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

Appellate Case No. 2016-001459

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

v.

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

PETITIONER'S REPLY

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REPLY

The most contentious issue in this case is that of successor liability. The law presumes that when one corporation purchases the assets of another, it does not assume the liabilities of the seller as part of the transaction. *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).[1] South Carolina has long recognized four exceptions to the doctrine of successor non-liability. It is the third exception, that "the successor corporation was a mere continuation of the predecessor," which is at issue in this case. *Id.*

South Carolina jurisprudence on the "mere continuation" exception is slim. The guideline is expressed only in a footnote, which states, with seeming simplicity:

> [T]he majority of courts interpreting the mere continuation exception have found it applicable only when there is commonality of ownership, i.e., the predecessor and successor corporations have substantially the same officers, directors, or shareholders. We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.

Simmons v. Mark Lift, 366 S.C. at 312 n.1, 622 S.E.2d at 215 n.1. The clear intent of the exception is to prevent a company from reinventing itself in a sham sale in order to escape its liabilities.

In the present case, Petitioner purchased the assets of an unrelated company in an arms-length transaction for valuable consideration. The Court of Appeals erred when it held that Petitioner was subject to the "mere continuation" exception.

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[1] "When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capitol." Restatement (Third) of Torts: Prod. Liab. §12 cmt. a (Am. Law. Inst. 1998)

The Respondents base their argument on the dissenting opinion in the *Simmons* case. Throughout this litigation, including in their *Return to Petition for Writ of Certiorari*, Respondents have unabashedly quoted from the dissenting opinion of Justice Burnett as if it were law. *Return to Petition for Writ of Certiorari*, p.13-14. In so doing, Respondents first persuaded the Circuit Court to stray from the *Simmons* majority's stated holding, based on the theoretical policy considerations espoused by Justice Burnett. (See Appendix p. 18, 298). Later, on appeal, the Respondents again quoted Justice Burnett's opinion as if it held the weight of authority, touting his reasoning as a valid rationale for holding Petitioner liable. (Appendix p. 630). The majority of the Court of Appeals followed Justice Burnett's dissenting analysis, and thereby clearly misapprehended the Supreme Court's test for imposing successor liability. (Appendix p. 656).

Justice Burnett's dissent is not binding precedent, and Respondents' dogged quotation of his opinion is misplaced. The Supreme Court specifically rejected Justice Burnett's analysis, stating: "Essentially, the dissent advocates an expansion of the mere continuation exception...We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders." *Simmons*, 366 S.C. at 312 n.1, 622 S.E.2d at 215 n.1. The Court maintained its holding by declining to review *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d. 67, 70, *cert. denied* October 8, 2008, *citing Simmons*.

The mere continuation exception hinges upon the seller and purchaser corporations having a commonality of ownership, or the same officers, directors and shareholders, both before and after the sale. *Simmons*, 366 S.C. at n. 1. While there is no discussion of the rationale behind the Court's decision in *Simmons*, other states have emphasized the importance of shareholder continuity in establishing a mere continuation. A federal district court in Virginia found that the most important factor in finding a purchaser liable for the debts of the seller is common ownership

between the two corporations. "Among these three required factors (officers, directors, and stockholders), it appears that identity of ownership is the most important component to sustain a finding of mere continuation." *Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992); *see also Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.*, 123 F.3d 201, 205 (4th Cir. 1997) (applying Virginia law) ("The most critical element in proving a continuation is showing the same ownership of the two companies, a 'common identity of the officers, directors, and stockholders in the selling and purchasing corporations.'"); *In re SunSport, Inc.*, 260 B.R. 88, 105 (Bankr. E.D. Va. 2000) ("The most critical element in proving a continuation is showing a common identity of the officers, directors, and stockholders in the selling and purchasing corporations. Of these, identity of ownership is the most important component to sustain a finding of mere continuation.") (Appendix p. 662, Konduros, J., dissenting).

Respondents would have this Court believe that the Circuit Court made a proper finding of fact that Eagle had the same officers, directors, and shareholders before and after the sale. However, the court's factual findings were based on a misapplication of the law and are unsupported by the evidence. Specifically, both the Circuit Court and the Court of Appeals failed to analyze the ownership of the Seller and Purchaser corporations, but rather improperly based their holdings on the analysis recommended by Justice Burnett in his dissent. The Circuit Court quoted Justice Burnett extensively, with phrases peppered throughout its opinion such as: "Justice Burnett cited...," "Justice Burnett stated...," and "Justice Burnett strenuously opined..." (See *Order of Judgment*, Appendix pp. 16-18). In keeping with Justice Burnett's rationale, the Circuit Court ultimately held:

> The Court finds that Eagle Windows and Doors continued to occupy the same space, manufactured the same products with the same employees, and marketed, manufactured, and continues to sell the same products under the same company name....I find that the Defendant accepted the goodwill and name recognition of

the Eagle Window brand but has specifically attempted to extinguish any liability arising from that goodwill...

(Appendix p. 19). The Court of Appeals improperly used the same analysis, looking to the factors espoused by Justice Burnett's dissent, rather than properly examining the ownership of the Seller and Purchaser. (Appendix p. 656).

Pursuant to *Simmons,* the proper predecessor and successor corporations in this case are the Seller, AAPC/Eagle and Taylor, and the Purchaser, Linsalata/EWD Acquisition. As Judge Konduros points out in her dissent, and as the record demonstrates, there was no commonality of ownership between that seller and purchaser, because there was no commonality of shareholders. This lack of commonality is clearly established by the Affidavit of Steven Perry,[2] the Corrected Affidavit of Andrew Wickham,[3] and Eagle's Answers to Plaintiffs' Interrogatories,[4] all of which were stipulated to at trial and unrefuted by the Respondents.[5] There is nothing in the Record which

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[2] The Affidavit of Steven Perry states, in paragraph 4: "Prior to this, LinCap had no business dealings, nor any contact with Eagle & Taylor d/b/a Eagle Window & Door, Inc., or its parent AAPC." In paragraph 14: "To the knowledge of Affiant, prior to Lincap's acquisition of the assets, the officers of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. held no ownership interest in Eagle & Taylor Company." (Appendix p. 410-415).

[3] The Corrected Affidavit of Andrew Wickham states, in paragraph 7: "None of the officers of Eagle were officers, directors, or shareholders of LinCap;" and in paragraph 11: "There was no commonality of ownership between LinCap and AAPC or Eagle & Taylor Company, nor did AAPC or Eagle & Taylor Company and LinCap have substantially the same officers, directors, and shareholders." (Appendix p. 424-427).

[4] The Answers to Plaintiffs' Interrogatories indicate that the relevant officers owned a minor interest in the successor Eagle but make no reference to any ownership in AAPC/Eagle and Taylor. (Appendix p. 428-439).

[5] In their *Return to Petition for Writ of Certiorari*, the Respondents state on page 6, Section D, that "[t]he application form and certificate of authority of the Secretary of State of Iowa indicated that...David Beeken, Charles Daoud, Steven Stopplemoor, Ronald Vander Weerd, Gregory Taber, and Andrew Wickham were all directors and officers of EWD Acquisition Company." This is untrue. Although the Respondents cite Appendix pp. 405-409 for this proposition, Petitioner believes that the documents to which Respondents refer may actually be found in the Appendix on pages 475 and 513. These documents, both titled Application for Amended Certificate of Authority, were filed with the Iowa Secretary of state on April 30, 2002 (Appendix p. 513) and June 18, 2002 (Appendix p. 475), after the date of the April 15, 2002, on which AAPC/Eagle & Taylor Company sold its assets to EWD Acquisition Company (The Asset Sale Agreement may be found in the Appendix on pp. 65-126). The Application forms to which Respondents refer were filed when EWD Acquisition changed its name to Eagle Window & Door Services after the asset sale. The first document, on Appendix p. 513, which was filed on April 30, 2002, indicates that EWD Acquisition Co. was incorporated on April 10, 2002, and had as its officers and directors Stephen Perry, Gregory Taber, and Ronald Neill, who were all affiliated with Linsalata and had no connection to AAPC/Eagle & Taylor. The second document, found in the Appendix on p. 475, was filed on June 18, 2002. It is the application for a name change to

reasonably supports the finding of fact that the two companies had shareholders in common.[6] The asset sale was an arms-length transaction, for adequate consideration, between two entirely unrelated parties: AAPC and Linsalata.

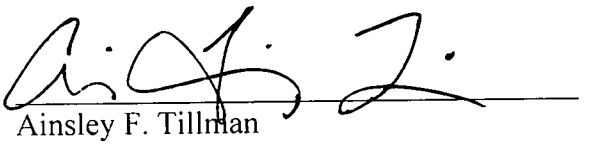
CONCLUSION

A writ of certiorari is a matter of sound judicial discretion. It may be granted when there are special and important reasons, including instances where there is a dissent in the decision of the Court of Appeals, or where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. Rule 242(b), SCACR. Because the Court of Appeals' holding on successor liability is in conflict with the Supreme Court's decision in *Simmons*, and because this conflict is emphasized in a dissenting opinion by Judge Konduros, Petitioner respectfully submits that its decision warrants review by the Supreme Court.

Eagle Window & Door Services, Inc. According to paragraph 7 of that document, the "current" officers indeed included Beeken, Daoud, Stopplemoor, Vander Weerd, Taber, and Wickham. That is because, pursuant to the Asset Sale Agreement, those men became officers of the purchased company, effective May 6, 2002. (Appendix p. 124). Petitioner has never disputed that those men were officers of AAPC's wholly owned subsidiary, Eagle Window & Door, Inc. However, those men were neither directors nor shareholders of that company, which, in fact had no ownership apart from AAPC. Furthermore, they were never officers, directors, or shareholders of Linsalata or EWD Acquisition Company prior to the bankruptcy sale.

[6] "Eagle Window & Door Inc." was a fictitious entity. It was simply the name by which Eagle and Taylor Company did business; Eagle and Taylor Company was itself the wholly owned subsidiary of AAPC. After the sale by AAPC/Eagle and Taylor to Linsalata/EWD Acquisition Company, AAPC had no further equity in Eagle Window & Door, Inc. Only Linsalata, through its ownership of EWD Acquisition Company, had any interest in Eagle Window & Door, Inc. after the Bankruptcy sale. (See Appendix pp. 131-134, *Affidavit of Jonathan Shoenike*).

Respectfully submitted,



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September 6th, 2016

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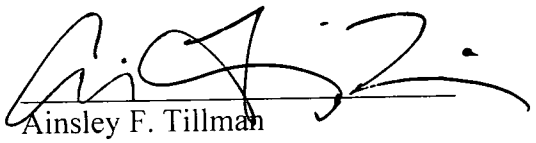
PROOF OF SERVICE

I certify that I have served the Petitioner's Reply 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' attorneys of record, Jason M. Imhoff and Ginger D. Goforth, at their office at The Ward Law Firm, 233 South Pine Street, Spartanburg, South Carolina, 29302, on September 9th, 2016.



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