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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168
Heard November 12, 2015 – Filed April 6, 2016

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

v.

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

PETITION FOR REHEARING
of APPELLANT EAGLE WINDOWS & DOORS, INC.

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Appellant Eagle Window & Door, Inc. petitions for rehearing of this case pursuant to Rule 221, SCACR. For reasons set forth in the dissenting opinion, and also in the legal and factual arguments of the Appellant, Appellant respectfully submits that the majority opinion in this case misapprehends the law and overlooks matters in the Record.

The majority opinion in this case misapprehends the test established by the Supreme Court for the determination of whether a successor corporation is a "mere continuation" of its predecessor for the purpose of establishing the liability of a successor corporation for the debts or deeds of its predecessor. In South Carolina, "a successor or purchasing company ordinarily is not liable for the debts of the predecessor or selling company." *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005). Because of South Carolina's public policy which, as Justice Konduros notes in her dissenting opinion in this case, favors the "unfettered transfer of assets between businesses," a purchasing corporation will only be held liable for the debts or deeds of its predecessor corporation <u>if</u> "(1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrant a finding of a consolidation or merger of the two corporations, (3) <u>the successor company was a mere continuation of the predecessor</u>, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims." *Simmons* at 312, 215 (emphasis added). The mere continuation exception is applicable "only when there is commonality of ownership" between the seller and purchaser corporations; the exception requires that the predecessor and successor have substantially the same officers, directors, and shareholders. *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* October 8, 2008, *citing Simmons*.

The majority opinion in this case improperly holds that "the evidence supports the circuit court's finding that Eagle is liable to Nationwide because Eagle was a mere continuation of EWD."

In so doing, the Court has misapprehended the test for the mere continuation exception, which requires commonality of ownership, and has relied instead on a theory of continuity of enterprise, which was rejected by the Supreme Court in *Simmons*. In his lengthy dissenting opinion in *Simmons*, Justice Burnett argued passionately that South Carolina should adopt the doctrine of continuity of enterprise in imposing successor liability. Burnett urged the Court to consider factors such as whether a successor "held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property;" "whether the successor continued to manufacture substantially the same product line as the processor;" "whether the successor retained the predecessor's managers, employees, or sales force;" and "whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists." *Simmons* at 318-324 (Burnett, J., dissenting).

Nevertheless, the majority of the Supreme Court, in a succinct footnote, rejected Burnett's dissenting twelve pages of analysis and held that successor liability may be imposed only where there is commonality of ownership. *Simmons* at 312 n.1, 215 n.1. After acknowledging the dissent's argument, the Court stated its holding: "We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders." *Id.* (Emphasis added). This holding of the majority was later acknowledged by the Court of Appeals in the case of *Walton v. Mazda*, which cites *Simmons* for the proposition that the "Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser." 376 S.C. 301, 307, 657 S.E.2d 67, 70.

Justice Few's opinion for the majority in the present case mistakenly considers various factors to find a continuity of enterprise (as Burnett's dissent urged), rather than properly restricting analysis to commonality of ownership (as the Court ultimately held). Justice Few

remarks that "Eagle continued manufacturing windows and doors in the same location with the same name and capitalizing on that continuity in its website marketing;" he also factors into his decision the evidence that "Eagle accepted and benefited from the goodwill, name recognition, and history of the Eagle brand." In considering such factors, Justice Few misapprehends binding precedent, which rejected Justice Burnett's proposed analysis and instead required that the Court look solely to commonality of ownership in imposing successor liability. There is no commonality of ownership in the present case, as Justice Konduros recognizes out in her dissent, and as the record demonstrates, because "there is no commonality of shareholders." This lack of commonality was clearly established by three affidavits and unrefuted by the Respondents.

Furthermore, the majority opinion of the Court of Appeals in this present case overlooks and misapprehends factual evidence in the Record. Admittedly, the facts in this case are complicated as they pertain to the identity of the proper Predecessor and Successor corporations (relevant to ascertaining whether there has been a "mere continuation" of ownership). The majority of the Court, in its effort to find commonality of ownership, mistakenly compares the wrong entities. As the record demonstrates, the proper predecessor and successor corporations are in fact the Seller and Purchaser parties in the bankruptcy sale, i.e. AAPC/Eagle & Taylor (the Seller) and EWD Acquisition Co. (the Buyer). As the Record demonstrates, those entities never had any commonality of ownership.

As to the issue of whether Nationwide failed to prove a design or manufacturing defect in the windows, the majority opinion of the Court of Appeals overlooked Appellant's arguments in the Record when it determined that Eagle abandoned the issue. While the meat of Appellant's argument on that issue was mistakenly left out of its brief, the issue itself was not abandoned because it was properly submitted to the Court under the Statement of Issues on Appeal, effectively

preserved in its entirety in the Record, and also raised in the course of oral argument. Rule 208(b)(1), SCACR, states: "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." This rule implies that, conversely, the Court *will* consider those issues that *are* set forth. Further, the Appellant's argument on the issue was fully fleshed out and preserved in the Record in Appellant's Memorandum in Opposition to Plaintiff's Proposed Order of Judgment. (ROA 206-ROA 208). Rule 210(h), SCACR, "Review Limited to Record on Appeal," states that "the appellate court will not consider any fact which does not appear in the record." This rule suggests that the converse is true, and that the court will therefore consider those things that appear in the record. Finally, the issue was raised in oral argument before the Court and should not be deemed to have been abandoned.

For the foregoing reasons, Appellant Eagle Window & Door, Inc. respectfully requests that this Court grant its Petition for Rehearing in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the Respondents, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondents' attorney of record, Jason M. Imhoff, at his office at The Ward Law Firm, 233 South Pine Street, Spartanburg, South Carolina, 29302, on April 19, 2016.

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April 19, 2016

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

Re: Nationwide Mutual Insurance Company, et. al., v. Eagle Window & Door, Inc.
Appellate Case No. 2014-001151

Dear Ms. Kitchings,

Enclosed for filing is the original and six (6) copies of the Petition for Rehearing of Appellant Eagle Window & Door, Inc. in the above-referenced matter. Also enclosed is the Proof of Service on the respondents and a filing fee of $25.

Very truly yours,

G. Dana Sinkler
Attorney for Appellant

via FedEx Overnight Delivery

cc: Jason M. Imhoff
Attorney for Respondents