THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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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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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**Appellants' Final Reply Brief**

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Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie D. Drawdy, Esquire
SC Bar No.: 70205
*JUSTIN O'TOOLE LUCEY, P.A.*
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406
E-Mail: jlucey@lucey-law.com

*Attorneys for the Appellants*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Rules**



**Other Authorities**



**Regulations**

## SUMMARY

Appellants have been denied their fundamental right to a jury trial by the lower court's rulings that granted declaratory relief, or in the alternative, summary judgment to Respondent. The record shows that genuine issues of material fact exist that make summary adjudication and dismissal of Appellants' claims inappropriate. Prevailing authority shows that declaratory relief should not have been granted, and Respondent should not be shielded by its predecessor's bankruptcy; instead, Respondent should be required to defend against Appellants' successor liability claims that it is a "mere continuation" of its predecessor.

Respondent's arguments in opposition are unavailing, as they have been reached by misconstruing or ignoring prevailing authority, as set forth in Appellants' Brief and herein. The issues on appeal are not limited, as Respondent suggests, to an analysis of its predecessor's bankruptcy sale order and purchase agreement in isolation. Rather, the issues center around the questions of fact genuinely disputed in this case and the proper application of South Carolina law and federal precedent to the facts and circumstances of this case. Given the gravity of the errors in Respondent's and the Circuit Court's interpretation of prevailing authority, this Court should reverse the lower court's orders and reinstate Appellants' claims against Respondent.

## STANDARD OF REVIEW

Respondent misstates the standard of review on appeal. In purportedly defining the standard under Rule 56, SCRCP, Respondent states that appellate review is "limited to corrections of errors at law," citing to *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009) (plaintiff sought reimbursement of defense costs under a contract in a declaratory judgment action), and *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005) (petitioner sought a court order declaring a trust was terminated *ab initio*). This is incorrect. The standard of review on summary judgment is not limited to correction of

errors of law; rather, appellate courts apply the same standard as circuit courts. *USAA Prop. & Cas. Ins. Co. v. Clegg,* 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) ("When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that 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.")

Likewise, each of Respondent's references to the standard for actions tried without a jury are inapplicable. This is not an appeal from any trial, before a judge or jury. An appeal from summary judgment carries its own standard, as Appellants set forth in their Brief. Thus, Respondent's propositions drawn from *King v. PYA/Monarch, Inc.,* 317 S.C. 385, 453 S.E.2d 885 (1995); *Sheek v. Crimestoppers Alarm Sys., Div. of Glen Curt Consultants*, 297 S.C. 375, 377 S.E.2d 132 (Ct. App. 1989); and *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005), having no bearing on the summary judgment standard, warrant no consideration.

As to appellate review of declaratory relief, Respondent does concede that this Court must correct errors of law. (Respondent's Brief at 9-10). It is the correction of errors of law that is principally sought by Appellants on appeal.

## ARGUMENT

Appellants have a right to proceed with their state law successor liability claims against Respondent. Prevailing case law holds that: (i) bankruptcy orders and incorporated purchase agreements like those at issue here are not blockades to claims like those brought by Appellants; (ii) a factual analysis is required to determine whether Respondent is the "mere continuation" of Respondent's predecessor that was hired to provide quality assurance during construction of The Gates at Williams-Brice ("The Gates"); and (iii) declaratory relief cannot be granted without first

filing a declaratory action. The lower court committed reversible error in finding against Appellants on each of these points, thereby denying Appellants their right to submit their claims to the true fact-finder, the jury.

## I. The QualityBuilt.com Sale Order and Incorporated Purchase Agreement Do Not Bar Appellants' State Law Claims.

The United States Supreme Court has implicitly confirmed[1] that broadly worded Sale Orders like the one at issue here do not absolve a successor entity from liability. Prevailing case law from this state has held the same. The requisite analysis set forth under these authorities to determine whether a Sale Order bars a claimant includes: review 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 disregarded by both the Circuit Court and Respondent.

### A. *General Motors* Supports Appellants' Position that Respondent is Not Shielded from Appellants' Claims by Its Predecessor's Broadly Worded Bankruptcy Sale Order and Purchase Agreement.

The Second Circuit decision in *General Motors* is instructive because it analyzes the viability of successor liability claims in the presence of a broadly worded bankruptcy sale order and incorporated purchase agreement. Like the sale order here, the sale order in *General Motors* gave the impression that "New GM" purchased its predecessor's assets free and clear of all claims. *General Motors*, No. 16-764 at App-9. Despite its broad language, the Second Circuit recognized "New GM" could be adjudged liable for two categories of claims: "independent" claims based on post-petition wrongful conduct and claims with no pre-bankruptcy relationship between claimant

[1] By its denial of certiorari in *General Motors LLC v. Celestine Elliott*, et al., the U.S. Supreme Court endorsed the Second Circuit's interpretation of the sale order at issue in accordance with bankruptcy law. Nos. 2015-2844, 15-2847 (2d Cir. 2016), cert. denied, __ U.S. __ (U.S. Apr. 24, 2017) (No. 16-764).

and predecessor. *Id.* at App-30-36 (concluding Sale Order could not be read, consistent with bankruptcy law, to cover claims brought by purchasers who had no contact or relationship with the predecessor).

Respondent does not attempt to refute the importance of the *General Motors* Court's decision in interpreting federal bankruptcy law and 11 U.S.C. § 101(5) of the Bankruptcy Code. Moreover, Respondent fails to refute two salient similarities between this case and *General Motors*: the broad sale order language and claimants who had no pre-bankruptcy relationship. (Respondent's Brief at 28-29). Respondent's failure to address these points deeply undercuts its argument that its predecessor's bankruptcy bars Appellants' claims; that argument cannot legitimately be made without fully applying the analysis in *General Motors*.

### B. *Nationwide* Must Be Read With its Key Authority, *In Re Grumman*, Which Holds that the Broad Language of a Bankruptcy Sale Order Does Not Shield Respondent from Liability.

Neither the Lower Court nor Respondent properly applied this State's Supreme Court decision in *Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 59, 714 S.E.2d 322, 325 (2011) or its key authority, *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). Perhaps worse than Respondent's failure to fully address *General Motors*, Respondent makes no reference whatsoever to *Grumman* even though Respondent heavily relies on *Nationwide*. *Grumman*'s ruling that allowed claimants to proceed despite broad sale order language like that at issue here is deadly for Respondent, which is most likely the reason it failed to address it. However, Respondent's head-in-the-sand approach does nothing to aid its argument.

### 1. Appellants' In Personam Action against Respondent is not Dischargeable.

While Respondent acknowledges that a §101(5) claim is "limited by the free and clear sale to *in rem* against the sale proceeds held by the Debtor" in a block quote from *Nationwide*, Respondent does not address the fact that Appellants' claims were brought *in personam.* (Respondent's Brief at 23-24). As this State's Supreme Court held in *Nationwide*, a sale order discharges "an action *in rem* against the proceeds paid to the debtor, while a post-sale tort action against the successor entity is not an action against the sale proceeds received by the debtor, but rather an *in personam* action against the successor itself." *Nationwide*, 394 S.C. at 58-59. The *Nationwide* Court looked largely to *Grumman* on this point:

> In *Grumman*, the bankruptcy court explained that under a § 363(f) "free and clear" sale, the purchaser of a bankrupt's assets need not fear that a creditor of the bankrupt estate can enforce its claim against those assets because the effect of the free and clear sale is to limit that creditor to *in rem* relief against the sale proceeds. Whether a party is limited to proceeding *in rem* against these proceeds, or is one whose claim lies against the purchaser, is determined first by 11 U.S.C. § 101(5) of the Bankruptcy Code. If the creditor does not have a § 101(5) claim, then his right to proceed against the purchaser is determined by state law. *Nationwide*, 394 S.C. at 59.

The fact that Appellant's action is *in personam* stands as yet another fatal blow to Respondent's argument that Respondent has chosen to ignore.

### 2. The Broad Sale Order Language in *Grumman* is identical to the Sale Order Language at Issue Here.

In *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.

*Grumman*, 445 B.R. at 246 (emphasis added).

Even with the broad language of this free and clear clause, the *Grumman* Court 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." *Grumman*, 445 B.R. at 250 (emphasis added) (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"). Like the court in *Grumman*, this Court should not allow Respondent to have a "free pass" by way of the QualityBuilt.com sale order.

## II. Proper Application of *Simmons* and its Progeny Is Necessary To Determine Whether Respondent Is a Mere Continuation of Its Predecessor.

The South Carolina Supreme Court has recognized four distinct exceptions to successor non-liability, including the exception that a successor company was a "mere continuation" of its predecessor. *Simmons v. Mark Lift Indus., Inc.,* 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (citing *Brown v. American Ry. Express Co.,* 128 S.C. 428, 123 S.E. 97 (1924)); *Nationwide*, 394 S.C. at 61. Appellants are only required to establish that Respondent's conduct meets one of these exceptions in order to show that Respondent may be liable to them. *Nationwide,* 394 S.C. 54, 61. Thus, Appellants have only alleged one exception in this matter, "mere continuation".

In its Brief, Respondent erroneously applies all of the independently operating tests in *Simmons* as "factors" and "four (4) elements specified in Simmons," and "unequivocally confirms" a falsity: that it is not a mere continuation of its predecessor. (Respondent's Brief at 16-17.) Respondent's arguments addressed to the three un-alleged exceptions to successor non-liability under *Simmons* are irrelevant. (Respondent's Brief at 17-18, 22-23.) Further, as discussed

more fully herein at Section II.B, Respondent's mere continuation analysis actually includes several admissions of the "commonality of ownership" between Respondent and its predecessor by its shared leadership of Executives Stan Luhr and Elizabeth Michaelis (Section III.C of Respondent's Brief at 19-22). Respondent's misapplication of the law and admission of the commonality of ownership is fatal to its case.

### A. The "Mere Continuation" Exception Requires a Fact-Based Inquiry.

Factual determinations are required to decide whether Respondent was the "mere continuation" of its predecessor. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 406, 408, 563 S.E.2d 109, 112 (Ct. App. 2002) ("If triable issues exist, those issues must go to the jury.") Under South Carolina law, courts examine, first and foremost, whether there is "commonality of ownership" between the two entities. *Simmons*, 366 S.C. at 312 n.1. That is, who directs, manages, holds shares, or has some beneficial interest in the entities is analyzed. (Appellants' Brief at 19-20); *see also Acme Boot Co. v. Tony Lama Interstate Retail Stores, Inc.*, 929 F.2d 691 (4th Cir. 1991) (recognizing the need for a jury trial on mere continuation 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.) Whether the two entities operate the same type of business; and whether both entities use the same name or the successor holds itself out to the public as the same entity, thus benefitting from the goodwill, name recognition, and history of its predecessor is also analyzed. (Appellants' Brief at 21). *Id.*

### B. The Record Evidences Genuine Issues For Trial, Namely the Conclusions to be Drawn From the Facts.

A host of facts exist in the record, many of which Respondent concedes or has not refuted, that raise jury questions about the conclusions that should be drawn from those facts. Respondent

concedes that it and its predecessor shared substantially the same leadership: (i) Stan Luhr and Elizabeth Michaelis were executives with Respondent's predecessor and were induced/retained as executives for Respondent; (ii) Luhr and Michaelis had ownership in Respondent's predecessor and were given ownership in Respondent; (iii) as former executives of its predecessor, Luhr and Michaelis were deemed "critical" to Respondent's success. Respondent also admits that it conducts the same type of business and purposely shares a very similar name as its predecessor. (Respondent's Brief at 20). Respondent also concedes that it used the same software as its predecessor. (Respondent's Brief at 11 ("Respondent purchased asserts such as software and intellectual property in the bankruptcy sale.")(R. p. 245)(assigning software patents to Quality Built, LLC).

There are other relevant facts raised by Appellants in their brief that Respondent does not concede or even address, such as its continual marketing on its website and in its press releases of its predecessor's experience under the umbrella of the "Quality Built Organization". Appellants contend the conclusion to be drawn from these facts globally is that Respondent has presented itself to the world as its predecessor, benefitting from the Quality Built brand and goodwill created by its Predecessor, since Respondent's "creation" in 2009 (*See* Chronology of Facts at Issue in Section III. C of Appellants' Brief and Appellants' Opp. Mem. R. pp. 332- 335, 343). A jury must determine the conclusions to be drawn from these facts, both the facts that Respondent has conceded and those that it fails to even address.

### C. Respondent Dismissed the "Mere Continuation" Analysis Set Forth Under South Carolina Law in Favor of Its Own Impermissible Conclusions from Themes of Its Own Design.

In lieu of fully addressing the "mere continuation" factors developed by *Simmons'* progeny under South Carolina law, Respondent focuses on whether a product manufacturer is involved and

whether a defective product has been placed into the stream of commerce. Respondent has mislead the lower court with erroneous precedent that the lower court failed to see through: that the nature of this case is not a defective products action; and that there is no "perpetuity by placement of a product in the stream of commerce." (April 2017 Order at 5-7; Respondent's Brief at 11, 16, 25, 28-29). This is not the law. The exceptions to successor non-liability under *Simmons* are not limited to the products liability realm, nor have these traditional exceptions been exclusively applied by courts in the products liability context. (Appellants' Brief at 21-23); *see, e.g., Fuisz v. Lynch, AIA, PLLC*, 147 F.Appx. 319, 322 (4th Cir. 2005) (architectural design services); *Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.,* 123 F.3d 201, 206 (4th Cir. 1997) (legal services).[2]

Respondent's only effort at a "mere continuation" analysis is to provide block quotes from the Affidavits of Gary Elzweig and Elizabeth Michaelis, and a cursory summation that those affidavit excerpts "clearly" show Respondent "is not a continuation" of its predecessor. (Respondent's Brief at 19-22). In fact, the opposite is true. Respondent chose several paragraphs from the Elzeig Affidavit that actually confirm commonality of ownership between Respondent and its predecessor. By Respondent's own admission, Stan Luhr and Elizabeth Michaelis, executives with the predecessor, were induced and retained as executives for Respondent, were given ownership in Respondent, and were deemed to be "critical" to the Respondent's success. (Respondent's Brief at 20). Respondent also concedes that its name was purposely chosen to be similar to its predecessor to provide a "seamless" transition. (Respondent's Brief at 20).

[2] Notably, Respondent does not cite authority for its assertions that *Simmons*, *Brown*, *Nationwide,* and *General Motors* are each inapplicable to this case because they are products liability cases and/or deal with a "degree of continuity" that is lacking in the instant case. (Respondent's Brief at 16, 24-26 29). Presumably, that is because no authority exists to support Respondent as to this assertion either. (See, e.g., Respondent's Brief at 16, 26).

Respondent's failure to acknowledge the factors considered by courts in applying the "mere continuation" exception under South Carolina law sounds the death knell for Respondent's argument. The facts in this record, and inferences and conclusions reasonably drawn therefrom, indicate commonality of ownership between QualityBuilt.com and Quality Built, LLC. Respondent is under the direction of the same president, in the same line of business, advertising the same history and experience as its predecessor, and using virtually the same name. A reasonable jury could conclude that Quality Built, LLC is the "mere continuation" of QualityBuilt.com. *Acme Boot Co.,* 929 F.2d 691 (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); *Nat'l Carloading Corp. v. Astro Van Lines, Inc.*, 593 F.2d 559, 563–64 (4th Cir. 1979) (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.

Under its misguided analysis, Respondent concludes that "no factual issue prevents summary judgment". (Respondent's Brief at 22). However, "[e]ven if there is no dispute as to the 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." *Thomas Sand Co*, 349 S.C. 402, 408.

### D. Respondent Relies Largely on Surface-Level Assertions that Have No Basis in the Law or Facts.

Respondent's further contentions are also unsupported. For instance, Respondent's objection that it is "not the entity" that provided services at The Gates, it is a different entity. (Respondent's Brief at 5). That is precisely the point of successor liability claims – the entity's name and *form* have undergone change, but in *substance* it operates largely unchanged. (Appellants' Brief at 23-24); *see, e.g., Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 275 (D.N.J. 1994) (noting decisions consistent with the well-established notion that "in successor liability cases the courts should not elevate form over substance"). Whether a bankruptcy proceeding took place that changed the Quality Built brand's *form* is of no consequence in answering whether one entity merely continued as another.

Likewise, Respondent proffers that the terms of the Bankruptcy Court Order "leave no question" that Respondent is not liable in this action because Respondent did not assume liabilities related to The Gates in the Bankruptcy Order, and the successor entity, Quality Built, LLC, filed a certificate of formation in 2009. (Respondent's Brief at 14). These arguments do not resolve the case. Appellants did not allege assumption of liability, express or implied, under the first of the *Simmons* exceptions to successor non-liability. And, a certificate of formation's filing date does not resolve whether an entity "merely continued" as another; the filing of a document evidences form alone. Thus the bankruptcy sale order's language, regardless of what it "clearly reveals" and defines as assumed liabilities, is inapposite. (Respondent's Brief at 15).

## III. The Lower Court's Grant of Declaratory Relief Was Inappropriate and Violates Appellants' Right to a Jury Trial As Set Forth Under Rule 38 of the South Carolina Rules of Civil Procedure and Section 15-53-90 of the South Carolina Uniform Declaratory Judgments Act.

The Circuit Court's decision to grant declaratory relief under Rule 57, SCRCP, was an

error of law that improperly intruded upon Appellants' right to a jury trial on issues of fact. (R. pp. 42-43). This case was commenced by Appellants in the Circuit Court as a construction defect action, not as an action under South Carolina's Declaratory Judgments Act (the "Act"). Appellants preserved their right to a jury trial by demand in their complaint in accordance with the South Carolina Rules of Civil Procedure. Once preserved, Rule 38(a) of the South Carolina Rules of Civil Procedure provides that issues of fact "must be tried" when not waived. Rule 38(a), SCRCP ("Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.").

### A. Respondent's Motion for Declaratory Relief is Inadequate.

A declaratory relief award pursuant to the Act, S.C. Code Ann. §§ 15-53-10, *et seq.*, 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)).[3]

Respondent has failed to address <u>any</u> of the authority submitted by Appellants that shows a declaratory judgment action must be filed to receive relief thereunder. What's more, the only authority Respondent cited in an attempt to demonstrate that its motion is tantamount to instituting

[3] *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.").

a declaratory judgment action, *Atkins v. Wilson*, is distinguishable. 417 S.C. 3, 788 S.E.2d 228 (2016). Unlike here, *Atkins* was initiated with a complaint filed under the Act, which was dismissed and followed by a motion for declaratory relief; this Court then ruled that, "[i]n any event, we construe Respondents' motion to enforce the March 18 order as a new action seeking declaratory relief under the Act [..]." *Atkins*, 417 S.C. at 12, n. 6 (emphasis added). *Atkins'* motion was construed as a "new" declaratory judgment action because a prior declaratory judgment action had already been filed. 417 S.C. at 7, 12. Moreover, *Atkins* did not present triable issues of fact. (See Section III.B, infra). For these reasons, *Atkins* is unhelpful to Respondent.

As such, it stands unrefuted that: "the 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).

### B. Even if Respondent's Motion was Adequate to Warrant Declaratory Relief, Issues of Fact Mandate that Appellants Receive their Preserved Right to a Jury Trial.

Even if Respondent's motion were to be treated as a declaratory judgment cause of action (which Appellants oppose), the Act provides that "[a]ll existing rights to jury trials are hereby preserved." S.C. Code Ann. § 15-53-90. As shown in Appellants' Brief and herein, issues of fact exist that warrant a jury trial. Rule 38's dictate that issues of fact be tried by jury must be followed;

Respondent's request for declaratory relief by way of its motion should not have been allowed to disturb Appellants' preserved, sacrosanct right to a jury trial. Thus, the Circuit Court's error in using the Act as a vehicle of resolution and in interceding as a finder of fact must be reversed.

## CONCLUSION

For the reasons set forth herein and in Appellants' Initial Brief, 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 should be vacated, and this matter should be remanded for completion of discovery and trial.

JUSTIN O'TOOLE LUCEY, PA

By: _____

Justin O'Toole Lucey, Esquire (Bar No. 15438)
Stephanie D. Drawdy, Esquire (Bar No. 70205)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Facsimile: 843.849.8406
Email: jlucey@lucey-law.com
Email: sdrawdy@lucey-law.com

*Attorneys for the Appellants.*

Charleston, South Carolina
August 6, 2018

Other Counsel of Record:

Alan R. Belcher, Esquire
Elizabeth F. Wieters, Esquire
Hall Booth Smith, PC
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
abelcher@hallboothsmith.com
eweiters@hallboothsmith.com
Tel: 843-720-3460
*Attorneys for Respondent*

Kent Stair, Esq.
Robin Graham, Esq.
Carlock Copeland
40 Calhoun Street, Suite 400
Charleston, SC 29401
kstair@carlockcopeland.com
rgraham@carlockcopeland.com
Tel: 843.266.8224
*Attorneys for Coast to Coast Engineering Services, Inc. d/b/a Criterium Engineers*

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**CERTIFICATE OF COMPLIANCE WITH RULE 211(B), SCACR**

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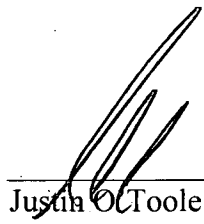
JUSTIN O'TOOLE LUCEY, PA
Justin O'Toole Lucey, Esquire (Bar No. 15438)
Stephanie D. Drawdy, Esquire (Bar No. 70205)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Facsimile: 843.849.8406
Email: jlucey@lucey-law.com
Email: sdrawdy@lucey-law.com

Attorneys for the Appellants

August 6, 2018
Charleston, South Carolina

The undersigned certifies that *Appellants' Final Reply Brief* complies with Rule 211(b), SCACR.

Signed: 
Justin O'Toole Lucey, Esquire

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**PROOF OF SERVICE**

---



Justin O'Toole Lucey, Esquire
SC Bar No.: 15438
Stephanie D. Drawdy, Esquire
SC Bar No.: 70205
*JUSTIN O'TOOLE LUCEY, P.A.*
415 Mill Street
Mount Pleasant, South Carolina 29201
Telephone: 843.849.8400
Telecopier: 843.849.8406
E-Mail: jlucey@lucey-law.com

*Attorneys for the Appellants*

August 6, 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' Final Reply Brief and Certificate of Compliance with Rule 211(b), SCACR*** by sending a copy of same via the United States Mail, postage pre-paid, and addressed as follows:

Alan R. Belcher, Esquire
SC Bar No.: 71686
Elizabeth F. Wieters, Esquire
SC Bar No.: 78064
Hall Booth Smith, PC
111 Coleman Boulevard, Suite 301
Mount Pleasant, South Carolina 29464
abelcher@hallboothsmith.com
eweiters@hallboothsmith.com

Tel: 843-720-3460

*Attorneys for Quality Built, LLC*

Kent Stair, Esq.
Robin Graham, Esq.
Carlock Copeland
40 Calhoun Street, Suite 400
Charleston, SC 29401
kstair@carlockcopeland.com
rgraham@carlockcopeland.com

Tel: 843.266.8224

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

Signed: _____
Justin O'Toole Lucey, Esquire

Charleston, South Carolina
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