

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT  
) CIVIL ACTION NO.: 2013-CP-40-7729

THE GATES AT WILLIAMS-BRICE )  
CONDOMINIUM ASSOCIATION and )  
KATHARINE SWINSON, Individually, and )  
on behalf of all others similarly situated, )

Plaintiffs,

vs.

QUALITY BUILT, LLC, and COAST TO )  
COAST ENGINEERING SERVICES, INC. )  
d/b/a CRITERIUM ENGINEERS, )

Defendants.

ORDER GRANTING QUALITY  
BUILT, LLC'S MOTION FOR  
DECLARATORY RELIEF, OR IN THE  
ALTERNATIVE MOTION FOR  
SUMMARY JUDGMENT

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SC Court of Appeals

JEANETTE B. ...  
CLERK OF COURT

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RICHLAND COUNTY  
FILED

THIS MATTER COMES BEFORE THE COURT upon Defendant Quality Built, LLC's ("Defendant") Motion for Declaratory Relief, or in the Alternative, Motion for Summary Judgment heard on March 13, 2017. Present at the hearing were Alan Belcher, Esq. appearing as counsel for Defendant, Justin Lucey, Esq. appearing as counsel for the Plaintiffs above-named ("Plaintiffs"), and Kent T. Stair, Esq. appearing as counsel for Defendant Coast to Coast Engineering Services, Inc. d/b/a Criterium Engineers ("Criterium"). After hearing the arguments of counsel, reviewing the contents of the Clerk of Court's file, and reading the memoranda submitting by counsel, this Court finds Defendant's Motion should be granted.

I. Defendant's Motion and Plaintiffs' Opposition.

This lawsuit initiated by the Plaintiffs concerns allegations of construction and design defects in connection with the construction of The Gates at Williams-Brice Condominiums ("The Gates"). Defendant argues it is not the party which performed work at the The Gates project

('the Project'). Further, Defendant submits that pursuant to the Order (I) Authorizing the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief filed on January 29, 2010 (the "Sale Order") and the Amended and Restated Asset Purchase Agreement by and among QualityBuilt.com as Seller and Quality Built, LLC as Buyer (the "Purchase Agreement"), the United States Bankruptcy Court authorized and ordered that the Defendant cannot be held liable for any alleged work performed by the entity called Qualitybuilt.com at The Gates Project.

As detailed in the Sale Order and Purchase Agreement, Defendant purchased assets from Qualitybuilt.com in a bankruptcy sale, free of liabilities with the exception of those explicitly named. The Gates was not an assumed liability under the Sale Order and Purchase Agreement, and therefore Defendant argues it should be dismissed from this action with prejudice. Defendant argues that inherent to this transaction, the United States Bankruptcy Court discharged Defendant of any liabilities of Qualitybuilt.com in its purchase of Qualitybuilt.com's assets. The Bankruptcy Court found "The Purchaser would not have entered into the Purchase Agreement . . . if the sale of the Purchased Assets was not free and clear of all Claims other than Assumed Contracts and Assumed Liabilities, or if the purchaser would, or in the future could, be liable for any such Claims, including, without limitation and as applicable, certain liabilities [] that expressly are not assumed by the Purchaser." Sale Order, ¶ W (emphasis added).

Plaintiffs submit to the Court that Defendant is liable under South Carolina common law successor liability theory and Defendant is a mere continuation of Qualitybuilt.com. The Plaintiffs rely on Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc. to establish that the

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Plaintiffs are not claimants under 11 U.S.C.A. § 101(5) and therefore may pursue an action in tort against Defendant, post-sale under successor liability theory. 394 S.C. 54 (2011).

However, the Nationwide case is a product defect case regarding defective windows placed in the stream of commerce by a predecessor company and is distinguishable from one-time quality control services provided by Qualitybuilt.com at The Gates Project. The test to which Plaintiffs cite in the Nationwide case to determine the type of claim reads:

[A]n individual has a §101(5) claim [which is limited by the free and clear sale to *in rem* against the sale proceeds held by the Debtor] **against a debtor manufacturer if** (i) events occurring before confirmation create a relationship, such as contact, exposure, impact, or privity, between the claimant and the debtor's product; and (ii) the basis for liability is the debtor's prepetition conduct in designing, manufacturing and selling the allegedly defective or dangerous product. ...

Nationwide, 394 S.C. at 59 (emphasis added). The United States Bankruptcy Code simply defines a claim under § 101(5) as "[a] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or [a] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C.A. § 101(5). Additionally, the bankruptcy order in Nationwide includes a "free and clear" clause which contemplates claims arising before the closing of the sale of the assets. Nationwide, 394 S.C. at 58. The bankruptcy order in the instant case clearly includes a "free and clear" clause which bars all claims before or after the petition date:

[F]ree and clear of liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), liabilities encumbrances, rights, remedies, restrictions, and interests and encumbrances of any kind

of nature whatsoever whether arising before or after the Petition Date, whether at law or in equity . . . .

Sale Order, p. 1 (emphasis added).

The Defendant argues the Nationwide tests as to determining the type of claim are inapplicable. Nationwide speaks to product manufacturer liability in the successor context and employs a more limited bankruptcy order, whereas the Sale Order in instant case bars all future claims and regards administration of quality control inspection services.

In following, Plaintiffs argue that once it is established Plaintiffs are not § 101(5) claimants, they may pursue a tort claim against Defendant under state law and South Carolina precedent sets forth exceptions to successor non-liability in Brown<sup>1</sup> and Simmons<sup>2</sup>, one being the "mere continuation" exception. Simmons v. Mark Lift Industries, Inc., 366 S.C. 308 (2005); Brown v. American R. E. Co., 128 S.C. 428, 431 (1924). Defendants argue these cases are distinguishable from the instant case, as Nationwide, Simmons, and Brown overwhelmingly and specifically address products liability actions.

Brown is distinguishable, as it constitutes the continuation of one transaction – the purchase and delivery of goods – the delivery of which was never completed. Brown, 128 S.C.

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<sup>1</sup> The Brown case from 1924 involves a railway defendant which was deemed liable by the circuit court for its predecessor's failure to deliver a shipment to the plaintiff. At the time the predecessor company processed and received the shipment on January 14, 1918, the defendant was not yet in existence. Brown, 128 S.C. at 429-30. On July 1, 1918, the defendant was incorporated and assumed by purchase certain property of the predecessor company. Id. at 430. On July 1, 1920, the plaintiff brought its suit against defendant for failure to deliver the shipment. Id. at 429. At the time of the suit, the predecessor company remained viable with assets. Id. at 430.

<sup>2</sup> The Simmons case cited by the Plaintiffs answers specific, certified questions from the United States District Court for the District of South Carolina by applying the Brown successor liability test. 366 S.C. 308 (2005). The certified questions posed to the Supreme Court regarding successor liability each specifically apply to products liability claims. Id. at 309-10. The facts in Simmons concern a predecessor company which manufactured scissor lifts until it was purchased by the successor company in 1991 which continued to manufacture similar scissor lifts until 1992. Id. at 310-11. The plaintiff's claim was for injuries sustained by a scissor lift occurring in 1999 which was manufactured and sold by the predecessor company. Id. at 310. As part of the purchase agreement, the successor company purchased "the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property, such as drawings, designs, blueprints, patents, licenses, and technology." Id. at 311.

428 (1924). It is alleged that Qualitybuilt.com, as owner of certain intellectual property, provided services for quality control at The Gates Project which was completed in 2007. There is no continuity of the predecessor's work at The Gates by the Defendant after Defendant was incorporated in 2009. Therefore there is no comparable analysis as Defendant is not liable in the instant case for completion of The Gates Project, or in Brown – payment of lost shipment.. Id. at 434.

Likewise, in Simmons the Court considers certified questions arising from the product liability context. Defendant argues the Simmons facts cannot be treated as tantamount to those in the instant case to apply the Brown test to this matter. The certified question posed to the Supreme Court in Simmons contemplates the successor company manufacturing a product placed in the stream of commerce, which is perpetuated by the successor company's purchase of designs, technology, licenses, and so on, to create that product. The injury was sustained by the similar product created by the predecessor company. In the instant case, neither Defendant nor its predecessor placed unreasonably dangerous or defective products into the stream of commerce. Instead, it is alleged Qualitybuilt.com was retained to perform a service at The Gates as one transaction in the form of quality control inspection. Defendant argues this is a one-time service and there is no product being placed in the stream.

## II. Law and Analysis.

The Court has two means at its disposal to grant the relief requested in Defendant's Motion: declaratory relief pursuant to S.C. Code § 15-53-10, *et seq.* and Rule 57, SCRPC, as well as summary judgment pursuant to Rule 56, SCRPC. The Court may liberally construe the Uniform Declaratory Judgments Act and afford the parties relief from uncertainty by determining the rights, status, and other legal relations of a party. Id. Likewise, under Rule 56 of

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the South Carolina Rules of Civil Procedure, the Court may determine judgment as a matter of law is appropriate, and has the authority to extend full faith and credit to the United States Bankruptcy Court's Sale Order. Bankruptcy orders and judgments are entitled to full faith and credit by state courts in subsequent proceedings. See McNaughton-McKay Elec. Co. of NC, Inc. v. Andrich, 324 S.C. 275, 280 (S.C. Ct. App. 1996) (quoting 1B J. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.419[3.-2], at 430 (2d ed. 1983)). By enforcing the Sale Order, the Court may find as a matter of law that the Plaintiffs' claim against Defendant is barred in its entirety.

Generally, a precursor to a products liability action in South Carolina is the defendant's placement of an unreasonably dangerous product into the stream of commerce. Thus, there is an inherent public policy demand for responsibility for products present in the stream of commerce into perpetuity, regardless of whether the predecessor manufacturer was the one that placed it in the stream, as opposed to the successor. Thereafter, it is the Nationwide case that contemplates a means for a plaintiff to pursue an action in tort against the product manufacturer, post-bankruptcy sale. Nationwide, 394 S.C. 54.

This Court finds that Defendant is not a successor of ongoing conduct, as is a recurring theme in defective product cases. The company Qualitybuilt.com performed a one-time inspection service at The Gates Project and there was no continuity thereafter by Defendant, post-bankruptcy for which Defendant can be held liable. Moreover, the Defendant purchased assets such as software and intellectual property in the bankruptcy sale. The sale at issue in this case is not one concerning the design or rights to manufacture a product placed in the stream of commerce.

Pursuant to S.C. Code § 15-53-10, *et seq.*, Rule 57, SCRCP, this Court declares that according to the plain, unambiguous language of the Sale Order and Purchase Agreement,

6726

there is no question the Defendant is free and clear of any liabilities associated with The Gates Project, and further, that it was the clear intent of the United States Bankruptcy Court to consummate the binding Purchase Agreement with the Sale Order, setting forth that Defendant would not *in the future* be liable for any claims other than those assumed liabilities set forth therein, lest the Defendant would not have entered into the transaction at all. The terms of the United States Bankruptcy Order serve as a complete bar to the Plaintiffs' claims against Defendant in this case. Furthermore, this Court declines to extend the holdings in defective-product actions such as Nationwide to the instant case, as this case merely concerns inspection services performed in a single occurrence. It is therefore,

ORDERED that Defendant's Motion be granted, and it is further,

ORDERED that Defendant be dismissed from this action with prejudice.



The Honorable G. Thomas Cooper, Jr.  
Circuit Court Judge  
Court of Common Pleas  
Fifth Judicial Circuit

This 7 day of April, 2017.  
Columbia, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

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JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4007729

Gates At Williams Brice Condominium Assn NOV 09 2017

Katharine Swinson  
PLAINTIFF(S)

SC Court of Appeals  
DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for :  Plaintiff  Defendant or  Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge \_\_\_\_\_ Judge Code 2126 Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 11 day of April, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Justin O'Toole Lucey

Stephanie D. Drawdy

Alan Ross Belcher Jr.  
Kent Taylor Stair

Elizabeth Wieters

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McAride