The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

September 7, 2018

The Honorable M. Hope Blackley
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Nationwide Mutual v. Eagle Window
Lower Court Case No. 2007-CP-42-00296
Appellate Case No. 2016-001459

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:
G. Dana Sinkler, Esquire
Jason Michael Imhoff, Esquire
Ainsley Fisher Tillman, Esquire
Ginger D. Goforth, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nationwide Mutual Insurance Company and Gilliam Construction Company Inc., Respondents,

v.

Eagle Window & Door, Inc., Petitioner.

Appellate Case No. 2016-001459

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 27831
Heard March 28, 2018 – Filed August 22, 2018

REVERSED

G. Dana Sinkler, of Gibbs & Holmes, of Charleston, and Ainsley Fisher Tillman, of Charleston, for Petitioner.

Jason M. Imhoff and Ginger D. Goforth, both of The Ward Law Firm, of Spartanburg, for Respondents.

JUSTICE HEARN: This products liability case presents a narrow question: Is Petitioner Eagle Window & Door, Inc. (Eagle) subject to successor liability for defective windows manufactured by a company who later sold its assets to Eagle in

a bankruptcy sale? The answer requires us to revisit our holding in *Simmons v. Mark Lift Industries, Inc.*[1] and clarify the doctrine of successor liability in South Carolina. The court of appeals affirmed the trial court's holding that Eagle is the "mere continuation" of the entity. *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, Op. No. 2016-UP-168 (S.C. Ct. App. filed Apr. 6, 2016). We now reverse because both the trial court and court of appeals incorrectly applied the test for successor liability.

FACTUAL BACKGROUND

In 1999, homeowners Renaul and Karen Abel contracted with Gilliam Construction Company, Inc. for the construction of a house in an upscale Landrum subdivision. In constructing the house, Gilliam used windows manufactured by Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. (Eagle & Taylor). Sometime after the home was completed, the Abels discovered damage from water intrusion around the windows. The Abels brought suit against Gilliam for the alleged defects and settled with Gilliam and its insurer, Nationwide Mutual, for $210,000. Nationwide and Gilliam (collectively Respondents) then initiated this contribution action seeking repayment of the settlement proceeds from several defendants, including Eagle, alleging it was liable for the obligations of Eagle & Taylor.

At the time of the manufacture and sale of the windows used in the Abel home, Eagle & Taylor was a wholly-owned subsidiary corporation of American Architectural Products Company (AAPC). Eagle & Taylor did business under two fictitious entities, neither of which was incorporated: Eagle Window & Door, Inc. and Taylor Building Products, Inc. In 2000, AAPC filed for reorganization under the U.S. Bankruptcy Code in the Northern District of Ohio. With the approval of the bankruptcy court, AAPC placed substantially all of the assets of the fictitious entity Eagle Window & Door, Inc. up for auction in 2002, where Linsalata Capital Partners Fund IV, L.P. (Linsalata)[2] was the successful bidder. To purchase and take title to the assets, Linsalata formed EWD Acquisition Co., a wholly-owned subsidiary corporation. After the assets were conveyed, EWD Acquisition Co.

---

[1] 366 S.C. 308, 622 S.E.2d 213 (2005).

[2] Linsalata is an investment partnership owned and managed by private equity buyout firm Linsalata Capital Partners.

formally changed its name to Eagle Window & Door, Inc.—the entity against which Respondents brought their contribution claim and the Petitioner in this appeal.

After the acquisition, Eagle engaged in substantially the same business of manufacturing and selling windows and doors, using the same facilities where Eagle & Taylor conducted business in Dubuque, Iowa.[3] Five officers from Eagle & Taylor joined Eagle in similar capacities after the sale, including David Beeken, who served as president of Eagle & Taylor since 2000 and had been with the company for several decades.

a. Shareholders

Prior to the asset sale, AAPC was the sole shareholder of Eagle & Taylor. After the sale was completed, Linsalata owned roughly 88% of the outstanding shares in Eagle, with the rest distributed in small amounts to Eagle officers and various investors.

b. Directors

From 1997 through May 2001, Frank Amedia was the sole director of Eagle & Taylor, with Joseph Dominijanni replacing him as sole director until the company's liquidation in 2002.[4] At the time of the asset purchase, Linsalata's Senior Vice President, Stephen Perry, was the sole director of Eagle (then known as EWD Acquisition Co.). After the transaction was completed and the corporate name changed to Eagle Window & Door, Inc., Perry issued a resolution adding Frank Linsalata and Ronald Neill as additional directors. At some point after May 2002, David Beeken was added as a director of Eagle.

---

[3] At the time of litigation, Eagle's website acknowledged that it was under new ownership since 2002 when it was acquired by Linsalata.

[4] AAPC's two directors were controlling shareholders George Hofmeister and Joseph Dominijanni.

c. Officers

Out of Eagle & Taylor's eight officers, five assumed similar roles as officers with Eagle after the asset sale. The remaining three officer positions were filled by Linsalata appointees.

Contribution Suit

In 2007, Respondents initiated a contribution suit against Eagle seeking to recover for amounts paid in the settlement with the Abels. Eagle defended against the claim on the ground that no successor liability flowed from Eagle & Taylor, the entity responsible for the manufacture and sale of the defective windows.[5] Respondents argued Eagle should be treated as a "mere continuation" of Eagle & Taylor because it retained a substantially similar name, produced the same products in the same facility, and benefitted from the brand's history by holding itself out as the successor entity. Moreover, Respondents asserted *Simmons* established that a plaintiff must only show commonality of officers, directors, *or* shareholders between predecessor and successor corporations in order to satisfy the mere continuation test.

The trial court ultimately entered judgment in favor of Respondents, finding Eagle to be a mere continuation of its predecessor. In its order, the trial court found the "predecessors [sic] and successor Eagle companies shared directors, officers, and shareholders." Citing *Simmons*, the trial court stated, "A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, *or* shareholders." (Emphasis added.). Finding five of Eagle's eight officers served in the same capacity with Eagle & Taylor, the trial court determined Eagle met the mere continuation test. The order further explained, "the Court finds that a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation," finding Eagle retained the same president (Beeken) as its predecessor, and that it benefitted from its name recognition and history. Lastly, the trial court found it unnecessary to determine whether *Simmons* required "officers, directors, and shareholders" or

---

[5] The trial court originally granted Eagle's motion to dismiss based on the bankruptcy sale's "free and clear" provisions, but the order granting dismissal was reversed by this Court, *see Nationwide Mut. Ins. Co., Inc. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 714 S.E.2d 322 (2011), wherein we held the contribution action was not barred by the terms of the bankruptcy sale, and the bankruptcy court did not retain jurisdiction over the contribution suit.

"officers, directors, or shareholders" because Respondents had proven commonality among all three classes in the successor and predecessor corporations. As a result, the court ordered Eagle to pay $187,758.42 in contribution and interest to Respondents.

In a split decision, the court of appeals affirmed the trial court's finding that Eagle was a mere continuation of Eagle & Taylor but reduced the contribution award to $78,333.33. *Eagle Window & Door*, Op. No. 2016-UP-168. Like the trial court, the court of appeals majority also found commonality of officers alone was sufficient to establish successor liability as a mere continuation.[6] Dissenting, Judge Konduros found *Simmons* and *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008, established that shareholder continuity was a critical component of the mere continuation test. The dissent further held the trial court erroneously relied upon the "continuation of operations" approach urged in Justice Burnett's dissent, which was ultimately rejected by the *Simmons* majority in favor of requiring continuity of ownership to establish a mere continuation. This Court granted Eagle's petition for a writ of certiorari to review the decision.

ISSUES

I. Did the court of appeals err in holding Eagle was a mere continuation of its predecessor corporation when there was no commonality of ownership?

II. Did the court of appeals err in holding Eagle abandoned the issue of whether Nationwide failed to prove a manufacturing or design defect?

DISCUSSION

I. Successor Liability

Eagle argues the court of appeals' holding conflicts with the established law on successor liability in South Carolina. According to Eagle, the *Simmons* court

---

[6] The majority opinion found Eagle & Taylor was a "wholly-owned subsidiary" of AAPC but also stated the trial court found Nationwide had proven "'that officers, directors, and stockholders remained in the successor corporation from the predecessor corporation.'" The opinion does not explain these factual inconsistencies with regard to ownership.

recognized the presumption that ordinarily, a successor corporation is not liable for the obligations of its predecessor, apart from four exceptions, including the mere continuation exception. Eagle's argument is straightforward: *Simmons* established the mere continuation exception only applies where there is continuity of ownership, and the court of appeals erred by finding commonality of corporate officers alone was sufficient to establish mere continuation. On the other hand, Respondents argue the court of appeals properly applied *Simmons* by requiring commonality between officers, directors, or shareholders, rather than all three groups. Consistent with their approach throughout this litigation, Respondents rely heavily on Justice Burnett's dissent and effectively ignore the *Simmons* majority's holding, arguing in favor of the broader enterprise continuation doctrine which the *Simmons* majority unequivocally rejected. We agree with Eagle that the court of appeals erred by finding that carryover of corporate officers resulted in a mere continuation when the record demonstrates there was no commonality of shareholders and directors between Eagle and its predecessor.

Ordinarily, in the absence of a statute, a successor or purchasing corporation is not liable for the debts of a predecessor or seller unless: (1) there was an agreement to assume such debts; (2) the circumstances surrounding the transaction amount to 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. *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). In this case we are concerned only with the third exception—mere continuation.

In *Simmons*, the Court was presented with a certified question asking whether a plaintiff may bring a product liability action based on a successor liability theory when the defendant corporation purchased the assets of the seller through a court-approved bankruptcy sale. 366 S.C. at 309, 622 S.E.2d at 213–14. A companion question then asked the Court to clarify which test is employed to determine whether there is successor liability for a company which purchased the assets of an unrelated company. *Id.* at 310, 622. S.E.2d at 214. The underlying product liability suit was premised on a defective elevated scissorlift that collapsed and injured the plaintiff in a work-related accident. *Id.* The scissorlift was designed, manufactured, and sold by Mark Industries. After selling the scissorlift, and years before the plaintiff's

injuries, Mark Industries filed for bankruptcy, selling many of its assets[7] to Terex Corp. at auction. *Id.* at 310–11, 622 S.E.2d at 214. To implement the asset purchase, Terex formed a wholly-owned subsidiary, Mark Lift Industries, Inc., which continued to manufacture scissorlifts at the former Mark plant for several months prior to relocating the assets and equipment to Terex's plant in Iowa. *Id.* There was no commonality of officers, directors, or stockholders between Mark Industries and Terex. *Id.* at 311, 622 S.E.2d at 215. After his injuries, the plaintiff filed suit against Mark Lift Industries and Terex, seeking recovery under a theory of successor liability.

Answering the first question in the affirmative, the Court held that a product liability claim could be maintained under a theory of successor liability, provided the plaintiff met one of the tests set forth in *Brown*, *supra*. *Id.* at 313, 622 S.E.2d at 215. The Court instructed the district court to apply *Brown* to determine whether there is successor liability when one company purchases the assets of an unrelated company. *Id.* at 312, 622 S.E.2d at 215. In response to Justice Burnett's dissent, and critical to the current case, the Court included this footnote with its discussion of the *Brown* test:

> Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership,** *i.e.*, **the predecessor and successor corporations have substantially the same officers, directors, or shareholders.** We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders. Further, we find no conflict with *Holloway v. John E. Smith's Sons Co.*, 432 F.Supp. 454 (D.S.C.1977). We do not find that the *Holloway* court established a new test of successor liability. Although the court in *Holloway* did not cite the test established in *Brown,* it applied the mere continuation exception. Unlike the present case in which Mark Lift and Terex did not share common officers, directors and shareholders, it appears from a reading of *Holloway* that there was, indeed, a commonality of ownership. Accordingly, the mere continuation exception was properly applied to that case.

---

[7] The assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill, all intellectual property, and technology. *Id.* at 311, 622 S.E.2d at 214.

Id. at 312 n.1, 622 S.E.2d at 215 n.1 (emphasis in original).

Dissenting, Justice Burnett recognized the plaintiff was arguing for an expansion of successor liability law beyond the four exceptions outlined in *Brown*, urging the Court to adopt either a continuity of enterprise exception or product line exception. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 315, 622 S.E.2d 213, 216–17 (2005) (Burnett, J., dissenting). Analyzing the mere continuation exception, Justice Burnett acknowledged "[m]ost courts traditionally have applied" the exception "only when there is commonality of ownership, *i.e.*, the predecessor and successor corporations have substantially the same officers, directors, or shareholders, ..." *Id.* at 316, 622 S.E.2d at 217 (citing *Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992). Justice Burnett then explained he would not interpret the mere continuation exception as narrowly as other courts and would instead consider a number of factors, including:

> (1) whether the successor, taking lawful advantage of the predecessor's accumulated goodwill and reputation, held itself out to the world as a continuation of the predecessor through continued use of the predecessor's corporate identity, trade names, advertising, or other intellectual property; (2) whether the successor continued to manufacture substantially the same product line as the predecessor, recognizing that manufacturing activity by its nature involves modification of product lines and elimination of unprofitable items; (3) whether the successor retained the predecessor's managers, employees, or sales force; (4) whether the successor continued to use the predecessor's equipment, supplier, dealer, or customer lists; (5) whether the successor assumed those liabilities and obligations of the predecessor ordinarily necessary for the continuation of normal business operations of the predecessor; and (6) whether the successor's officers, directors, or shareholders are substantially the same as the predecessor's.

Id. at 323, 622 S.E.2d at 221. Thus, Justice Burnett advocated for a more flexible approach to the mere continuation test, beyond the scope of the traditional test which relied on continuity of ownership.[8]

The issue now before the Court hinges on the proper application of the mere continuation test established in *Simmons*. Eagle argues the trial court and court of appeals erred by holding *Simmons* only required a plaintiff to prove commonality of officers, directors, *or* shareholders, rather than all three classes, to establish mere continuation. We agree with Eagle. The confusion arises from the use of the disjunctive "or" when the *Simmons* majority explained that under the traditional approach, the mere continuation exception is "applicable only when there is commonality of ownership, *i.e.,* the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Simmons*, 366 S.C. at 312, n. 1, 622 S.E.2d at 215 n. 1 (emphasis omitted). Despite the use of "or," the preceding clause of that sentence indicates that commonality of *ownership* is required for the exception to apply. In the corporate context, without commonality of shareholders, there is no commonality of ownership. Moreover, the sentence that follows carries the full force and effect of the majority's holding: "We **decline to extend** the exception to cases in which there is no such commonality of officers, directors **and** shareholders." *Id.* (emphasis added).

We hold the court of appeals erred by finding *Simmons* only required commonality of officers to establish a mere continuation while failing to acknowledge the clear and unequivocal language declining to extend the exception beyond instances where there is commonality of officers, directors, and shareholders. Contrary to the court of appeals' holding in this case, an earlier court of appeals opinion also interpreted the mere continuation exception from *Simmons* to require commonality between officers, directors, and shareholders. *See Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008 ("In *Simmons v. Mark Lift Industries, Inc.*, the South Carolina Supreme Court declined to extend the mere continuation exception to situations where there is no commonality between officers, directors, and shareholders of the seller and purchaser.").

---

[8] Admittedly, if Justice Burnett's dissent had carried the day, the trial court and the court of appeals majority would be correct in finding that Eagle is a mere continuation of its predecessor corporation.

The trial court's "mere continuation" analysis mirrored Justice Burnett's dissent and focused heavily on Eagle's name, location, website, and goodwill. This analysis was error, as it falls within the continuity of enterprise theory of successor liability that the *Simmons* majority flatly rejected. *See Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883–84 (Mich. 1976) (setting forth factors to determine successor liability based on continuity of enterprise, including whether (1) there was retention of key personnel, assets, and corporate name; (2) the purchasing corporation assumed liabilities and obligations of the seller ordinarily necessary for the continuation of the business; and (3) the purchasing corporation held itself out to the world as the effective continuation of the seller). While there arguably may be merits to expanding South Carolina's successor liability test to include the continuity of enterprise theory, that is not the question currently before the Court, nor is that the argument advanced by Respondents. Instead, Respondents conflate the theories of successor liability and transform the mere continuation analysis into something more akin to continuity of enterprise. *See Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1283 (8th Cir. 1994) (explaining the continuity of enterprise exception is "significantly different" from the mere continuation exception, with the focus on the continuity of the seller's business operation and not the continuity of management and ownership).

The *Simmons* majority's decision to limit the mere continuation exception to cases where there is commonality of officers, directors, and shareholders is consistent with the traditional application of the doctrine. *See, e.g., Grand Laboratories, Inc.*, 32 F.3d at 1283 ("The traditional mere continuation exception focuses on the continuation of management and ownership between the predecessor and successor corporations."); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977) ("The key element of a 'continuation' is a common identity of the officers, directors and stockholders in the selling and purchasing corporations."); *Vernon v. Schuster*, 688 N.E.2d 1172, 1176 (Ill. 1997) ("In determining whether one corporation is a continuation of another, the test used in the majority of jurisdictions is whether there is a continuation of the *corporate entity of the seller*—not whether there is a continuation of the *seller's business operation*, as the dissent appears to emphasize. . . . In accord with the majority view, our appellate court has 'consistently required identity of ownership before imposing successor liability under [the continuation exception].'") (emphasis in original) (internal citations omitted); Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 Fla. J. Int'l L. 365, 372 (1996) ("In applying the mere continuation doctrine, courts have rejected the 'totality of the circumstances' standard and instead have insisted that all of the necessary elements must be satisfied.").

While some states have expanded successor liability to include enterprise continuity,[9] the existence of these cases alone is not sufficient to override the express language contained in *Simmons* signifying that the Court declined to expand the doctrine where there is no commonality between officers, directors, and shareholders. Accordingly, with only commonality of officers but no commonality of directors or shareholders, the court of appeals erred in affirming the trial court's conclusion that Eagle is a mere continuation of Eagle & Taylor.

As an alternative argument, Respondents suggest the Court need not debate the proper application of *Simmons* because there was in fact commonality among officers, directors, and shareholders in this case. This assertion is factually incorrect; we found *no* evidence in the record to support the trial court's finding that there was any shareholder continuity between Eagle and Eagle & Taylor.[10]

Eagle & Taylor was a wholly-owned subsidiary of AAPC at the time of the asset sale, meaning AAPC held 100% of the corporation's stock. After the sale, AAPC did not acquire any shares in the newly-formed Eagle corporation, nor did it possess any ownership in Linsalata. Contrary to the trial court's order, Stephen Perry's affidavit stated there was no commonality of ownership between the predecessor and successor entities, and none of the officers of Eagle & Taylor (who went on to become officers of Eagle and are the only possible source of shareholder commonality between Eagle and Eagle & Taylor) possessed any ownership interest in the predecessor prior to the sale. While Beeken and other officers were given shares in Eagle *after* the acquisition, none of them owned any shares in Eagle & Taylor. Moreover, Beeken served as a director only with Eagle and enjoyed no such role at Eagle & Taylor. The sole director of Eagle & Taylor had no role with Eagle after the acquisition. Thus, the record indicates the corporate officers were the only group with commonality between Eagle and its predecessor, while no continuity existed with directors and shareholders. Because there was no commonality of shareholders and directors between Eagle and Eagle & Taylor, we reverse the court of appeals' finding of successor liability.

---

[9] *See, e.g., Stanley v. Miss. State Pilots of Gulfport, Inc.*, 951 So.2d 535, 539–40 (Miss. 2006) ("[W]e adopted the 'continuity of enterprise' theory to hold a successor corporation liable for the predecessor's debts where the successor benefitted from the goodwill of the predecessor without sharing the liabilities.").

[10] In support of this assertion, Respondents cite only to the conclusory findings of fact in the trial court's order.

We recognize the mere continuation test is a strict one, but we temper our holding by noting it is not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, we stress control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability.[11] Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, our successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied.

II. Failure to Plead Defect

Eagle claims the court of appeals erred in finding it abandoned the issue of whether Respondents failed to prove a design or manufacturing defect in the windows. Eagle argues that because it included the issue in its statement of issues on appeal, it preserved the argument despite failing to raise it anywhere else in the brief. We find no merit in this argument as our appellate jurisprudence has clearly established that "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006).

CONCLUSION

Applying the mere continuation test as enunciated in *Simmons*, we find the trial court erred in holding Eagle to be the mere continuation of Eagle & Taylor, and therefore we reverse the court of appeals.

---

[11] Such a scenario is not present in this case, as the record indicates the asset sale was engineered primarily by Linsalata, and the officers who continued in similar capacities with Eagle were merely along for the ride, rather than the drivers.

REVERSED.

BEATTY, C.J., KITTREDGE, JAMES, JJ., and Acting Justice Diane Goodstein, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., Respondents,

v.

Eagle Window & Door, Inc., Appellant.

Appellate Case No. 2014-001151

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2016-UP-168
Heard November 12, 2015 – Filed April 6, 2016

AFFIRMED AS MODIFIED

G. Dana Sinkler, Gibbs & Holmes, of Wadmalaw Island, for Appellant

Jason Michael Imhoff and Carl Reed Teague, The Ward Law Firm, PA, both of Spartanburg, for Respondents.

FEW, C.J.: Eagle Window and Door, Inc. (Eagle) appeals the circuit court's order finding Eagle is a "mere continuation" of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc. (EWD) and therefore liable to Nationwide Mutual

Insurance Company (Nationwide) for contribution under a theory of successor liability. We affirm as modified.

I. Facts and Procedural History

Gilliam Construction Company, Inc. (Gilliam) contracted with Renaul and Karen Abel for the construction of their home in Spartanburg County in 1999 and 2000. After the project was completed, the Abels discovered certain defects and deficiencies in the home—including leaking windows—and invoked the arbitration clause in their contract with Gilliam. Between the time the windows were made by EWD and the discovery of the defects, EWD's parent company, American Architectural Products Corporation (AAPC) filed for bankruptcy. The assets of EWD were sold to EWD Acquisition, Co., a corporation wholly owned by Linsalata Capital Partners Fund IV, L.P., (Linsalata) and created solely to buy the assets. The consideration paid was $64,750,000. EWD Acquisition, Co. thereafter changed its name to Eagle Window and Door, Inc. (Eagle).[1] Eagle was invited to participate in the arbitration under the Abel/Gilliam construction contract, but declined. The Abels' claim was settled by Nationwide and its insured Gilliam[2] for $235,000.[3]

Nationwide then instituted this contribution action against various defendants, including Eagle, under the Uniform Contribution Among Tortfeasors Act (the Act)[4] to recover the settlement costs. Nationwide argued Eagle was a "mere continuation" of EWD rendering Eagle liable for contribution to the settlement. Nationwide presented affidavits, requests to admit, and responses to interrogatories

---

[1] *Nationwide Mut. Ins. Co. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 714 S.E.2d 322 (2011).

[2] Because Gilliam paid a portion of the settlement amount—$10,000 in cash and waived $25,000 owed—both it and Nationwide are plaintiffs in this contribution action. However, for the sake of simplicity, we will generally refer to Nationwide as the party seeking contribution.

[3] The settlement agreement between the parties alludes only to payment of $210,000 as consideration for the Abels' release of their claims. However, Nationwide presented evidence Gilliam also waived approximately $25,000 owed to it by the Abels under the contract as additional consideration for the settlement.

[4] S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2015).

regarding the corporate structure of EWD, AAPC, Eagle, and Linsalata—the commonality of officers, directors, and shareholders being central to the issue of successor liability.

The officers of EWD and Eagle are listed below.

EWD Officers		**Eagle Officers**	
Chairman		Chairman	Stephen Perry (Sr. V.P. & CFO of Linsalata)
President	David Beeken	President	David Beeken
Executive V.P.	Charles Daoud	Executive V.P.	Charles Daoud
V.P. of Finance	Steven Stoppelmoor	V.P. of Finance	Steven Stoppelmoor
V.P. of Engineering	Ronald Vander Weerd	V.P. of Engineering	Ronald Vander Weerd
Treas. & Asst. Scty.		Treas. & Asst. Scty.	Gregory L. Taber
Secretary	Jonathan Schoenike	Secretary	Ronald H. Neill
Controller	Andrew Wickman	Controller	Andrew Wickman

With respect to directors and shareholders, EWD was a wholly-owned subsidiary of AAPC. At the time of bankruptcy, AAPC was owned primarily by George Hofmeister who controlled approximately 73% of the shares. AAPC had two directors, Hofmeister and Joseph Dominijanni. Neither Hofmeister nor Dominijanni owns any interest in Linsalata or Eagle.

Stephen Perry, Vice President and Chief Financial Officer of Linsalata, named himself and two additional persons as directors for Eagle—Frank Linsalata and Ronald Neill, an attorney for Linsalata. David Beeken was later added as a director. The record demonstrates the carry-over officers from EWD to Eagle were given a minor ownership interest in Eagle, as delineated in the chart below.

Eagle Ownership

Linsalata	87.9%
Mass Mutual Life Ins. Co.	6.3%
David Beeken	1.7%
Charles A. Doud	1.6%

Ronald Vander Weerd	.2%
Andrew Wickman	>.00005%

With respect to the operation of the companies, the parties do not dispute that Eagle remained in the same facilities, continued manufacturing windows and doors, retained the same employees, and essentially held itself out as an ongoing business.

The circuit court concluded Eagle was a mere continuation of EWD stating, "a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation . . . . It is clear from that marketing material that Eagle considers itself a separate and autonomous entity which has designed and manufactured windows in the same city for a century and a half, despite its numerous parent companies." The circuit court stated that even if mere continuation required commonality of officers, directors, and shareholders, Nationwide had proven "that officers, directors, and stockholders remained in the successor corporation from the predecessor corporation."

With respect to its right to contribution, Nationwide presented the testimony of William R. Still, a forensic engineer, and Cindy Thomas, a Nationwide representative. Still testified the Abels' windows were defective and caused damage to their home totaling approximately $211,000. Cindy Thomas testified two other defendants, Window and Door Concepts, Inc., the window seller, and Hobbit Plastering, the stucco applicator, settled the contribution claims against them for $24,000 and $41,000, respectively.

Nationwide moved, over Eagle's objection, to dismiss the other remaining defendants, and the circuit court granted the motion.

The circuit court determined Eagle was the party responsible for the Abels' damages and ordered Eagle to pay $117,500, half of the $235,000 settlement, as its pro rata share under the Act. The circuit court further determined that the damages were liquidated and awarded Nationwide prejudgment interest amounting to $70,258.42.

II. Issues on Appeal[5]

[5] We have consolidated some of the issues listed by Eagle.

1. Did the circuit court err in ruling Eagle is liable to Nationwide under a theory of successor liability?

2. Did the circuit court err in finding Nationwide did not fail to plead or prove a design or manufacturing defect in the windows?

3. Did the circuit court err in finding Nationwide was entitled to recover $25,000 for the amount it contends Gilliam "waived" as payment under its contract with the Abels?

4. Did the circuit court err in permitting Nationwide to unilaterally release Eagle's codefendants?

5. Did the circuit court err in determining the amount Eagle should pay in contribution?

6. Did the circuit court err in allowing prejudgment interest?

III. Standard of Review

"In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence." *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). "Accordingly, [an appellate court's] scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law." *Id.*

"In an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009). A contribution action is enforced in equity and reviewed under an equitable standard. *RIM Assocs.' v. Blackwell*, 359 S.C. 170, 179, 597 S.E.2d 152, 157 (Ct. App. 2004).

This appeal requires us to use a split standard of review in that the determination of whether Eagle is a mere continuation is an action at law, but Nationwide's overall entitlement to contribution is a matter arising in equity.

IV. Successor Liability

"[I]n the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company **unless** (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrant[s] a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims." *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005) (footnote omitted) (citing *Brown v. Am. Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924)). "[T]he majority of courts interpreting the mere continuation exception have found it applicable only when there is commonality of ownership, *i.e.,* the predecessor and successor corporations have substantially the same officers, directors, or shareholders." *Simmons*, 366 S.C. at 312 n.1, 622 S.E.2d at 215 n.1 (emphasis omitted). In *Nationwide*, the supreme court reversed the dismissal of Nationwide's contribution claim, stating, "If [Nationwide] can establish that [Eagle]'s conduct meets one or more of the *Brown* tests, then [Eagle] may be liable to [Nationwide]." *Nationwide*, 394 S.C. at 61, 714 S.E.2d at 326.

We find the evidence supports the circuit court's finding that Eagle is liable to Nationwide because Eagle was a mere continuation of EWD.

Eagle continued manufacturing windows and doors in the same location with the same name and capitalizing on that continuity in its website marketing. Of the eight officers appointed to Eagle post sale, five were officers of pre sale Eagle. Among those five officers were the President and CEO, Executive Vice President, Vice President of Finance, Vice President of Engineering, and Controller.

Eagle's own website demonstrates Eagle is merely a continuation of its former self. Eagle accepted and benefited from the goodwill, name recognition, and history of the Eagle brand. Further, Eagle continued to occupy the same space and manufacture the same products with the same employees. It marketed, manufactured, and continued to sell the same products under the same company name. This evidence supports the circuit court's factual findings.

Eagle also argues the circuit court erred in examining Eagle as the successor corporation when Linsalata—Eagle's parent company—was the purchaser of EWD's assets. We disagree. The actual purchaser of EWD's assets was EWD Acquisition, Co., which eventually became Eagle. Therefore, the circuit court appropriately focused its examination on Eagle, not Linsalata.

V. Contribution—Failure to Plead Defect

Eagle argues Nationwide was not entitled to any recovery because it failed to plead or prove a design or manufacturing defect in the windows. Eagle is correct that Nationwide's complaint does not allege a specific window defect but alleges only that "Plaintiffs and Defendants have a common liability to the Plaintiffs in the underlying action." However, we find the issue was tried by the circuit court with the consent of all parties. *See* Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."). Therefore, the lack of any specific allegation in the complaint does not defeat Nationwide's right of recovery. Moreover, Eagle does not mention or argue this issue in its brief outside of listing it in the Statement of Issues on Appeal. Therefore, we find this issue has been abandoned. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

VI. Contribution—$25,000 Waiver by Gilliam

Terri Gilliam testified that as part of Gilliam's settlement with the Abels, Gilliam waived $25,000 owed for construction work on the Abels' home. The circuit court considered this waiver as though it were money paid by Gilliam to the Abels in assessing the amount subject to contribution in this case. Eagle alleges this was error because the Settlement Agreement between the parties did not mention the waiver of the $25,000 as consideration for the settlement. We disagree.

Nationwide introduced a letter in which Renaul Abel admitted that amount was owed. The contribution complaint mentions this waiver as part of the settlement, and Terri Gilliam testified to that as well. Thus, the evidence supports the circuit court's decision to include this waiver in the overall settlement amount, and we affirm on this issue.

VII. Contribution—Unilateral Release of Codefendants

"[A] plaintiff has the sole right to determine which co-tortfeasor(s) she will sue." *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 345-46, 698 S.E.2d 559, 560 (2010). "A ruling that a [] defendant can compel a plaintiff to join other alleged

tortfeasors as defendants in that suit would overturn this firmly entrenched common law principle. Moreover, a . . . ruling that where these defendants cannot be joined because they have already settled with the plaintiff, the action must be dismissed, would thwart our strong public policy favoring the settlement of disputes." *Chester*, 388 S.C. at 346, 698 S.E.2d at 560.

Nationwide had the right to release any remaining codefendants from the case, and we affirm the circuit court's ruling permitting them to do so.

VIII. Contribution—Pro Rata Share

Section 15-38-20(A) of the South Carolina Code (2005) provides "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." Section 15-38-30 of the South Carolina Code (2005) sets forth how the court is to determine each party's share of liability in a contribution action. "In determining the pro rata shares of tortfeasors in the entire liability (1) their relative degrees of fault shall not be considered; (2) if equity requires, the collective liability of some as a group shall constitute a single share; and (3) principles of equity applicable to contribution generally shall apply." *Id.*

In this case, the circuit court split the total amount of damages for which Nationwide sought contribution evenly between Gilliam and Eagle. This was error. The settlement agreement indicates the Abels alleged "construction related defects" including "deficiencies in the framing, window installation, stucco application, windows, paving, subgrade water barrier, generator, chimney, and flooring systems." Having paid a settlement to extinguish all those claims, Nationwide then sought contribution from all defendants alleging they shared a "common liability" for the settlement.

As previously discussed, Nationwide was permitted to dismiss defendants from the contribution action. However, it was inequitable for the circuit court to ignore Nationwide's settlements with the window seller ($24,000) and stucco applicator ($41,000). Nationwide is afforded a windfall when Eagle's pro rata share is added to the two prior settlement amounts. Section 15-38-30 permits the pro rata share of multiple tortfeasors to be combined into one share if equity requires. In this case, Still's testimony indicated Eagle was primarily at fault for the leaky windows and resulting damage. Therefore, it would be reasonable and fair to combine the two defendants who settled into one share and give Gilliam and Eagle one share each,

leaving a denominator of three. By this calculation, Eagle's pro rata share in contribution should be $78,333.33.

IX. Contribution—Prejudgement Interest

"The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." *Smith-Hunter Constr. Co. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.* (citation omitted).

In this case, the circuit court erred in determining that the sum for which it found Eagle liable was capable of precise determination at any time prior to trial. As previously discussed, Nationwide filed its contribution action seeking $235,000. Therefore, the total damages were determined. However, it alleged a common liability for that amount between nine named tortfeasors and then proceeded to settle with two tortfeasors for amounts ranging from $24,000 to $41,000. Not until the time of trial did Nationwide dismiss the remaining defendants, reducing the pool of potentially contributing tortfeasors. At best, Eagle could have guessed it would owe one-ninth of the total claimed—or approximately $26,000. That amount was speculative and is significantly less than the amount for which the circuit court found it liable. Therefore, we find the circuit court erred in awarding prejudgment interest.

X. Conclusion

For the reasons explained, Nationwide is entitled to judgment against Eagle for contribution in the amount of $78,333.33, and the order of the circuit court is

AFFIRMED AS MODIFIED.

MCDONALD, J., concurs.

KONDUROS, J., dissenting:

I would conclude Eagle is not the mere continuation of EWD, and therefore, I respectfully dissent. In *Simmons*, a dissenting Justice Burnett argued for a more expansive view of the mere continuation exception based largely on principals of equity and fairness. *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 318-19, 622 S.E.2d 213, 217-18 (2005) (Burnett, J., dissenting). He surmised a successor company should not be able to take advantage of the good will and name recognition of the prior business without also assuming its tort liability to injured consumers. *Id.* at 323-24, 622 S.E.2d at 221. The majority in *Simmons* specifically rejected this position in a footnote stating:

> Essentially, the dissent advocates an expansion of the mere continuation exception. However, as noted by the dissent, the majority of courts interpreting the mere continuation exception have found it applicable **only when there is commonality of ownership,** *i.e.,* **the predecessor and successor corporations have substantially the same officers, directors, or shareholders.** We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.

Simmons, 366 S.C. at 312 n.1, 622 S.E.2d at 215 n.1. The Supreme Court of South Carolina further maintained this position by declining to review *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* Oct. 8, 2008, which cited the *Simmons* footnote with approval as an essential element for finding a mere continuation. Consequently, I view commonality of ownership as a threshold question apart from other factors that may suggest a mere continuation.

On appeal, Eagle posits a complicated question regarding what exactly is required to establish commonality of ownership. In the previously cited *Simmons* footnote, the majority used the disjunctive *or* in discussing the commonality of ownership (same officers, directors, *or* shareholders) and in the following sentence used the conjunctive *and* (same officers, directors, *and* shareholders). In *Simmons*, that distinction did not matter because none of the officers, directors, or shareholders of the two entities were common. *Id.* at 312, 622 S.E.2d at 215. Likewise, in *Walton*, 376 S.C. at 307, 657 S.E.2d at 70, commonality of officers, directors, and shareholders was not an issue.

The case sub judice presents a closer question. Many of the officers of EWD also became officers in Eagle, and David Beeken was eventually named a director of Eagle. Relying on the *or* in *Simmons*, the circuit court concluded because one of the three positions—in this case officers—overlapped, the mere continuation exception was satisfied.[6] By affirming the circuit court, the majority implicitly agrees. Eagle contends this interpretation of commonality of ownership is erroneous, and I agree.

Although this issue has not been elucidated in South Carolina jurisprudence,[7] some Virginia cases offer guidance as to the importance of shareholder continuity in establishing a mere continuation. In applying Virginia's traditional view of the

---

[6] The circuit court also concluded EWD and Eagle shared officers, directors, and shareholders, but that is not borne out by the record. According to the order, the circuit court relied on Eagle's answers to interrogatories dated October 28, 2011, in reaching this conclusion. However, the interrogatories indicate the relevant officers own a minor stock interest in the new company, Eagle, and make no reference to any ownership in the old company. Additionally, Nationwide's argument at the summary judgment hearing does not suggest a continuation of shareholders as it asks the court to use the officers, directors, *or* shareholders approach. Nationwide's counsel stated, "And, then, each of these folks here [referencing the common officers] owns an interest in the successor corporation. They *become* owners." Furthermore, the Affidavit of Stephen Perry states that to the best of his knowledge, none of the officers of EWD had an ownership interest in EWD. Admittedly, the affidavit of Jonathan Schoenike states "neither David Beeken nor any of the others officers of [EWD] had control of AAPC, and if such person had any ownership interest at all, such ownership interest would not have amounted to more than between one-tenth to one one-hundredth percent of AAPC." However, this statement seems too equivocal to establish an ownership interest in AAPC or EWD, particularly in light of Nationwide's position in this litigation. Even if some overlap in ownership occurred, the record demonstrates it was not substantial.

[7] One unpublished federal district court of South Carolina case has indicated a lack of common ownership will thwart a mere continuation claim. *See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 2007 WL 2893372, at *10 (D.S.C. Sept. 28, 2007) ("Under South Carolina law, the mere continuation exception is applicable only where there is a commonality of ownership. DSM owned old CNC. Andlinger owned new CNC. Therefore, in this case, new CNC was not the mere continuation of old CNC because there was no commonality of ownership.").

mere continuation exception, courts have indicated identity of officers, directors, *and* stockholders is a critical point. The federal district court of Virginia has found "Among these three required factors (officers, directors, and stockholders), it appears that identity of ownership is the most important component to sustain a finding of mere continuation." *Taylor v. Atlas Safety Equip. Co.*, 808 F. Supp. 1246, 1251 (E.D. Va. 1992); *see also Kaiser Found. Health Plan of Mid-Atl. States v. Clary & Moore, P.C.*, 123 F.3d 201, 205 (4th Cir. 1997) (applying Virginia law) ("The most critical element in proving a continuation is showing the same ownership of the two companies, a 'common identity of the officers, directors, and stockholders in the selling and purchasing corporations.'"); *In re SunSport, Inc.*, 260 B.R. 88, 105 (Bankr. E.D. Va. 2000) ("The most critical element in proving a continuation is showing a common identity of the officers, directors, and stockholders in the selling and purchasing corporations. Of these, identity of ownership is the most important component to sustain a finding of mere continuation." (citation omitted)).

Some treatises have also discussed the importance of shareholder continuity. "[C]ourts taking the position that common identity of ownership is an indispensable or the most important factor have routinely held that there can be no mere continuation in the absence of continuity of shareholders, without regard to whether the predecessor dissolved after the transfer . . . ." David J. Marchitelli, Annotation, *Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor, Based on Mere Continuation or Continuity of Enterprise Exceptions to Nonliability*, 13 A.L.R. 6th 355 (2006). Justice Burnett's dissent in *Simmons* also recognized the narrowness of the mere continuation exception. *See Simmons*, 366 S.C. at 317, 622 S.E.2d at 371 (Burnett, J., dissenting) (indicating the exception currently applies "only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names" (quoting Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in the United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996))).

In this case, there is no commonality of shareholders. EWD sold assets for adequate consideration in an arm's length transaction. Linsalata bought the EWD assets, and because Linsalata was not in the business of making windows and doors, it retained many of the same people at Eagle to operate the business.

> When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the

> predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

Restatement (Third) of Torts: Prod. Liab. § 12 cmt. a (Am. Law. Inst. 1998).

In my opinion, the Simmons majority's rejection of the "continuation of operations" approach establishes South Carolina's position favoring the unfettered transfer of assets between businesses in the absence of shareholder overlap. Additionally, although the circuit court employed the "officers, directors, and shareholders" test, I believe it overemphasized Justice Burnett's "continuation of operations" approach in its analysis as evidenced by its opening statement that "a review of Eagle's own website establishes that Eagle is a mere continuation of its predecessor corporation."

Based on all of the foregoing, I would find Eagle is not a mere continuation of EWD. Because that conclusion would be dispositive of the remaining issues on appeal, I decline to address them. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S .E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).