

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Lower Court Case No. 2013-CP-40-7729
Court of Appeals Case No. 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 #296848,

Appellants,

v.

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

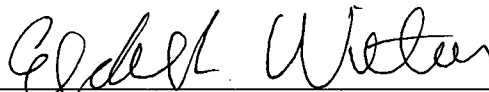
Defendants,

Of Whom, QUALITY BUILT, LLC,

Respondent.

INITIAL BRIEF OF RESPONDENT

Respectfully submitted,



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Dated: June 1, 2018

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ISSUING AN ORDER GRANTING RESPONDENT'S MOTION FOR DECLARATORY RELIEF, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT?
- II. AS A MATTER OF LAW DOES RESPONDENT HAVE LIABILITY IN THIS ACTION?
- III. IS QUALITY BUILT, LLC A MERE CONTINUATION OF QUALITYBUILT.COM?
- IV. ARE APPELLANTS CLAIMANTS UNDER 11 U.S.C.A. § 101(5)?
- V. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ISSUING AN ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

INTRODUCTION

Respondent is not the successor to the inspection company that performed quality control services during the construction of The Gates at Williams-Brice in Columbia, South Carolina ("The Gates"). Respondent is not a proper party to this case, and the Circuit Court properly dismissed Appellants' claims against Respondent.

STATEMENT OF THE CASE

As set-forth on the record in the Richland County Clerk of Court's files, on December 26, 2012, Appellants filed a civil action styled *The Gates at Williams-Brice Condominium Association and Katherine Swinson, individually and on behalf of all other similarly situated v. DDC Construction, Inc., et al.*, Civil Action Number 2012-CP-40-8512 ("Gates I")¹. This initial lawsuit alleged construction and design defects and damages in connection with the construction of The Gates. As an aside, Gates I was before this Honorable Court, Appellate Case No. 2015-000180; 418 S.C. 282, 792 S.E.2d 240 (Ct. App. 2016), wherein Appellants Dinerstein and OCIP² appealed the Circuit Court's order denying their motion for non-jury trial and to strike the class action allegations. This Court reversed and remanded the Circuit Court's order. Subsequently, Gates filed a motion seeking dismissal of their petition for a writ of certiorari to the Court of Appeals, as they settled the matter with Dinerstein and OCIP, and asked the

¹ On 05/15/2013 Appellants Amended its Complaint adding thirty-three (33) more defendants; on 02/19/2014 Appellants filed Second Amended Complaint; and 08/07/2014 a Third Amended Complaint. (Complaint, R.)

² "The developers for the Gates condominium community include the following companies: DDC Construction, Inc.; DMC Consolidated, Inc.; DMC Builders, Co., Inc.; DC Developers—Columbia Condos, Inc.; Columbia Condos, LP; DMC Developers I, Ltd.; and Highway One Construction, Inc. According to Homeowners, these companies operated under the trade name "Dinerstein Companies." Although these defendants object to this designation, the court references these parties in their developer capacity as "Dinerstein Defendants." The subcontractors covered under the Dinerstein Defendants' owner-controlled insurance policy (OCIP Defendants) include the following: Associated Concrete Contractors, Inc.; Bailey Electric Company, LLC; C&B Utilities, LP; Carolina Floor Systems, Inc.; Century Fire Protection, LLC; Cherokee, Inc.; Coronado Stucco, LP; Cross Plains Custom Tile, Inc.; Lowry Construction & Framing, Inc.; LTB Construction, Inc.; Martin Morales, Jr. Painting & Drywall, LLC; Metal Construction Materials, Inc.; and Wyman Acoustics LLC. Several of these developers and subcontractors settled with Homeowners prior to the filing and during the pendency of this appeal. The remaining defendants on appeal are DDC Construction, Inc. and Columbia Condos, LP. For ease of reference, the court collectively references the nonsettling parties throughout this appeal as "Developer." 418 S.C. 282 at 286.

Supreme Court to vacate the opinion rendered by this Court. The Supreme Court granted Gates' motion and vacated this Court's opinion (420 S.C. 181, 801 S.E.2d 400 (Mem) (S.C. 2017).

In the interim, on December 27, 2013, Appellants filed this action styled *The Gates at Williams-Brice Condominium Association and Katherine Swinson, individually and on behalf of all other similarly situated v. Quality Built, LLC, et al.*, Civil Action Number 2013-CP-40-7729 ("Gates II") alleging negligence/gross negligence and breach of warranty against Respondent in connection with defective construction and design of The Gates.³

Eight hundred seventy-four (874) days later, Appellants filed its/their Amended Complaint in Gates II, adding the claim of "Successor Liability" against Respondent.⁴ (Amended Complaint, R.) Thereafter, the following transpired:

- A. June 15, 2016 - Respondent files its Answer. (R.)
- B. June 17, 2016 - Criterium files a Notice of Removal to U.S. District Court. (R.)
- C. July 15, 2016 - Appellants file Motion to Remand. (R.)
- D. September 7, 2016 - Order Granting Motion to Remand. (R.)
- E. December 20, 2016 - Criterium files Motion for Summary Judgment. (R.)
- F. January 17, 2017 - Respondent files Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment. (R.)
- G. February 21, 2017 - Respondent filed Memorandum in Support of Its Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment. (R.)
- H. March 6, 2017 - Respondent files Motion for Summary Judgment. (R.)
- I. April 7, 2017 - Order Dismissing Respondent's Motion for Summary Judgment. (R.)

³ In Gates II, Appellants are suing for the same damages arising out of the same injury that they claimed in Gates I. In all of Appellants' six (6) Complaints filed to date regarding the alleged damages to The Gates, the factual allegations of injury to The Gates is the very same injury complained of in their December 26, 2012 Complaint in Gates I.

⁴ On 05/18/2016 Appellants filed an Amended Complaint adding Coast to Coast Engineering Services, Inc. d/b/a Criterium Engineers as an alleged consultant to Quality Built for a total of six (6) Complaints filed to date.

- J. April 7, 2017 - Order Granting Respondent's Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment. (R.).
- K. April 7, 2017 - Order Granting Criterium's Motion for Summary Judgment. (R.)
- L. April 20, 2017 - Appellants file Motion for Reconsideration. (R.)
- M. June 8, 2017 - Respondent files Memorandum in Opposition to Appellants' Motion for Reconsideration. (R.)
- N. October 17, 2017 - Order Denying Appellants' Motion for Reconsideration. (R.).
- O. November 9, 2017 - Appellants file Notice of Appeal. (R.)

The Honorable G. Thomas Cooper, Jr. ("Judge Cooper") correctly ruled on the Order Granting Respondent's Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment and Order Denying Appellants' Motion for Reconsideration as supported below.

FACTS OF THE CASE

The crux of this case is whether the United States Bankruptcy Court for the Southern District of California (hereinafter referred to as the "Bankruptcy Court") Order entered March 11, 2010, Authorizing the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances,⁵ and Amended and Restated Asset Purchase Agreement by and among QualityBuilt.com and Quality Built, LLC precludes Appellants' to claims damages under a theory of successor liability. (Bankruptcy Court Order R.). Both issues have been correctly decided as a matter of law by the Circuit Court.

Gates I and Gates II arise out of the design, development and construction of The Gates. The Gates, located in Columbia, South Carolina, and completed in 2007, consists of one hundred fifty-eight (158) condominium units situated within six buildings. The Appellants are The Gates'

⁵ Full title of the Order entered on March 11, 2010 is (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. (Bankruptcy Court Order, R.)

HOA and individual unit owners as a purported class. In this lawsuit, Appellants are suing the Respondent alleging construction defects in connection with the construction of The Gates. More particularly, for negligence/gross negligence, breach of warranty and successor liability. Appellants contend that Respondent was negligent in failing to adequately effect quality control relating to the construction of The Gates.

The Respondent has asserted since the inception of this lawsuit that it is not the proper party to this action, as it is not the entity that provided quality control services at The Gates during the construction period.⁶ The entity that purportedly undertook this role, Qualitybuilt.com, is no longer a viable corporation. Given that this Court will be focused on whether there is evidence to support Judge Cooper's rulings, it is important to understand the pertinent intricacies of Qualitybuilt.com, Qualitybuilt.com's bankruptcy action and Respondent.

I. Qualitybuilt.com

Qualitybuilt.com was a California corporation formed on July 12, 1999. (California Secretary of State Seal, Articles of Incorporation, R.). On August 14, 2009, Qualitybuilt.com filed for Chapter 11 Bankruptcy.⁷ (Chapter 11 Bankruptcy Petition, R.)

II. Quality Built, LLC

Quality Built, LLC, a Delaware Corporation, was formed as a Delaware Limited Liability Company and filed its Certificate of Formation with the Delaware Secretary of State's Office on July 24, 2009. (State of Delaware Secretary of State Seal and Quality Built, LLC's Certificate of Formation R.).

⁶ On January 28, 2014, then counsel for Respondent sent correspondence to Appellants' counsel requesting him to voluntarily dismiss, with prejudice, their Complaint citing a Sales Order entered into on March 12, 2010 by the Bankruptcy Court, which will be detailed further in this Brief. (Correspondence, R.).

⁷ *In Re: Qualitybuilt.com*, a California Corporation, U.S. Bankruptcy Court Southern District of California, Case No.: 09-12113-CL7. (Chapter 11 Bankruptcy Petition, R.)

III. Bankruptcy Case of Qualitybuilt.com

Qualitybuilt.com, as a debtor-in-possession, filed a Motion for Order Approving Sale of Property of the Estate Free and Clear of All Liens, Claims, and Encumbrances, Subject to Overbid; and Memorandum of Points and Authorities in Support Thereof ("Motion Approving Sale", (R.)). Prior to the filing of said Motion, and as part of the bankruptcy proceedings, Respondent entered into a Purchase Agreement with Qualitybuilt.com for the purchase of various assets and liabilities, which was attached as an exhibit to the Motion for Order Approving Sale. (Exhibit Purchase Agreement, R.)

As part of the contractually binding Purchase Agreement, Respondent assumed only those liabilities identified in Schedule 2.1 of the Purchase Agreement. (Exhibit Purchase Agreement, R.). Respondent expressly disclaimed all other liabilities, including "any liabilities or obligations with respect to . . . litigation or threatened litigation, claim, obligation, damages, costs and expenses relating to or arising out of or relating to any actions or omissions of or services performed by, Seller . . . whether arising under contract, tort, civil or criminal law or otherwise [.]" (Exhibit Purchase Agreement, R.). At the time the parties consummated the Purchase Agreement, Gates I had not been filed, nor had Qualitybuilt.com been notified of a pending claim.

On March 11, 2010, by order of the Bankruptcy Court, Respondent purchased certain assets of Qualitybuilt.com from the Trustee in bankruptcy pursuant to 11 U.S.C. §§ 101, 105, 363, and 365.⁸ ("Sale Order", (R.)). As part of the Sale Order, the Bankruptcy Court

⁸ Often in Chapter 11 cases, the "end-game" is a sale of the debtor's assets pursuant to section 363 of the Bankruptcy Code. So-called "363 Sales" offer a number of advantages to buyers and sellers alike. The bankruptcy court order confirming the sale will protect the transaction from "second-guessing" by other parties in interest. Provided that the purchaser is proceeding in "good faith," any appeal from the sale confirmation order will be dismissed as moot unless the objecting party can obtain a stay of the order – a practical impossibility in most cases.

authorized the entry of a contract entitled Amended and Restated Asset Purchase Agreement by and among QualityBuilt.com as Seller and Quality Built, LLC as Buyer ("Purchase Agreement", (R.)). The Purchase Agreement sets forth the detailed terms of the asset purchase between the two entities, including which liabilities were assumed by Respondent in the transaction. Pursuant to the Purchase Agreement and Sale Order, The Gates was not an Assumed Liability to be retained by Respondent. (Purchase Agreement, R.)

As a prerequisite to the bankruptcy sale, the Bankruptcy Court authorized the Purchase Agreement and entered it as part and parcel of the Sale Order and transaction. In the Sale Order, the Bankruptcy Court authorized and approved the sale of Qualitybuilt.com -

[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 . . .** (collectively, "Claims") (other than certain liabilities that are expressly assumed or created by the Purchaser, as set forth in the Purchase Agreement) (collectively, the "Assumed Liabilities").⁹ (emphasis added)

(Sale Order, R.)

In short, Respondent's liabilities were exclusively limited to those contained in the Assumed Liabilities. The Sale Order, in no uncertain terms, discharged and released Respondent from any past, present, or future liabilities.

The Sale Order also contains numerous provisions regarding Respondent's purchase of Qualitybuilt.com's assets "free and clear" of "all [c]laims." The Bankruptcy Court found "The

And perhaps most importantly, if one or more statutory conditions are satisfied, the sale will be "free and clear" of liens and other third-party interests. 11 U.S.C. §§ 363(f) and (m).

⁹ In the 363 Sale context, buyers who are concerned about successor liability typically ask for a judicial declaration that the buyer will not be liable for any of the liabilities of the seller, a finding that the buyer would not proceed with the purchase in the absence of protections against successor liability claims, and an injunction against the assertion of such claims. A number of courts have been receptive to such provisions, which they view as furthering the bankruptcy policy goals of maximizing the value of the debtor's assets and treating creditors equally.

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, R.). In no uncertain terms, the Order states:

Except as otherwise provided in the Purchase Agreement, all persons and entities (and their respective successors and assigns) including, but not limited to, all debt security holder, equity security holders, affiliates, governmental, tax and regulatory authorities, lenders customers, employees, trade creditors, **litigation claimants** and other creditors, holding Claims (whether legal or equitable, secured or unsecured, known or unknown, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, senior or subordinated) except for Assumed Liabilities, arising under or out of, in connection with, or in any way relating to, [Qualitybuilt.com], the Purchased Assets, the operation of the Business prior to Closing or the transfer of the Purchased Assets to [Respondent], **are hereby forever barred, estopped and permanently enjoined from asserting such Claims against [Defendant]; its successors or assigns, its property or the Purchased Assets. No such persons or entities shall assert against [Defendant] or their successors in interest any Claim arising from, related to or in connection with the ownership, sale or operation of any Assets prior to Closing, except for Assumed Liabilities.** (emphasis added) (Sale Order, R.)

Respondent only assumed two liabilities: payment of \$69,343.04 to Mid Pacific Testing and Inspections and payment of \$3,128.38 to James Edward Engineers. (Purchase Agreement, R.). Moreover, Respondent did not assume any contract between Qualitybuilt.com and Appellants. (Purchase Agreement, R.). In fact, Respondent did not assume a contract between QualityBuilt.com and any person or entity in South Carolina. To reiterate in no uncertain terms, the Sale Order states,

The Sale Order [] shall be effective as a determination that, as of Closing [] no Claims, other than Assumed Liabilities and Assumed Contracts relating to the Purchased Assets, will be assertable against the Purchaser, its affiliates, successors or assigns, or any of their respective assets [and

that all claims] have been unconditionally released, discharged and terminated . . .

(Sale Order, R.)

Furthermore, "[Respondent] shall have no obligations under any liabilities of Seller or the Bankruptcy Estate other than the Assumed Liabilities, the Assumed Contracts, and its obligations under this Agreement." (Sale Order, R.).

STANDARD OF REVIEW

"A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue." Auto Owners Ins. Co. v. Newman, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Temple v. Tec-Fab, Inc., 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). Therefore, the trial court's findings will not be disturbed unless they are found to be without evidence that reasonably supports those findings. Id. at 600, 675 S.E.2d at 415. In an action for declaratory relief, the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a greater weight or preponderance of the evidence. Vt. Mut. Ins. Co. v. Singleton, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994); see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct.App.2006).

Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." When the circuit court grants summary judgment on a question of law, we review the ruling de novo. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "We observed that de novo review allows an appellate court to make its own findings of fact; however, this standard does not

abrogate two long-standing principles still recognized by our courts during the de novo review process: (1) a trial judge is in a superior position to assess witness credibility, and (2) an appellant has the burden of showing the appellate court that the preponderance of the evidence is against the finding of the trial judge." Stoney v. Stoney, -- S.E.2d --, 2018 WL 2145094 (S.C. Sup. Ct. April 18, 2018). On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009); Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The judge's findings are equivalent to a jury's findings in a law action. King v. PYA/Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). Questions regarding credibility and weight of evidence are exclusively for the trial judge. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence. Epworth, 365 S.C. at 164, 616 S.E.2d at 714.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

The purpose of summary judgment is to "expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a

properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." Rawlinson Rd. Homeowners Assoc., Inc. v. Jackson, 395 S.C. 25, 33, 716 S.E.2d 337, 342 (Ct. App. 2011).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN ORDER GRANTING RESPONDENT'S MOTION FOR DECLARATORY RELIEF, OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Respondent's Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment (Motion, R.) afforded the Circuit Court two means to grant the relief requested in Respondent's Motion: declaratory relief pursuant to S.C. Code Ann. § 15-53-10, et seq. and Rule 57 of the South Carolina Rules of Civil Procedure ("SCRCP"), and Summary Judgment pursuant to Rule 56, SCRCP. Pursuant to the Bankruptcy Court's order and the contract Purchase Agreement, Appellants do not have a right of action against Respondent arising from any alleged services provided by Qualitybuilt.com at The Gates. Whether the Court looks through the lens of declaratory relief or through summary judgment, either vehicle leads to the same dispositive result.

The Circuit Court found Respondent is not a successor of ongoing conduct, as is the recurring theme in the defective product cases cited by Appellants. The entity Qualitybuilt.com performed a one-time inspection service at The Gates, and there was no continuity thereafter by Respondent post-bankruptcy, for which Respondent can be held liable. Moreover, the Respondent 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. The Court also found the plain, unambiguous language of the Sale Order and Purchase Agreement, as a matter of law, articulated that

Respondent is free and clear of any liabilities associated with The Gates, which was the unambiguous intent of the Bankruptcy Court's binding of Purchase Agreement with the Sale Order, setting forth that Respondent would not in the future be liable for any claims other than those assumed liabilities set forth therein.

A. Uniform Declaratory Judgment Act

A 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.* Respondent sought declaratory relief by way of the aforementioned motion, because a legal declaration was necessary in this matter to determine if Respondent was free of any liability arising from Qualitybuilt.com's alleged involvement at The Gates. To find otherwise would be contrary to the plain language of the contractual Purchase Agreement and subsequent confirmation of that Agreement by order of the Bankruptcy Court. Respondent sought declaratory relief as to its lack of liability under the Purchase Agreement and confirming Sale Order, as well as a dismissal with prejudice.

Appellants assert Respondent's motion and the Order granting the motion were procedurally improper. To the contrary, this Court in *Atkins v. Wilson*, 417 S.C. 3, 788 S.E.2d 228 (Ct. App. 2016) found otherwise. In *Atkins*, the mayor and town of Chapin, SC, the respondents, were sued by members of the town council, the appellants, to declare a provision of the town code unenforceable. The provision in question allowed the mayor to control the agenda of the council meetings. The appellants sought a declaratory judgment as well as a preliminary injunction to halt the mayor's control of the agenda and alter the language of the provision. The respondents filed a motion to dismiss. The circuit court issued an order denying declaratory judgment and the preliminary injunction, and granted the respondents motion to

dismiss. The appellants then posted an agenda without notification or approval by the respondents. So, the respondents filed a motion for civil contempt. Atkins at 788 S.E.2d 230.

This Court noted the respondents did not correctly invoke the circuit court's authority to rule under the Uniform Declaratory Judgments Act.¹⁰ Nevertheless, this Court construed the respondents' motion to enforce the original order as a new action seeking declaratory relief under the Uniform Declaratory Judgments Act, which requires courts to construe and administer the provisions of the Uniform Declaratory Judgment Act liberally. S.C. Code Ann. § 15–53–130 (2005). This court also interpreted the circuit court's later order regarding the motion for civil contempt as an original declaratory judgment issued under the authority of section 15–53–20, which gives courts of record the power to “declare rights, status and other legal relations whether or not further relief is or could be claimed” and confers on such declarations “the force and effect of a final judgment or decree. Id. at 232. (emphasis added).

The Atkins ruling bestowed upon the Circuit Court the authority to treat Respondent's Motion for Declaratory Relief (or in the Alternative, Motion for Summary Judgment) as a new action seeking declaratory relief and properly rule upon it.

B. Rule 56 SCRPC Summary Judgment

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Flemming v. Rose, 350 S.C. 488 (S.C. 2002) (emphasis added); and where "the pleadings, depositions,

¹⁰ This Court stated "We note Respondents did not correctly invoke the circuit court's authority to rule under the Uniform Declaratory Judgments Act (the Act). While the circuit court's March 18, 2014 order merely granted Respondents' motion to dismiss Appellants' declaratory judgment action, Respondents' memorandum supporting their motions emphasized the order's statement that the Mayor must sign off on the agenda prior to its distribution to Council and characterized that statement as a “declaration.” The circuit court then stated in its May 5, 2014 order that it had previously “declared” that agendas for Council meetings had to be approved by the Mayor prior to the agenda's distribution. Again, we emphasize the circuit court's March 18 order dismissed the declaratory judgment action pursuant to Rule 12(b)(6)” Therefore, the circuit court incorrectly invoked section 15–53–120 of the South Carolina Code (2005), which states that further relief based on a declaratory judgment may be granted whenever necessary or proper, in support of its “declaratory ruling.” Atkins, at 788 S.E.2d 236, n. 6.

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Smith v. S.C. Ins. Co., 350 S.C. 82 (S.C. Ct. App. 2002).

There is no genuine issue as to any material fact that pursuant to the Sale Order and Purchase Agreement, that Respondent does not have liability in this action. The Gates was completed in 2007, prior to Respondent's formation in 2009. Moreover, the terms of the Sale Order and Purchase Agreement leave no question that Respondent did not assume the liability of a claim arising from The Gates when it purchased the assets of Qualitybuilt.com in 2010.

Under Rule 56 SCRCP, the Court may determine judgment as a matter of law is appropriate, and has the authority to extend full faith and credit to the Bankruptcy Court's Sale Order. Bankruptcy orders and judgments are entitled to full faith and credit by state courts in subsequent proceedings. McNaughton-McKay Elec. Co. of NC, Inc. v. Andrich, 324 S.C. 275, 280 (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 found as a matter of law that Appellants' claims against Respondent are barred in its entirety. It was appropriate for the Court to make its ruling in this matter, considering there is no genuine issue of material fact, and therefore the Court may determine judgment as a matter of law as to the issue at hand.

II. AS A MATTER OF LAW RESPONDENT DOES NOT HAVE LIABILITY IN THIS ACTION

"Where the terms of a contract are clear and unambiguous as a matter of law, its construction is for the court . . ." Holcombe v. Orkin Exterminating Co., Inc., 282 S.C. 104, 105 (S.C. Ct. App. 1984) (citing Black v. Freeman, 274 S.C. 272 (S.C. 1980)). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is

required and the contract's language determines the instrument's force and effect." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93 (S.C. Ct. App. 2004). Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." Lee v. Univ. of S.C., 407 S.C. 512, 518 (S.C. 2014) (quoting S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, 379 S.C. 645, 655 (S.C. Ct. App. 2008)).

The recitation of the plain, unambiguous language of the Purchase Agreement and Sale Order clearly reveals Respondent did not assume the liabilities of Qualitybuilt.com, so as to be liable to the Appellants in the construction of The Gates. Not only is this contention clearly defined by the terms of the Purchase Agreement, but those terms were also authorized and entered by the Bankruptcy Court, via the Sale Order (Sale Order, Purchase Agreement, R.).

The Circuit Court liberally applied Rule 56(c) SCRPC and granted Respondent's motion by way of a dismissal by interpreting and applying the terms of the Purchase Agreement. In that vein, the Court may declare that it is extending full faith and credit to the Bankruptcy Court's Sale Order, which expressly adopts the terms of the Purchase Agreement as part of its Order. Under Rule 56 SCRPC, the Court may determine judgment as a matter of law is appropriate, and has the authority to extend full faith and credit to the Bankruptcy Court's Sale Order. Bankruptcy orders and judgments are entitled to full faith and credit by state courts in subsequent proceedings. McNaughton-McKay Elec. Co. of NC, Inc. v. Andrich, 324 S.C. 275, 280 (S.C. Ct. App. 1996).

Respondent is not legally responsible for any liability arising from Qualitybuilt.com's alleged involvement at The Gates. To find otherwise would be contrary to the plain language of the Purchase Agreement and the Bankruptcy Court's confirmation of that Agreement by way of the Sale Order.

III. QUALITY BUILT, LLC IS NOT A MERE CONTINUATION OF QUALITYBUILT.COM

Throughout their Brief, Appellants argue and cite federal and South Carolina case law regarding product liability litigation presumably in an effort to persuade the Circuit Court and this Honorable Court that Respondent is the successor of Qualitybuilt.com and therefore liable to Appellants for alleged damages. This case however, is not a products liability case. Here, we have an inspection company that performed quality control services during the construction of The Gates. Appellants are alleging construction and design defects and damages in connection with said construction. There have been no products designed, manufactured and put in the stream of commerce.

Appellants assert that so long as a successor's conduct meets one or more of the tests articulated in Brown v. Am. Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924), and Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) a successor may be held liable for the torts of its predecessor. Although, Appellants cite product liability cases in support of their catch-all argument, assuming *arguendo* Simmons was applicable to this case, which the Respondent denies, the Respondent will address the factors set-forth therein. “[A]bsence 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. Id. at 366 S.C. 312, 622 S.E.2d 215.

Appellants' attempts to persuade the Circuit Court that Appellants have a right of action against Respondent arising from any alleged services provided by Qualitybuilt.com have

failed. The Circuit Court has correctly denied Appellants' assertions. Contrary to the misplaced allegations against the Respondent, applying the four (4) elements specified in Simmons, albeit a products liability case, unequivocally confirms Respondent is not the successor to the inspection company that performed quality control services during the construction of The Gates.

A. There was not an agreement to assume Qualitybuilt.com's debts

“When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense.” S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct. App. 2003).

Pursuant to the Purchase Agreement and Sale Order, the Bankruptcy Court authorized Respondent's purchase of Qualitybuilt.com's assets, free of liabilities with the exception of those explicitly named (Sale Order, R.). As part of the Sale Order, the Bankruptcy Court authorized the entry of a contract titled Amended and Restated Asset Purchase Agreement by and among Qualitybuilt.com as Seller and Quality Built, LLC as buyer (Sale Order, R.). The Purchase Agreement sets forth the detailed terms of the asset purchase between the two entities, including which liabilities were assumed by Respondent in the transaction. (Purchase Agreement, R.). Pursuant to the Purchase Agreement and Sale Order, The Gates was not an Assumed Liability to be retained by Respondent. Respondent would not have entered into the Purchase Agreement and would not have consummate the Sale Transaction, thus adversely affecting Qualitybuilt.com, its estate, creditors, employees, and other parties in interest if the sale of the Purchased Assets was not free and clear of all Claims other than Assumed Contracts and Assumed Liabilities; or if Respondent would, or in the future could, be held liable for any such claims, including, without limitation and as applicable, certain liabilities (collectively, the

"Excluded Liabilities") that expressly are not assumed by Respondent, as set forth in the Purchase Agreement.¹¹ (Sale Order, Purchase Agreement, R.). Accordingly, no factual issue prevents summary judgment based on this exception.

B. The circumstances surrounding the Purchase Agreement does not warrant a finding of a consolidation or merger of Qualitybuilt.com and Quality Built, LLC

As the Circuit Court properly determined, there is no evidence in the record indicating the transaction between Qualitybuilt.com and Respondent amounted to a consolidation. Both parties signed affidavits swearing they have never had any interest in the other entity¹². The Purchase Agreement clearly establishes a sale between Qualitybuilt.com and Respondent. The Purchase Agreement entered into and made part of the Bankruptcy Court's Order, between Respondent and Qualitybuilt.com, was not entered into as a consolidation or merger of the two entities. Qualitybuilt.com explored strategic alternatives for the Business over an extended period of time and had communicated with more than 54 parties about possible sales, mergers, combinations, and alternatives regarding debt or equity capital investments or financing. (Sale Order, R.). Respondent at the time of the Sale Order and Purchase Agreement was a newly formed Delaware limited liability company. Neither Respondent nor any of its members were "insiders" of Qualitybuilt.com, as that term is defined by section 101(31) of the Bankruptcy Code. (Sale Order, R.). Accordingly, no factual issue prevents summary judgment based on this exception.

¹¹ As stated, in the 363 Sale context, buyers who are concerned about successor liability typically ask for a judicial declaration that the buyer will not be liable for any of the liabilities of the seller, a finding that the buyer would not proceed with the purchase in the absence of protections against successor liability claims, and an injunction against the assertion of such claims. A number of courts have been receptive to such provisions, which they view as furthering the bankruptcy policy goals of maximizing the value of the debtor's assets and treating creditors equally.

¹² See Section C, "Quality Built, LLC was/is not a mere continuation of Qualitybuilt.com" - Affidavits of Gary Elzweig and Elizabeth Michaelis. (Motion, Affidavit, R.).

C. Quality Built, LLC was/is not a mere continuation of Qualitybuilt.com

Respondent was/is not a mere continuation of Qualitybuilt.com. The Affidavit of Gary Elzweig filed with the Bankruptcy Court on February 19, 2010, in support of Qualitybuilt.com's Motion for Order Approving Sale of Property of the Estate Free and Clear of Liens, Claims And Encumbrances, Subject to Overbid (Motion, Affidavit, R.), gave sworn testimony as to:

"1. I am the managing and currently sole member of Quality Built, LLC ("Quality"), the proposed purchaser of substantially all assets of QualityBuilt.com ("Debtor").

4. In 1977, [obtained a Bachelors of Science degree in Civil Engineering and Engineering Mechanics from Columbia University, School of Engineering and Applied Sciences. I have extensive knowledge and expertise in the construction quality assurance industries, and have significant success operating business in these and other industries.

b. For the last twenty-five years, I have successfully managed, built, and grown exponentially specialty engineering and other businesses, including those in the construction quality assurance industries. In 2002, for example, I started Code Administration, Plans Review & Inspection Services, Inc. ("CAPRI"), a structural engineering, inspection, and construction materials testing firm. In three years, I grew CAPRI to a company generating annual revenues of more than \$50 million with 16 offices and more than 400 employees nationwide. In 2008, I sold CAPRI for a significant purchase price commensurate with market valuations for companies of this size in this industry.

5. I am not nor have I ever served as a director, officer or employee of the Debtor. I do not have nor have I ever held any interest in the Debtor or had any control over the Debtor. In fact, except for CAPRI, which was merely a competitor of the Debtor's, neither I nor any member of any company in which I hold an interest have or to my knowledge ever had any connection to the Debtor, its officers, directors, or any other insiders of the Debtor.

6. Quality's proposed purchase of the Debtor's assets was negotiated with the assistance of counsel (Proskauer Rose LLP for Quality; and Keehn & Associates for the Debtor) in an arm's-length transaction, without the existence of any self-dealing, manipulation, collusive bidding, fraud, or other improper behavior.

7. Quality was formed for the purpose of acquiring and operating the Debtor's business. 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. I have engaged in numerous corporate sale and purchase transactions, and this is very common practice.

9. None of the anticipated members investing cash into Quality have any interest in or connection to the Debtor, its officers, directors, or any other insiders of the Debtor.

10. As an inducement to attract and retain Elizabeth Michaelis and Stan Luhr to serve as President and Chief Technical Officer, respectively, of Quality, Quality has offered these individuals grants of 5% of the common equity interests outstanding in Quality in restricted stock subject to customary forfeiture and repurchase provisions and restrictive covenants. I will serve as Chairman of Quality, and Brian Kramer, a very successful seasoned engineering executive licensed as a Professional Engineer in the State of California with Master of Business Administration, will serve as Chief Executive Officer of Quality. As members holding the majority interest in quality (70%), Mr. Kramer and I will have control over Quality and its operations.

11. Quality's proposed offer to the Debtor's existing officers 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. Accordingly, the proposed retention and related structure is a necessary condition to Quality's willingness to proceed with this transaction.

13. I have reviewed the objections to the Sale Motion, and based on the comments, Quality is willing to revise its requested minimum overbid to \$30,000, so long as Quality is entitled to receive a break-up fee of \$25,000 ("Break-up Fee") in the event Quality is not the highest bidder. .

."

(Motion, Affidavit, R.).

In furtherance, the Affidavit of Elizabeth Michaelis (the President of Qualitybuilt.com at the time) was filed with the Bankruptcy Court on February 18, 2010 as a "Reply Declaration . . .

to U.S. Trustee's Response to Debtor's [Qualitybuilt.com] Motion for Order Approving Sale Of Property of the Estate Free and Clear of All Liens, Claims and Encumbrances, Subject to Overbid". (Motion, Affidavit, R.). Ms. Michaelis gave sworn testimony as to:

"1. I am the President of Qualitybuilt.com, a California corporation ("Qualitybuilt.com"), operating a construction risk consultant firm with offices located at 15330 Avenue of Science, San Diego, California, and the debtor-in-possession in this matter.

2. I have previously summarized the Debtor's marketing efforts with respect to the sale of assets and assumption of contracts, which are the subject of the pending motion, that were conducted prior to the commencement of this case. In paragraphs 10 through 14 of my "Omnibus Declaration, etc." filed August 20, 2009, a copy of which is attached hereto marked Exhibit A and incorporated herein by this reference.

3. Since the sale proposed in the original First Day Motions was abandoned, I have contacted the following individuals who I believe might have an intent in acquiring the "Purchased Assets" and, assuming the executory contracts that are the subject of the pending motion:

Mr. Lee Adams
Consolidated Construction Services, Inc.
3235 Donna Drive
Carlsbad, CA 92008

Trey Baldwin
Baldwin Connelly Group
4010 West Boy Scout Blvd, Suite 200
Tampa, FL 33607

Glenn Michael Burns
Profession Warranty Service Corp
4443 Brookfield Corporate Drive, #300
Chantilly, VA 20151

Michael S. Berk
TA Associates
2000 Clarendon St.
Boston, MA 02116

Jeffrey J. Cook CWC
WICK PILCHER
2201 E. Camelback Rd., Suite 220A

Phoenix, AZ 85016

Bruce Halvax
30100 Towncenter Drive
Suite 0-137
Laguna Niguel, CA 92677

Michael Hopson
ZNAIC
12222 Merit Drive, Suite 700
Dallas, TX 75251

4. All of the marketing efforts have been by direct contact with prospective purchasers. We have relied upon this method of marketing because of the nature of the assets involved, only business entities currently involved our sector of the construction industry (providers of third party inspection services) could reasonably expected to have an interest in acquiring our assets. Our market niche is sufficiently narrow that the identify of such prospective purchasers is well known to us."

(Motion, Affidavit, R.).

Despite Appellants' assertions that Respondent is a continuation of Qualitybuilt.com, which the Circuit Court has properly denied twice, the sworn testimony of Mr. Elzweig and Ms. Michaelis clearly shows that Respondent is not a continuation of Qualitybuilt.com. Accordingly, no factual issue prevents summary judgment based on this exception.

D. The Purchase Agreement was not entered into fraudulently for the purpose of wrongfully defeating creditors' claims

The Purchase Agreement was not entered into fraudulently for the purpose of defeating any creditors of Qualitybuilt.com. The Purchase Agreement and each of the transactions contemplated therein were negotiated, proposed and entered into by Qualitybuilt.com and Respondent in good faith, without collusion or fraud and from arm's-length bargaining positions. (Sale Order, R.). Respondent was a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code. The approval of the Purchase Agreement and the consummation of the Sale Transaction by the Bankruptcy Court was in the best interest of Qualitybuilt.com, its

creditors, its estate, and other parties in interest. (Sale Order, R.). "The Purchase Agreement was not entered into, and the Debtor, the Purchaser or the Purchasers present at the Sale Hearing or contemplated owners, have not entered into the Purchase Agreement or propose to consummate the Sale Transaction, for the purpose of hindering, delaying or defrauding the Debtor's present or future creditors. Neither the Debtor, the Purchaser nor the Purchasers present at the Sale Hearing or contemplated owners are entering into the Purchase Agreement, or proposing to consummate the Sale Transaction, fraudulently for the purpose of statutory and common law fraudulent conveyance and fraudulent transfer claims whether under the Bankruptcy Code or under the laws of the United States." (Sale Order, R.). Accordingly, no factual issue prevents summary judgment based on this exception.

IV. APPELLANTS ARE NOT CLAIMANTS UNDER 11 U.S.C.A. § 101(5)

As stated, Appellants assert that Respondent is liable under South Carolina common law successor liability theory and Respondent is a mere continuation of Qualitybuilt.com. Appellants incorrectly rely on Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc., 394 S.C. 54, 714 S.E.2d 322 (2011) to establish that Appellants are not claimants under 11 U.S.C. § 101(5) and therefore may pursue an action in tort against Respondent, post-sale under a successor liability theory. 394 S.C. 54 (2011).

The Nationwide case is also 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. The test to which Appellants 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. § 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 (emphasis added)

(Sale Order, R.).

The Respondent 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.

Appellants argue that once it is established they are not § 101(5) claimants, Appellants may pursue a tort claim against Respondent under state law and South Carolina precedent sets

forth exceptions to successor non-liability in Brown¹³ and Simmons¹⁴, 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). Respondent argues 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, and the delivery of which was never completed. Brown, 128 S.C. 428 (1924). It is alleged that Qualitybuilt.com, as owner of certain intellectual property, provided services for quality control at The Gates, which was completed in 2007. There is no continuity of the predecessor's work at The Gates by the Respondent after Respondent was incorporated in 2009. Therefore there is no comparable analysis as Respondent is not liable in the instant case for completion of The Gates, or in Brown - payment of lost shipment. Id. at 434.

Likewise, in Simmons the Court considers certified questions arising from the product liability context. Respondent 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

¹³ 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.

¹⁴ The Simmons case cited by Appellants 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.

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 Respondent nor its predecessor placed unreasonably dangerous or defective products into the stream of commerce. To the contrary, Appellants allege Qualitybuilt.com was retained to perform a service at The Gates as one transaction in the form of quality control inspection. Respondent argues this is a one-time service and there is no product being placed in the stream of commerce.

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.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ISSUING AN ORDER DENYING APPELLANTS' MOTION FOR RECONSIDERATION

The Appellants filed a Motion for Reconsideration pursuant to Rule 52 and 59(e) of the SCRCP requesting the Circuit Court amend and/or reconsider its April 7, 2017 Order granting Respondent's Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment.

The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to allow the parties liberal opportunity to move for the trial judge to reconsider matters properly encompassed in a decision on the merits, regardless of whether the issues and arguments have been previously

presented. "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Memorial Hosp.. Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)).

Appellants assert that the Circuit Court's April 7, 2017 Order does not accurately analyze and apply the applicable case law to the facts at issue. Appellants erroneously reduce the Order to a blanket ruling that exceptions to successor non-liability should not be applied in the instant case simply because it is a non-product defect action. Appellants reference cases which do not include product defect causes of action in support thereof. Although the product-defect case sets a strong example for distinguishing the instant case to preclude application of successor liability, the Circuit Court's Order does not conclude this to be the only basis of granting Respondent's Motion. The Circuit Court found Qualitybuilt.com's alleged inspection services performed at The Gates constituted a completed transaction which has not continued into perpetuity, as placing a product into the stream of commerce will. In support of their assertions Appellants cited:

Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (Ct. App. 2008), the predecessor company sold Mr. Walton a vehicle and when he returned for service within six months of purchase, the successor company would not honor the vehicle's written warranty issued at the time of purchase. Walton, 376 S.C. 301, 303 (Ct. App. 2008). Although Walton

did not plead a defective product cause of action, the same concept applies in distinguishing Qualitybuilt.com's services in the instant case from that of sale of an automobile with an express warranty. The instant cases involves allegations arising from quality inspection services performed and concluded; there is no continuity of conduct as in Walton.

Pacific Capro Indus. v. Glob. Advantage Distribution, Inc., 2010 WL 890052 (D.S.C. Mar. 8, 2010). In Pacific the District Court does not reach an analysis of whether to apply the parties' arguments of the legal standard, and simply dismisses the motion at hand without prejudice to provide time for the parties to conduct further discovery.

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 2007 WL 2893372 (D.S.C. Sept. 28, 2007), which is a federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") case concerning the predecessor company's alleged contamination of 27 acres in Charleston in the 1960's and 1970's. 2007 WL 2893372 (D.S.C. Sept. 28, 2007). Again, Defendant distinguishes the facts of Ashley II, which involves CERCLA and imposes strict liability upon defendants and parallels the same concept of a defective product action. Contamination of real property over a decade as contemplated by CERCLA is a far reach from that of Qualitybuilt.com's allegedly negligent inspection service performed at The Gates.

Elliott v. GM, LLC (In re Motors Liquidation Co.), 829 F.3d 135 (2d Cir. N.Y. July 13, 2016). Elliott, a New York case, contemplates an "Old GM" and a "New GM" distinguishing the General Motors company prior to Chapter 11 bankruptcy from the new General Motors which emerged after bankruptcy. Id. at 143. The New GM recalled automobiles which contained potentially lethal ignition defects that had been manufactured and disseminated by the Old GM. Id. The same premise of continuity of conduct applies to

Elliott which distinguishes Qualitybuilt.com's performance of an inspection service at The Gates from that of New GM's recall of over 25 million dangerous vehicles distributed by Old GM to U.S. consumers. Id. at 148. Furthermore, Old GM knew of the defective ignition switch and received consumer complaints prior to its bankruptcy; as such, Old GM should have revealed the claims in bankruptcy. Id. at 160. New GM perpetuated the conduct with misrepresentations surrounding the fatal automobile ignitions. Id. at 157. In this matter, Appellants seek to bridge a comparison between New GM's misrepresentations regarding safety of fatal automobile ignitions to that of Quality Built, LLC's alleged conduct under successor liability theory. Not only has this argument been briefed and disposed of by the Circuit Court, but the New GM conduct to which the Appellants refer to form the basis of independent claims is not tantamount to that of any alleged conduct by Quality Built, LLC.

Appellants' interpretation of the Circuit Court's Order and arguments are misplaced. The cases referenced by Appellants, despite their lacking a defective product cause of action per se in the underlying pleadings, demonstrate a degree of continuity that is distinguishable from the instant case. In the same vein, a defective product action contemplates perpetuity by placement of a product in the stream of commerce, which the Circuit Court has distinguished from the instant case as well.

Appellants did not present any novel facts, arguments, or theories in support of their Motion to Reconsider. Nor did Appellants highlight any portion of the record the Circuit Court may have misunderstood, failed to fully consider, or failed to rule on. As such, the Circuit Court properly denied Appellants' motion, ruling after careful consideration of the Appellants' Motion and the record in this case, the Circuit Court was unable to discover any material fact or principle of law that either has been overlooked or disregarded and further found no error of law or facts

not appropriately considered. Furthermore, the Circuit Court found that, despite the fact that Respondents were not prepetition claimants in the QualityBuilt.com bankruptcy, which under the Nationwide and Brown cases might allow successor liability, the Respondents do not meet any of the exceptions listed therein."

VI. CONCLUSION

Appellants have failed to demonstrate that the Circuit Court abused its discretion in any manner. For all of the foregoing reasons, and any reasons appearing in the record, Respondent respectfully requests this Court dismiss or deny the appeal and affirm the Orders issued by The Honorable G. Thomas Cooper, Jr., and to award costs and fees to Respondent as permitted by the South Carolina Rules of Appellate Procedure and the South Carolina Code of Laws.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Lower Court Case No. 2013-CP-40-7729
Court of Appeals Case No. 2017-002325

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JUN 04 2018
SC Court of Appeals

THE GATES AT WILLIAMS-BRICE CONDOMINIUM
ASSOCIATION and KATHARINE SWINSON, Individually,
and on behalf of all others similarly situated #296848,

Appellants,

v.

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

Defendants,

Of Whom, QUALITY BUILT, LLC,

Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent upon the attorneys of record by way of U.S. Mail, stamped First Class delivery, on June 1, 2018, addressed as follows:

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Dated: June 1, 2018

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June 1, 2018

VIA FEDERAL EXPRESS PRIORITY OVERNIGHT

South Carolina Court of Appeals
Clerk of Court Office
ATTN: JESSICA SALEN
1220 Senate Street
Columbia, South Carolina 29201

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JUN 04 2018
SC Court of Appeals

RE: *The Gates at Williams-Brice Condominium Association, et al. v. Quality Built, LLC*
Lower Court Case No.: 2013-CP-40-7729
Court of Appeals Case No.: 2017-002325
HBS File No.: 7484.0001


Dear Ms. Salen:

As it pertains to the above-captioned appeal, in accordance with Rule 208(a)(2) of the SCACR, enclosed please find the original and one copy of Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal, as well as a Proof of Service for each.

Please file the original and return a clocked copy to our office in the enclosed self-addressed, stamped envelope. By copy of this letter we are serving counsel of record with the same.

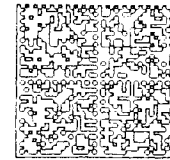
Thank you for your assistance in this matter. If you have any questions or concerns, please do not hesitate to contact our office.

Very truly yours,


Elizabeth F. Wieters

EFW/sb

cc: Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Kent Stair, Esquire
Robin Graham, Esquire



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