THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 12 2016
SC SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016

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

v.

Eagle Windows & Doors, Inc., ... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

G. Dana Sinkler
2180 Rosebank Plantation Road
Wadmalaw Island, SC 29487
(843) 224-1758
Of Gibbs & Holmes, PC
171 Church St., Suite 110
Charleston, SC 29401
and
Ainsley Fisher Tillman
29 Brisbane Drive
Charleston, SC 29407
(843) 277-4497
Attorneys for Petitioner

Jason M. Imhoff
The Ward Law Firm
233 S. Pine Street
Spartanburg, SC 29302
(864) 573-8500
Attorney for Respondents

TABLE OF CONTENTS

Certificate of Counsel....................1

Questions Presented....................2

Statement of the Case....................3

Arguments

I. The Court of Appeals Improperly Relied on a Theory of Continuity of Enterprise to Find Successor Liability, Rather Than the Required Test of Commonality of Ownership....................5

II. Eagle Did Not Abandon the Issue of whether Nationwide Failed to Prove a Design or Manufacturing Defect....................8

Conclusion....................10

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that Petitioner filed a Petition for Rehearing and that the Court of Appeals finally ruled on the Petition on June 9, 2016.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that Eagle was a mere continuation of its predecessor corporation because there was no commonality of ownership?

II. Did the Court of Appeals err in holding that Eagle abandoned the issue of whether Nationwide failed to prove a manufacturing or design defect?

STATEMENT OF THE CASE

Petitioner Eagle Window & Door, Inc. asks that this Court issue a writ of certiorari to review the Court of Appeals' final decision in this case because that holding is in conflict with the Supreme Court's decision in *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005). This conflict is emphasized by Judge Konduros in her dissenting opinion.

This appeal arises from a Complaint by Nationwide Mutual Insurance Company (hereinafter "Nationwide") and its insured, Gilliam Construction Company, Inc. (hereinafter "Gilliam") in which those parties seek to impose successor liability on Eagle Window & Door, Inc. (hereinafter "Eagle") for alleged defects in windows installed in a home constructed by Gilliam for Renaul and Karen Abel in 1999. Nationwide and Gilliam settled with the Abels for $210,000. They then brought the contribution action that is the subject of this appeal, seeking repayment of the settlement proceeds from several defendants, including Eagle. (Appendix p. 24).

Eagle has denied its responsibility for any part of the settlement. Eagle claims that it has no successor liability, based on the terms of the Asset Sale Agreement by which it purchased the assets (but not the liabilities) of the company that originally manufactured the windows in Abels' home. The windows were neither manufactured nor sold by Petitioner Eagle.

The windows at question were manufactured and sold by a Delaware corporation called Eagle & Taylor Company ("Eagle and Taylor"). Eagle and Taylor had two separate divisions, neither of which was incorporated: Eagle Window & Door, Inc. (a fictitious entity) and Taylor Building Products, Inc. (also a fictitious entity). Eagle & Taylor Company itself was a wholly owned subsidiary of American Architectural Products Company ("AAPC"), which was a publicly traded Delaware corporation. (Appendix pp. 127-128).

In December of 2000, AAPC filed for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. As part of the bankruptcy case, AAPC sought and obtained permission from the Bankruptcy Court to sell substantially all of the assets of Eagle & Taylor Company's division, Eagle Window & Door, Inc. The assets, and not the liabilities, were sold at auction, and the successful bidder was Linsalata Capital Partners Fund IV, L.P. ("Linsalata"). Linsalata was an investment partnership owned by Linsalata Capital Partners, a Cleveland, Ohio middle-market private equity buyout firm. In the course of the bidding process, Linsalata created EWD Acquisition Co. ("EWD Acquisition"), a Delaware corporation, to be its buyer entity. EWD Acquisition was Linsalata's wholly owned subsidiary. Thus, in May of 2002, the assets of AAPC's subsidiary Eagle & Taylor were sold to EWD Acquisition, wholly owned by Linsalata. Prior to that sale, none of the partners of Linsalata had any connection, business dealings with, or ownership of Eagle & Taylor Company or AAPC. After title to the assets was conveyed, EWD Acquisition changed its name to Eagle Window & Door, Inc. It is this entity that is the subject of the current lawsuit. (See Appendix pp. 170-183).

Petitioner Eagle does not dispute that the facilities, employees, nature of the business, and many officers of the window and door company remained the same after the asset sale transaction between AAPC/Eagle & Taylor and EWD Acquisition/Linsalata. After all, Eagle & Taylor's window manufacturing division was AAPC's only profitable company at the time of the sale; Linsalata purchased the business for that very reason, and it retained the same employees, facilities, and most officers so that the company would continue to be successful. Nonetheless, none of the officers of the window division of Eagle & Taylor (i.e. the fictitious Eagle Window & Door, Inc.) had any control of AAPC, and if any of those officers owned any stock in AAPC at all, it would

not have amounted to more than one hundredth percent of AAPC. (Appendix p. 133). There was only one officer in common between Eagle & Taylor and Petitioner Eagle, and that was its president, David Beeken. After the bankruptcy sale, Beeken was also made a director of and given a 1.7% ownership in EWD Acquisition Co. However, at all times subsequent to the asset sale, Linsalata had total control of the operations of Eagle, until the sale of the company in 2005 to Anderson. (Appendix p. 174-175).

In an order dated April 29, 2014, the circuit court held that Eagle was a mere continuation of its predecessor corporation. (Appendix p. 4). The Court of Appeals affirmed the circuit court's judgment, with Judge Konduros dissenting, in an unpublished opinion filed on April 6, 2016. (Appendix p. 651). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

I. The Court of Appeals Improperly Relied on a Theory of Continuity of Enterprise to Find Successor Liability, Rather Than the Required Test of Commonality of Ownership.

The Court of Appeals' holding in the present case is in conflict with the Supreme Court's established test for the determination of whether a purchasing 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 Judge 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 if "(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) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims." *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 Court of Appeals in this case erred when it held 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 ignored the proper test for the mere continuation exception, which requires commonality of ownership, and relied instead on a theory of continuity of enterprise, which was specifically rejected by the Supreme Court in *Simmons*.

In a lengthy dissenting opinion in *Simmons*, Justice Burnett argued passionately that South Carolina should adopt the doctrine of continuity of enterprise in imposing successor liability. Justice 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 instead 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.

The majority opinion of the Court of Appeals in the present case improperly considered various factors to find a continuity of enterprise (exactly as Justice Burnett's dissent urged), rather than correctly restricting analysis to commonality of ownership (as the *Simmons* Court ultimately held). In so doing, the Court was erroneously motivated by the idea that Eagle "essentially held itself out as an ongoing business." (Appendix p. 654). For example, the Court proclaimed as a basis for its decision that "Eagle's own website demonstrates Eagle is a mere continuation of itself." The Court of Appeals went on to pronounce:

> Eagle accepted and benefited from the goodwill, name recognition, and history of the Eagle brand. Further, Eagle continued to occupy the same space and manufacture the same products with the same employees. It marketed, manufactured, and continued to sell the same products under the same company name. This evidence supports the circuit court's factual findings.

(Appendix p. 656). It is critical to note that when it even considered the above factors, the Court of Appeals was disregarding the binding precedent of the Supreme Court's *Simmons* decision, and the decision of its own Court in *Walton*, which requires proof of commonality of ownership as a threshold for successor liability.

There is no commonality of ownership in the present case, as Judge Konduros pointed out in her dissent, and as the record demonstrates, because there is no commonality of shareholders. AAPC/Eagle and Taylor, as the Seller, had no ownership in common with the purchasing successor, Linsalata/EWD Acquisition. This lack of commonality is clearly established by three affidavits, which are unrefuted by the Respondents. The asset sale was an arms-length transaction, for adequate consideration, between entirely unrelated parties.

Because the Court of Appeals failed to properly apply binding precedent, Petitioner respectfully submits that its decision on the issue of successor liability warrants review by the Supreme Court.

II. Eagle Did Not Abandon the Issue of whether Nationwide Failed to Prove a Design or Manufacturing Defect.

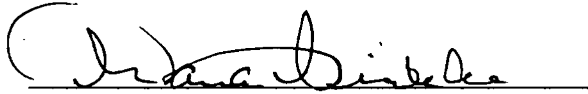
As to the issue of whether Nationwide failed to prove a design or manufacturing defect in the windows, the Court of Appeals overlooked Appellant's arguments in the Record when it determined that Eagle abandoned the issue. Eagle properly submitted the issue to the Court under the Statement of Issues on Appeal. 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. (Appendix p. 210-212). 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. Because it was set forth in the statement of issues on appeal, preserved in the record, and raised in the course of oral argument, the Court erred when it deemed the issue to have been abandoned by Eagle.

CONCLUSION

For the foregoing reasons, Petitioner Eagle Window & Door, Inc. respectfully requests that this Court grant its petition for a writ of certiorari in this case.

Respectfully submitted,



G. Dana Sinkler
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church St., Suite 110
Charleston, SC 29401
(843) 224-1758

Ainsley F. Tillman
S.C. Bar No. 70551
29 Brisbane Drive
Charleston, SC 29407
(843) 277-4497

Attorneys for Petitioner

July 5, 2016

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

RECEIVED
JUL 12 2016
SC SUPREME COURT

Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016

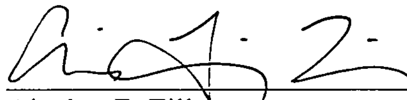
Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc. .... Respondents,

v.

Eagle Windows & Doors, Inc., ... Petitioner.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for A Writ of Certiorari 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 July 8, 2016.



Ainsley F. Tillman
S.C. Bar No. 70551
29 Brisbane Drive
Charleston, SC 29407
Attorney for Petitioner