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S.C. SUPREME COURT

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
On Certiorari to the Court of Appeals of South Carolina
Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016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.

BRIEF OF PETITIONER

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INDEX

Index.....	i
Table of Authorities.....	ii
Questions Presented.....	1
Statement of the Case.....	2
I. Procedural History.....	2
II. Facts.....	3
III. The Decision of the Court of Appeals.....	5
Argument	
I. The Court of Appeals Improperly Relied on a Theory of Continuity of Enterprise to Find Successor Liability, Rather Than Applying the Required Test of Commonality of Ownership to Properly Find that Petitioner Is Not Liable for the Torts of Its Predecessor.....	6
A. The Supreme Court of South Carolina has restricted successor liability under the mere continuation exception to instances where the successor and predecessor corporations have common ownership.....	7
B. The majority of other jurisdictions require common ownership between a predecessor and successor corporations as a threshold to imposing liability on a successor under the mere continuation exception.....	9
C. The Court of Appeals disregarded binding precedent when it applied a continuity of enterprise theory to find that Petitioner was a mere continuation of its predecessor.....	13
D. Under existing South Carolina law, Petitioner Eagle may not be held liable for the torts of its predecessor because it lacked commonality of ownership with its predecessor.....	15
II. Eagle Did Not Abandon the Issue of whether Nationwide Failed to Prove a Design or Manufacturing Defect.....	17
Conclusion.....	18

TABLE OF AUTHORITIES

South Carolina Cases

Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924).....6, 8-9

Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005)...5, 7-9, 13-16

Walton v. Mazda of Rock Hill, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008).....14-15

Other State Cases

Baltimore Luggage Co. v. Holtzman, 562 A.2d 1286 at 1293 (Md. App. 1989).....10

Grand Lab., Inc. v. Midcon Lab, 32 F.3d 1277, 1283 (8th Cir. 1994).....10

In re SunSport, Inc., 260 B.R. 88, 105 (Bankr. E.D. Va. 2000).....11

Pancratz v. Mosanto Co., 547 N.W.2d 198 at 201 (Iowa 1996).....11

Taylor v. Atlas Safety Equip. Co., 808 F. Supp. 1246, 1251 (E.D. Va. 1992).....11

Vernon v. Schuster, 688 N.E.2d 1172 at 1176 (Ill. 1997).....10-12

Welco Industries, Inc. v. Applied Cos., 617 N.E.2d 1129 at 1134 (Ohio 1993).....11

Rules

SCACR, Rule 208(b)(1).....17

SCACR, Rule 210(h).....17

Other Authority

Restatement (Third) of Torts: Prod. Liab. §12 (Am. Law. Inst. 1998).....6

M. Reilly, *Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745, 793-94 (2003).....10

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

I. Procedural History

This appeal arises from a lawsuit filed by Nationwide Mutual Insurance Company (hereinafter “Nationwide”) and its insured, Gilliam Construction Company, Inc. (hereinafter “Gilliam”) in which those parties sought to impose successor liability on Eagle Window & Door, Inc. (hereinafter “Petitioner” and “Eagle”) for alleged defects in windows installed in a home constructed by Gilliam for homeowners Renaul and Karen Abel in 1999. Nationwide and Gilliam settled with the Abels for \$210,000. They then filed the underlying contribution action, seeking repayment of the settlement proceeds from several defendants, including Petitioner Eagle. (Appendix p. 24).

In an order dated April 29, 2014, the circuit court held that Eagle was a mere continuation of its predecessor corporation and thereby imposed liability on Eagle as the buyer of the assets of the original window manufacturer. (Appendix p. 4). The Court of Appeals affirmed the circuit court’s judgment as to the issue of successor liability, with Judge Konduros dissenting, in an unpublished opinion filed on April 6, 2016. (Appendix p. 651). The Court of Appeals denied rehearing (again by a divided panel) on June 9, 2016. Eagle petitioned this Court for a writ of certiorari on July 5, 2016. That petition was granted on May 2, 2017.

The issues before this Court are (1) whether the circuit court and Court of Appeals erred by imposing successor liability on Eagle for the allegedly defective

windows, despite the fact that Petitioner is not a mere continuation of the original manufacturer; and (2) whether Eagle abandoned its claim that Nationwide failed to plead or prove a manufacturing defect. The relevant facts are as follows.

II. Facts

The windows at question were manufactured and sold by a Delaware corporation called Eagle & Taylor Company (“Eagle & Taylor”). Eagle & 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; 131).

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 fictitious entity, Eagle Window & Door, Inc. (Appendix p. 133; 170-171). The assets 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. (Appendix pp. 170-171). Prior to that sale, none of the partners of Linsalata had any connection, business dealings with, or ownership of Eagle & Taylor Company or AAPC. (Id.) After title to the assets was conveyed, Linsalata's EWD Acquisition changed its name to Eagle Window & Door, Inc. (See Appendix p. 173). It is that entity against which Respondents brought their contribution claim; it is that entity against which the Circuit Court imposed successor liability; and it is that entity which is now the Petitioner before this Court.

When Respondents brought their contribution claim in circuit court, Eagle denied its responsibility for any part of the amount paid by Respondent insurance company to the homeowners. Eagle's defense is that it was the subsequent purchaser of the assets of the original window manufacturing company. Petitioner Eagle itself neither manufactured nor sold the allegedly defective windows. (Appendix pp. 42-43). Thus, Petitioner argued that pursuant to South Carolina common law and the subject Asset Sale Agreement, it was not liable for the actions of the division of AAPC which originally manufactured the windows in the Abels' home. (Appendix pp. 50-58).

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. However, 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 have amounted to no more than one 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. Nonetheless, 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 Windows. (Appendix pp. 174-175).

III. The Decision of the Court of Appeals

The Court of Appeals affirmed the circuit court's judgment on the issue of successor liability, with Judge Konduros dissenting, in an unpublished opinion filed on April 6, 2016. (Appendix pp. 651-663). Petitioner sought a writ of certiorari to review that decision, because the Court of Appeals' 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).

ARGUMENT

I. The Court of Appeals Erroneously Imposed Successor Liability on Petitioner, which Had No Ownership in Common with Its Predecessor Corporation.

The Court of Appeals' holding is in conflict with the Supreme Court's established doctrine on the liability of a successor corporation for the debts or deeds of its predecessor. The law in South Carolina is clear: a purchasing company will not be held liable for the acts of its predecessor in the absence of fraud, agreement, de facto merger, or a commonality of ownership between the predecessor and successor company. It is error to impose liability on the Petitioner under the facts of the present case, because none of those criteria apply.

The law presumes that when one corporation purchases the assets of another, it does not assume the seller corporation's liabilities as part of the transaction. *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). This presumption of non-liability exists in the common law governing corporations in order to encourage the free alienability of corporate assets, to limit shareholders' exposure to liability, and thereby to facilitate the formation and investment of capital. *Restatement (Third) of Torts: Prod. Liab.* §12 cmt. a (Am. Law. Inst. 1998).¹ Thus, in South Carolina, and across the country, "[a] successor or purchasing company ordinarily is not liable

¹ See also, *Restatement (Third) of Torts: Products Liability* § 12, cmt. b at p.211: "[A] majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without even benefitting very many tort plaintiffs because dissolving corporations would switch to piecemeal sales of assets to avoid that liability."

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) (emphasis added).

The *Simmons* Court, like the majority of jurisdictions nationwide, recognized four instances in which the presumption of a successor corporation’s non-liability may be overcome. A purchasing corporation will only be held liable for the acts 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), *citing Brown*. The circuit court erroneously held that, under the third exception, the Petitioner is a “mere continuation” of its predecessor. A divided Court of Appeals wrongly agreed.

A. The Supreme Court of South Carolina has restricted successor liability under the mere continuation exception to instances where the successor and predecessor corporations have common ownership.

South Carolina jurisprudence on the “mere continuation” exception is unambiguous: the mere continuation exception is applicable “**only when there is commonality of ownership**” between the seller and purchaser corporations. *Simmons*, at 312 n.1, 215 n.1 (emphasis in original). The rule established by this Court states:

[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 (underlined emphasis added).

The facts in *Simmons* shed light on the Court's holding and bear many similarities to the present case. In *Simmons*, the plaintiff was injured in 1999 by equipment manufactured by Mark Industries ("Mark") in 1990. In 1991, Mark filed for bankruptcy, and its motion to sell various assets was granted by the bankruptcy court. Terex was the winning bidder at auction, where it purchased from Mark: "the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property, such as drawings, designs, patents, licenses, and technology." *Simmons* at 214. The injured plaintiff claimed that Terex was liable for his injuries under the theory of successor liability. The Supreme Court granted certification from the United States District Court of South Carolina to address questions of successor liability. It held:

Our opinion in *Brown* sets forth the proper test to determine, in a products liability action, whether there is successor liability of a company which purchases the assets of an unrelated company....Further, we conclude a plaintiff may maintain a state law-based product liability claim under a successor liability theory against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the federal bankruptcy court **provided** one of the exceptions set forth in the *Brown* opinion applies.

Simmons at 215 (emphasis in original), citing *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).²

In a lengthy dissent, Justice Burnett urged that the facts and circumstances of the sale to Terex warranted an expansion of *Brown*'s mere continuation exception to include liability for successor corporations which, among other things, continue to manufacture the same product line, use the same equipment, and use the predecessor's trade names, advertising, and intellectual property. *Simmons* at 221 (Burnett, J., *dissenting*). However, the Court's majority explicitly rejected Justice Burnett's proposed analysis and restricted liability under the mere continuation exception to those instances where the predecessor and successor share a common ownership. *Simmons* at 312 n.1, 215 n.1.

B. The majority of other jurisdictions require common ownership between a predecessor and successor corporations as a threshold to imposing liability on a successor under the mere continuation exception.

While there is no discussion of the rationale behind the Court's decision in *Simmons*, courts in other jurisdictions have elaborated on the policy behind the mere continuation exception and have limited application of the exception to situations in which the asset sale was accomplished for the purpose of defrauding creditors. Those Courts observe that the "exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of the reach of the

² The *Simmons* case received considerable attention from the South Carolina Bar and business organizations. In addition to the briefs filed by the parties, amicus curiae briefs were also filed on behalf of the South Carolina Trial Lawyers Association, the South Carolina Manufacturers' Alliance and the Products Liability Advisory Council, Inc.

predecessor's creditors." *Vernon v. Schuster*, 688 N.E.2d 1172 at 1176 (Ill. 1997), quoting *Baltimore Luggage Co. v. Holtzman*, 562 A.2d 1286 at 1293 (Md. App. 1989) (holding that successor's retention of a minority interest in predecessor was insufficient grounds to invoke "mere continuation" exception absent indicia of fraud). In particular, the exception is meant to prevent a company from reinventing itself in a sham sale in order to escape its liabilities. *Grand Lab., Inc. v. Midcon Lab*, 32 F.3d 1277, 1283 (8th Cir. 1994) (applying Iowa law) ("parties cannot circumvent the mere continuation exception by inserting...sham owners and directors of a new company that is in substance the predecessor.")³

Across the country, most courts emphasize the importance of shareholder continuity in establishing a mere continuation. The test used in the majority of jurisdictions "is whether there is a continuation of the corporate entity of the seller—not whether there is a continuation of the seller's business operations." *Vernon* at 1176 (emphasis added). In evaluating the similarity between the predecessor and

³ In her article on this topic, Professor Marie Reilly emphasizes that the mere continuation exception focuses on continuity as evidence of fraud, and not as independent justification for imposing successor liability:

A transferee should be liable as a successor not because it continues some attributes of the transferor, but because it colluded with the transferor in fraud, or at the time of the transfer reasonably should have known that the debtor/transferor planned to hide assets from creditors. Evidence of continuity—of shareholders or other insiders, business operations, or products line—can be probative on the question of collusion and on that of the transferee's access to information about a future fraud on creditors. Absent this critical evidence, the fact that the transferee uses the acquired assets in the same way as the transferor did, or continues to manufacture a similar product line, does not make the transfer sufficiently 'unfair' to the transferor's creditors to justify the imposition of their loss on the transferee.

M. Reilly, *Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745, 793-94 (2003).

successor corporations, courts look primarily to identity of ownership. *See Pancratz v. Mosanto Co.*, 547 N.W.2d 198 at 201 (Iowa 1996) (“We have never applied the mere continuation exception where the buying and selling corporations had different owners”); *Welco Industries, Inc. v. Applied Cos.*, 617 N.E.2d 1129 at 1134 (Ohio 1993) (“It is not in dispute that Vickers and Welco were strangers and that the owners of Vickers are not the owners of Welco”); *Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992) (“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”); *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.”) *See also* Appendix pp. 660-663, Konduros, J., dissenting.

A look at the Illinois case of *Vernon v. Schuster* illustrates how essential continuity of the corporate entity, manifested in ownership, is to the mere continuation exception. In that case, a father owned a heating and plumbing company as the sole proprietor. In the course of his business, the father installed and annually serviced a boiler belonging to the plaintiffs. In fairly rapid succession, the father died, his son inherited the company and began to operate it as a sole proprietorship, and the plaintiffs’ boiler failed. Plaintiffs brought a negligence claim, alleging that the son had succeeded the liability of his father. Even though the son had worked

with his father before his death, and even though, after his father's death, the son retained the company name, operated the same sort of business out of the same location, and serviced his father's same customers, the Supreme Court of Illinois held that, as a matter of law, the son's business was not a mere continuation of his father's.

In so doing, that Court noted:

Common identity of ownership is lacking when one sole proprietorship succeeds another. It is well settled that a sole proprietorship has no legal identity separate from that of the individual who owns it. The sole proprietor may do business under a fictitious name if he or she chooses. However, doing business under another name does not create an entity distinct from the person operating the business....In this case, it must be remembered that 'Diversey Heating' had no legal existence. Diversey Heating was only a pseudonym for James Schuster. Once he died, Diversey Heating ceased to exist. Now, Diversey Heating is only a pseudonym for defendant.

Based on the obvious lack of common identity of ownership, the continuation exception to the rule of successor corporate nonliability cannot be applied to defendant.

Vernon v. Schuster, 688 N.E.2d 1172, 228 Ill. Dec. 195 at 199-200 (Ill. 1997).

As the record demonstrates, Petitioner Eagle is an entirely separate corporate entity from its predecessor, AAPC/Eagle & Taylor. The predecessor company—the windows division of Eagle & Taylor—was wholly owned by AAPC, a publicly traded corporation. It was purchased by an unrelated corporate entity, EWD Acquisition, which was wholly owned by Linsalata, a group of partners out of Ohio who operated a private equity buyout firm. When Linsalata purchased the assets of the windows division of Eagle & Taylor, it named as the company's directors several of its own members. Linsalata did retain many of the officers of the original company, and it continued to operate the windows division in much the same manner as it had been

operated prior to its sale. However, no members of Linsalata ever owned any stock in AAPC, nor were they involved in its management as officers or directors.

Linsalata's purchase of AAPC's subsidiary was not undertaken as a sham sale to avoid liability; it was an arms-length transaction between entirely unrelated corporate entities. As Judge Konduros points out in her dissent, there was never a common identity of ownership between the predecessor and successor corporations in this case.

C. The Court of Appeals disregarded binding precedent when it applied a continuity of enterprise theory to find that Petitioner was a mere continuation of its predecessor.

Under the commonality of ownership test set forth by this Court in *Simmons v. Mark Lift*, the Court of Appeals ought to have held that Petitioner Eagle is not a mere continuation of its predecessor. However, the Court of Appeals ignored the proper test and instead incorrectly relied on a theory of continuity of enterprise, which was advocated in his dissent by Justice Burnett, and which was specifically rejected by the majority of the Court.

In his dissenting opinion in *Simmons*, Justice Burnett argued zealously 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*). These factors were not, and never have been, adopted as the law of South Carolina.

In fact, the majority of the Supreme Court, in a succinct footnote, rejected Justice Burnett's opposing 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. The Court noted, "[e]ssentially, the dissent advocates an expansion of the mere continuation exception." *Id.* 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.* The Court confirmed this position by refusing to review *Walton v. Mazda of Rock Hill*, 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 (Ct. App. 2008).

In the present case—in spite of this Court's holding in *Simmons*—the majority of the Court of Appeals improperly applied a continuity of enterprise test (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 divided Court of Appeals was erroneously motivated by the idea that Eagle "essentially held itself out as an ongoing business." (Appendix p. 654). For example,

the majority 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.

D. Petitioner Eagle may not be held liable for the torts of its predecessor because it lacks commonality of ownership with its predecessor.

There is no commonality of ownership in the present case, as Judge Konduros points out in her dissent, and as the record demonstrates, because the shareholders and directors of the Seller, AAPC, and the Purchaser, Linsalata, were not the same. This lack of commonality is clearly established by the Affidavit of Steven Perry,⁴ the

⁴ The Affidavit of Steven Perry (Co-President of Linsalata Capital Partners) 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 pp. 410-415).

Corrected Affidavit of Andrew Wickham,⁵ and Eagle's Answers to Plaintiffs' Interrogatories,⁶ all of which were stipulated to at trial and unrefuted by the Respondents. (Appendix p. 5). There is nothing in the Record which reasonably supports the finding of fact that the two companies had shareholders in common.⁷ The asset sale was an arms-length transaction, for adequate consideration, between two entirely unrelated corporations: AAPC/Eagle & Taylor and Linsalata/EWD Acquisition. Under the *Simmons* test, Petitioner is not liable for the debts of its predecessor.

Because the mere continuation exception hinges upon the seller and purchaser corporations having a commonality of ownership, and because the facts demonstrate no such commonality, the Court of Appeals' decision to impose successor liability on Petitioner was erroneous and must be reversed by this Court.

⁵ The Corrected Affidavit of Andrew Wickham (former Controller of AAPC's windows division, and later Finance and Business Integration Manager of Petitioner Eagle) 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 pp. 424-427).

⁶ 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 pp. 428-439).

⁷ "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*, General Counsel to AAPC).

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

As to the issue of whether Respondents failed to prove a design or manufacturing defect in the windows, the Court of Appeals overlooked Petitioner'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 Petitioner's argument on the issue was fully fleshed out and preserved in the Record in Eagle'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 of Appeals erred when it deemed the issue to have been abandoned by Eagle.

CONCLUSION

For the foregoing reasons, as well as for those stated by Judge Konduros in her dissenting opinion in this case, Petitioner respectfully submits that the Court should reverse the judgment of the Court of Appeals and find that liability may not be imposed upon Petitioner for the deeds of its predecessor, and that Petitioner did not abandon the issue of whether Respondents failed to prove a defect.

Respectfully submitted,



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June 13th, 2017

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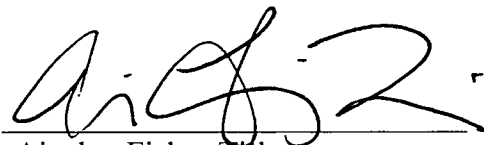
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v.

Eagle Windows & Doors, Inc., Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon opposing counsel by depositing a properly addressed copy in the United States Mail, postage prepaid, on June 13th, 2017.



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