THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper Jr., Circuit Court Judge
Case No. 2013-CP-40-7729
Appellate Case Tracking Number: 2017-002325

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SC Court of Appeals

The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated, Appellants,

v.

Quality Built, LLC and Coast To Coast Engineering Services, Inc. D/B/A Criterium Engineers, Respondents.

Appellants' Initial Brief

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Circuit Court erred in granting Quality Built, LLC's Motion for Declaratory Relief since Quality Built, LLC has never filed a cause of action for declaratory relief.**

2. **Whether the Circuit Court erred by determining that the QualityBuilt.com bankruptcy sale order barred Appellants from bringing their state law claims.**

3. **Whether the Circuit Court erred in making its own determination that the mere continuation exception to successor non-liability was not met in contravention of prevailing case law, and the facts and circumstances of this case.**

INTRODUCTION

Respondent is the successor to the inspection company which provided quality assurance for the construction of The Gates at Williams-Brice in Columbia, South Carolina ("The Gates"). Respondent uses the same inspection software, in the same line of business, under the direction of the same president, advertising the same history and experience as the company that failed its quality assurance at The Gates.

Appellants seek reversal of Circuit Court Orders that improperly dismissed Plaintiffs' claims. First, the Circuit Court erred in granting declaratory relief when no declaratory judgment cause of action was pending. Second, the Circuit Court erred in finding the bankruptcy sale order to be a bar to Plaintiffs' state law claims. Third, the Circuit Court erred in mis-applying prevailing law and deciding issues of fact raised by Plaintiffs' successor liability claim. These errors demand reversal.

STATEMENT OF THE CASE

This appeal arises from a putative class action that was commenced by Appellants in December 2013, for construction deficiencies at The Gates. Appellants are The Gates at Williams-Brice Condominium Association ("COA") and Katharine Swinson, individually, and on behalf of the owners of the one hundred fifty-eight (158) condominiums at The Gates. Appellants alleged negligence/gross negligence and breach of warranty against Quality Built, LLC in their complaint, and sought damages caused by defective quality control during the construction of The Gates. (Complaint, R. ____).

In early 2016, Appellants filed an Amended Complaint that clarified that Quality Built, LLC is the successor to Qualitybuilt.com and added an express successor liability claim against Quality Built, LLC as a mere continuation of QualityBuilt.com. (Amended Complaint, R. __).[1]

In February 2017, Quality Built, LLC filed its Motion for Declaratory Relief, or in the Alternative, Motion for Summary Judgment. (Motion, R.__). The Circuit Court heard oral argument on these Motions on March 13, 2017, and issued its Order granting Quality Built, LLC's Motion for Declaratory Relief on April 7, 2017. (April 2017 Order, R. __).

On April 20, 2017, Appellants filed a Motion for Reconsideration of the April 7, 2017 Order (Motion for Reconsideration, R. ___). On May 8, 2017, Appellants submitted supplemental authority that was pertinent to Appellants' Motion for Reconsideration. (Supplemental Authority Letter, R. ___).

On July 17, 2017, the Circuit Court heard oral argument on Appellants' Motion for Reconsideration. The Court issued an Order that denied Appellants' Motion for Reconsideration on October 17, 2017. (October 2017 Order, R. ___).

Appellants filed a Notice of Appeal of both the April 2017 Order and October 2017 Order with this Court on November 7, 2017.

FACTUAL BACKGROUND

Circa 1994, Stan Luhr started the "Quality Built" program, a third-party quality assurance inspection program.

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[1] This amendment was predicated in part upon information learned in the deposition of Elizabeth Michaelis, President of Quality Built, LLC and Former President/Secretary of Quality Built.com, which occurred in the predecessor defective construction action, *The Gates at Williams-Brice Condominium Association, et al .v. DDC Construction, Inc., et al*, Case No. 2012-CP-40-8512. As of this filing, the predecessor action has been substantially resolved, with claims remaining pending against fewer than a half-dozen parties.

In 1999, Luhr founded QualityBuilt.com as a litigation support company that employed the Quality Built program. Luhr hired Elizabeth Michaelis to work at QualityBuilt.com as its Vice President of Sales.[2]

Circa 2002, QualityBuilt.com launched its website, www.qualitybuilt.com, and Luhr promoted Michaelis to Vice President of QualityBuilt.com.

Circa 2003, Luhr then promoted Michaelis to the dual roles of Vice President and Secretary of the Board of QualityBuilt.com.

Circa 2004, Luhr promoted Michaelis to the dual roles of President and Secretary of the Board of QualityBuilt.com; Luhr maintained the title of Chief Executive Officer of QualityBuilt.com.

In 2006, QualityBuilt.com was hired by The Gates' general contractor/developer pursuant to an insurance requirement for a third party to perform quality assurance inspection services for construction of The Gates. (Michaelis Dep., 23:2-26:5, R. ____).

In March 2007, QualityBuilt.com obtained certification with The International Standards Organization ("ISO") by the hands-on work of QualityBuilt.com President and Board Secretary Michaelis (Michaelis Dep., pp. 122:9-123:25, R. ____; 2008 QualityBuilt.com Web Pages, R. ____). (This becomes relevant later in the chronology when Quality Built, LLC takes credit for the ISO certification).

In mid-2009, Quality Built, LLC was formed, and included two principle executives from QualityBuilt.com:

> QualityBuilt.com Chief Executive Officer, President and 50% Equity Security Holder Stan Luhr held the title of Quality Built, LLC Chief Technical Officer, Principal and 5% common equity holder; and

[2] According to Michaelis, Luhr hired Michaelis as Vice President of Sales at QualityBuilt.com in 1996 – three (3) years before QualityBuilt.com was formed (Michaelis Dep. 11:22-12:4, R. __).

> QualityBuilt.com President, Secretary, and 50% Equity Security Holder Elizabeth Michaelis held the title of Quality Built, LLC Executive President and 10% common equity holder (originally starting with 5%).

(Michaelis Dep. 14:1-14:8, 16:17-16:22, 17:8-13, R. ____); Quality Built, LLC Employment Agreement Extract from Quality Built, LLC Asset Purchase Agreement at 59, R. ____); QualityBuilt.com US Bankruptcy Court (SDC), Voluntary Petition at 5-6, , R. ____).

In late 2009, QualityBuilt.com filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court, Southern District of California, Case No. 09-12113-PB11.

In February 2010, Quality Built, LLC's Managing Member and Head of its Board of Directors, Gary Elzweig, submitted an affidavit confirming Quality Built, LLC retained Luhr and Michaelis to serve as Quality Built, LLC's Chief Technical Officer and President, respectively, and each held 5% common equity interest. (Elzweig Aff, R. ____).

In March 2010, the Southern District of California Bankruptcy Court issued an Order approving a Section 363 "Free and Clear" sale of QualityBuilt.com's assets to Respondent Quality Built, LLC, and authorized consummation of an Asset Purchase Agreement between Quality Built, LLC and QualityBuilt.com (the "Sale Order" and "Purchase Agreement", Exhibits A and B to Quality Built, LLC Motions, R. ____).

Also in March 2010, Quality Built, LLC issued a press release that advertised to the public that it was a "newly *restructured* firm" that retained QualityBuilt.com Founders Luhr and Michaelis as Chief Technical Officer and President. (Quality Built, LLC Press Release, R. ____). (emphasis added).

Circa 2010 – *one year after Quality Built, LLC was formed and incorporated* – Quality Built, LLC advertised itself to the public on the QualityBuilt.com website, www.QualityBuilt.com, as having experience dating back to *1995* – a year after Stan Luhr developed the Quality Built, LLC program (and four years before QualityBuilt.com was even formed):

> Fifteen years ago, when insurance carriers refused to insure construction in California, Quality Built went to all the major financial centers in the United States as well as those in London, Dublin and the Bahamas. We met with insurance carriers and provided them with data to demonstrate that construction was not the blind risk they thought it was, provided that construction companies implement proper quality control and inspection systems to assure the quality of construction. We rolled out our risk management program that has since become the standard for underwriting construction for over 30 insurance carriers. In fact, Quality Built created all of the compliance metrics that are used today by most insurance carriers.

(2010 Quality Built, LLC Web Pages, R. ____). (emphasis added).[3]

In 2011 – *two years after Quality Built, LLC allegedly commenced business* - Quality Built, LLC advertised itself to the public on the QualityBuilt.com website, www.QualityBuilt.com, as the only United States company with ISO certification that it held since 2007:

> Quality Built™ is the only construction risk inspection firm in the United States that has been awarded a certification from The International Standards Organization (ISO). In 2007, Quality Built received its first certification, ISO 9001:2000, and in March 2010, ISO recertified Quality Built under ISO 9001:2008.
>
> Quality Built is the only construction inspection risk management solution company in the United States that has achieved the highly coveted ISO Certification from the International Standards Organization assuring after rigorous evaluation that Quality Built's systems and work product produces standardized and consistent levels of quality and accuracy.

(2011 Quality Built, LLC Web Pages, R. ____) (emphasis added).

In 2012 – *when Quality Built, LLC was allegedly in business for just three years* – Quality Built, LLC advertised to the public on the QualityBuilt.com website, www.QualityBuilt.com that Beth Michaelis had been with the "Quality Built Organization" for *thirteen years* - which would date back to circa 1999, the year Stan Luhr formed successor QualityBuilt.com:

> Beth [Michaelis] is President of Quality Built®, the nation's leading construction quality assurance firm. In her more than 13 years with the Quality Built® organization, Beth continues to expand Quality Built's risk management and

[3] Circa 2010, approximately nine months after Luhr assisted in forming Quality Built, LLC, Quality Built, LLC President Kramer terminated Quality Built, LLC CEO Luhr. (Michaelis Dep., 17:18-18:5, R. ____).

quality assurance line of services, with a special focus on cultivating large builder and insurance industry relationships.

(2012 Quality Built, LLC Web Pages, R. ____). (emphasis added).

STANDARD OF REVIEW

This appeal challenges the Circuit Court's grant of Respondent's Motion for Declaratory Relief. A Circuit Court's decision to grant declaratory relief should be reversed on appeal if there is "a clear showing of an abuse of discretion", and the decision is "clearly against the weight of the evidence or controlled by an error of law." *Med. Univ. of S.C. v. Taylor*, 294 S.C. 99, 103, 362 S.E.2d 881, 883 (Ct. App. 1987) (held that circuit court erred in granting declaratory/injunctive relief because administrative proceedings were already pending on same issues between same parties when declaratory relief action was filed).

This appeal also challenges the Circuit Court's alternative ruling made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Since summary judgment is a drastic remedy, it should be cautiously invoked so that no one will be improperly deprived of a trial on disputed factual issues. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). Appellate courts apply the same standard as circuit courts when a ruling is made under Rule 56, SCRCP. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). Summary judgment may only be affirmed when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, ... the nonmoving party must come

forward with specific facts showing there is a genuine issue for trial." *Id.* "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below on appeal from an order granting summary judgment. *Clegg*, 377 S.C. at 653, 661 S.E.2d at 796; *Thomas Sand,* 349 S.C. at 408, 563 S.E.2d at 112 ("Even if there is no dispute as to evidentiary facts, summary judgment is not appropriate where there is a dispute as to a conclusion to be drawn from those facts and to clarify the application of the law."); *Watters v. Terminix Serv., Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008) (giving the appellant "every benefit of the doubt"). "Summary judgment should be granted only when it is perfectly clear that *no* issue of fact is involved." *Piedmont Engineers, Architects & Planners, Inc. v. First Hartford Realty Corp.*, 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982); *see also Thomas Sand,* 349 S.C. at 408, 563 S.E.2d at 112 ("If triable issues exist, those issues must go to the jury.").

ARGUMENT

The Circuit Court committed error by granting Respondent's Motion for Declaratory Relief. The Circuit Court should have refrained from granting declaratory relief since there was not a declaratory judgment action pending. The Circuit Court also erred by misconstruing prevailing precedent as to the lack of legal effect that QualityBuilt.com's bankruptcy had on Appellants' claims. Lastly, the trial court erroneously determined that Respondents claims did not fall within the "mere continuation" exception to successor non-liability. It so doing, the trial court misconstrued the facts and invaded the jury's province. As shown below, Appellants are not barred by the QualityBuilt.com bankruptcy sale order, and are free to bring their state law claims against

Quality Built, LLC under a successor liability theory, and have proffered qualifying evidence. This Court should reverse both Circuit Court Orders and find Appellants are entitled to proceed with their claims against Quality Built, LLC.

I. The Circuit Court Erred in Granting Quality Built, LLC's Motion for Declaratory Relief In light of the Fact that Quality Built, LLC Never Filed a Declaratory Judgment Cause of Action and Issues of Fact Exist that Should Be Heard by a Jury.

The Circuit Court should not have granted Quality Built LLC's Motion for Declaratory Relief under Rule 57, SCRCP, over Appellants' objection. *Smith v. S.C. Ret. Sys.,* 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999) ("a court should not exercise [declaratory relief] power lightly"). In its April 2017 Order, the Circuit Court erred by ruling under Rule 57 that QualityBuilt.com's Bankruptcy Sale Order is a "complete bar" to Appellants' claims (April 2017 Order at 77, R.___). This ruling is procedurally improper because Quality Built, LLC has only sought declaratory relief by way of a motion. Even if a declaratory relief motion were construed to be a proper vehicle for relief, the issue of whether an exception to successor non-liability is met triggers questions for a jury, not a judge.

A. The April 2017 Order that Granted Declaratory Relief Is Procedurally Improper Because Quality Built, LLC Never Filed a Declaratory Judgment Cause of Action.

Notwithstanding the fact that Quality Built, LLC never filed a declaratory judgment action, the Circuit Court proceeded to grant declaratory relief in its April 2017 Order:

> Pursuant to S.C. Code § 15-53-10, et seq., Rule 57, SCRCP, this Court declares that according the [sic] to the plain, unambiguous language of the Sale Order and Purchase Agreement, there is no question the Defendant is free and clear of any liabilities associated with The Gates Project [...](April 2017 Order at 6-7, R.___).

This ruling is an error of law. A declaratory relief award pursuant to the Uniform Declaratory Judgments Act, S.C. Code §§ 15-53-10, *et seq.*, (the "Act") is proper only after a declaratory judgment action is filed. "A party may not make a motion for declaratory relief, but rather, the

party must bring an action for a declaratory judgment." *Treece v. S.C. Dep't of Mental Health SCDMH*, No. CIVA3:08-03909DCNJRM, 2010 WL 1254927, at *2 (D.S.C. Mar. 24, 2010) (motion for declaratory relief under Fed.R.Civ.P. 57 denied because no action for declaratory relief was filed) (quoting *Kam-Ko Bio-Pharm Trading Co., Ltd.Australia v. Mayne Pharma (USA), Inc.*, 560 F.3d 935, 943 (9th Cir.2009) (plaintiff's declaratory judgment motion deemed a summary judgment motion because no declaratory judgment cause of action was filed)).[4]

"[T]he requirements of pleading and practice in actions for declaratory relief are exactly the same as in other civil actions, including the requirement that the action is commenced by filing a complaint." *Treece*, 2010 WL 1254927, at *2 (emphasis added) (citing 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2768 (3d ed.1998)); *see also Groves v. City of Darlington, SC*, No. 4:08-CV-0402-TLW-TER, 2010 WL 5257231, at *2 (D.S.C. June 1, 2010), report and recommendation adopted, No. 4:08-CV-0402-TLW-TER, 2010 WL 5257232 (D.S.C. Dec. 17, 2010) (motion for declaratory judgment held not to be "the proper vehicle to obtain the relief sought" because no cause of action for declaratory relief had been filed).

Quality Built, LLC never filed a declaratory judgment action under the Act. Quality Build's answer filed in June 2016 is devoid of any reference to a request for declaratory relief. (Answer, R. __). Quality Built, LLC's only pleading seeking declaratory relief is it's Motion for Declaratory

[4] Because Rule 57 under the South Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure correspond, analysis of the federal rule may be instructive in interpreting the state rule. *Med. Univ. of S.C. v. Taylor*, 294 S.C. 99, 102, 362 S.E.2d 881, 883 (Ct. App. 1987) ("Rule 57 of the South Carolina Rules of Civil Procedure" is "like its federal counterpart."); *see*, e.g., *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), *reh'g denied* (July 13, 2016) (looking to federal cases interpreting Rule 12(h)(1) for guidance on Rule 12(h)(1), SCRCP); *Wright v. Cordesville Pentecostal Holiness Church*, 310 S.C. 321, 322, 426 S.E.2d 772, 773 (1993) (looking to federal cases to interpret Rule 60(b)(5), SCRCP); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335–36, 426 S.E.2d 777, 781 (1993) (looking to the federal system in examining appeals from denial of a Rule 12(b)(2) motion).

Relief, or in the Alternative, Motion for Summary Judgment. Quality Built, LLC's failure to file a declaratory judgment action is fatal to its request for declaratory relief. (R's Motion, R. __).

B. Even if a Declaratory Relief Motion Was the Proper Vehicle, the More Appropriate Remedy is Submission of Those Claims to a Jury.

Even if the Circuit Court had discretion to grant declaratory relief by motion (which Appellants do not concede), the more appropriate remedy would have been submission of those issues to a jury:

> When a proceeding under this chapter involves <u>the determination of an issue of fact</u> such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. <u>All existing rights to jury trials are hereby preserved</u>. Section 15-53-90 (emphasis added).

If a declaratory judgment action were pending (which it is not), Appellants' right to a jury trial would be triggered under this provision because at least one "determination of an issue of fact" is involved in Appellants' pending action. The Circuit Court went against the weight of evidence in the record and improperly took over the fact-finding role to determine that Quality Built, LLC did not fall within any of the successor non-liability exceptions. (October 2017 Order at 1, R.___). This determination is improper even in the Rule 57, SCRCP, context. Appellants have a right to a jury trial because, as shown below, genuine issues of material fact exist, as well as disputes regarding the conclusions to be taken from those facts.

"A court will <u>not</u> entertain a declaratory judgment action if there is pending, at the time of the commencement of the declaratory judgment action, <u>another action or proceeding</u> to which the <u>same persons are parties</u> and in which are involved and may be adjudicated the <u>same issues</u> that are involved in the declaratory judgment action. This Rule is especially applicable [...] where <u>another remedy will be more appropriate</u> under the circumstances." 25 S.C. Jur. Rules of Civil Procedure § 57.2 (emphasis added) (citing *MUSC v. Taylor*, 294 S.C. 99). Here, Appellants'

pending *action* against Respondents involves the same issues that the Circuit Court decided under Respondent's motion, making Respondent's motion an inappropriate avenue for relief. The more appropriate avenue was to dismiss Quality Built, LLC's Motion for Declaratory Relief as improper, and find that genuine issues of material fact exist that require a determination by jury.

II. The QualityBuilt.com Sale Order Does Not Bar Appellants' State Law Claims.

The Circuit Court erred in finding there was "no question" Respondents were free and clear of any liability related to The Gates based on the Sale Order and incorporated Purchase Agreement:

> [T]here 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. (April 2017 Order at 7, R. __) (emphasis added).

The United States Supreme Court implicitly confirmed that broadly worded Sale Orders like the one at issue here do not absolve a successor entity from liability. Rather, an analysis must be done of the sale order language, whether the claimant had a pre-bankruptcy relationship with the debtor, and whether the claim is against the bankruptcy proceeds or *in personam* against the successor itself. This analysis was not performed by the Circuit Court.

A. *General Motors* is Authoritative On the Effect a Sale Order Should Have on a Successor Entity's Liability.

The United States Supreme Court, the ultimate authority on questions of federal law relating to bankruptcy, refused to review the Second Circuit's findings in *General Motors LLC v. Celestine Elliott, et al.* Nos. 2015-2844, 15-2847 (2d Cir. 2016), cert. denied, __ U.S. __ (U.S. Apr. 24, 2017) (No. 16-764). In *General Motors*, the Second Circuit (in line with other circuits[5])

[5] *See, e.g., Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268, 1277–78 (5th Cir. 1994); *Matter of Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir.1991), *cert. denied,* 503 U.S. 906, 112 S.Ct. 1262,

concluded that a successor entity, GM, was not shielded from liability for two categories of claims despite the bankruptcy sale order and incorporated purchase agreement, both of which purported to dictate otherwise. Like the sale order at issue here, the sale order in *General Motors* gave the impression that successor "New GM" purchased its predecessor's assets free and clear of all claims not provided for under that order:

> The proposed sale order provided that New GM would acquire Old GM assets free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability.

General Motors, No. 16-764 at App-9 (internal quotations omitted). Despite this broad language, however, the Second Circuit recognized "New GM" could be adjudged liable for two categories of "claims" premised on successor liability. *Id.* at App-30-36.

The first category encompassed "independent claims." *Id.* at App-34-35. The Second Circuit defined "independent claims" as those based on post-closing wrongful conduct. *Id.* ("These sorts of claims are based on New GM's *post*-petition conduct, and are not claims that are based on a right to payment that arose before the filing of petition or that are based on prepetition conduct.") A bankruptcy court order could not prospectively eliminate New GM's liability for its future acts at the time of the petition in accordance with bankruptcy law.

The second category comprised claims where no pre-bankruptcy relationship existed between the claimant and the predecessor. *Id.* at App-35[6] (concluding Sale Order could not be

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117 L.Ed.2d 491 (1992); *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1577 (11th Cir. 1995).

[6] And, in response to New GM's argument that the Second Circuit was "modifying the Sale Order and knock[ing] the props out of the foundation on which the [Sale Order] was based", the *General Motors* Court held that its decision was consistent with bankruptcy law:

> We do not *modify* the Sale Order. Instead, we merely interpret the Sale Order in accordance with bankruptcy law. [The "free and clear" provision] does not cover independent claims or Used Car Purchasers' claims.

read, consistent with bankruptcy law, to cover claims brought by purchasers who had no contact or relationship with the predecessor).

Here, Quality Built, LLC's post-bankruptcy conduct exposed it to tort liability independent of the pre-petition acts of its predecessor, QualityBuilt.com. And, Appellants had no pre-bankruptcy relationship with QualityBuilt.com. Appellants did not even know of QualityBuilt.com's existence or role in the construction of The Gates until after the bankruptcy.

B. The April 2017 Order Did Not Properly Examine Whether the Sale Order Between QualityBuilt.com and Quality Built, LLC Bars Appellant's State Law Claims.

The April 2017 Order failed to properly apply this State's Supreme Court decision in *Nationwide* and its discussion of 11 U.S.C. § 101(5). It was only by ignoring the factors set out in *Nationwide* that the Circuit Court determined the 11 U.S.C. § 363(f) sale of QualityBuilt.com to Quality Built, LLC was a bar to Appellants' claims. The Circuit Court's conclusion that the Sale Order deprived Appellants of their ability to bring their state law claims is an error of law.

In determining whether a 11 U.S.C. § 363(f) sale may preclude state law tort claims, the South Carolina Supreme Court examines both the language of the bankruptcy court order's "free and clear" provisions and whether the claims at issue fall within the ambit of 11 U.S.C. § 101(5). *See Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 57–60, 714 S.E.2d 322, 324–25 (2011); *see also Simmons v. Mark Lift Indus., Inc.,* 366 S.C. 308, 310-11, 622 S.E.2d 213, 214-215 (2005) (concluding "a plaintiff may maintain a state law-based product liability claim under a successor liability theory against a successor corporation which purchased the

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General Motors, No. 16-764 at App-35 (internal quotations omitted) (emphasis in original); *In re Grumman Olson Industries, Inc.*, 445 B.R. 243, 247 (Bkrtcy. S.D.N.Y. 2011) (whether a sale order exonerates a successor entity is a "straight forward, threshold legal question").

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" even though the bankruptcy order provided "[n]othing herein shall be construed as assumption of or by the Buyer of any liabilities of the Seller, including, without limitation, any liability for products manufactured or sold by Seller"). If Appellants are not prepetition claimants under §101(5)[7], Appellants are free to proceed with their claims against Respondent under a successor liability theory. *Nationwide*, 394 S.C. at 60, 714 S.E.2d at 325.

1. Appellants' Lack of a Pre-Bankruptcy Relationship With QualityBuilt.com and Appellants' In Personam Claim Against Quality Built, LLC Are Vital Factors Weighing In Favor of Finding Appellants Are Not Bound by the Sale Order.

A claim does not fall within §101(5) if there is no pre-bankruptcy relationship (e.g., contact, exposure, impact, or privity) between the claimant and predecessor that gives rise to a claim to be administered under the bankruptcy case. *See Nationwide*, 394 S.C. at 59, 714 S.E.2d at 325 (finding appellants were not barred by §101(5) because "the homeowners dealt with the

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[7] This State's Supreme Court defined "prepetition claimants" in *Nationwide*, 394 S.C. 54, 60, as those whose claims are completely barred by a sale order. The *Nationwide* Court held that the claimants at issue were not prepetition-Section 101(5) claimants, and thus had a right to bring their state claim to determine successor liability. Just like the *Nationwide* claimants, Appellants are "not prepetition claimants", are not barred by the Sale Order, and should be allowed to proceed with their state law claims. In its October 2017 Order, the Circuit Court even ruled that if a claimant is not a prepetition claimant, then the court might "allow" claimant to pursue state law claims under the theory of successor liability:

> In addition, the Court finds that, despite the fact that <u>Respondents were not prepetition claimants</u> in the Quality Built.com bankruptcy, which under the *Nationwide* and *Brown* cases <u>might allow successor liability</u>, the Respondents do not meet any of the exceptions listed therein. (October 2017 Order at 1) (emphasis added).

The Circuit Court then went to a step too far by making its own cursory, factual determination that no exception to successor non-liability was met. (October 2017 Order at 1).

contractor, not the window manufacturer, and there was no preexisting relationship between the manufacturer and the homeowner"); *see also Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.,* 58 F.3d 1573, 1577 (11th Cir. 1995) (claimants that had no pre-bankruptcy relationship with debtor held not to have claims under 11 U.S.C. Section 101(5)).

Further, if a claim is brought *in personam* <u>against the successor itself</u>, it is not barred by a bankruptcy order that discharges claims, if any, whether before or after the sale of assets, that "attach" to the sale proceeds. *Nationwide*, 394 S.C. at 58-59, 714 S.E.2d at 325 ("[A] post-sale tort action against the successor entity is not an action against the sale proceeds received by the debtor, [it is] an *in personam* action against the successor itself.").

The April 2017 Order does not address the lack of pre-bankruptcy relationship (e.g., contact, exposure, impact, or privity) between Appellants and Respondent. The Order also does not acknowledge that Appellant's action was brought *in personam* against Quality Built, LLC, or that the sale order discharged all the claims it defined as those that "attach" to the sale proceeds. (QualityBuilt.com Bankruptcy Court Order 7-8, Mar. 11, 2010, at Quality Built, LLC Production of Documents 00257-58 ("All holders of Claims are adequately protected . . . .by having their Claims, if any, attach to the proceeds of the Sale Transaction. . . .").). The April 2017 Order did not even specify that Appellants were §101(5) prepetition claimants, and instead simply concluded that Appellants were barred by the sale order. (October 2017 Order at 1, R. __).

2. The Broad Language of the Sale Order that Purports to Shield Quality Built, LLC from Liability Has Been Held by Other Courts to be Ineffective.

As shown above with the *General Motors* case, a broadly worded sale order will not shield a successor from liability.[8] However, despite being made aware of *General Motors*, the Circuit

[8] Since the United States Supreme Court's refusal to grant certiorari in *General Motors* was issued

Court ruled that it found no principal of law that had been overlooked or disregarded in its prior Order. (October 2017 Order at 1, R. __). The April 2017 Order focused on the language of the QualityBuilt.com sale order that purports to bar claims "before or after" the bankruptcy petition. (April 2017 Order at 3-4, R. __) (emphasis added). The Circuit Court distinguished this language from the language in the *Nationwide* sale order that refers to barring "claims arising before the closing of the sale of the assets" (Order at 3-4) (emphasis added) (*citing Nationwide*, 394 S.C. 54, 58-59, 714 S.E.2d 322, 325). However, this point is undermined by one of the cases cited in *Nationwide* – In re Grumman Olson Indus., Inc., 445 B.R. 243 (Bankr. S.D.N.Y. 2011), aff'd, 467 B.R. 694 (S.D.N.Y. 2012).

The *Nationwide* Court looked to the analysis in *In re Grumman* regarding the limits a free and clear bankruptcy sale places on a creditor to *in rem* relief against bankruptcy sale proceeds. *Nationwide,* 394 S.C. at 59, 714 S.E.2d at 325. Notably, in *In re Grumman*, the "free and clear" provision of the sale order was the same as in the case at bar – the sale was free and clear of all claims "arising prior to or subsequent to" the petition date:

> The sale ... of the assets to be purchased under the Lot 2 APA (the "Lot 2 Assets") shall be free and clear of all ... claims ... and other interests ... and all debts arising in any way in connection with any acts of the Debtor, claims (including but not limited to "claims" as that term is defined in the Bankruptcy Code) ... and matters of any kind and nature, whether arising prior to or subsequent to the commencement of this Chapter 11 case ... (the foregoing collectively referred to as "Claims") ... and holders thereof shall be permanently enjoined from asserting such against the Lot 2 Assets and the [*sic*] shall look solely to the proceeds of the sale.

In re Grumman, 445 B.R. at 246.

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approximately fourteen days after the April 2017 Order was issued, Appellants promptly notified the Circuit Court of this supplemented authority. (Supplemental Authority Letter, R. __).

Even with the broader language of this free and clear clause, the *Grumman* Court still found that the Sale Order did not prohibit a third party's claim against a bankrupt entity's successor: "[t]he Sale Order did not give [successor] a free pass on future conduct, and the suggestion that it could is doubtful." *In re Grumman*, 445 B.R. at 250 (citing *Schwinn Cycling & Fitness Inc. v. Benonis,* 217 B.R. 790, 796–97 (N.D.Ill.1997) (sale order "was not intended to, nor could it, preempt all possible future successor liability claims"). Just as in *Grumman*, here the "before or after" language in the Sale Order does not bar Appellants' claims.

In keeping with *Nationwide*, the Court should reverse the April 2017 Order and find Appellants' lack of a pre-bankruptcy relationship with QualityBuilt.com rendered the sale order inapplicable to Appellants' *in rem* claims:

> [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. <u>The debtor's prepetition conduct gives rise to a claim to be administered in a [bankruptcy] case only if there is a relationship established before confirmation between an identifiable claimant or group of claimants and that prepetition conduct</u>.

Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc., 394 S.C. 54, 59, 714 S.E.2d 322, 325 (2011) (lower court decision to grant motion to dismiss based on sale order's express preclusion of state law actions reversed because plaintiff had <u>no relationship with debtor prior to bankruptcy</u>) (emphasis added) (quoting *Epstein v. Official Committee of Unsecured Creditors (In re Piper Aircraft Corp.*), 58 F.3d 1573, 1577 (claimants that had <u>no pre-bankruptcy relationship</u> with debtor held not to have Section 101(5) claims)); *Simmons v. Mark Lift Indus., Inc.,* 366 S.C. 308, 309-313, 622 S.E.2d 213, 214-215 (2005)(third party with <u>no pre-bankruptcy relationship</u> to predecessor allowed to proceed with claims against successor despite protective provisions in

purchase agreement); *see also Holloway v. John E. Smith's Sons Co., Div. of Hobam, Inc.*, 432 F.Supp. 454, 455-56 (D.S.C. 1977) (summary judgment denied to successor of bankrupt entity, and claims by third party that had no pre-bankruptcy relationship with bankrupt-predecessor allowed to proceed) (Appellants' Opp. Memorandum at 10-12 and Motion for Reconsideration Memorandum at 5-6, R. ___).

III. The Circuit Court Erred in Finding that the Mere Continuation Exception to Successor Non-Liability Set Forth in *Brown* and its Progeny Was Not Met Based on Its Mis-Application of Prevailing Law, and the Facts and Circumstances of this Case.

Once it is determined that a "claim" is not precluded by a bankruptcy sales order, the *Brown* test should be applied to determine whether there are issues of fact for a jury. However, the Circuit Court further erred by its mis-application of *Brown* and its progeny regarding successor liability; and by making its own factual determinations based on its own erroneous criteria. A jury – not the Circuit Court – should decide whether Quality Built, LLC meets any of the successor liability exceptions under *Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc.,* 394 S.C. 54, 714 S.E.2d 322, (2011) and *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). *Acme Boot Co. v. Tony Lama Interstate Retail Stores, Inc.*, 929 F.2d 691 (Table), Nos. 90-2621, 90-2630, and 90-2637, 1991 WL 39457, at *3 (4th Cir. Mar. 26, 1991) (recognizing factual determinations must be made prior to determining whether successor liability should be imposed under mere continuation exception when, *inter alia*, the sole owner of the selling entity continued working with the purchasing entity, and he was entitled to an incentive package based on net sales, but he did not own stock or act as a manager of the purchasing entity).

A. *Brown* and Its Progeny Set Forth the Criteria To Determine Whether a Successor Is a Mere Continuation of Its Predecessor.

The South Carolina Supreme Court has recognized four exceptions to successor non-liability, including the "mere continuation" exception that applies in this case:

> In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants 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, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (citing *Brown*, 128 S.C. 428, 123 S.E. 97; *Nationwide*, 394 S.C. 54, 61 ("If appellants can establish that respondent's conduct meets one or more of the *Brown* tests, then respondent may be liable to them.").

To determine whether one entity merely continued as another, South Carolina courts examine, first and foremost, whether there is "commonality of ownership" between the two entities. *Simmons*, 366 S.C. at 312 n.1. Commonality of ownership exists when "the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Id.*; *see, e.g., Walton v. Mazda of Rock Hill,* 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Simmons* rule, examining commonality between officers, directors, shareholders); *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, No. 2:05-2782-CWH, 2007 WL 2893372, at *9-10 (D.S.C. Sept. 28, 2007) (applying South Carolina state law, examining who owned each of the two entities); *Holloway v. John E. Smith's Sons Co., Div. of Hobam, Inc.,* 432 F.Supp. 454, 456 (D.S.C. 1977) (examining whether the two entities shared officers, supervisors, employees); *Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.,* 123 F.3d 201, 206 (4th Cir. 1997) (finding, under Virginia law, when there is "substantial overlap" in the officers and directors of two entities, "this factor militates strongly in favor of a finding of successor liability").

Other factors South Carolina courts consider in the "mere continuation" analysis are whether the successor engages in the same type of business as its predecessor, and whether the successor uses the same name or holds itself out to the public as the same entity, thus benefitting

from the goodwill, name recognition, and history of its predecessor. *See, e.g., Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, No. 2014-001151, 2016 WL 1359188, at *1-4 (S.C. Ct. App. Apr. 6, 2016) (affirming circuit court's finding of liability under the mere continuation exception because the successor, *inter alia*, made, marketed, and sold the same products with the same employees and five of the same officers under the same name, noting that the successor's "own website demonstrates [it] it is merely a continuation of its former self"); *Holloway*, 432 F.Supp. at 456 (denying summary judgment under the mere continuation exception because the successor produced the same/similar products under the same supervision and used the same name as the predecessor).

B. The Circuit Court Imposed Its Own Arbitrary Criteria To Find Respondents Did Not Fall Within Any Exception to Successor Non-Liability.

The Circuit Court imposed its own arbitrary analysis to find Respondents "do not meet any of the [successor non-liability] exceptions" listed in *Brown*. (October 2017 Order at 1, R. __). The Circuit Court based this ruling on criteria of its own creation: that the nature of this case is not a defective products action; and Respondents were "not successors of ongoing conduct". (April 2017 Order at 5-7). As shown herein, these are not the criteria that should be employed to determine exceptions to successor non-liability, and the Circuit Court's rulings amount to errors of law.

1. The Circuit Court Erred in Holding that Exceptions to Successor Non-Liability are Applied Only in Products Liability Cases.

The Circuit Court erroneously ruled that cases applying exceptions to successor non-liability are limited to defective product liability actions:

> [T]his 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. (April 2017 Order at 7).

South Carolina Courts have repeatedly applied the exceptions to successor non-liability set forth in *Nationwide*, *Brown* and *Simmons* in factual scenarios outside the products liability context. *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 306–07, 657 S.E.2d 67, 69–70 (Ct. App. 2008) (exceptions to successor non-liability applied in action to enforce car warranty that alleged breach of contract, unfair trade practices, and willful and malicious conduct); *Pacific Capro Indus. v. Glob. Advantage Distribution, Inc.*, No. CA 4:08CV4155-RBH, 2010 WL 890052, at *4-5 (D.S.C. Mar. 8, 2010) (exceptions to successor non-liability applied in action regarding storage agreement that alleged disgorgement, civil conspiracy and unjust enrichment/restitution); *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, No. CIV.A. 2:05-2782-CWH, 2007 WL 2893372, at *9-10 (D.S.C. Sept. 28, 2007) (exceptions to successor non-liability applied in action regarding environmental liabilities filed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980). In fact, *Brown* itself is not a product liability action; rather, it was an action on an allegedly missing delivery.

In applying the traditional mere continuation theory and de facto merger theory, there is no distinction in the continuity/merger analyses based on the type of business that has allegedly been continued, whether manufacturing products or providing services. Compare *Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc.*, 2014 WL 7664673 at *7 (S.C.Com.Pl.)(window manufacturing) and *Glynwed, Inc. v. Plastimatic, Inc.*, 869 F.Supp. 265, 275-77 (D.N.J. 1994) (plastic injection molding) with *Fuisz v. Lynch, AIA, PLLC*, 147 F.Appx. 319, 322 (4th Cir. 2005) (architectural design services) and *Kaiser Found. Health Plan of Mid-Atlantic States v. Clary & Moore, P.C.*, 123 F.3d 201, 206 (4th Cir. 1997) (legal services). It would be error to limit the scope of the successor non-liability exceptions to products liability actions. *Glynwed*, 869 F. Supp. at

271–72 (rejecting defendant's contention that successor liability only applies in the products liability context).

In 1990, the Vermont Supreme Court expressly concluded as much, and cited a Fourth Circuit opinion in further support of that conclusion. *See Cab-Tek, Inc. v. E.B.M., Inc.*, 153 Vt. 432, 435–37, 571 A.2d 671, 673 (1990) ("While the criteria set forth therein happened to be applied in a products liability suit, other jurisdictions have used the same test to impose successor liability for corporate debts in other types of cases."); *National Carloading Corp. v. Astro Van Lines, Inc.*, 593 F.2d 559, 563–64 (4th Cir.1979) (applying the traditional exceptions to successor non-liability when the buying company had notice that the selling company relinquished its assets rendering it unable to pay its debts, that notice being premised on the fact that the two corporations had common officers and directors).

2. The Circuit Court Erroneously Found Ongoing Conduct Was a Necessary Factor for Application of a Successor Non-Liability Exception.

The Court erroneously found that, because Respondent was "not a successor of ongoing conduct," it did not fall within any of the exceptions to successor non-liability (April 2017 Order at 4, 6; R.___). As shown above, ongoing conduct has never been a factor in a determination of successor liability. It was an error of law to impose this requirement, and reversal and correction of the April 2017 Order on this point is necessary.

The successor liability doctrine was developed so that companies that changed form, but not substance, could not escape their liabilities while benefiting from the good will of their namesake and history. *See, e.g., Brown*, 128 S.C. at 432, 123 S.E. at 99 ("It would be manifestly unfair, unjust, and contrary to equity that [the successor] should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its

creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. If [the successor] takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it.") (quoting *McAlister v. American Railway Express Co.*, 179 N. C. 556, 103 S. E. 129, 15 A. L. R. 1090); *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46, 50 (1939) ("The corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it."); *Brabham v. Southern Exp. Co.*, 124 S.C. 157, 117 S.E. 368, 368 (1922) ("By its action [the successor] has allowed the Southern Express Company to go out of existence and now proposes to let the respondent whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness…").

C. The Facts in the Record Overwhelmingly Evidence that Quality Built, LLC was the Mere Continuation of QualityBuilt.com.

Factual determinations are required to decide whether Quality Built, LLC was the "mere continuation" of its predecessor, QualityBuilt.com. The chronology in this record, and inferences and conclusions reasonably drawn therefrom, indicate commonality of ownership between QualityBuilt.com and Quality Built, LLC, which is a necessary factor to find the "mere continuation" exception applies:

- In 1994, Stanley Luhr started the "Quality Built" program, a third-party quality assurance inspection program (Luhr Affidavit at 2, R.___)
- In 1999, Luhr formed Qualitybuilt.com (Luhr Affidavit at 2, R.___); Mr. Luhr was a board member, CEO and 50% shareholder in QualityBuilt.com until it went into bankruptcy. (Voluntary Petition at 3, R. ___; Michaelis Dep., 14:6-7, R. ____).
- From 1999 until its demise, Elizabeth Michaelis was President, Board Secretary, and 50% shareholder in QualityBuilt.com (Luhr Affidavit at 2, R.___) (Voluntary Petition at 3, R. ___; Michaelis Dep., 14:1-14:8. R. ___)

- In 2010, Luhr was Chief Technical Officer, Principal, and 5% owner in Quality Built, LLC. As part of the 2010 Asset Purchase Agreement, Mr. Luhr assigned to Quality Built, LLC, 14 trademarks and 3 published U.S. patents that Luhr received from his Qualitybuilt.com work. (Asset Purchase Agreement at 62; R. ____; Luhr Affidavit at 19, R. ____).[9]

- Also in 2010, Elizabeth Michaelis transitioned from QualityBuilt.com to Quality Built, LLC as President and 10% owner of Quality Built, LLC. (Asset Purchase Agreement at 59, R. _____) (Michaelis Dep., 6:7-9:3, 8:5-12 and 17:8 to 17:13; R. ____);

- Quality Built, LLC Founder Gary Elzweig, admitted the transition from QualityBuilt.com to Quality Built, LLC was a "seamless continuation" of its former self that included keeping virtually the same name as its predecessor and retaining its predecessors' executive/management team, Luhr and Michaelis:

> I purposely chose the name Quality Built, LLC because I wanted to maintain a seamless transition in the transaction, and believed that the company's value and viability going forward would benefit by keeping the names of the new owner similar to the prior owner.
> (Elzweig Affidavit at 3, R.___)
>
> Quality's proposed offer to the Debtor's existing officers [Luhr & Michalis] is very common for a purchase transaction of this type. In fact, the going concern value of a company is often driven, in large part, by the company's existing management, and the retention of such management is often a critical condition to the purchase. I believe that Ms. Michaelis and Mr. Luhr are critical to the success of Quality's business going forward, and that the proposed structure is necessary to retain such individuals.
> (Elzweig Affidavit at 4, R.___)

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[9] Circa 2010, Kramer allegedly terminated Luhr after approximately nine months with Quality Built, LLC. (Michaelis Dep., 17:25 to 18:7 R. _____).

> Now Luhr has no interest in the business and Quality Built, LLC and Elizabeth Michaelis and the investors proceed forward together without him (Michaelis with a 5% interest plus her secret preferred return), but with **all of the goodwill, intellectual property, and know-how of former Qualitybuilt.com.**
> (Luhr Affidavit, R. ____)(emphasis added).

Since its 2009 formation until this year, Quality Built, LLC has presented itself to the public as a "seamless" continuation of QualityBuilt.com in multiple ways that show it is a "mere continuation" of its predecessor:

- Quality Built, LLC continuously markets itself on its website and in its press releases with a nearly identical name as its predecessor and capitalizes on its Predecessor's experience under the umbrella of the "Quality Built Organization";

- The 2015 Quality Built, LLC web page advertises Quality Built President Michaelis' "more than 20 years" of experience with "the Quality Built organization", which would date back to circa 1993 – approximately the time Michaelis started at QualityBuilt.com as the office manager. (2015 QualityBuilt.com Web Pages, R. ____);

- As recently as early 2015, Quality Built, LLC's web page marketed itself as being founded in 1994 – the *exact same year* CEO Luhr developed the "Quality Built" program (2015 Web Page, R. ____); notably, the website address has remained the same (https://www.qualitybuilt.com) for both QualityBuilt.com and Quality Built, LLC (2008 QualityBuilt.com Web Pages, R. ____; 2010 QualityBuilt.com Web Pages, R. ____; 2011 Website Pages, R. ___; 2012 QualityBuilt.com Web Pages, R. ____; and 2015 QualityBuilt.com Web Pages, R. ____).

- Quality Built, LLC produces the same type of business under the "Quality Built" Program created in 1994 by Stan Luhr (2008 and 2011 Web Pages, R.___; QualityBuilt.com US Bankruptcy Court (SDC), Voluntary Petition, R.___).

(Appellants' Opp. Memorandum at 4-7, 15, 29, R. __).

A reasonable jury could conclude from the facts in this record, and the conclusions to be drawn from them, that Quality Built, LLC is the "mere continuation" of QualityBuilt.com. *Acme Boot Co*, 929 F.2d 691, Nos. 90-2621, 90-2630, and 90-2637, 1991 WL 39457, at *3 (summary judgment improperly granted on mere continuation exception to successor non-liability, under Virginia law, when fact questions existed as to common ownership); *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1151 (1st Cir. 1974) *disapproved of by Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (successor that used predecessor's name, advertised itself using predecessor's experience, and produced same product in same way as predecessor was not immune

from predecessor's liability); *National Carloading,* 593 F.2d 559, 563–64 (exception to successor non-liability applied when successor and predecessor shared common officers and directors). In light of the prevailing authority and weight of evidence, Appellants should be allowed to proceed with their claims against Quality Built, LLC.

CONCLUSION

Based on the foregoing, Appellants respectfully request that the Circuit Court's Orders granting Quality Built, LLC's Motion for Declaratory Relief, or in the Alternative, Motion for Summary Judgment filed on April 10, 2017 and Denying Appellants' Motion for Reconsideration filed on October 17, 2017 be vacated and that this matter be remanded for Trial.

JUSTIN O'TOOLE LUCEY, PA

By: ______________________

Justin O'Toole Lucey, Esquire (Bar No. 15438)
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Attorneys for the Appellants.

Charleston, South Carolina
March 5, 2018

Other Counsel of Record:

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Attorneys for Coast to Coast Engineering Services, Inc. d/b/a Criterium Engineers

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper Jr., Circuit Court Judge
Case No. 2013-CP-40-7729
Appellate Case Tracking Number: 2017-002325

The Gates At Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated,

Appellants,

v.

Quality Built, LLC and Coast To Coast Engineering Services, Inc. D/B/A Criterium Engineers,

Respondents.

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MAR 07 2018
SC Court of Appeals

PROOF OF SERVICE

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Attorneys for the Appellants

March 5, 2018
Charleston, South Carolina

I, Justin O'Toole Lucey, Esquire, of the law offices of Justin O'Toole Lucey, P.A., attorney for the Appellants, do hereby certify that I have served the below listed counsel and parties in this action with a copy of *Appellants' Initial Brief and Proof of Service* by sending a copy of same via U.S. Mail:

Alan R. Belcher, Esq.
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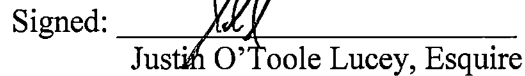

Signed: ______________________
Justin O'Toole Lucey, Esquire

Mount Pleasant, SC
March 5, 2018

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PROOF OF SERVICE

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Attorneys for the Appellants

March 5, 2018
Charleston, South Carolina

I, Justin O'Toole Lucey, Esquire, hereby certify that on March 5, 2018 I served a copy of ***Appellants' Designation of Matter to Be Included in the Record on Appeal and Certification*** on the following counsel, via the United States Mail, postage pre-paid, and addressed as follows:

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Attorneys for Coast To Coast Engineering Services, Inc. d/b/a Criterium Engineers

Signed: ________________________
Justin O'Toole Lucey, Esquire

Mount Pleasant, SC
March 5, 2018

JUSTIN O'TOOLE LUCEY, PA

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Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn
James L. Floyd, III

Reply to:
P.O. Box 806
Mt. Pleasant, SC 29465

March 5, 2018

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MAR 07 2018
SC Court of Appeals

BY REGULAR MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: *The Gates at Williams-Brice Condo Assoc., et al v. Quality Built, LLC*
Appellate Case No.: 2017-002325

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the following documents in the above-referenced matter which are being submitted on behalf of Appellants, The Gates at Williams-Brice Condominium Association and Katharine Swinson, individually, and on behalf of all others similarly situated:

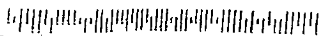
1. Initial Brief of Appellants;
2. Appellants' Designation of Matter to be Included in the Record on Appeal and Certification; and
3. Appellants' Proof of Service.

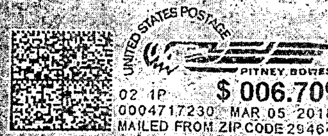
I would greatly appreciate you filing these pleadings with the Court of Appeals and returning a date stamped copy of each to my attention in the enclosed self-addressed, stamped envelope.

If you need anything else or I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me at your convenience.

Best regards,

Laura W. Knight





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ATTORNEYS AT LAW
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