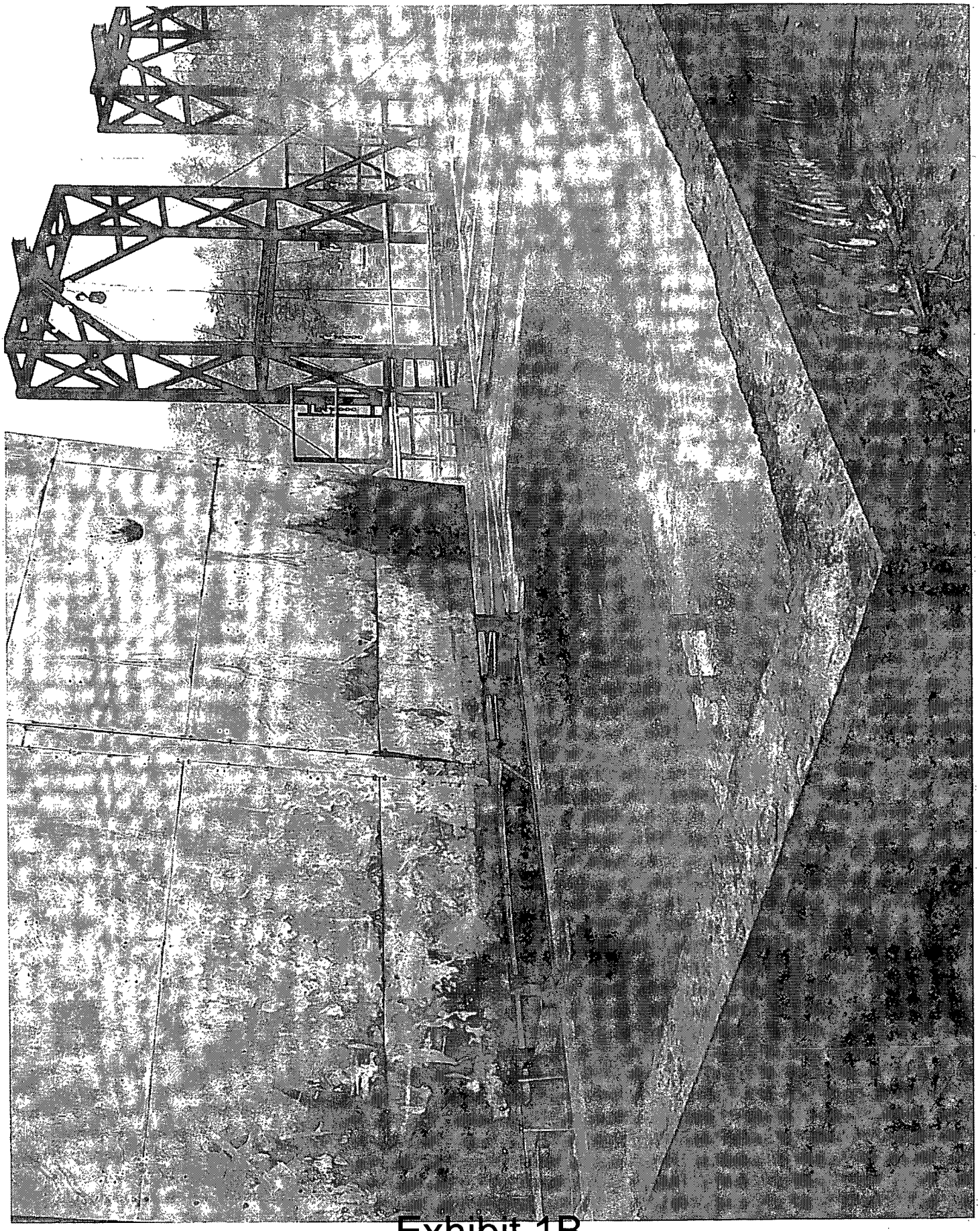


Exhibit 1B

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

Exhibit 2

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.

Exhibit 2

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

Exhibit 2

"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.

Exhibit 2

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?

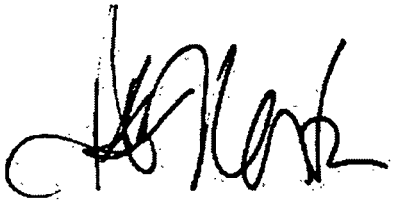
[2] The Supreme Court noted that several other jurisdictions "have adopted the 'dual persona' doctrine in the context of product liability suits by employees" and "have applied the 'dual persona' doctrine where the employer has other legally-recognized identities." Id. at 23-24. Rather than predict how 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.

Exhibit 2

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

Exhibit 2

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIFIED QUESTION
From the United States District Court
For the District of South Carolina, Charleston Division

David C. Norton, United States District Judge

C.A. No. 2:11-cv-012910-DCN

Suzanne Roerig Mendenall, Personal Representative of the Estate of Everette Eugene Mendenall,

Plaintiff,

v.

Anderson Hardwood Floors, L.L.C., Shaw Industries, Inc., and Shaw Industries Group, Inc.,

Defendants.

PROOF OF SERVICE

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Attorneys for the Defendants

I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **Brief of Defendants** in the above-captioned matter was served on all parties hereto by depositing a copy of the same in the United States Mail, postage prepaid, on August 20, 2012, addressed as follows to their attorneys of record:

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YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 8/20/12

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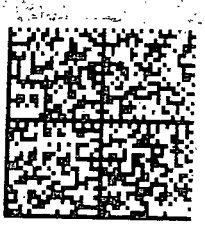

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