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

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S.C. SUPREME COURT

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Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016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.

REPLY BRIEF OF PETITIONER

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STANDARD OF REVIEW

Because the facts that are pertinent to the question of successor liability were admitted into evidence by stipulation of the parties, as joint exhibits at trial,[1] this Court is free to review whether the trial court properly applied the law to those facts, without deference to the lower court. *JK Const. v. Regional Sewer Authority*, 336 S.C. 162 at 166, 519 S.E.2d 561 (1999).

ARGUMENT

Respondents, in their brief, argue that the "promotion of fairness and justice" warranted a finding in their favor by the Circuit Court and the Court of Appeals. Fairness and justice, however, are not served by veering from this Court's established doctrine. The bottom line is that a successor corporation is generally not held liable for the deeds and debts of its predecessor, absent an agreement to do so, or fraud. *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924); *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). Where, as in the present case, a purchasing corporation acquires the assets of an entirely unrelated corporation in an arms-length transaction, for valuable consideration, and without the intent to defraud creditors, the purchasing corporation enjoys a presumption of nonliability for the obligations of its predecessor. *Id.* The Circuit Court's and the Court of Appeals' assignment of liability in the present case is in conflict with the law of South Carolina and thus is neither fair nor just.

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[1] Appendix pp. 5, 237-239

Respondents would have this Court believe that the Circuit Court made a proper finding of fact that the predecessor and successor corporations in this case 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 not supported by the evidence. The lack of any relationship or association between the Seller and Purchaser corporations is clearly borne out by the record: The Respondent construction company purchased the allegedly faulty windows in the year 2000 from "Eagle Window & Door, Inc.," an unincorporated, fictitiously named division of Eagle & Taylor Company—a Delaware corporation which was itself a wholly owned subsidiary of a publicly traded Delaware corporation called American Architectural Products Company ("AAPC"). (Appendix pp. 424-425). When AAPC filed for bankruptcy in 2002, it sought to sell the assets of its window division, and it received permission to do so from the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, pursuant to the United States Bankruptcy Code. (Appendix pp. 131-133, 410-411, 424-425). AAPC's window division was sold at an auction—at which there were several interested buyers—and the successful bidder was an Ohio middle-market private equity buyout firm called Linsalata Capital Partners Fund IV, L.P. ("Linsalata"). (Appendix p. 411). No owners of Linsalata owned any shares in AAPC, nor did they have any connection or business dealings with that company or its subsidiary, Eagle & Taylor. (Appendix pp.130-134, 410-411). The assets were purchased for valuable consideration ($64,750,000) and without any collusion or intent

to defraud creditors between the Seller (AAPC/Eagle & Taylor) and Purchaser (Linsalata/EWD) (Appendix pp. 411-415).

Respondents incorrectly argue that the Circuit Court aptly found that the successor corporation in this case was a mere continuation of its predecessor. This Court, in *Simmons*, set forth the standard for determining whether a purchasing corporation is a mere continuation of its predecessor, which would justify an exception to the doctrine of successor nonliability:

> [T]he majority of courts interpreting the mere continuation exception have found it applicable **only where 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, 366 S.C. at 312 n.1, 622 S.E.2d at 215 n.1 (bold emphasis in original; underlined emphasis added). In the present case, the Circuit Court and the Court of Appeals failed to adhere to that standard.

Throughout its *Order of Judgment*, the Circuit Court cited Justice Burnett's dissenting opinion in *Simmons* as if it were law,[2] rather than properly regarding the

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[2] *See, e.g.*, Appendix p. 15, 18. The Circuit Court quoted Justice Burnett's dissent 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).

opinion of the majority. In fact, the very basis of the Circuit Court's holding is an incorrect understanding of *Simmons*; the trial judge opined: "a party need only show that the successor corporation has substantially the same officers, directors or shareholders; thus, proving that a successor corporation has substantially the same officers is sufficient to prove a mere continuation." (Appendix p. 17). This statement by the Circuit Court, which formed the basis of its *Order*, is patently erroneous for two reasons: (1) the Supreme Court in *Simmons* actually required a commonality of "officers, directors, **and** shareholders," before and after an asset sale; and (2) the Circuit Court looked in error to the wrong entities in an effort to assign liability; there was in fact no commonality between the corporate seller (AAPC) and buyer (Linsalata), which were strangers to one another at the time of sale.[3]

The Circuit Court and, later, the Court of Appeals, misconstrued the underpinnings of the mere continuation exception, which looks for identity of ownership between the Seller and Purchaser as an indication of collusion. Here, the windows division of AAPC, which was sold at auction, was just one asset of a corporate entity. None of the officers of the windows division, including its president David Beeken, had any ownership or control over the actions of AAPC. (Appendix p. 133, paragraph 11). Furthermore, the officers of the windows division were in no way

[3] The Circuit Court's misunderstanding of the law of corporations and the proper application of successor liability may be seen in this statement from its *Order*: "Eagle focuses on Linsalata and the officers, shareholders, or directors of Linsalata. Linsalata is not a party to this action. Plaintiffs sued Eagle, not Linsalata." (Appendix p.18)

affiliated with the purchasing corporation, Linsalata/EWD Acquisition.[4] (Appendix pp. 424-427).

The Circuit Court's finding that the predecessor and successor corporations in this case had shareholders in common is clearly erroneous, as there is absolutely no evidence in the record that demonstrates shareholders in common between Linsalata/EWD Acquisition and AAPC/Eagle & Taylor. What the Record does reveal is honest speculation by an affiant that some of the officers of the windows division may have had stock ownership in AAPC amounting to no more than between one-tenth to one one-hundredth of a percent of the ownership in that enormous, publicly traded corporation. (Appendix p. 133, paragraph 11). There is no evidence in the Record

[4] In the *Brief of Respondents*, 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 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.

whatsoever that any owners of shares in AAPC/Eagle & Taylor also had ownership in the purchasing corporation at the time of sale; in fact there is much evidence to the contrary. (*see* Appendix p. 134, paragraph 14; p. 415, paragraph 17; and p. 426, paragraph 11). That some of the officers of AAPC's unincorporated window division, which was the subject of the asset sale transaction, later acquired a small percentage of stock in the successor corporation, after the asset sale, does not suffice to indicate a commonality of ownership between the seller and buyer entities at the time of the sale sufficient to establish that Linsalata was a mere continuation of AAPC.[5]

The analysis on which the Circuit Court and the Court of Appeals based their decisions improperly involves the continuity of enterprise of Eagle's window business. The continuity of enterprise and product line expansions to the mere continuation exception were rejected by this Court in *Simmons*. 366 S.C. 308 at 312 n.1, 622 S.E.2d at 215 n.1. Instead, this Court limited the application of the mere continuation exception to instances where there is commonality of ownership between the predecessor and successor corporations. *Id*; *see also 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) (the "Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the

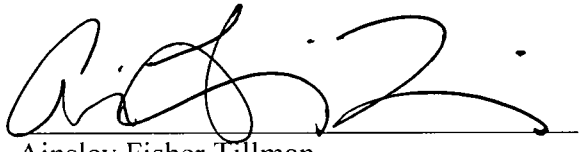
[5] The *Affidavit of Stephen B. Perry* was admitted at trial as Joint Exhibit # 2. Stephen Perry was the Co-President and Senior Managing Director of Linsalata. In paragraph 15, Perry describes the **post**-sale distribution of shares of stock in the newly formed Eagle Window & Door Holding Company. According to Perry's affidavit, Linsalata Capital Partners Fund IV, L.P. owned the vast majority of those shares (23,000). David Beeken, in contrast, was issued 450 shares of the stock in the new company. (Appendix p. 414-415, paragraph 15).

seller and purchaser.") The Record is clear that there was no such commonality in the present case. (Appendix pp. 659-663, Konduros, J., *dissenting*). Thus, there can be no question that Petitioner is not a mere continuation of its predecessor.

Conclusion

The Circuit Court and the Court of Appeals, as well as the Respondents in their arguments to this Court, rely on the rejected proposals of Justice Burnett in his dissenting opinion in *Simmons*. Their reliance on a dissenting opinion is an error of law, further warranting *de novo* review by this Court. Because the decisions of the lower courts do not conform to the legal principles established by this Court, and because under the proper analysis it is clear from the undisputed facts that there is no commonality of ownership between the seller and purchaser corporations in this case, Petitioner respectfully requests that this Court would hold that Petitioner is not a mere continuation of its predecessor and is therefore not liable to the Respondents.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Reply 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 July 29th, 2017.

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