

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUL 12 2016

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

SO SUPREME COURT

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016

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

v.

Eagle Windows & Doors, Inc., ... Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI,
VOLUME III

G. Dana Sinkler
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church St., Suite 110
Charleston, SC 29401
(843) 224-1758

and

Ainsley Fisher Tillman
S.C. Bar No. 70551
29 Brisbane Drive
Charleston, SC 29407
(843) 277-4497

Attorneys for Petitioner

Jason M. Imhoff
The Ward Law Firm
233 S. Pine Street
Spartanburg, SC 29302
(864) 573-8500
Attorney for Respondents

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 CHESTER J. CULVER Secretary of State State of Iowa	IOWA 2000 BIENNIAL REPORT for a FOREIGN CORPORATION Required by Iowa Code chapter 490	FOR OFFICE USE ONLY AR-2  FILED Iowa Secretary of State MAR 6 2000 4:30 p.m.
1. Name of the Corporation, its registered agent and registered office. 490 FP-196911 EAGLE & TAYLOR COMPANY CORPORATION SERVICE COMPANY 729 INS EXCH BLDG DES MOINES, IA 50309		DO NOT MAKE CHANGES IN THIS BOX - SEE ENCLOSED CHANGE FORM
2. The corporation has no officers. ☐ The corporation has no directors. ☐ SEE INSTRUCTION SHEET ENCLOSED.		
3. 001 Pres ☐ Sec ☐ Treas ☐ Dir ☒ AMEDIA, FRANK J 755 BOARDMAN-CANFIELD RD BLDG G-WEST BOARDMAN, OH 44512	V	Pres ☐ Sec ☐ Treas ☐ Dir ☒ NAME Frank J. Amedia ADDRESS 3000 Northwest 125th St. ADDRESS Opa Locka, FL 33167 ADDRESS
002 Pres ☒ Sec ☐ Treas ☐ Dir ☐ TUCKER, DALE 375 E 9TH ST DUBUQUE, IA 52004-1072	10	Pres ☒ Sec ☐ Treas ☐ Dir ☐ NAME David Beaken ADDRESS 375 East Ninth Street ADDRESS P.O. Box 1072 ADDRESS Dubuque, IA 52004-1072
003 Pres ☐ Sec ☐ Treas ☒ Dir ☒ DOMINIJANNI, JOSEPH L 6500 BROOKTREE RD STE 202 WEXFORD, PA 15090	40	Pres ☐ Sec ☐ Treas ☒ Dir ☐ NAME Joseph L. Dominijanni ADDRESS 6500 Brooktree Rd., Ste 202 ADDRESS Wexford, PA 15090 ADDRESS
004 Pres ☐ Sec ☒ Treas ☐ Dir ☐ JONATHAN K. SCHOENIKE 755 BOARDMAN-CANFIELD RD BLDG G-WEST BOARDMAN, OH 44512	30	Pres ☐ Sec ☒ Treas ☐ Dir ☐ NAME David J. McCalvey ADDRESS 3000 Northwest 125th Street ADDRESS Miami, Florida 33167 ADDRESS
4. Address of the Principal Office of the Corporation. 755 BOARDMAN - CANFIELD BUILDING C - WEST BOARDMAN, OH 44512		Change the principal office to: 755 Boardman-Canfield Rd. Building G-West Boardman, OH 44512
5. The state or country under whose law the corporation is incorporated. DE		
6. Does the corporation own agricultural land in Iowa? (Number of acres) YES, the corporation owns ☐ acres. NO ☒		
7. Is the corporation a "family farm corporation?" YES ☐ NO ☒		
8. SIGNED: <i>David J. Wolfe, Jr.</i> David J. Wolfe, Jr. Assistant Secretary 12-3-00 (330) 965-9910 Signature/Title Date Phone Report must be signed by an officer or a person authorized by the board of directors to sign the report.		
9. ENCLOSE FILING FEE OF \$45.00		

**Make Checks Payable To: Secretary of State
MUST BE FILED BY MARCH 31, 2000**

ROA 449



CHESTER J. CULVER
Secretary of State
State of Iowa

APPLICATION FOR
AMENDED CERTIFICATE
OF AUTHORITY

000003-WF

264944

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1504 of the Iowa Business Corporation Act, the undersigned corporation applies for an amended certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Acquisition Co.
and the name the corporation uses in Iowa if different than its real name is _____

The corporate name has been changed to Eagle Window & Door, Inc.

2. The state [or foreign country] of incorporation on the records of the Secretary of State of Iowa is
DELAWARE

The state [or foreign country] of incorporation has been changed to _____

3. The duration of the corporation on the records of the Secretary of State of Iowa is PERPETUAL
The duration has been changed to _____

4. The date of incorporation of the corporation was April 10, 2002

5. The street address of its principal office is
address 2045 Kerper Boulevard
city, state, zip Dubuque, IA 52004-1072

6. The street address of its registered office in Iowa and the name of its registered agent at that office:
name Corporation Service Company
address 729 Insurance Exchange Building
city, state, zip Des Moines, IA 50309

7. The names and business addresses of its current directors and officers:
name See attached officers/directors rider
address _____
city, state, zip _____

835-0114
08/01

00245
(4)

42 JUL 18 AM 11:10
SECRETARY OF STATE
501928 ACADIT \$100.00-50

ROA 450

000004-WF

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

Please attach additional pages if needed.

8. A certificate of existence, or a document of similar import, duly authenticated by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature Ronald H. Neill

Type or print name and title Ronald H. Neill, Secretary

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.

SECRETARY OF STATE
Corporations Division
Lucas Building
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX 515/242-5953

00246

ROA 451

000005-WF

RIDER 7

Names and Business Addresses of Current Directors and Officers

<u>NAME AND TITLE(S)</u>	<u>ADDRESS</u>
Stephen B. Perry - Director, Chairman	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Frank N. Linsalata - Director	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Ronald H. Neill - Director, Secretary	1400 McDonald Investment Center Cleveland, OH 44114
David Beeken - President	2045 Kerper Boulevard Dubuque, IA 52001
Charles A. Daoud - Executive Vice President	2045 Kerper Boulevard Dubuque, IA 52001
Steven R. Stoppelmoor - Vice President of Finance	2045 Kerper Boulevard Dubuque, IA 52001
Ronald Vander Weerd - Vice President of Engineering	2045 Kerper Boulevard Dubuque, IA 52001
Gregory L. Taber - Treasurer and Assistant Secretary	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Andrew Wickham - Controller	2045 Kerper Boulevard Dubuque, IA 52001

00247

{CLB2929.DOC,1}

ROA 452

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EAGLE WINDOW & DOOR, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTEENTH DAY OF JUNE, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "EAGLE WINDOW & DOOR, INC." WAS INCORPORATED ON THE TENTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

6-18-02

11/18/02

W310258



3512812 8300

020380411

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1828503

DATE: 06-13-02

00248

ROA 453

000007-wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2004
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED
Date: 4/1/2004 15:55
Corporation No.: 264944
Certification No.: A04264944

1. Name of the Corporation, its registered agent and registered office

EAGLE WINDOW & DOOR, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

2045 KERPER BLVD

Address

City

DUBUQUE

State

IA

Zip

520041072

Country

USA

☐ Pres ☐ Sec ☒ Treas ☐ Dir

Name

GREGORY L TABER

Address

5900 LANDERBROOK DR STE 280

Address

City

MAYFIELD

State

OH

Zip

44124

Country

USA

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

RONALD H NEILL

Address

1400 MCDONALD INVESTMENT CTR

Address

City

CLEVELAND

State

OH

Zip

44114

Country

USA

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name

STEPHEN B PERRY

Address

5900 LANDERBROOK DR STE 280

Address

City

MAYFIELD

State

OH

Zip

44124

Country

USA

4. Address of the Principal Office of the Corporation

Address

ROA 454

000008-wf

2045 KERPER BLVD
Address

City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated: DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: ANDREW WICKHAM Capacity: CONTROLLER

ROA 455

000009-WF



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2006
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED
Date: 3/20/2006 11:30
Corporation No.: 264944
Certification No.: A06264944

1. Name of the Corporation, its registered agent and registered office.

EAGLE WINDOW & DOOR, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s):

☐ Pres ☒ Sec ☐ Treas ☐ Dir				
Name ALAN E. BERNICK				
Address 551 NORTH MAINE STREET				
City State Zip Country BAYPORT MN 55003 USA				
☒ Pres ☐ Sec ☐ Treas ☐ Dir				
Name DAVID BEEKEN				
Address 551 NORTH MAINE STREET				
City State Zip Country BAYPORT MN 55003 USA				
☐ Pres ☐ Sec ☐ Treas ☒ Dir				
Name JAMES E. HUMPHREY				
Address 551 NORTH MAINE STREET				
City State Zip Country BAYPORT MN 55003 USA				
☐ Pres ☐ Sec ☒ Treas ☐ Dir				
Name ROBERT P. PENVOSE JR.				
Address 551 NORTH MAIN STREET				
City State Zip Country BAYPORT MN 55003 USA				

4. Address of the Principal Office of the Corporation:

Address
551 NORTH MAINE STREET
City State Zip Country

ROA 456

000010-WF

BAYPORT MN 55003 USA

5. The state or country under whose laws the corporation is incorporated. DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: James K. Taylor Capacity: Tax Director - Officer

ROA 457



MICHAEL A. MAURO
Secretary of State
State of Iowa

APPLICATION FOR
AMENDED CERTIFICATE
OF AUTHORITY

264944

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1504 of the Iowa Business Corporation Act, the undersigned corporation applies for an amended certificate of authority to transact business in Iowa, and states:

- The name of the corporation is Eagle Window & Door, Inc.
and the name the corporation uses in Iowa if different than its real name is _____
The corporate name has been changed to Eagle Window & Door Manufacturing, Inc.
- The state [or foreign country] of incorporation on the records of the Secretary of State of Iowa is Delaware
The state [or foreign country] of incorporation has been changed to Delaware (unchanged)
- The duration of the corporation on the records of the Secretary of State of Iowa is perpetual
The duration has been changed to perpetual (unchanged)
- The date of incorporation of the corporation was April 10, 2002
- The street address of its principal office is
address 551 North Maine Street
city, state, zip Bayport, MN 55003
- The street address of its registered office in Iowa and the name of its registered agent at that office:
name Corporation Service Company
address 729 Ins Exchange Building
city, state, zip Des Moines, IA 50309
- The names and business addresses of its current directors and officers:
name See attached list
address _____
city, state, zip _____

635_0114
05/01

007169

4

ROA 458

000012-WF

name _____
address _____
city, state, zip _____

name _____
address _____
city, state, zip _____

name _____
address _____
city, state, zip _____

Please attach additional pages if needed.

8. A certificate of existence, or a document of similar import, duly authenticated by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title Alan E. Bernick, Senior Vice President

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX 515/242-5953

007170

ROA 459

000013- wF-

Eagle Window & Door Manufacturing, Inc.
A Delaware corporation

List of Directors and Officers
April 2007

Name	Address
David N. Beeken	551 North Maine Street, Bayport, Minnesota 55003
Gary L. Berndt	551 North Maine Street, Bayport, Minnesota 55003
Alan E. Bernick	551 North Maine Street, Bayport, Minnesota 55003
Mary D. Carter	551 North Maine Street, Bayport, Minnesota 55003
Charles A. Daoud	551 North Maine Street, Bayport, Minnesota 55003
Philip E. Donaldson	551 North Maine Street, Bayport, Minnesota 55003
James E. Humphrey	551 North Maine Street, Bayport, Minnesota 55003
T. Randall Iles	551 North Maine Street, Bayport, Minnesota 55003
Jay R. Lund	551 North Maine Street, Bayport, Minnesota 55003
Mary J. Schumacher	551 North Maine Street, Bayport, Minnesota 55003
James K. Taylor	551 North Maine Street, Bayport, Minnesota 55003
Ronald Vander Weerd	551 North Maine Street, Bayport, Minnesota 55003

007171

ROA 460

000014-wf

Delaware

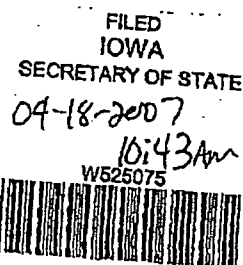
PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EAGLE WINDOW & DOOR MANUFACTURING, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE SIXTEENTH DAY OF APRIL, A.D. 2007.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL REPORTS HAVE BEEN FILED TO DATE.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE BEEN PAID TO DATE.



007172

3512812 8300
070437458



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State
AUTHENTICATION: 5596169

DATE: 04-16-07

ROA 461

000015-WF



MICHAEL A. MAURO
Secretary of State
State of Iowa

**STATEMENT OF CHANGE
OF REGISTERED OFFICE
204944 AND/OR
REGISTERED AGENT**

Pursuant to Iowa law, the undersigned submits this Statement to change the business entity's registered office and/or registered agent in Iowa. Read the INSTRUCTIONS on the back of this form before completing the information and signing below.

- The **NAME** of the business entity is: Engle Window & Door Manufacturing, Inc.
- The **street address** of the **CURRENT** registered **OFFICE** as indicated on the Secretary of State's records is:
729 INS Exchange Building Des Moines IA 50309
street city state zip
- The **street address** of the **NEW** registered **OFFICE** is:
2722 Grand Avenue Des Moines IA 50312
street city state zip
- The **name** of the **CURRENT** registered **AGENT** as indicated on the Secretary of State's records is:
Corporation Service Company
(If more than one AGENT is registered, indicate which one is being replaced.)
- The **name** of the **NEW** registered **AGENT** is: C T Corporation System

8. If the **REGISTERED AGENT** has changed, the **NEW** Registered Agent must sign here, consenting to their appointment, or attach their written consent to this form.

Michele Miller
Assistant Secretary
Signature of NEW Registered Agent

Complete **ONLY** if the Registered Agent changes.

7. If the **REGISTERED AGENT** changes the **street address** of their **business office** on this form, here indicating that **NOTICE** of the change has been given to the business entity.

Signature of Registered Agent

Complete **ONLY** if the Registered Agent changes the **street address** of their **business office**.

FILED
IOWA
SECRETARY OF STATE

9-4-2007
11:50 AM
W542258



8. After any/all change(s) are made, the **street address** of the registered office and the **street address** of the registered agent will be identical.

9. Signature by authorized representative:

Alan E. Bernick
SVP
Name and Title

Date: 9/4/07

PRINT Name and Title:

Alan E. Bernick SVP

(651) 264-7789

Telephone Number

1499 - 1/18/2007 C T System Online

RECEIVED TIME SEP. 4. 11:50AM

ROA 462



CHESTER J. CULVER
Secretary of State
State of Iowa

000016-wf

APPLICATION FOR
RESERVATION
OF NAME

204946

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

The undersigned applies to reserve exclusive use of a business organization name, pursuant to the (check one)

- ☒ Iowa Business Corporation Act (profit corporations).
☐ Iowa Nonprofit Corporation Act (nonprofit corporations).
☐ Iowa Limited Partnership Act
☐ Iowa Limited Liability Companies Act

RECEIVED
SECRETARY OF STATE
IOWA
02 APR 30 AM 11:42
\$10.00 D/C

1. The name to be reserved is Eagle Window & Door, Inc.

2. The name and address of the applicant is

Name EWD Acquisition Co.
Address 2045 Kerper Boulevard
City, State, Zip Dubuque, IA 52004-1072

Signature Ronald H. Neill

Type or print name & title Ronald H. Neill, Secretary

Date April 29, 2002

NOTES:

1. The filing fee is \$10.00.
2. Make checks payable to Secretary of State.
3. The information you provide will be open to public inspection under Iowa Code chapter 22.11.

635-0051

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX: 515/242-5953

FILED
IOWA
SECRETARY OF STATE

4-30-02

11:43 AM
W304347



00544

ROA 463



MICHAEL A. MAURO
Secretary of State
State of Iowa

344628
000017-10P
LIMITED LIABILITY COMPANY
Application for
Certificate of Authority

READ INSTRUCTIONS ON REVERSE BEFORE COMPLETING

Pursuant to section 1402 of the Iowa Limited Liability Company Act, the undersigned applies for a certificate of authority to transact business in Iowa and hereby states:

1. The name of the limited liability company: Eagle Window & Door LLC
- 1A. The name the limited liability company will use in Iowa, if different than the legal name of the company named above:
(Refer to note #4 on the back of this form)
2. The limited liability company is formed under the laws of the state (or foreign country) of:
Minnesota
3. The date of formation of the limited liability company: January 16, 2007
4. The duration of the limited liability company is: Perpetual
5. The street address of its registered office in Iowa and the name of its registered agent at that office:
G T Corporation System
Name
2222 Grand Avenue Des Moines, IA 50312
Address City State Zip
The registered office and registered agent comply with the requirements of section 490A.501.*
6. The address of the office required to be maintained in the state of its formation by the law of that state (if such an address is not required, the address of the principal office of the limited liability company):
551 North Maine Street
Address
Bayport, MN 55003
City State Zip
7. (A) This foreign limited liability company is governed by an operating agreement that establishes or provides for the establishment of designated series of members, managers or membership interests having separate rights, powers, or duties with respect to specified property or obligations of the foreign limited liability company, or profits and losses associated with the specified property or obligations. ☐ YES ☒ NO
(B) All debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series, if any, are enforceable against the assets of such series only, and not against the assets of the foreign limited liability company generally. ☐ YES ☒ NO
8. The effective date and time of this application, if different than the date and time of filing:
(Refer to note #3 on the back of this form) 007173
Date _____ Time _____
9. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application by the secretary of state or proper officer in the state or other jurisdiction of its formation accompanies this application
10. Signature [Signature] Date 4/3/07
Type or print name and title Alan E. Bernick, Senior Vice President

ROA 464

000018-WF

State of Minnesota

SECRETARY OF STATE

CERTIFICATE OF GOOD STANDING

I, Mark Ritchie, Secretary of State of Minnesota, do certify that: The limited liability company listed below is a limited liability company formed or registered to do business under the laws of Minnesota; the limited liability company was formed by the filing of articles of organization or registered to do business by filing an application for a certificate of authority with the Office of the Secretary of State on the date listed below; the limited liability company is governed by Chapter 322B of Minnesota Statutes; and this limited liability company is authorized to do business as a limited liability company at the time this certificate is issued.

Name in Minnesota: Eagle Window & Door LLC

State of Organization: Minnesota

Date Formed or Registered: 1/16/2007

This certificate has been issued on: 1/16/2007

FILED
IOWA
SECRETARY OF STATE

04-18-2007
10:43 am
W525078



00717-1

Mark Ritchie
Secretary of State

000019 wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2004
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 3/30/2004 16:15
Corporation No.: 264990
Certification No.: A04264990

1. Name of the Corporation, its registered agent and registered office

EAGLE WINDOW & DOOR SERVICES, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

2045 KERPER BLVD

Address

City	State	Zip	Country
DUBUQUE	IA	520041072	USA

☐ Pres ☐ Sec ☒ Treas ☐ Dir

Name

GREGORY L TABER

Address

5900 LANDERBROOK DR STE 280

Address

City	State	Zip	Country
MAYFIELD	OH	44124	USA

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

RONALD H NEILL

Address

1400 MCDONALD INVESTMENT CTR

Address

City	State	Zip	Country
CLEVELAND	OH	44144	USA

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name

STEPHEN B PERRY

Address

5900 LANDERBROOK DR STE 280

Address

City	State	Zip	Country
MAYFIELD	OH	44124	USA

4. Address of the Principal Office of the Corporation

Address

ROA 466

000020-WF

2045 KERPER BLVD			
Address			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated: DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: ANDREW WICKHAM Capacity: CONTROLLER

ROA 467



CHESTER J. CULVER
Secretary of State
State of Iowa

264990
APPLICATION FOR
CERTIFICATE
OF AUTHORITY

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1503 of the Iowa Business Corporation Act, the undersigned corporation applies for certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Services Co.

1A. [See note 5] The name the corporation will use in Iowa, if different than the legal name of the corporation is _____

2. The corporation is incorporated under the laws of the state [or foreign country] of Delaware

3. The date of incorporation of the corporation was April 12, 2002

4. The duration of the corporation is perpetual

5. The street address of its principal office is _____

Address 2045 Kerper Boulevard

City, State, Zip Dubuque, IA 52004-1072

6. The street address of its registered office in Iowa and the name of its registered agent at that office:

Name Corporation Service Company

Address 729 Insurance Exchange Building

City, State, Zip Des Moines, IA 50309

7. The names and business addresses of its current directors and officers:

Name Stephen B. Perry, Director, Chairman of the Board of Directors

Address 5900 Landerbrook Drive, Suite 280

City, State, Zip Mayfield, OH 44124

Name Ronald H. Neill, Secretary

Address 1400 McDonald Investment Center

City, State, Zip Cleveland, OH 44114

Name Gregory L. Taber, Treasurer and Assistant Secretary

Address 5900 Landerbrook Drive, Suite 280

City, State, Zip Mayfield, OH 44124

635_0110A
06/01

3
00733

ROA 468

Name _____ n/a

Address _____

City, State, Zip _____

Name _____ n/a

Address _____

City, State, Zip _____

[Please attach additional pages as necessary]

8. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application, by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title Stephen B. Perry, Chairman of the Board

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.
5. If the name of the corporation does not satisfy the requirements of section 401 of the Iowa Business Corporation Act, the corporation may do either of the following in applying for a certificate of authority:
 - a. add one of the following words or abbreviations to its corporate name for use in Iowa:
corporation, incorporated, company, limited, corp., inc., co., ltd.;
 - or
 - b. use a fictitious name to transact business in Iowa if the corporation's real name is unavailable and the corporation delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX: 515/242-5853

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06/01

00734

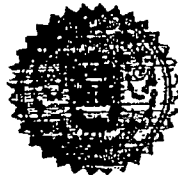
Delaware

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EWD SERVICES CO." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE
4-29-02
2:15 PM
W304518



3512821 8300

020265558

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1743174

DATE: 04-25-02

00735

ROA 470



CHESTER J. CULVER
Secretary of State
State of Iowa

000024-wf
APPLICATION FOR
AMENDED CERTIFICATE
OF AUTHORITY

2

264990
TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1604 of the Iowa Business Corporation Act, the undersigned corporation applies for an amended certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Services Co.

and the name the corporation uses in Iowa if different than its real name is _____

The corporate name has been changed to Eagle Window & Door Services, Inc.

2. The state [or foreign country] of incorporation on the records of the Secretary of State of Iowa is

delaware

The state [or foreign country] of incorporation has been changed to _____

3. The duration of the corporation on the records of the Secretary of State of Iowa is PERPETUAL

The duration has been changed to _____

4. The date of incorporation of the corporation was April 20, 2002

5. The street address of its principal office is

address 2045 Kerper Boulevard

city, state, zip Dubuque, IA 52004-1072

6. The street address of its registered office in Iowa and the name of its registered agent at that office:

name Corporation Service Company

address 729 Insurance Exchange Building

city, state, zip Des Moines, IA 50309

7. The names and business addresses of its current directors and officers:

name See attached officers/directors rider

address _____

city, state, zip _____

635.0114
06/01

4
00241

ROA 471

000025-00F

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

Please attach additional pages if needed.

8. A certificate of existence, or a document of similar import, duly authenticated by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title Ronald H. Neill, Secretary

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.

SECRETARY OF STATE
Corporations Division
Lucas Building
Des Moines, Iowa 50319

Phone: 515/281-6204
FAX 515/242-5953

00242

ROA 472

000026-wf

RIDER 7

Names and Business Addresses of Current Directors and Officers

<u>NAME AND TITLE(S)</u>	<u>ADDRESS</u>
Stephen B. Perry - Director, Chairman	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Frank N. Linsalata - Director	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Ronald H. Neill - Director, Secretary	1400 McDonald Investment Center Cleveland, OH 44114
David Beeken - President	2045 Kerper Boulevard Dubuque, IA 52001
Charles A. Daoud - Executive Vice President	2045 Kerper Boulevard Dubuque, IA 52001
Steven R. Stoppelmoor - Vice President of Finance	2045 Kerper Boulevard Dubuque, IA 52001
Ronald Vander Weerd - Vice President of Engineering	2045 Kerper Boulevard Dubuque, IA 52001
Gregory L. Taber - Treasurer and Assistant Secretary	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Andrew Wickham - Controller	2045 Kerper Boulevard Dubuque, IA 52001

(CLB2929.DOC)

00243

ROA 473

000027-WF

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EAGLE WINDOW & DOOR SERVICES, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTEENTH DAY OF JUNE, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "EAGLE WINDOW & DOOR SERVICES, INC." WAS INCORPORATED ON THE TENTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

6-18-02

11:18 AM

W310257



3512821 8300

020380411

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1828504

DATE: 06-13-02

00244

ROA 474

000028-wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2006
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 3/20/2006 15:33
Corporation No.: 264990
Certification No.: A06264990

1. Name of the Corporation, its registered agent and registered office.

EAGLE WINDOW & DOOR SERVICES, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s):

☐ Pres ☒ Sec ☐ Treas ☐ Dir			
Name ALLEN BURNICK			
Address 100 4TH AVENUE N			
City	State	Zip	Country
BAYPORT	MN	550031096	USA
☒ Pres ☐ Sec ☐ Treas ☐ Dir			
Name DAVID BEEKEN			
Address 2045 KERPER BLVD			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA
☐ Pres ☐ Sec ☐ Treas ☒ Dir			
Name JIM HUMPHREY			
Address 100 4TH AVENUE N			
City	State	Zip	Country
BAYPORT	MN	550031096	USA

4. Address of the Principal Office of the Corporation:

Address 2045 KERPER BLVD			
Address			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated. DE

6. Does the corporation hold an interest in agricultural land in Iowa? No

7. Is the corporation a "family farm corporation?" No

ROA 475

000029-WF

8. Signed: JILL MICHAELIS Capacity: ASSISTANT CONTROLLER

ROA 476



CHESTER J. CULVER
Secretary of State
State of Iowa

APPLICATION FOR
CERTIFICATE
OF AUTHORITY

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1603 of the Iowa Business Corporation Act, the undersigned corporation applies for certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Acquisition Co.
- 1A. [See note 5] The name the corporation will use in Iowa, if different than the legal name of the corporation is 264944
2. The corporation is incorporated under the laws of the state [or foreign country] of Delaware
3. The date of incorporation of the corporation was April 10, 2002
4. The duration of the corporation is perpetual
5. The street address of its principal office is
Address 2045 Kerper Boulevard
City, State, Zip Dubuque, IA 52004-1072
6. The street address of its registered office in Iowa and the name of its registered agent at that office:
Name Corporation Service Company
Address 729 Insurance Exchange Building
City, State, Zip Des Moines, IA 50309
7. The names and business addresses of its current directors and officers:
- Name Stephen B. Perry, Director, Chairman of the Board of Directors
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
- Name Gregory L. Taber, Treasurer and Assistant Secretary
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
- Name Ronald H. Nell, Secretary
Address 1400 McDonald Investment Center
City, State, Zip Cleveland, OH 44114

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06/01

ROA 477

000031-WF

Name _____ n/a
 Address _____
 City, State, Zip _____

Name _____ n/a
 Address _____
 City, State, Zip _____

[Please attach additional pages as necessary]

8. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application, by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____
 Type or print name and title _____ Stephen B. Perry, Chairman of the Board

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.
5. If the name of the corporation does not satisfy the requirements of section 401 of the Iowa Business Corporation Act, the corporation may do either of the following in applying for a certificate of authority:
 - a. add one of the following words or abbreviations to its corporate name for use in Iowa:
 corporation, incorporated, company, limited, corp., inc., co., ltd.;
 or
 - b. use a fictitious name to transact business in Iowa if the corporation's real name is unavailable and the corporation delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

SECRETARY OF STATE
 Corporations Division
 Lucas Building, 1st Floor
 Des Moines, Iowa 50319

Phone: 515/281-5204
 FAX: 515/242-5953

635_0110A
 06/02

00541

ROA 478

Delaware

The First State

000032-104

PAGE 1

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EWD ACQUISITION CO." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

4-30-02
11:43 AM
W304345



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

3512812 8300

020265558

AUTHENTICATION: 1743173

DATE: 04-25-02

00542

ROA 479



CHESTER J. CULVER
Secretary of State
State of Iowa

000033-WF

FICTITIOUS NAME RESOLUTION

204044

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

I, Ronald H. Neill, certify that I am the [secretary - ch. 490 & ch. 504A] or
[manager or L.L.C. member - ch. 490A], [general partner - ch. 487], or [presiding officer of the board of directors or other
association officer - ch. 499] of EWD Acquisition Co.
(name of business entity)
a business entity subject to the provisions of:

- ☒ Iowa Business Corporation Act (profit corporation - Iowa Code ch. 490)
- ☐ Iowa Nonprofit Corporation Act (nonprofit corporation - Iowa Code ch. 504A)
- ☐ Iowa Limited Liability Company Act (Iowa Code ch. 490A)
- ☐ Iowa Uniform Limited Partnership Law (Iowa Code ch. 487)
- ☐ Cooperative Associations (Iowa Code ch. 499)

RECEIVED
SECRETARY OF STATE
IOWA
02 APR 30 AM 11:43

2
DJC \$5.00 078353

and I also certify that:
the following is a true and correct copy of a resolution adopted on the 29th day of April, 2002.

Signature: Ronald H. Neill

Ronald H. Neill, Secretary

(Type or print name & title)

RESOLVED, that the business entity adopts the name:

Eagle Window & Door, Inc.

under which it may operate in Iowa, that the secretary (ch. 490 or ch. 504A), manager or L.L.C. member (ch. 490A), general partner (ch. 487), or presiding officer of the board of directors or other association officer (ch. 499) of the business entity is authorized to certify a copy of this resolution and is directed to deliver the copy of the resolution to the Secretary of State of Iowa for filing.

The filing fee is \$5.00
Make checks payable to Secretary of State.

SECRETARY OF STATE
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204 FAX: 515/242-5953

E-mail: sos@sos.state.ia.us

FILED
IOWA
SECRETARY OF STATE
4-30-02
11:43AM
W304346



631,0000
COPY

00543

ROA 480



CHESTER J. CULVER
Secretary of State
State of Iowa

000034-wf
APPLICATION FOR
AMENDED CERTIFICATE
OF AUTHORITY

264944

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1504 of the Iowa Business Corporation Act, the undersigned corporation applies for an amended certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Acquisition Co.
and the name the corporation uses in Iowa if different than its real name is _____
The corporate name has been changed to Eagle Window & Door, Inc.
2. The state [or foreign country] of incorporation on the records of the Secretary of State of Iowa is DELAWARE
The state [or foreign country] of incorporation has been changed to _____
3. The duration of the corporation on the records of the Secretary of State of Iowa is PERPETUAL
The duration has been changed to _____
4. The date of incorporation of the corporation was April 10, 2002
5. The street address of its principal office is
address 2045 Kerper Boulevard
city, state, zip Dubuque, IA 52004-1072
6. The street address of its registered office in Iowa and the name of its registered agent at that office:
name Corporation Service Company
address 729 Insurance Exchange Building
city, state, zip Des Moines, IA 50309
7. The names and business addresses of its current directors and officers:
name See attached officers/directors rider
address _____
city, state, zip _____

835.0114
08/01

00245
4

ROA 481

000035-wf

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

name _____

address _____

city, state, zip _____

Please attach additional pages if needed.

8. A certificate of existence, or a document of similar import, duly authenticated by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title Ronald H. Neill, Secretary

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.

SECRETARY OF STATE
Corporations Division
Lucas Building
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX 515/242-5953

00246

ROA 482

000036 wf

RIDER 7

Names and Business Addresses of Current Directors and Officers

<u>NAME AND TITLE(S)</u>	<u>ADDRESS</u>
Stephen B. Perry - Director, Chairman	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Frank N. Linsalata - Director	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Ronald H. Neill - Director, Secretary	1400 McDonald Investment Center Cleveland, OH 44114
David Beeken - President	2045 Kerper Boulevard Dubuque, IA 52001
Charles A. Daoud - Executive Vice President	2045 Kerper Boulevard Dubuque, IA 52001
Steven R. Stoppelmoor - Vice President of Finance	2045 Kerper Boulevard Dubuque, IA 52001
Ronald Vander Weerd - Vice President of Engineering	2045 Kerper Boulevard Dubuque, IA 52001
Gregory L. Taber - Treasurer and Assistant Secretary	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Andrew Wickham - Controller	2045 Kerper Boulevard Dubuque, IA 52001

{CLB2929.DOC;1}

00247

ROA 483

000037-WF

Delaware

PAGE 1

The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EAGLE WINDOW & DOOR, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTEENTH DAY OF JUNE, A.D. 2002.

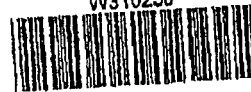
AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "EAGLE WINDOW & DOOR, INC." WAS INCORPORATED ON THE TENTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

6-18-02
11:18 AM

V0310258



Harriet Smith Windsor

Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1828503

DATE: 06-13-02

00248

3512812 8300

020380411

ROA 484

000038-48



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2004
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 4/1/2004 15:55
Corporation No.: 264944
Certification No.: A04264944

1. Name of the Corporation, its registered agent and registered office

EAGLE WINDOW & DOOR, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

2045 KERPER BLVD

Address

City	State	Zip	Country
DUBUQUE	IA	520041072	USA

☐ Pres ☐ Sec ☒ Treas ☐ Dir

Name

GREGORY L TABER

Address

5900 LANDERBROOK DR STE 280

Address

City	State	Zip	Country
MAYFIELD	OH	44124	USA

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

RONALD H NEILL

Address

1400 MCDONALD INVESTMENT CTR

Address

City	State	Zip	Country
CLEVELAND	OH	44114	USA

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name

STEPHEN B PERRY

Address

5900 LANDERBROOK DR STE 280

Address

City	State	Zip	Country
MAYFIELD	OH	44124	USA

4. Address of the Principal Office of the Corporation

Address

ROA 485

000039-104

2045 KERPER BLVD			
Address			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated: DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: ANDREW WICKHAM Capacity: CONTROLLER

ROA 486

000040-*wf*

CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2006
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 3/20/2006 11:30
Corporation No.: 264944
Certification No.: A06264944

1. Name of the Corporation, its registered agent and registered office.

EAGLE WINDOW & DOOR, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s):

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name
ALAN E. BERNICK

Address
551 NORTH MAINE STREET
Address

City	State	Zip	Country
BAYPORT	MN	55003	USA

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name
DAVID BEEKEN

Address
551 NORTH MAINE STREET
Address

City	State	Zip	Country
BAYPORT	MN	55003	USA

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name
JAMES E. HUMPHREY

Address
551 NORTH MAINE STREET
Address

City	State	Zip	Country
BAYPORT	MN	55003	USA

☐ Pres ☐ Sec ☒ Treas ☐ Dir

Name
ROBERT P. PENVOSE JR.

Address
551 NORTH MAIN STREET
Address

City	State	Zip	Country
BAYPORT	MN	55003	USA

4. Address of the Principal Office of the Corporation:

Address
551 NORTH MAINE STREET
Address

City	State	Zip	Country
------	-------	-----	---------

ROA 487

000041-21

BAYPORT MN 55003 USA

5. The state or country under whose laws the corporation is incorporated. DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: James K. Taylor Capacity: Tax Director - Officer

ROA 488



CHESTER J. CULVER
Secretary of State
State of Iowa

000042. w
264990
APPLICATION FOR
CERTIFICATE
OF AUTHORITY

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1603 of the Iowa Business Corporation Act, the undersigned corporation applies for a certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Services Co.
- 1A. [See note 5] The name the corporation will use in Iowa, if different than the legal name of the corporation is _____
2. The corporation is incorporated under the laws of the state (or foreign country) of Delaware
3. The date of incorporation of the corporation was April 12, 2002
4. The duration of the corporation is perpetual
5. The street address of its principal office is
Address 2045 Kerper Boulevard
City, State, Zip Dubuque, IA 52004-1072
6. The street address of its registered office in Iowa and the name of its registered agent at that office:
Name Corporation Service Company
Address 729 Insurance Exchange Building
City, State, Zip Des Moines, IA 50309
7. The names and business addresses of its current directors and officers:
- Name Stephen B. Perry, Director, Chairman of the Board of Directors
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
- Name Ronald H. Neill, Secretary
Address 1400 McDonald Investment Center
City, State, Zip Cleveland, OH 44114
- Name Gregory L. Taber, Treasurer and Assistant Secretary
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124

RECEIVED
SECRETARY OF STATE
IOWA
02 MAR - 1 AM '02
03 APR 29 PM 2:15
RECEIVED
SECRETARY OF STATE
IOWA
53467 CAUT11 \$100.0 DJC 2

3
00733

675_0110A
06/01

ROA 489

Name 11 n/a
Address 11
City, State, Zip 11

Name _____ n/a
Address _____
City, State, Zip _____

(Please attach additional pages as necessary)

8. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application, by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature [Signature]
Type or print name and title Stephen B. Perry, Chairman of the Board

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.
6. If the name of the corporation does not satisfy the requirements of section 401 of the Iowa Business Corporation Act, the corporation may do either of the following in applying for a certificate of authority:
 - a. add one of the following words or abbreviations to its corporate name for use in Iowa:
corporation, incorporated, company, limited, corp., inc., co., ltd.;
or
 - b. use a fictitious name to transact business in Iowa if the corporation's real name is unavailable and the corporation delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX: 515/242-5953

638_0110A
06/01

00734

ROA 490

000044-wf

Delaware

PAGE 1

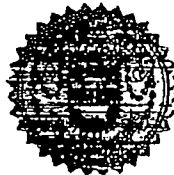
The First State

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EWD SERVICES CO." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

H. Windsor
2:15 PM
W304516



3512821 8300

020265558

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1743174

DATE: 04-25-02

00735

ROA 491



CHESTER J. CULVER
Secretary of State
State of Iowa

000045-wf
APPLICATION FOR
AMENDED CERTIFICATE
OF AUTHORITY

2

264990

02 JUN 18 AM 11:13

SECRET
IOWA
STATE
SECRETARY

501926 ACAU11 \$100.00 sfo

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1504 of the Iowa Business Corporation Act, the undersigned corporation applies for an amended certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Services Co.
and the name the corporation uses in Iowa if different than its real name is _____

The corporate name has been changed to Eagle Window & Door Services, Inc.

2. The state [or foreign country] of incorporation on the records of the Secretary of State of Iowa is delaware

The state [or foreign country] of incorporation has been changed to _____

3. The duration of the corporation on the records of the Secretary of State of Iowa is PERPETUAL

The duration has been changed to _____

4. The date of incorporation of the corporation was April 10, 2002

5. The street address of its principal office is _____

address 2945 Kerper Boulevard

city, state, zip Dubuque, IA 52004-1072

6. The street address of its registered office in Iowa and the name of its registered agent at that office:

name Corporation Service Company

address 729 Insurance Exchange Building

city, state, zip Des Moines, IA 50309

7. The names and business addresses of its current directors and officers:

name See attached officers/directors rider

address _____

city, state, zip _____

835_0114
08/01

60241

ROA 492

000046-WF

name _____
address _____
city, state, zip _____

name _____
address _____
city, state, zip _____

name _____
address _____
city, state, zip _____

Please attach additional pages if needed.

8. A certificate of existence, or a document of similar import, duly authenticated by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature: Ronald H. Neill

Type or print name and title Ronald H. Neill, Secretary

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.

SECRETARY OF STATE
Corporations Division
Lucas Building
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX 515/242-5953

00242

ROA 493

000047-wf

RIDER 7

Names and Business Addresses of Current Directors and Officers

<u>NAME AND TITLE(S)</u>	<u>ADDRESS</u>
Stephen B. Perry - Director, Chairman	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Frank N. Linsalata - Director	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Ronald H. Neill - Director, Secretary	1400 McDonald Investment Center Cleveland, OH 44114
David Beeken - President	2045 Kerper Boulevard Dubuque, IA 52001
Charles A. Daoud - Executive Vice President	2045 Kerper Boulevard Dubuque, IA 52001
Steven R. Stoppelmoor - Vice President of Finance	2045 Kerper Boulevard Dubuque, IA 52001
Ronald Vander Weerd - Vice President of Engineering	2045 Kerper Boulevard Dubuque, IA 52001
Gregory L. Taber - Treasurer and Assistant Secretary	5900 Landerbrook Drive, Suite 280 Mayfield, OH 44124
Andrew Wickham - Controller	2045 Kerper Boulevard Dubuque, IA 52001

{CLB2929.DOC}

00243

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Delaware

PAGE 1

The First State

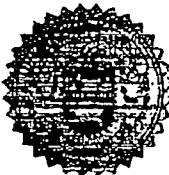
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EAGLE WINDOW & DOOR SERVICES, INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTEENTH DAY OF JUNE, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE SAID "EAGLE WINDOW & DOOR SERVICES, INC." WAS INCORPORATED ON THE TENTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

6-18-02
11:18 AM
W310257



3512821 8300

020380411

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1828504

DATE: 06-13-02

00244

ROA 495

000049-WF



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2004
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 3/30/2004 16:15
Corporation No.: 264990
Certification No.: A04264990

1. Name of the Corporation, its registered agent and registered office

EAGLE WINDOW & DOOR SERVICES, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

2045 KERPER BLVD

Address

City State Zip Country
DUBUQUE IA 520041072 USA

☐ Pres ☐ Sec ☒ Treas ☐ Dir

Name

GREGORY L TABER

Address

5900 LANDERBROOK DR STE 280

Address

City State Zip Country
MAYFIELD OH 44124 USA

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

RONALD H NEILL

Address

1400 MCDONALD INVESTMENT CTR

Address

City State Zip Country
CLEVELAND OH 44144 USA

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name

STEPHEN B PERRY

Address

5900 LANDERBROOK DR STE 280

Address

City State Zip Country
MAYFIELD OH 44124 USA

4. Address of the Principal Office of the Corporation

Address

ROA 496

000050-40

2045 KERPER BLVD			
Address			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated: DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: ANDREW WICKHAM Capacity: CONTROLLER

ROA 497

000051- wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2006
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED
Date: 3/20/2006 15:33
Corporation No.: 264990
Certification No.: A06264990

1. Name of the Corporation, its registered agent and registered office.

EAGLE WINDOW & DOOR SERVICES, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s):

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

ALLEN BURNICK

Address

100 4TH AVENUE N

Address

City

BAYPORT

State

MN

Zip

550031096 USA

Country

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

2045 KERPER BLVD

Address

City

DUBUQUE

State

IA

Zip

520041072 USA

Country

☐ Pres ☐ Sec ☐ Treas ☒ Dir

Name

JIM HUMPHREY

Address

100 4TH AVENUE N

Address

City

BAYPORT

State

MN

Zip

550031096 USA

Country

4. Address of the Principal Office of the Corporation:

Address

2045 KERPER BLVD

Address

City

DUBUQUE

State

IA

Zip

520041072 USA

Country

5. The state or country under whose laws the corporation is incorporated. DE

6. Does the corporation hold an interest in agricultural land in Iowa? No

7. Is the corporation a "family farm corporation?" No

ROA 498

000052-WF

B. Signed: JILL MICHAELIS Capacity: ASSISTANT CONTROLLER

ROA 499

000053-WF

24110 NS
196911-5

AUG 29 1996

ARTICLES OF MERGER
OF
EAGLE WINDOW & DOOR, INC., an Iowa corporation,
AND
TAYLOR BUILDING PRODUCTS COMPANY, a Michigan corporation
INTO
AMERICAN ARCHITECTURAL PRODUCTS, INC., a Delaware corporation

SECRETARY OF STATE

Pursuant to the provisions of Section 490.1105 of the Code of Iowa, the undersigned corporation adopts the following Articles of Merger for the purpose of merging the referenced corporations into one of such corporations:

FIRST: The following Plan of Merger was approved by the Board of Directors of American Architectural Products, Inc. (the "Surviving Corporation") in the manner prescribed by the Delaware General Corporation Law, the jurisdiction under which the Surviving Corporation is formed and the Agreement and Plan of Merger was adopted and approved by such corporation pursuant to and in accordance with the laws of that jurisdiction:

Attached hereto and by this reference made a part hereof is Exhibit A, Agreement and Plan of Merger by and among American Architectural Products, Inc., Eagle Window & Door, Inc. and Taylor Building Products Company

SECOND: Pursuant to Section 490.1104 of the Code of Iowa, Shareholder approval was not required to this merger of a wholly-owned subsidiary into the parent corporation. As to Eagle Window & Door, Inc. and Taylor Building Products Company (the "Subsidiary Corporations"), Eagle Window & Door, Inc. has 210,851 shares of common stock outstanding, and Taylor Building Products Company has 1,000 shares of common stock outstanding; said shares being the only issued and outstanding shares of the Subsidiary Corporations, and all of said shares are owned by the Surviving Corporation.

THIRD: The Surviving Corporation is the owner of all issued and outstanding shares of the Subsidiary Corporations and the Surviving Corporation waived the mailing of a copy of the Plan of Merger.

FOURTH: The effective date and time of this document is the date of its filing with the Iowa Secretary of State's Office.

00656

ROA 500

000054--WP

DATED: August 26, 1996.

AMERICAN ARCHITECTURAL PRODUCTS, INC.

By: George S. Hofmeister
George S. Hofmeister
Chairman and Chief Executive Officer

STATE OF OHIO

§
§

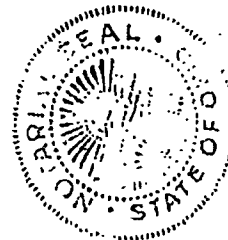
COUNTY OF CUYAHOGA §

On this 26th day of August, 1996, before me, the undersigned, a Notary Public in and for said County, in said State, personally appeared George S. Hofmeister, to me personally known, who, being by me duly sworn, did say that he is Chairman and Chief Executive Officer, of said corporation executing the within and foregoing instrument; that no seal has been procured by the said corporation; that said instrument was signed on behalf of said corporation by authority of its Board of Directors; and that the said George S. Hofmeister, as such officers, acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by him voluntarily executed.

James E. Phillips
Notary Public

My commission expires:

JAMES E. PHILLIPS
ATTORNEY AT LAW
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION HAS NO EXPIRATION DATE
SECTION 147.03 R. C.
6899136157.1A



-2-

00657

ROA 501

AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER (this "Agreement") is entered into by and among **AMERICAN ARCHITECTURAL PRODUCTS, INC.**, a Delaware corporation ("AAP"), **EAGLE WINDOW & DOOR, INC.**, an Iowa corporation ("Eagle"), and **TAYLOR BUILDING PRODUCTS COMPANY**, a Michigan corporation ("Taylor") (AAP, Eagle and Taylor are sometimes collectively referred to in this Agreement as the "Constituent Corporations"; Eagle and Taylor are sometimes collectively referred to in this Agreement as the "Merged Corporations").

RECITALS

A. AAP is incorporated and existing under the General Corporation Law of Delaware and is authorized to have outstanding one hundred thousand (100,000) shares of common stock, par value \$.01 per share, of which one hundred (100) of such shares are issued and outstanding on the date of this Agreement.

B. Eagle is incorporated and existing under the Iowa Business Corporation Act and is authorized to have outstanding five hundred thousand (500,000) shares of common stock, of which two hundred ten thousand eight hundred fifty-one (210,851) of such shares are issued and outstanding on the date of this Agreement.

C. Taylor is incorporated and existing under the Michigan Business Corporation Act and is authorized to have outstanding one thousand (1,000) shares of common stock, par value \$1.00 per share, of which one thousand (1,000) such shares are issued and outstanding on the date of this Agreement.

D. In unanimous written actions dated as of August 29, 1996, the respective boards of directors of each of the Constituent Corporations adopted and the shareholders of each of the Merged Corporations approved the merger of the Merged Corporations with and into AAP in accordance with the provisions of this Agreement.

PROVISIONS

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and provisions set forth in this Agreement, each of the Constituent Corporations agrees as follows:

Exhibit A to Articles of Merger
Page 1 of 4

000056 WF

ARTICLE I

The Merger

Section 1.01. The Merger. At the Effective Time (as defined in Section 1.02 of this Agreement), the Merged Corporations shall be merged with and into AAP (the "Merger"), the separate corporate existence of the Merged Corporations shall cease, and AAP shall continue as the surviving corporation under the laws of the State of Delaware and continue to use the name AMERICAN ARCHITECTURAL PRODUCTS, INC. At the Effective Time, all assets and property of every description, and every interest therein, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each of the Merged Corporations, and all obligations belonging to or due to each of the Merged Corporations, shall be vested in AAP without further act or deed, and title to any real estate or any interest therein vested in any Merged Corporation shall not revert or in any way be impaired by reason of the Merger. AAP shall be liable for all of the obligations of each Merged Corporation. Any claim existing, or action or proceeding pending, by or against any of the Merged Corporations, may be prosecuted to judgment with right of appeal, as if the Merger had not taken place, or AAP may be substituted in its place. All of the rights of creditors of each Merged Corporation shall be preserved unimpaired, and all liens upon the property of each Merged Corporation as of the Effective Time shall be preserved unimpaired.

Section 1.02. Effective Time. The Merger shall be effected on or before August 31, 1996, and shall become effective as of the date and time specified in the Certificate of Merger delivered to the Secretary of State of the State of Delaware (the "Effective Time").

Section 1.03. Certificate of Incorporation of AAP. The Certificate of Incorporation of AAP in effect immediately prior to the Effective Time shall continue to operate as the Certificate of Incorporation of AAP.

Section 1.04. Bylaws of AAP. The Bylaws of AAP immediately prior to the Effective Time shall continue to operate as the Bylaws of AAP.

Section 1.05. Directors and Officers. The directors and officers of AAP immediately prior to the Effective Time shall continue to be the directors and officers of AAP and shall serve in such capacities until their successors may be elected and qualified or until any of them should resign or be removed from office.

Section 1.06. Cancellation of Shares of Merged Corporations; Status of AAP Shares. At the Effective Time, all of the outstanding shares of each of the Merged Corporations shall be cancelled. The present holders of the outstanding shares of stock of AAP shall continue to hold the same share certificate or certificates in AAP that they now hold, and such share certificate

Exhibit A to Articles of Merger
Page 2 of 4

00659

ROA 503

000057-WF

or certificates shall continue to represent the like number of outstanding shares of stock of AAP after the Effective Time.

ARTICLE II

Miscellaneous Provisions

Section 2.01. Headings. The subject headings of the Articles and Sections of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions.

Section 2.02. Counterparts. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 2.03. Severability. In the event that any of the terms or provisions of this Agreement are determined to be unenforceable by any court of competent jurisdiction, the parties to this Agreement shall consider such terms or provisions amended and modified so as to eliminate such invalidity or unenforceability, and all other terms and provisions shall remain in full force or effect as originally written.

[The Remainder of this Page Intentionally Left Blank.]

Exhibit A to Articles of Merger
Page 3 of 4

00660

ROA 504

000058-WF

Signature Page to Agreement and Plan of Merger

IN WITNESS WHEREOF, each of the parties to this Agreement has executed this
Agreement this 29th day of August, 1996.

AMERICAN ARCHITECTURAL PRODUCTS, INC.

By: George S. Hofmeister
George S. Hofmeister
Chairman and Chief Executive Officer

TAYLOR BUILDING PRODUCTS COMPANY

By: George S. Hofmeister
George S. Hofmeister
President and Treasurer

EAGLE WINDOW & DOOR, INC.

By: George S. Hofmeister
George S. Hofmeister
President and Treasurer

64994156900.2A
Dmft: 06/19/96

Exhibit A to Articles of Merger
Page 4 of 4

FILED
IOWA
SECRETARY OF STATE
8/29/96
2:18pm
W117925



00661

ROA 505

000059-WF

AR-1



PAUL D. PATE
Secretary of State
State of Iowa

IOWA 1996
ANNUAL REPORT
for an
IOWA CORPORATION

Required by Iowa Code chapter 490

FOR OFFICE USE ONLY



PAUL D. PATE
IOWA SECRETARY OF STATE
FILED 04/01/1996 AT 04:30 PM
FILING # 000024110A96207985

1. Name of the corporation, its registered agent and registered office.
490 DP-024110
EAGLE WINDOW & DOOR, INC.
C T CORPORATION SYSTEM
2222 GRAND AVE
DES MOINES, IA 50312

(Do not make changes in this box! Use box #3.)

2. Address of the Principal Office of the Corporation
375 EAST 9TH STREET
DUBUQUE, IA 52001

Change the address to:

3. CHANGE OF REGISTERED AGENT OR OFFICE

Please refer to instruction sheet

1. Name of the new registered agent:

(Please print)

X

(Signature of new registered agent)

2. The address of the new registered office in Iowa is:

Street Address. (A street address is required
A post office box may be added.)

(City, State, Zip)

4. Stock Authorized and Issued

Delayed Part Filed 10-20-87

	TYPE	CLASS	SERIES	AUTHORIZED	ISSUED
1.	-P---			500---	
2.	C	Common	\$1.00	2000-- 500,000	210851
3.					
4.					

5. Does the corporation own agricultural land in Iowa?
YES, the corporation owns

acres.

XXXX

NO

6. Is the corporation a "family farm corporation?"

YES

XXXX

NO

7. FILING FEE IS ENCLOSED \$30.00

The officers and directors of the corporation are reported on page 2 and any attached additional sheets.

8. SIGNED: X David A. Dorian Assistant Secretary | 3/29/96 | (313) 374-7400
Signature/Title | Date | Phone

Report must be signed by an officer or a person authorized by the board of directors to sign the report.

MUST BE FILED BY MARCH 31, 1996.

Page 1

0416961157D.C0001424268R/R SOS \$30.00

ROA 506

024110 EAGLE WINDOW & DOOR, INC.

000060-10F

AR-1

9. PLEASE READ INSTRUCTIONS BEFORE COMPLETING THIS PAGE

THE CORPORATION HAS NO OFFICERS. ☐

THE CORPORATION HAS NO DIRECTORS. ☐

FOR OFFICE USE ONLY



CORRECTIONS IN THIS COLUMN ONLY.

10. 01 O U A D R	OFFICER ☒ DIRECTOR ☐ SILVERMAN, BARRY J. 21001 VAN BORN RD TAYLOR, MI 48180	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
02 O U A D R	OFFICER ☒ DIRECTOR ☐ TUCKER, DALE 375 EAST 9TH STREET DUBUQUE, IA 52004-1072	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
03 OD U A D R	OFFICER ☒ DIRECTOR ☒ GARDNER, LEE 21001 VAN BORN ROAD TAYLOR, MI 48180	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
04 O U A D R	OFFICER ☒ DIRECTOR ☐ BORAN, DAVID A 21001 VAN BORN ROAD TAYLOR, MI 48180	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
05 OD U A D R	OFFICER ☒ DIRECTOR ☒ WADHAMS, TIMOTHY 21001 VAN BORN ROAD TAYLOR, MI 48180	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
06 O U A D R	OFFICER ☒ DIRECTOR ☐ BENNEY, JEFF 375 EAST 9TH STREET DUBUQUE, IA 52004-1072	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS
07 O U A D R	OFFICER ☒ DIRECTOR ☐ YASSAY, JOSEPH 375 EAST 9TH STREET DUBUQUE, IA 52004-1072	OFFICER ☐ DIRECTOR ☐ NAME Delete ADDRESS ADDRESS ADDRESS
	OFFICER ☐ DIRECTOR ☐	OFFICER ☐ DIRECTOR ☐ NAME ADDRESS ADDRESS ADDRESS

ATTACH ADDITIONAL SHEETS IF NECESSARY

Page 2

MUST BE FILED BY MARCH 31, 1996.

ROA 507



MICHAEL A. MAURO
Secretary of State
State of Iowa

**STATEMENT OF CHANGE
OF REGISTERED OFFICE
AND/OR
REGISTERED AGENT**

Pursuant to Iowa law, the undersigned submits this Statement to change the business entity's registered office and/or registered agent in Iowa. Read the INSTRUCTIONS on the back of this form before completing the information and signing below.

1. The NAME of the business entity is: Eagle Window & Door Manufacturing, Inc.

2. The street address of the CURRENT registered OFFICE as indicated on the Secretary of State's records is:

729 INS Exchange Building Des Moines IA 50309
street city state zip

3. The street address of the NEW registered OFFICE is:

2222 Grand Avenue Des Moines IA 50312
street city state zip

4. The name of the CURRENT registered AGENT as indicated on the Secretary of State's records is:

Corporation Service Company

(If more than one AGENT is registered, indicate which one is being replaced.)

5. The name of the NEW registered AGENT is: C T Corporation System

6. If the REGISTERED AGENT has changed, the NEW Registered Agent must sign here, consenting to their appointment, or attach their written consent to this form.

Michele Miller
Assistant Secretary
Signature of NEW Registered Agent

Complete ONLY if the Registered Agent changes.

7. If the REGISTERED AGENT changes the street address of their business office on this form, here indicating that NOTICE of the change has been given to the business entity.

Signature of Registered Agent

Complete ONLY if the Registered Agent changes the street address of their business office.

8. After any/all change(s) are made, the street address of the registered office and the street address of the registered agent will be identical.

9. Signature by authorized representative:

Alan E. Bernick
Signature

Date:

9/4/07

PRINT Name and Title:

Alan E. Bernick SVP
Name and Title

(651) 264-7789
Telephone Number

IAFORM - 1/18/2007 C T System Online

RECEIVED TIME SEP. 4. 11:50AM

ROA 508



CHESTER J. CULVER
Secretary of State
State of Iowa

000062-10F

APPLICATION FOR
CERTIFICATE
OF AUTHORITY

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1503 of the Iowa Business Corporation Act, the undersigned corporation applies for certificate of authority to transact business in Iowa, and states:

1. The name of the corporation is EWD Acquisition Co.
- 1A. [See note 5] The name the corporation will use in Iowa, if different than the legal name of the corporation is _____
2. The corporation is incorporated under the laws of the state [or foreign country] of Delaware
3. The date of incorporation of the corporation was April 10, 2002
4. The duration of the corporation is perpetual
5. The street address of its principal office is
Address 2045 Kerper Boulevard
City, State, Zip Dubuque, IA 52004-1072
6. The street address of its registered office in Iowa and the name of its registered agent at that office:
Name Corporation Service Company
Address 729 Insurance Exchange Building
City, State, Zip Des Moines, IA 50309
7. The names and business addresses of its current directors and officers:
- Name Stephen B. Perry, Director, Chairman of the Board of Directors
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
- Name Gregory L. Taber, Treasurer and Assistant Secretary
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
- Name Ronald H. Neill, Secretary
Address 1400 McDonald Investment Center
City, State, Zip Cleveland, OH 44114

02 APR 30 11:42

RECEIVED
SECRETARY OF STATE
IOWA

370 0.0015 111000 028855

635 0110A
06/01

3
00540

ROA 509

000063-WF

Name _____ n/a

Address _____

City, State, Zip _____

Name _____ n/a

Address _____

City, State, Zip _____

[Please attach additional pages as necessary]

8. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application, by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title _____ Stephen B. Perry, Chairman of the Board

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.
5. If the name of the corporation does not satisfy the requirements of section 401 of the Iowa Business Corporation Act, the corporation may do either of the following in applying for a certificate of authority:
 - a. add one of the following words or abbreviations to its corporate name for use in Iowa:
corporation, incorporated, company, limited, corp., inc., co., ltd.;
or
 - b. use a fictitious name to transact business in Iowa if the corporation's real name is unavailable and the corporation delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX: 515/242-5953

535_0110A
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ROA 510

000064-WF

Delaware

PAGE 1

The First State

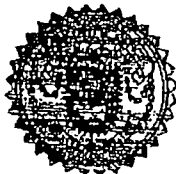
I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "END ACQUISITION CO." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

4-30-02

11:42AM
W304345



Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

3512812 8300

020265558

AUTHENTICATION: 1743173

DATE: 04-25-02

00542

ROA 511

000065-wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2004
BIENNIAL REPORT
for a
FOREIGN CORPORATION
Required by Iowa Code Chapter 490

CHESTER J. CULVER
Secretary of State
FILED

Date: 4/1/2004 15:55
Corporation No.: 264944
Certification No.: A04264944

1. Name of the Corporation, its registered agent and registered office

EAGLE WINDOW & DOOR, INC.
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA 50309

2. The corporation has: ☐ No officers ☐ No directors

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir			
Name DAVID BEEKEN			
Address 2045 KERPER BLVD			
City State Zip Country DUBUQUE IA 520041072 USA			
☐ Pres ☐ Sec ☒ Treas ☐ Dir			
Name GREGORY L TABER			
Address 5900 LANDERBROOK DR STE 280			
City State Zip Country MAYFIELD OH 44124 USA			
☐ Pres ☒ Sec ☐ Treas ☐ Dir			
Name RONALD H NEILL			
Address 1400 MCDONALD INVESTMENT CTR			
City State Zip Country CLEVELAND OH 44114 USA			
☐ Pres ☐ Sec ☐ Treas ☒ Dir			
Name STEPHEN B PERRY			
Address 5900 LANDERBROOK DR STE 280			
City State Zip Country MAYFIELD OH 44124 USA			

4. Address of the Principal Office of the Corporation

Address

ROA 512

000066- wf

2045 KERPER BLVD			
Address			
City	State	Zip	Country
DUBUQUE	IA	520041072	USA

5. The state or country under whose laws the corporation is incorporated: DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: ANDREW WICKHAM Capacity: CONTROLLER

ROA 513

Site Map | Contact Us



Michael A. Mauro

Business Services Home → Search Databases → Iowa Corporations → Summary

Search Databases

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Nonprofits

Youth/Civic Events

Press/Media

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[Names](#)
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Summary

Searched: eagle window & door

[Print Certificate of Standing](#)

Corp No.	Legal Name	Status
24110	EAGLE WINDOW & DOOR, INC.	Inactive
Type	State of Inc.	Modified
Legal	IA	No
Expiration Date	Effective Date	Filing Date
PERPETUAL	May 08, 1967	May 08, 1967
Chapter	CODE 490 DOMESTIC PROFIT	

Names (viewing 3 of 6)

Type	Status	Modified	Name
Legal	Active	No	EAGLE WINDOW & DOOR, INC.
Former	Inactive	No	EAGLE MFG. CO.
Former	Inactive	No	EAGLE WINDOW & DOOR

Registered Agent or Reserving Party

Full Name	C T CORPORATION SYSTEM
Address	2222 GRAND AVE
City, ST, Zip	DES MOINES, IA, 50312

Home Office

Full Name	
Address	375 EAST 9TH STREET
City, ST, Zip	DUBUQUE, IA, 52001

Home | State of Iowa | Site Map | Contact Us

ROA 514

EXHIBIT F

000068-01

 CHESTER J. CULVER Secretary of State State of Iowa	IOWA 2000 BIENNIAL REPORT for a FOREIGN CORPORATION Required by Iowa Code chapter 490	FOR OFFICE USE ONLY  FILED Iowa Secretary of State MAR 6 2000 4:30 p.m.
	1. Name of the Corporation, its registered agent and registered office. 490 FP-196911 EAGLE & TAYLOR COMPANY CORPORATION SERVICE COMPANY 729 INS EXCH BLDG DES MOINES, IA 50309	

DO NOT MAKE CHANGES IN THIS BOX - SEE ENCLOSED CHANGE FORM

2. The corporation has no officers. ☐The corporation has no directors. ☐

SEE INSTRUCTION SHEET ENCLOSED.

3. 001	Pres ☐ Sec ☐ Treas ☐ Dir ☒ AMEDIA, FRANK J 755 BOARDMAN-CANFIELD RD BLDG G-WEST BOARDMAN, OH 44512	NAME Frank J. Amedia ADDRESS 3000 Northwest 125th St. ADDRESS Opa Locka, FL 33167 ADDRESS
002	Pres ☒ Sec ☐ Treas ☐ Dir ☐ TUCKER, DALE 375 E 9TH ST DUBUQUE, IA 52004-1072	Pres ☒ Sec ☐ Treas ☐ Dir ☐ NAME David Beeken ADDRESS 375 East Ninth Street ADDRESS P.O. Box 1072 ADDRESS Dubuque, IA 52004-1072
003	Pres ☐ Sec ☐ Treas ☒ Dir ☒ DOMINIJANNI, JOSEPH L 6500 BROOKTREE RD STE 202 WEXFORD, PA 15090	Pres ☐ Sec ☐ Treas ☒ Dir ☐ NAME Joseph L. Dominijanni ADDRESS 6500 Brooktree Rd., Ste 202 ADDRESS Wexford, PA 15090 ADDRESS
004	Pres ☐ Sec ☒ Treas ☐ Dir ☐ JONATHAN K. SCHOENIKE 755 BOARDMAN-CANFIELD RD BLDG G-WEST BOARDMAN, OH 44512	Pres ☐ Sec ☒ Treas ☐ Dir ☐ NAME David J. McKelvey ADDRESS 3000 Northwest 125th Street ADDRESS Miami, Florida 33167 ADDRESS

 4. Address of the Principal Office of the Corporation.
 755 BOARDMAN - CANFIELD
 BUILDING C - WEST
 BOARDMAN, OH 44512

 Change the principal office to:
 755 Boardman-Canfield Rd.
 Building C-West
 Boardman, OH 44512

5. The state or country under whose law the corporation is incorporated.

DE

6. Does the corporation own agricultural land in Iowa? (Number of acres)

YES, the corporation owns ☐ acres. NO ☒

7. Is the corporation a "family farm corporation?"

YES ☐ NO ☒
 8. SIGNED: *David J. Wolfe, Jr.* David J. Wolfe, Jr.
 Assistant Secretary
 Report must be signed by an officer or a person authorized by the board of directors to sign the report.

9. ENCLOSE FILING FEE OF \$45.00

 Make Checks Payable To: Secretary of State
 MUST BE FILED BY MARCH 31, 2000

ROA 515

000069 wf



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2002
BIENNIAL REPORT
for a
FOREIGN
CORPORATION
Required by Iowa Code chapter 490

CHESTER J. CULVER
Secretary of State
FILED
Date: 1/16/2002 10:11
Corporation No.: 196911
Certification No.: A02196911

1. Name of the Corporation, its registered agent and registered office

EAGLE & TAYLOR COMPANY
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA, 50309

2. ☐ The Corporation has no officers. ☐ The Corporation has no directors.

3. Officer(s).

☒ Pres ☐ Sec ☐ Treas ☐ Dir
Name

DAVID BEEKEN

Address

P.O. BOX 1072

Address

City	State	Zip	Country
DUBUQUE	IA	52004-1072	USA

☐ Pres ☐ Sec ☒ Treas ☒ Dir

Name

DOMINIJANNI, JOSEPH L

Address

6500 BROOKTREE RD

Address

STE 102

City	State	Zip	Country
WEXFORD	PA	15090-9273	USA

☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

JONATHAN SCHOENIKE

Address

860 BOARDMAN-CANFIELD ROAD

Address

SUITE 107

City	State	Zip	Country
BOARDMAN	OH	44512-4235	USA

4. Address of the Principal Office of the Corporation

Address

860 BOARDMAN - CANFIELD ROAD

Address

SUITE 107

City	State	Zip	Country
BOARDMAN	OH	44512	USA

5. The state or country under whose laws the corporation is incorporated. DE

6. Does the corporation hold an interest in agricultural land in Iowa? No

7. Is the corporation a "family farm corporation?" No

8. Signed: DAVID J. WOLFE, JR. Capacity: ASSISTANT SECRETARY

ROA 516



CHESTER J. CULVER
Secretary of State
State of Iowa

000070-WF

APPLICATION FOR
CERTIFICATE
OF AUTHORITY

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

Pursuant to section 1503 of the Iowa Business Corporation Act, the undersigned corporation applies for certificate of authority to transact business in Iowa, and states:

- 264944 02 APR 30 AM 11:42
RECEIVED
SECRETARY OF STATE
IOWA
1. The name of the corporation is EWD Acquisition Co.
 - 1A. [See note 5] The name the corporation will use in Iowa, if different than the legal name of the corporation is _____
 2. The corporation is incorporated under the laws of the state (or foreign country) of Delaware
 3. The date of incorporation of the corporation was April 10, 2002
 4. The duration of the corporation is perpetual
 5. The street address of its principal office is
Address 2045 Kerper Boulevard
City, State, Zip Dubuque, IA 52004-1072
 6. The street address of its registered office in Iowa and the name of its registered agent at that office:
Name Corporation Service Company
Address 729 Insurance Exchange Building
City, State, Zip Des Moines, IA 50309
 7. The names and business addresses of its current directors and officers:
Name Stephen B. Perry, Director, Chairman of the Board of Directors
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
Name Gregory L. Taber, Treasurer and Assistant Secretary
Address 5900 Landerbrook Drive, Suite 280
City, State, Zip Mayfield, OH 44124
Name Ronald H. Neill, Secretary
Address 1400 McDonald Investment Center
City, State, Zip Cleveland, OH 44114

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06/01

3
00540

ROA 517

000071-009

Name _____ n/a

Address _____

City, State, Zip _____

Name _____ n/a

Address _____

City, State, Zip _____

(Please attach additional pages as necessary)

8. A certificate of existence, or a document of similar import, duly authenticated within 90 days prior to the date of this application, by the official having custody of corporate records in the state or country of incorporation, accompanies this application.

9. Signature _____

Type or print name and title _____ Stephen B. Perry, Chairman of the Board

NOTES:

1. The filing fee is \$100.00. Make checks payable to SECRETARY OF STATE.
2. The document is to be signed by the chairperson of the board, the president, or other officer of the corporation. If directors have not been selected, the document is to be signed by an incorporator. If the corporation is in the hands of a court appointed fiduciary, the document is to be signed by the fiduciary. A copy of a signature is acceptable for filing. Verification is not required.
3. One copy of the document is to be delivered to the Secretary of State for filing.
4. The effective time and date of the document is the later of the following:
 - a. the time of filing on the date it is filed;
 - b. the time specified in the document on the date it is filed;
 - c. the time and date specified in the document, not later than 90 days after the date it is filed.
5. If the name of the corporation does not satisfy the requirements of section 401 of the Iowa Business Corporation Act, the corporation may do either of the following in applying for a certificate of authority:
 - a. add one of the following words or abbreviations to its corporate name for use in Iowa: corporation, incorporated, company, limited, corp., inc., co., ltd.;
 - or
 - b. use a fictitious name to transact business in Iowa if the corporation's real name is unavailable and the corporation delivers to the secretary of state for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name.

SECRETARY OF STATE
Corporations Division
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204
FAX: 515/242-5953

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06/01

00541

ROA 518

Delaware

The First State

000072-10F

PAGE 1

I, HARRIET SMITH WINDSOR, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "EWD ACQUISITION CO." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE TWENTY-FIFTH DAY OF APRIL, A.D. 2002.

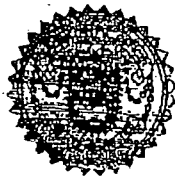
AND I DO HEREBY FURTHER CERTIFY THAT THE FRANCHISE TAXES HAVE NOT BEEN ASSESSED TO DATE.

FILED
IOWA
SECRETARY OF STATE

4-30-02

11:45AM

W304345



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020265558

Harriet Smith Windsor
Harriet Smith Windsor, Secretary of State

AUTHENTICATION: 1743173

DATE: 04-25-02

00542

ROA 519



CHESTER J. CULVER
Secretary of State
State of Iowa

000073
FICTITIOUS NAME
RESOLUTION

TO THE SECRETARY OF STATE OF THE STATE OF IOWA:

I, Ronald H. Neill, certify that I am the (secretary - ch. 504A) or
[manager or L.L.C. member - ch. 490A], [general partner - ch. 487], or [presiding officer of the board of directors or other
association officer - ch. 499] of EWD Acquisition Co.
(name of business entity)
a business entity subject to the provisions of:

- ☒ Iowa Business Corporation Act (profit corporation - Iowa Code ch. 490)
☐ Iowa Nonprofit Corporation Act (nonprofit corporation - Iowa Code ch. 504A)
☐ Iowa Limited Liability Company Act (Iowa Code ch. 490A)
☐ Iowa Uniform Limited Partnership Law (Iowa Code ch. 487)
☐ Cooperative Associations (Iowa Code ch. 499)

and I also certify that:
the following is a true and correct copy of a resolution adopted on the 29th day of April, 2002.

Signature: Ronald H. Neill

Ronald H. Neill, Secretary

(Type or print name & title)

RESOLVED, that the business entity adopts the name:

Eagle Window & Door, Inc.

under which it may operate in Iowa, that the secretary (ch. 490 or ch. 504A), manager or L.L.C. member (ch. 490A), general partner (ch. 487), or presiding officer of the board of directors or other association officer (ch. 499) of the business entity is authorized to certify a copy of this resolution and is directed to deliver the copy of the resolution to the Secretary of State of Iowa for filing.

The filing fee is \$5.00
Make checks payable to Secretary of State.

SECRETARY OF STATE
Lucas Building, 1st Floor
Des Moines, Iowa 50319

Phone: 515/281-5204 FAX: 515/242-5953
E-mail: sos@sos.state.ia.us

685 9999
0001

SECRETARY OF STATE

4-30-02

11/3AM



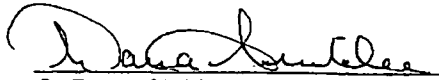
00543

ROA 520

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

10/24, 2014



G. Dana Sinkler
Gibbs & Holmes
171 Church Street, Suite 110
Charleston, SC 29401
(843) 224-1758
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

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

v.

Eagle Windows & Doors, Inc., ... Appellant.

APPENDIX to the RECORD ON APPEAL

G. Dana Sinkler
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church St., Suite 110
Charleston, SC 29401
(843) 224-1758
Attorney for Appellant

Jason M. Imhoff
S.C. Bar No. 69355
The Ward Law Firm P.A.
233 South Pine Street
P.O. Box 5663
Spartanburg, SC 29304
(864) 582-3075
Attorney for Respondents

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Transcript

Transcript of the Testimony of Mr. Philip Gilliam, dated 12/10/2013.....1

Exhibits

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Photographs from April 2005 Window Water Testing.....41

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2007-CP-42-00296

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

Plaintiffs,

-vs-

Eagle Windows & Doors, Inc., et al,

Defendant.

TRANSCRIPT OF RECORD

December 10, 2013
Spartanburg, South Carolina

Ordered: March 12, 2014

Delivered: March 14, 2014

BEFORE:

The Honorable J. Mark Hayes, II, Presiding Judge.

APPEARANCES:

Mr. Jason M. Imhoff,, Esquire
Attorney Appearing for the Plaintiffs

Mr. G. Davis Sinkler, Esquire
Mr. Guy Gibbs, Esquire
Attorneys Appearing for the Defendant

Transcript of the testimony of Mr. Phillip Gilliam on December 10, 2013.

Pamela Faucette, CVR-M
Circuit Court Reporter

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

WITNESSES**Mr. Phillip Gilliam:****Page:**

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Continued Direct by Mr. Imhoff.....	6
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Redirect by Mr. Imhoff.....	30

EXHIBITS**Joint Exhibits:****Marked:****Received:**

1 - (Responses to Plaintiffs' Request for Admissions)	4	4
2 - (Affidavit of Steven Perry)	4	4
3 - (Affidavit of Andrew Wickham)	4	4
4 - (Answers to Plaintiffs' Interrogatories)	4	4
5 - (Website for Eagle)	4	4
6 - (Application for Amended Certificate of Authority)	4	4

Plaintiffs' Exhibits:**Marked:****Received:**

1 - (Contract Agreement)	7	19 (Over Obj)
2 - (Invoice)	18	19 (Over Obj.)
3 - (Letter Dated 5/17/03)	19	22
4 - (Settlement & Release)	20	22
5 - (Four Photos of Home)	(Marked/admitted in prior transcript.)	
6 - (Pages 19 & 20 - Photos)	(Marked/admitted in prior transcript)	

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

Plaintiffs' Exhibits:

Marked:

Received:

7 - (Letter Dated 8/9/05)

(Marked/admitted in prior transcript.)

8 - (Report of Findings Pages 5 - 9)

(Marked in prior transcript.)

9 - (Pages 22 - 28 of
Mr. Still's Report)

(Marked/admitted in prior transcript.)

Defendant's Exhibits:

Marked:

Received:

(None)

Reporter's Certification..... 36

REPORTER'S NOTE: All Joint Exhibits were previously noted as marked and stipulated to in the previous transcript.

REPORTER'S NOTE: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

REPORTER'S NOTE: Some of the names in this transcript are spelled phonetically.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

December 10, 2013

10:02 A.M.

(Joint Exhibits 1 through 6 were previously marked for
identification and admitted into evidence by stipulation of the parties.)

(Off-the-Record Comments)

THE COURT: So, you want to — you're going to call your
witnesses first?

MR. IMHOFF: Yes, Your Honor — yes, Your Honor.

THE COURT: Okay.

MR. IMHOFF: Are you ready, Your Honor?

THE COURT: Yes, sir.

MR. IMHOFF: Your Honor, we call Phil Gilliam.

THE COURT: Sir, just come up here and let the clerk swear you
in.

(Whereupon,

PHILLIP GILLIAM

having been first duly sworn, testified as follows:)

(Off-the-Record Comments)

THE COURT: And give us your name again.

THE WITNESS: Phillip Gilliam.

THE COURT: Phillip Gilliam.

Direct Examination by Mr. Imhoff:

Q. Now, Mr. Gilliam, what do you do for a living?

A. I'm a residential contractor.

Q. And what company do you work for?

A. Gilliam Construction Company, which I own.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Okay. And how long have you worked for Gilliam Construction
2 Company?

3 A. Since 1994.

4 Q. All right. And do you have any licenses?

5 A. I do.

6 Q. What type of licenses?

7 A. I hold a residential builders' license with the State of South Carolina.

8 Q. And how long have you been building homes?

9 A. Since 1994.

10 Q. And — and how many homes have you built?

11 A. Approximately fifty (50) homes.

12 Q. Is your — is your license limited in any way?

13 A. It is not. It's unlimited residential.

14 MR. IMHOFF: Your Honor, at this time, I'd like to offer Mr. Gilliam
15 as an expert in residential construction, building envelope, and building
16 products.

17 THE COURT: Residential construction, building what was that?

18 MR. IMHOFF: Building envelope.

19 THE COURT: And, then, the third one?

20 MR. IMHOFF: Building products.

21 MR. SINKLER: Well, I'm not sure what you mean by an expert in
22 building products. I — I'd like to ask him a couple of questions ---

23 THE COURT: Certainly.

24 MR. SINKLER: — about that.

25 Voir Dire by Mr. Sinkler:

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Have you ever designed a window?

2 A. No, sir.

3 Q. Do you know anything about the design of a window?

4 A. I — I do know things about the design of a window, yes.

5 Q. But you've never designed one yourself?

6 A. No, sir, I have not.

7 Q. Okay. Have you ever manu — manufactured a window?

8 A. No, sir.

9 Q. Have you got any — any experience in man — manufacturing defects
10 or design defects? Is that something — something you have an understanding of
11 articles on that (phonetic)?

12 A. No, sir.

13 Q. All right. Do you have any — any expertise in that?

14 A. Only the experience of dealing with multiple windows, windows
15 companies over a 20-year period.

16 (Brief Pause)

17 MR. SINKLER: All right. I don't — with — with that, I'm okay with
18 him being whatever you ever said about his — you were offering him for.
19 You're offering him for — to talk about construction and — and things of that
20 nature.

21 THE COURT: All right. I'll find him qualified as — as you
22 requested. You may go ahead.

23 MR. IMHOFF: Thank you, Your Honor.

24 (Brief Pause)

25 Continued Direct Examination by Mr. Imhoff:

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Mr. Gilliam, did you have the opportunity to meet and work for Renaul
2 and Karen Able?

3 A. Yes, sir.

4 Q. All right. And what did Renaul and Karen Able hire you to do?

5 A. They hired me to construct a residence at The Cliffs of Glassy.

6 MR. IMHOFF: May I approach, Your Honor?

7 THE COURT: All right.

8 (Off-The-Record Comments)

9 (Whereupon, Plaintiff's Exhibit 1 was marked for identification.)

10 Q. (By Mr. Imhoff) Mr. Gilliam, is this the contract agreement you had
11 with Renaul and Karen Able?

12 (Exhibit handed to the witness.)

13 A. Yes, it is.

14 Q. Okay. And is that contract for the construction of a -- of a home at
15 The Cliffs of Glassy?

16 A. That's correct.

17 Q. And did that contract agreement require you to build and deliver them
18 a home which was free of defects?

19 A. Yes, it does.

20 Q. Okay. Did it also require that, if you and the Ables had a disagreement
21 that, that disagreement would be resolved in arbitration?

22 A. Yes, it does.

23 Q. Okay. Did the agreement, the contract agreement, require any
24 particular windows in the Ables' home?

25 A. The contract specified a Peachtree brand window.

- 1 Q. Okay. Did you install Peachtree windows in Mr. Able's home?
- 2 A. We did not.
- 3 Q. Why not?
- 4 A. At the request of Mr. Able, he preferred the use of a product called
- 5 Eagle Windows.
- 6 Q. And did you ultimately go and purchase those windows for Mr. Able?
- 7 A. Yes.
- 8 Q. And have them installed in Mr. Able's home?
- 9 A. Yes.
- 10 Q. All right. Did you — at some point, did Mr. Able complain about
- 11 defects in his home?
- 12 A. He did.
- 13 Q. And what defects did he complain about?
- 14 A. There was water leaking to the interior of the home.
- 15 Q. Okay. And did you do — and were you able to resolve that issue with
- 16 Mr. and Mrs. Able short of arbitration?
- 17 A. I was not.
- 18 Q. And did they ultimately sue your construction company?
- 19 A. Yes.
- 20 Q. All right. And it was in an arbitration forum?
- 21 A. Correct.
- 22 Q. Okay. Did you, in an arbitration forum, invite both the subcontractors
- 23 in the construction and also Eagle Manu — and Eagle Window, the manufacturer of
- 24 the windows?
- 25 A. Yes.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Okay. And did they join the arbitration?

2 A. No, they did not.

3 Q. Did you do any investigation about the cause of the leaking into Mr.
4 Able's home?

5 A. We did.

6 Q. What did you do?

7 A. We flood (phonetic) tested the windows. We examined the joints
8 around the windows. We attempted to make the window leak by using water hoses.

9 Q. And did the windows leak?

10 A. The windows did leak.

11 Q. Where did they leak?

12 A. The windows leaked at the miter joint of the frame of the window.

13 Q. If you would, explain — explain that area, the miter joint, to the Court.

14 A. This window is an extruding aluminum frame. Where the side of that
15 aluminum frame meets the bottom, that joint — the two sides are mitered together.

16 Q. So there's a piece of metal that is vertical and a piece of metal that's
17 horizontal?

18 A. Correct.

19 Q. And in between those is the glass?

20 A. That's correct.

21 Q. All right. And are those two pieces of metal two separate pieces of
22 metal?

23 A. Two separate pieces of metal at all four corners.

24 Q. At all four corners? All right. And so there's a joint or a — a gap
25 where those two pieces of metal meet?

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1 A. That's correct.

2 Q. All right. And is that where the window was leaking?

3 A. That is correct.

4 Q. And is that what your investigation revealed when you put a water
5 hose to the window?

6 A. Yes, it is.

7 Q. Okay. Was Eagle Window invited to participate in that testing?

8 A. Yes.

9 Q. Did they participate in that testing?

10 A. Not in the first test, but in the second test.

11 Q. Okay. How many tests were done on the windows?

12 A. Multiple tests.

13 Q. Are the windows supposed to leak when you put the hose on them?

14 A. No.

15 Q. Okay. Are the windows supposed to leak as a matter of course in the
16 building envelope of that house?

17 A. No.

18 Q. Okay. Are — were the windows defective?

19 A. Yes.

20 MR. SINKLER: I object to the conclusion, Your Honor. I don't
21 think that would be — he doesn't know anything about design or manufacture,
22 so I don't know whether he would know they were defective when he says
23 defective (phonetic).

24 THE COURT: All right. I'll let you cross examine him on that
25 point.

1 MR. SINKLER: Thank you.

2 (Brief Pause)

3 Q. (By Mr. Imhoff) When you purchased the windows for Mr. Able's
4 home, did you expect them to leak in the manner that you found they were leaking
5 when you did your investigation?

6 A. No, I did not.

7 Q. Thank you. Did you find any investigation, publication, news article,
8 any document or anything that would have put you on notice that these windows
9 would leak in the manner that you found they did?

10 A. I did not.

11 Q. When Eagle Window was on site for the water testing, did they make
12 any suggestions to change the manner in which you were testing these windows?

13 A. No, they did not.

14 Q. Okay. Did they have any criticisms of the way that you were testing
15 the windows?

16 A. They did not.

17 Q. Did they participate in testing the window?

18 A. Yes.

19 Q. Okay. And how did they participate?

20 A. Observance of the tests that were performed.

21 Q. Okay. Was their participation limited to just observing the tests?

22 A. At that time, yes.

23 Q. Did they do any tests of their own on the windows?

24 A. Not to my knowledge.

25 Q. Okay. Do you know if they've ever done any tests on the windows at

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1 issue in Mr. Able's home?

2 A. Not while I was present.

3 Q. Did they ever tell you that they were not willing to honor a warranty for
4 those windows?

5 A. Yes.

6 Q. Okay. I'm sorry, did they ever tell you they were not willing to -- strike
7 that.

8 (Brief Pause)

9 Q. Did damages occur to Mr. Able's home because of those leaking
10 windows?

11 A. That's correct.

12 Q. All right. How?

13 A. The water -- the water that intruded, through the corners of the
14 windows, was pulled behind the nailing pin of the window where it, then, entered the
15 building envelope, the wood portion of the walls, causing damage.

16 Q. Okay. Was the removal of stucco around those windows necessary to
17 fix the issue with them leaking?

18 A. Yes.

19 Q. Was repair of the damages caused from the leaking windows
20 necessary due to those windows leaking?

21 A. Yes.

22 Q. Okay. Was -- was a repair to the rough opening, where the windows
23 were put into the building, necessary due to those leaking windows?

24 A. Yes.

25 Q. Have you seen the scope of repair which was proposed by Mr. Able

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1 and his expert, Randy Still?

2 A. Yes.

3 Q. Did you understand that scope of repair?

4 A. I did.

5 Q. Did you understand that scope of repairs to include removing stucco
6 all the way around the windows ----

7 A. I did.

8 Q. ---- fixing any damage that was found caused by the leaking windows?

9 A. Yes.

10 Q. Okay. And also installing what's called pan flashing underneath the
11 windows?

12 A. Yes.

13 Q. Okay. Was pan flashing necessary pursuant to code at the time the
14 windows were installed?

15 A. No.

16 Q. Okay. Do you recall why pan flashing was necessary during the
17 repair?

18 A. Because the windows leaked.

19 Q. Okay. Was there an alternative to installing pan flashing?

20 A. Using a window that didn't leak.

21 Q. Okay. So the alternative to that was to remove the window, purchase
22 new windows, and reinstall them?

23 A. Yes.

24 Q. But the scope of repair that Mr. Able chose instead just put a pan
25 underneath the window; is that right?

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1 A. That's correct.

2 Q. All right. And what did that pan do to allow those windows to stay in
3 the building?

4 A. The — the purpose of the pan was to catch the water that came
5 through the window, through the window leaks, and direct that water down the wall
6 to the outside.

7 Q. Is that a cheaper alternative than removing all of the windows,
8 purchasing new windows, and installing them?

9 A. Yes.

10 Q. Okay. Did you believe that Mr. Able's and Mr. Still's scope of repair
11 was reasonable?

12 A. Yes.

13 Q. Okay. Did you — at the time the arbitration was proceeding, did you
14 understand that, that work was actually being done?

15 A. Yes.

16 Q. Do you remember the name of the company that was doing it?

17 A. Blue Ridge Construction.

18 Q. And do you recall that Mr. Still was conducting contract administration
19 services for that work?

20 A. Yes.

21 Q. And approving the payments?

22 A. Yes.

23 (Brief Pause)

24 Q. Was that amount necessary due to these leaking windows?

25 A. Yes.

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1 Q. Okay. Were the repairs to the stucco and the window installation
2 required because of the leaking windows?

3 A. Yes.

4 (Brief Pause)

5 Q. Do you have employees at Gilliam Construction that install windows
6 and install stucco?

7 A. I use subcontractors to do the work.

8 Q. All right. So all of the work that's done on a project that you're working
9 on is by independent subcontractors?

10 A. Correct.

11 Q. Okay. And what do you do on the project?

12 A. I am the liaison with the cust — customer. I am the supervisor of daily
13 work; planner, scheduler, controller.

14 Q. Do you have to oversee the subcontractors?

15 A. I do.

16 Q. And supervise them?

17 A. I do.

18 Q. Is part of your obligation to make sure that they are following the
19 applicable code at the time?

20 A. Yes, sir.

21 Q. Okay. Did the stucco applicator violate the code at the time?

22 A. He did not.

23 Q. Did the window installer violate the code at the time?

24 A. He did not.

25 (Brief Pause)

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1 Q. And did you know, or have reason to know, that the windows that were
2 requested by Mr. Able and installed in this house would leak?

3 A. No, I had no idea.

4 Q. All right. Do you believe that you have any fault for the failure of these
5 windows in Mr. Able's house?

6 A. No.

7 Q. Who do you believe was ultimately responsible for the failure and the
8 necessity to make this repair?

9 A. The manufacturer of the window.

10 MR. SINKLER: If Your Honor, please, the — he's getting into the
11 question of contribution among joint tortfeasors. And the statute that was in
12 effect at this time said relative degrees of fault could — could not be
13 considered. And he's trying to apportion fault by the answers and that
14 violates the statute that is applicable to this case.

15 MR. IMHOFF: I'll move on.

16 THE COURT: Okay. He'll move on. Thank you, sir.

17 Q. (By Mr. Imhoff) Was the case — was the arbitration with the Ables
18 ultimately settled?

19 A. Yes.

20 Q. Okay. Do you recall how much the Ables were demanding in that
21 arbitration?

22 (Brief Pause)

23 A. (No Response)

24 Q. In general?

25 A. Two hundred thousand dollars (\$200,000).

1 Q. Was it in excess of \$250,000?

2 MR. SINKLER: Object to the form of the question. He's leading
3 the witness.

4 THE COURT: All right. You need to watch the form of the
5 question, please, sir. Did he answer? I didn't hear him answer -- to your
6 previous question?

7 MR. IMHOFF: What previous was that -- which question, Your
8 Honor?

9 THE COURT: As to the amount.

10 Q. (By Mr. Imhoff) Okay. Do you -- do you recall how much the amount
11 the Ables were asking for?

12 A. In your -- in the initial demand, I don't recall that number. It was two
13 hundred thousand (\$200,000) or more.

14 Q. Okay. All right. Do you recall how much the case was ultimately
15 settled for?

16 A. I do.

17 Q. Okay. How much?

18 A. Two hundred and forty-five thousand (\$245,000).

19 Q. Okay. And of that \$245,000, how much did Gilliam Construction add
20 -- contribute?

21 A. Gilliam Construction contributed \$35,000.

22 Q. Okay. And how was that \$35,000 broken down?

23 A. Twenty-five thousand (\$25,000) of that amount was the last invoice for
24 construction work on the initial contract, which was never paid. The balance of
25 \$10,000 was a cash addition that Gilliam Construction made to settle the case.

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1 Q. Okay. So you actually wrote a check for \$10,000?

2 A. Correct.

3 (Brief Pause)

4 MR. IMHOFF: May I approach, Your Honor?

5 THE COURT: (Nods affirmatively.)

6 (Off-The-Record Comments)

7 (Whereupon, Plaintiff's Exhibit 2 was marked for identification.)

8 Q. (By Mr. Imhoff) I'm going to hand you Defense [sic] Number Exhibit 2
9 now. Is that the invoice for the amount of money that Mr. Able did not pay you
10 because of this window issue?

11 A. Yes, it is.

12 Q. And what is the total amount of that invoice?

13 A. Twenty-five thousand, five eighty-four, fifty (\$25,584.50) --- excuse me,
14 fifty-three (\$25,584.53).

15 MR. IMHOFF: Your Honor, we would ask that these Defense
16 Exhibits — I mean, Plaintiff's Exhibits 1 and 2 be moved into evidence at this
17 time.

18 (Brief Pause)

19 THE COURT: Any objection to Plaintiff's 1 and 2?

20 MR. SINKLER: If it's been produced before, I — I have no
21 objection to it, but I — I've — I've not seen either one (phonetic).

22 MR. IMHOFF: I think I — I think I offered my entire file to Mr.
23 Sinkler. And, so, I don't know — I mean, I can't put my finger on it ---

24 MR. SINKLER: My — my file that you gave me was --- had Bates
25 stamps on it all. And I don't see any Bates stamps on either one of these.

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1 **MR. IMHOFF:** What I mean is, I offered for him to come and
2 look. And I think he actually did through my entire file. Is that — isn't that
3 true?

4 **MR. SINKLER:** I have no idea.

5 **MR. IMHOFF:** No, I think I forwarded that to you to come look at
6 my file and I thought that you or Ashley (phonetic) actually came and looked
7 at it.

8 **MR. SINKLER:** That's a possibility, but it was in 2007 that Ashley
9 could have. But I don't — I don't think you did because you had made an
10 motion to dismiss. By — by the time a lot of this happened, several of the
11 parties (phonetic) had their case dismissed. (Phonetic)

12 **THE COURT:** All right. I will — I will allow the documents in if —
13 because the documents are going to back up — it's my understanding, what
14 you're presenting these documents to do, they're simply backing up what he's
15 verbally testifying to.

16 **MR. IMHOFF:** That's correct, Your Honor. They're just additional
17 proof.

18 **THE COURT:** Okay. And if — if you run across anything that's
19 brand-new, that's — that's not coming from the witness, then, let me know
20 about that.

21 **MR. IMHOFF:** I will.

22 **(Off-the-Record Discussion)**

23 **(Whereupon, Plaintiff's Exhibits 1 and 2 were admitted over**
24 **objection.)**

25 **(Whereupon, Plaintiff's Exhibit 3 was marked for identification.)**

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1 Q. (By Mr. Imhoff) Okay. I'm going to hand you Plaintiff's Exhibit
2 Number 3.

3 (Exhibit handed to the witness.)

4 Q. Do you recognize that as a letter from Mr. Able to you concerning the
5 payment of that \$25,000 and change?

6 A. Yes.

7 Q. Okay. And did you take that as an admission that he owed that money
8 but would not pay you because of the window issue?

9 MR. SINKLER: I object to that, Your Honor.

10 THE COURT: All right.

11 Q. (By Mr. Imhoff) What does that letter say?

12 THE COURT: All right. Thank you. You can answer that
13 question.

14 A. This letter was an acknowledgment of the amount of money that Mr.
15 Able still owed for the construction of his home.

16 Q. When — when the money was paid and also the labor was made, of
17 the amount of money Mr. Able paid you, did you obtain a release from Mr. Able?

18 A. Yes.

19 Q. At the same time, did you obtain a release of any liability of Eagle
20 Window?

21 A. Yes.

22 (Whereupon, Plaintiff's Exhibit 4 was marked for identification.)

23 (Off-the-Record Discussion)

24 Q. (By Mr. Imhoff) And I'm going to hand you Plaintiff's Exhibit Number 4.

25 (Exhibit handed to the witness.)

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1 Q. Can you identify that release?

2 (Brief pause while the witness examines document.)

3 A. This is the settlement agreement and release between Renaul and
4 Karen Able and Gilliam Construction.

5 Q. Okay. Did does that release also release any liability of Eagle Window
6 for this — for this product defect?

7 A. No. They — no, they are not named in the settlement release.

8 MR. IMHOFF: May I approach, Your Honor?

9 THE COURT: (Nods affirmatively.)

10 MR. SINKLER: Are you offering that as an exhibit?

11 MR. IMHOFF: I'm sorry?

12 MR. SINKLER: Are you offering that as an exhibit?

13 MR. IMHOFF: I will, yes.

14 MR. SINKLER: Okay.

15 (Brief Pause)

16 Q. (By Mr. Imhoff) Do you see in Paragraph 1 that Eagle Window is
17 identified?

18 A. Yes, I do.

19 MR. IMHOFF: Your Honor, I would move to admit Exhibits 3 and
20 4 into evidence at this time.

21 MR. SINKLER: And what — what is 3? Is that 4 or what?

22 MR. IMHOFF: Yeah, it's 4.

23 MR. SINKLER: What is 3?

24 MR. IMHOFF: Three (3) is the letter from Renaul and 2 is the
25 letter — or invoice.

1 (Brief Pause)

2 MR. SINKLER: I have no objection.

3 THE COURT: All right. Without objection, it'll be 3 and 4.

4 (Whereupon, Plaintiff's Exhibits 3 and 4 were admitted into
5 evidence without objection.)

6 MR. IMHOFF: Your Honor, no — no further questions for Mr.
7 Gilliam at this time.

8 THE COURT: Okay.

9 Cross Examination by Mr. Sinkler:

10 Q. Mr. Gilliam, show you me in the settlement agreement or the eventual
11 release where there was any consideration other than the \$210,000 paid by Gilliam
12 and Gilliam Construction Company and Nationwide Insurance Company.

13 (Brief Pause)

14 A. I may need just a moment, sir.

15 (Pause while the witness examines document.)

16 A. In my — my quick scan of the document, I don't — I don't see it listed
17 here. I'm trying to tax an eight-year old memory of how this all went down.

18 Q. All right. But let me just represent to you, I've read this a number of
19 times myself and I don't see anything in the way of consideration other than under
20 Item Number 1 on Page 2. And, if you can find anything to the contrary, please, let
21 me know.

22 A. Okay.

23 Q. All right. Do you know where these windows came from originally?

24 A. Eagle manufacturers.

25 Q. And do you know where — where they work?

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- 1 A. Pardon?
- 2 Q. Do you know where Eagle manufacturing was?
- 3 A. Their manufacturing plant was in Dubuque, Iowa.
- 4 Q. So they were shipped all the way from there to Greenville, South
- 5 Carolina?
- 6 A. Right, to a distributor in Greenville.
- 7 Q. And that was over to Simpsonville at ----
- 8 A. Window and Door Concepts.
- 9 Q. Window and Door Concepts. That was Mr. Gold (phonetic)?
- 10 A. Charles Gold (phonetic).
- 11 Q. All right. Do you have any idea if those windows suffered any sort of
- 12 damage on — on the trip from Iowa to Greenville?
- 13 A. There was no damage noted when they were delivered to the home.
- 14 Q. Would there have been any damage noted at the time that you made
- 15 the window tests? Did you find damage noted?
- 16 A. No. It would be routine to inspect the delivery for damage; the
- 17 packaging, the windows themselves.
- 18 Q. Do you know whether they did that?
- 19 A. That was done, but no damage was noted at the time.
- 20 Q. How do you know that?
- 21 A. I was present. I'm present for all window deliveries.
- 22 Q. That survive (phonetic)?
- 23 A. Yes, sir.
- 24 Q. All right. Do you remember Mr. Still telling you about how tight the
- 25 space was for the installation of the windows?

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1 A. Define space, sir. I'm — I'm not sure what space you're talking about,
2 sir.

3 Q. The space of the opening to — to install the windows in the — in the
4 rough opening for the windows? (Phonetic)

5 A. I don't specifically recall that remark in any of his notes.

6 Q. All right.

7 (Brief Pause)

8 Q. If, in fact, the window opening was tight and made it difficult for the
9 window to be installed, would that be a problem?

10 A. The window would have to be re-framed to accept the — the window
11 that was sent for that opening.

12 Q. So you wouldn't want to force it in — into the opening?

13 A. We don't allow our crew to force the jams.

14 Q. All right.

15 (Brief Pause)

16 Q. Could the windows have been damaged in the installation?

17 A. Not to my knowledge.

18 Q. Could they have? Could they have? Is that a possibility?

19 A. I have — I guess it's possible, but I'm not aware of any damages.

20 Q. But the windows leaked?

21 A. Correct.

22 Q. So there's something -- something happened to the window to make it
23 leak, right?

24 A. Yes, sir. And it's my opinion that a metal-to-metal joint with no sealant
25 is going to leak.

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1 Q. Well.... There was no sealant put on it at all?

2 A. No, sir.

3 Q. And who installed the windows?

4 A. My — my crew that I hired that I subcontracted with installed the
5 windows.

6 Q. Is that Mr. Churchill (phonetic)?

7 A. Correct.

8 Q. Did he — did he put any sort of ----

9 A. Not at that particular joint we're talking about, no, sir.

10 Q. He didn't put anything else ----

11 A. No. It would not be ordinary to seal the window at that location.

12 (Brief Pause)

13 Q. Wasn't — wasn't the — did the stucco go all the way to the ground?

14 A. Yes, sir.

15 Q. Wasn't that one of the problems?

16 A. Not for the windows. The stucco did go all the way to the ground.

17 Q. So, if — if the water got into the window, or in through the window, it
18 had no way of getting — getting to the ground, right, because — because the stucco
19 was installed improperly?

20 A. I — I can't agree with that statement. The damages that were revealed
21 were isolated to the window area. The path of water damage was limited to the area
22 around the windows.

23 Any water that leaked in never would have had the opportunity to get
24 to the ground in that it was absorbed by the wood.

25 Q. All right. That's your opinion?

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1 A. Pardon?

2 Q. That's your opinion?

3 A. Yes, sir.

4 Q. Now, you — you gave a deposition, did you not?

5 A. I did.

6 Q. And you did that on the 21st day of December, 2005.

7 A. Yes, sir.

8 Q. And at Page —

9 MR. SINKLER: Do you have an extra copy of that?

10 MR. IMHOFF: (Shakes head negatively.)

11 MR. SINKLER: No? I'll — I'll just show him mine.

12 (Document handed to the witness.)

13 (Brief Pause)

14 Q. (By Mr. Sinkler) And referring to Page 122 of your deposition — can
15 you identify this as your deposition?

16 A. Yes, yes, sir.

17 Q. All right. At Page 122, Mr. Gibbs, who was deposing you, showed you
18 an Exhibit 36. And I have a copy of Plaintiff's Exhibit 36, which is a — (inaudible)
19 Imhoff's 0485. And you listed a number of payments that you — or a number of
20 expenses. Let me show you that.

21 (Document shown to the witness.)

22 Q. (By Mr. Sinkler) Do you recognize that?

23 A. Yes, sir, I'm familiar.

24 Q. All right.

25 MR. IMHOFF: Do you have a copy, Mr. Sinkler?

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1 MR. SINKLER: Excuse me?

2 MR. IMHOFF: Do you have a copy of that?

3 MR. SINKLER: Of this Exhibit 36?

4 MR. IMHOFF: To his deposition?

5 MR. SINKLER: Yeah. I don't.

6 MR. IMHOFF: Do you have the exhibits? I'm sorry. Are there
7 exhibits attached to his deposition that's with that?

8 A. No, not — not that I have. I have no exhibits.

9 Q. (By Mr. Sinkler) It probably did. At any rate, Mr. Gibbs said, "Let me
10 show you Exhibit 36." And, then, "I expect you know the answer to this without my
11 showing you the file, so, let me ask you what it is."

12 And your answer was, "It is a listing of monies that I've provided
13 Gilliam Construction Company..." — that I've provided Gilliam Construction
14 Company..." — meaning it provided — "...to pay for items I felt exceeded what would
15 be considered punch list items but were done in an effort to satisfy and make happy
16 things that we did in the house."

17 And, then, he asked you, "So it is money that Gilliam Construction has
18 spent on the house that you did not charge the Ables for?" And you said, "That's
19 correct."

20 MR. IMHOFF: Your Honor, can I object? I didn't hear a question
21 in — in any of that.

22 THE COURT: Okay.

23 MR. SINKLER: I'm asking — I'm asking him if he said, "That's
24 correct."

25 A. Yes.

1 Q. (By Mr. Sinkler) So tell me what — what these are as — compared to
2 the \$25,000 that the — you mentioned in the settlement.

3 A. Certainly. Mr. Able had a long list of issues that he found with the
4 house. Some justified; some I did not feel justified. But, in my practice as a builder,
5 I try to go out of my way to make sure my customer is happy.

6 At this time, I was building — 100% of my business was building in this
7 one community. And I strive try hard to maintain the reputation of doing whatever it
8 would take to make the customer happy.

9 The items that you see here are items that I completed in order to
10 make Mr. Able happy with his home. These were not items that were in the contract
11 of the home.

12 These were not items that are defective items as part of the
13 construction of the home. But these are items that he felt he needed to have in
14 order to be satisfied with the home.

15 Q. Okay. So did these items have anything to do with the \$25,000?

16 A. These do not.

17 Q. All right. That's all I have. All right.

18 (Off-the-Record Discussion)

19 Q. Do you have a copy of the \$10,000 check that — that you gave to
20 settle the case?

21 A. I do not have a copy with me here today, no.

22 Q. Do you have a — any sort of copy of the check that — that was given
23 by your insurance company to settle the case?

24 A. I do not possess a copy today.

25 (Brief Pause)

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1 Q. It would be your testimony that the insurance company paid \$20,000
2 and you paid ten (\$10,000)?

3 MR. IMHOFF: Objection, Your Honor. It misstates the facts. I'm
4 not sure where he got that.

5 THE COURT: Well, he can respond. He's on cross examination.

6 A. No, sir. I — I don't understand your numbers.

7 Q. Okay. When you settled, your total settlement was the twenty-one
8 thousand (\$21,000) — I mean was \$210,000?

9 A. Two hundred and ten thousand (\$210,000) plus there were other
10 expenses; professional engineering fees, attorney fees, just — that raised the
11 settlement amount to I believe it was two, forty-five (\$245,000).

12 Q. Well, in consideration for the release, it says it's \$210,000. And you
13 couldn't find anything else in the release that indicated there was any other
14 consideration paid.

15 A. That is what the release states, yes.

16 Q. All right. So how do we know additional monies were paid by the
17 insurance company if they're not in the release?

18 A. The additional monies — there were monies paid by Gilliam
19 Construction. One was a concession of the \$25,000. The other was the \$10,000
20 check.

21 Q. Why is that not mentioned in the release?

22 A. I don't know that.

23 Q. Okay.

24 MR. SINKLER: I don't have anything further, Your Honor.

25 THE COURT: Any redirect limited to what he went into?

1 MR. IMHOFF: Yes, Your Honor, just briefly.

2 Redirect Examination by Mr. Imhoff:

3 Q. If you would, please look at Exhibit Number 4, Mr. Gilliam.

4 (The witness complied with the request.)

5 A. Okay.

6 Q. And, if you turn to the second page, do you see paragraph Number 1?

7 A. Yes.

8 Q. And does that reads "We, Renaul Able and Karen Able, individually..."

9 and so on?

10 A. Yes.

11 Q. So that is the Ables' section of the release?

12 A. Correct.

13 Q. Turn to Page 2 and Paragraph 2, if you would, Mr. Gilliam.

14 (The witness complied with the request.)

15 Q. That starts, "We, Phillip Gilliam and Gilliam Construction Company,
16 Inc..." Do you recognize that?

17 A. Yes.

18 Q. Do you understand that to be your part of the release?

19 A. I do.

20 Q. Turn to Page 30 if — I'm sorry, Page 4, if you will.

21 (The witness complied with the request.)

22 Q. And, so, the first page, it is language where you are releasing the
23 Ables. Will you, please, read that paragraph at the top of Page 4?

24 A. Paragraph 3 or the paragraph above?

25 Q. It's — no, no, no, the paragraph above; just start reading.

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1 A. "...Are in any way connected with any and all damages to persons or
2 property resulting or to result or which might result in the future from any amounts
3 owed or allegedly owed by Plaintiffs to Defendants, relating to the property..."

4 Q. Okay. You can stop right here. What do you understand that you to
5 be releasing the Ables for there, Mr. Gilliam?

6 A. From any damages to persons or property which could result in any
7 money owed in the future by the Plaintiff to the Defendant.

8 Q. Okay. So it's "...any amounts owed or allegedly owed by Plaintiffs"?
9 Do you see that part?

10 A. Yes, sir.

11 Q. Do you know who the Plaintiffs were in that case?

12 A. Yes.

13 Q. Do you know who alleged that the Plaintiffs owed money?

14 A. Yes.

15 Q. Who?

16 A. I have alleged that the Plaintiffs owed money.

17 Q. Okay. Did you sign this document releasing the Ables from the money
18 that you allege they owe you?

19 A. Yes. I think I understand the question --- yes.

20 Q. Okay. Is that money the \$25,000 that the Ables owe to you?

21 A. Yes.

22 Q. Okay. Was that part of your concession to settle the case?

23 A. Correct.

24 Q. And you believe that they owe you that money?

25 A. Yes.

1 Q. Does Exhibit 3 — I'm sorry, 2 and 3 support your allegation that they
2 owe that money?

3 A. It does.

4 Q. Okay. And did Mr. Able's letter to you admit that he owed that money?

5 A. Correct.

6 MR. IMHOFF: No further questions, Your Honor.

7 MR. SINKLER: This is an exhibit, is it not, the settlement and the
8 release?

9 MR. IMHOFF: It's Number 4.

10 THE COURT: Thank you, sir. You may step down.

11 MR. SINKLER: May it please the Court?

12 (The witness complied with the Court's request.)

13 THE COURT: Yeah, just leave — you can take your deposition,
14 but leave all those things right there.

15 THE WITNESS: Okay.

16 (The witness complied with the request.)

17 (Brief Pause)

18 MR. IMHOFF: Your Honor, we would dismiss any allegations and
19 Defendants not already dismissed. If American Architectural Products,
20 Window — Window Door — Window and Doors Concepts, Inc., Charles Gold,
21 Harbor Plastering (phonetic), Phillip Bender (phonetic), Upstate
22 Waterproofing, Dale Coleman (phonetic) , and Gary Churchill, have not
23 previously been dismissed, we would do that at this time, leaving only Eagle
24 Window.

25 MR. SINKLER: Well, Mister — what they're trying to do is to — to

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1 try to see who is in contribution, the only ones that are active are those that
2 I'm dismissing? No, you can't do that.

3 And under — under the contribution provisions of the statute at the
4 time, you consider the various parties that have already been sued and —
5 and their contribution to the overall liability. And, then, you divide by that
6 figure and — and apply pro rata liability.

7 There's a case that the Supreme Court decided that Justice Toal
8 wrote, and I think I can provide you with a copy of it, that — that establishes
9 that based on the language of the statute in 2000, which is applicable to this
10 particular case, you can't consider relative degrees of fault. And you — you
11 got to apply pro rata liability.

12 And in the case of *Southeastern Freight Lines against The City of*
13 *Hartsville and South Carolina Department of Highways and Public*
14 *Transportation* (phonetic), the — the jury had to apportion liability for an
15 automobile accident that injured somebody in a way that applied 70% to
16 Hartsville and 20% to — no, 70% responsibility to somebody called
17 Southeastern, 20% to the city and 10% to the state.

18 And on appeal the Supreme Court ruled that you had apportion that
19 pro — pro rata so each one paid an apportionate share rather than that. And
20 I can — do you have another copy of that, that's not marked up.

21 (Off-the-Record Discussion)

22 MR. SINKLER: Your Honor, may I approach?

23 THE COURT: (Nods affirmatively.)

24 (Documents handed up to the Court.)

25 THE COURT: Thank you.

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1 **MR. SINKLER:** These are all parties to the suit. And two of them
2 are parties that have already settled and — and they're all — including Mr.
3 Gilliam, are all parties to the any contribution irrespective of whether he now
4 releases them or not.

5 **THE COURT:** I'm sorry? I missed that last part.

6 **MR. SINKLER:** Irrespective of whether he now chooses to release
7 them since — since he's trying to pin all the liability on Eagle Windows, the
8 old Eagle Windows.

9 **(Brief Pause)**

10 **MR. IMHOFF:** If I may, Your Honor. I guess my first question is,
11 is he objecting to me dismissing Defendants? I'm ---

12 **MR. SINKLER:** I'm — I'm objecting — I object to the purpose for
13 which you're doing it. That's what I object ---

14 **MR. IMHOFF:** Well, I'm not sure that it's the proper time to argue
15 this. I'm certainly welcome to. And what I would say is — is this; That it is --
16 Eagle Windows did not participate in the arbitration.

17 They have not really participated in this case. We may bring the case
18 against whomever we choose. If Eagle Window decides to put evidence up
19 that there should be other defendants; liable, responsible who contributed to
20 this damage, then, they're certainly welcome to do that.

21 What we are not going to do is continue a cause of action against
22 them or put any evidence up that any of the other defendants are responsible
23 or should be added to the group of defendants as Mr. Sinkler pointed —
24 pointed out as the denominator for the pro rata share.

25 He's welcome to put that up in his case.

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MR. SINKLER: And I think the statute requires it.

THE COURT: All right. Well, everybody is protected on the record.

MR. IMHOFF: Thank you. And — and I would say, I think there's — and I don't know where it is in here, but — but the Court — and the statute does envision that, even folks that are not part of the case, can be used to determine the denominator, the fraction so to speak.

But we're not going to put that evidence up. Eagle Window may.

THE COURT: Okay. All right. Thank you.

MR. IMHOFF: Your Honor, we would next call Randy Still.

(Whereupon, the requested portion of the proceeding concluded.)

REPORTER'S CERTIFICATE

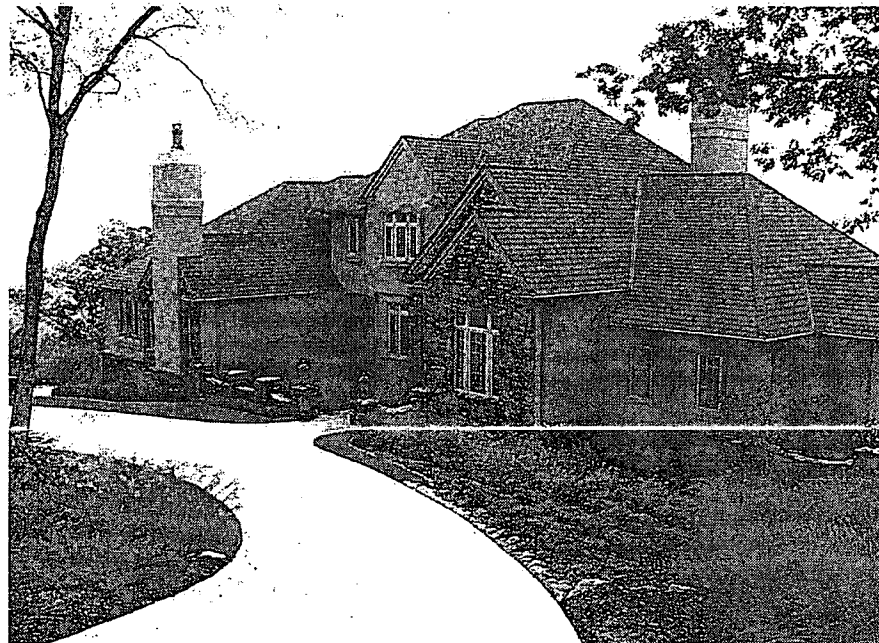
I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 35, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

March 13, 2014

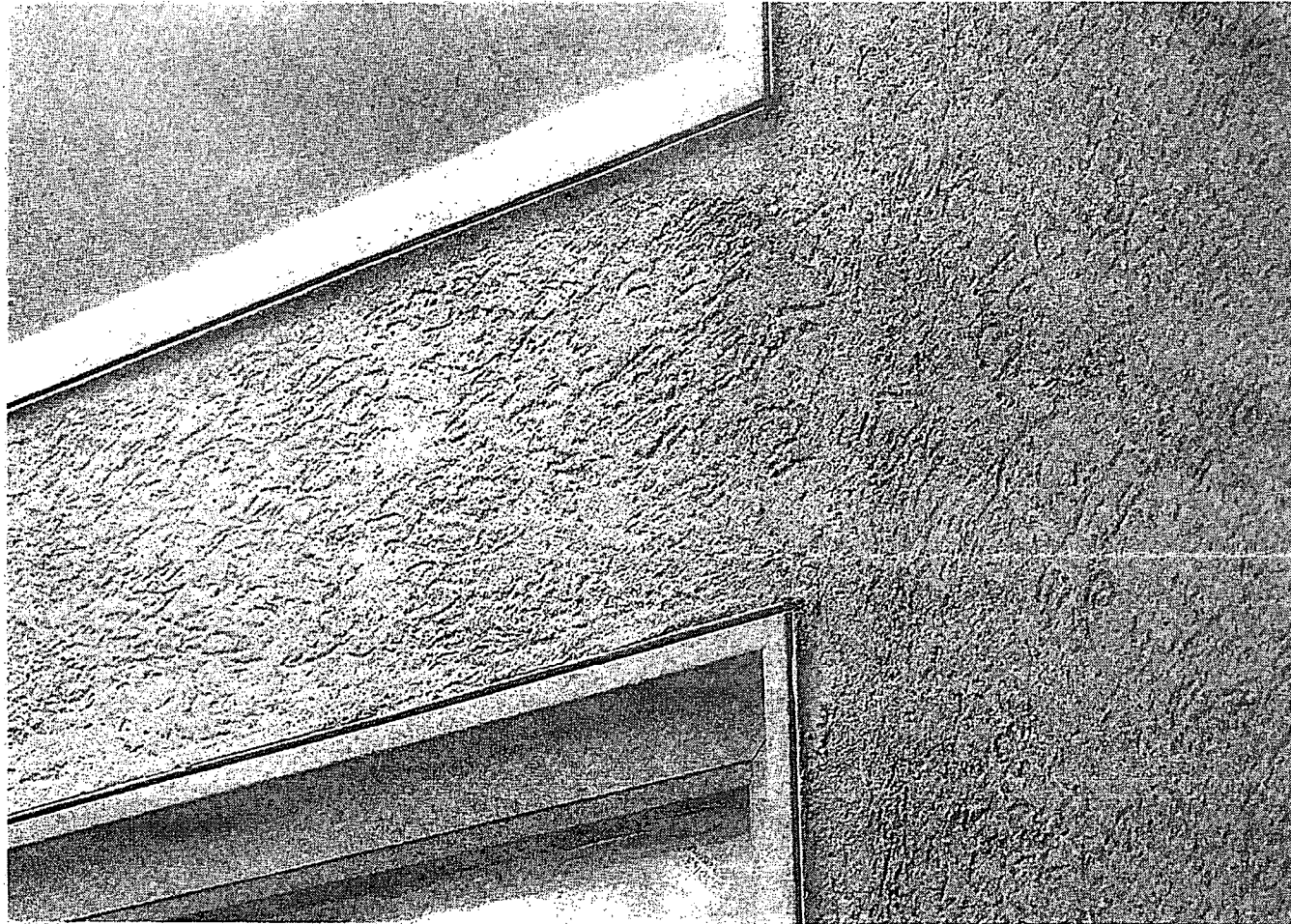
Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

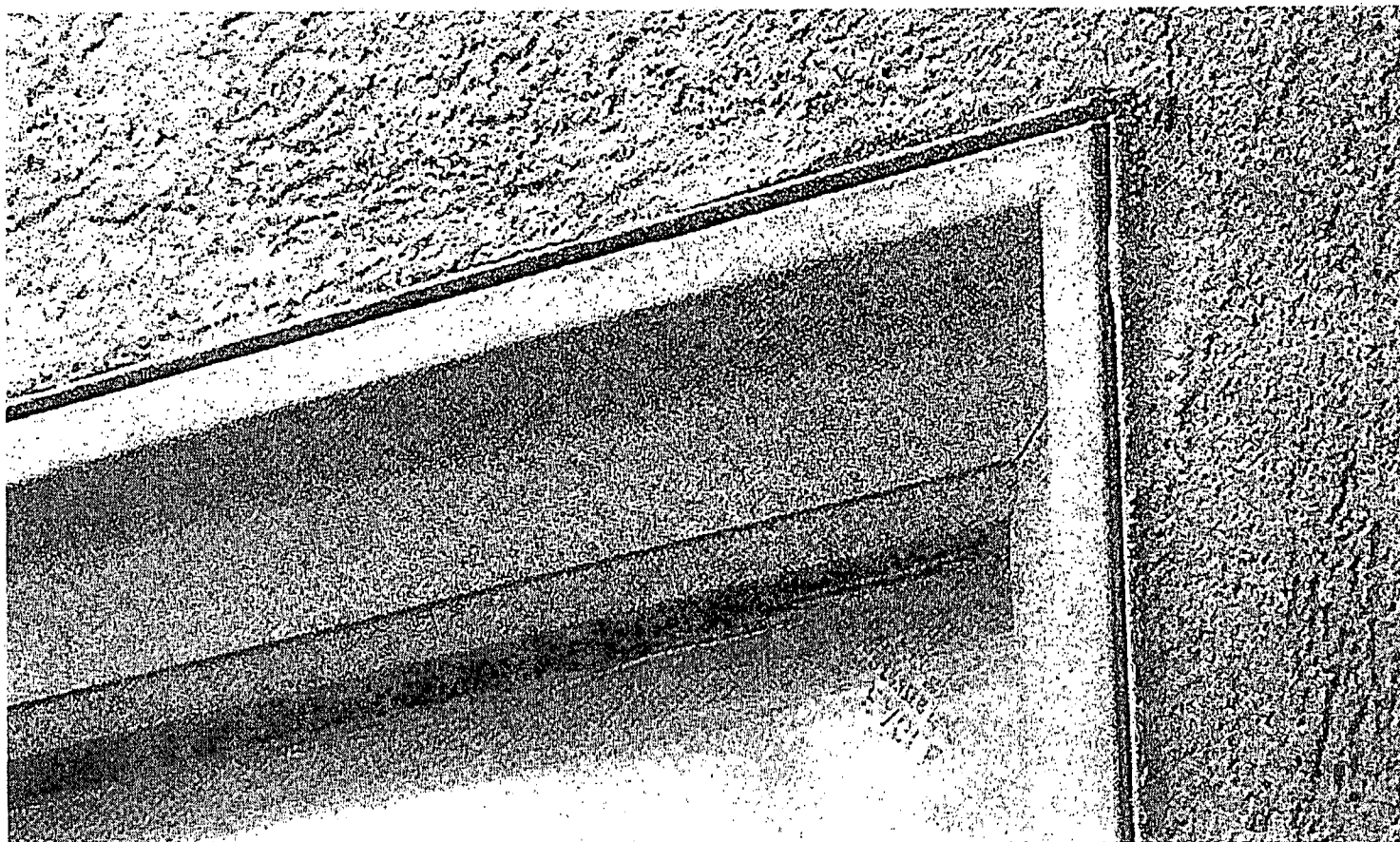
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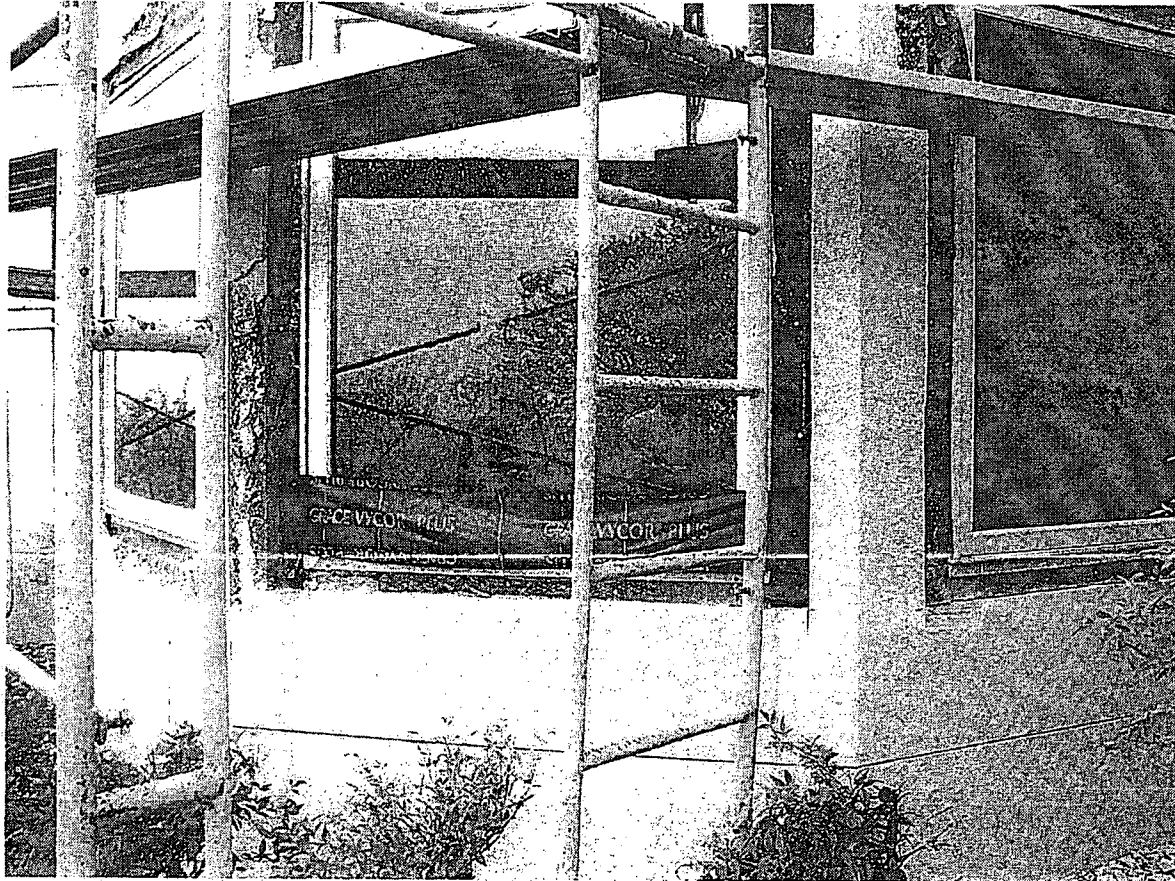


Able Residence, 4 Lobelia Way, Landrum, SC

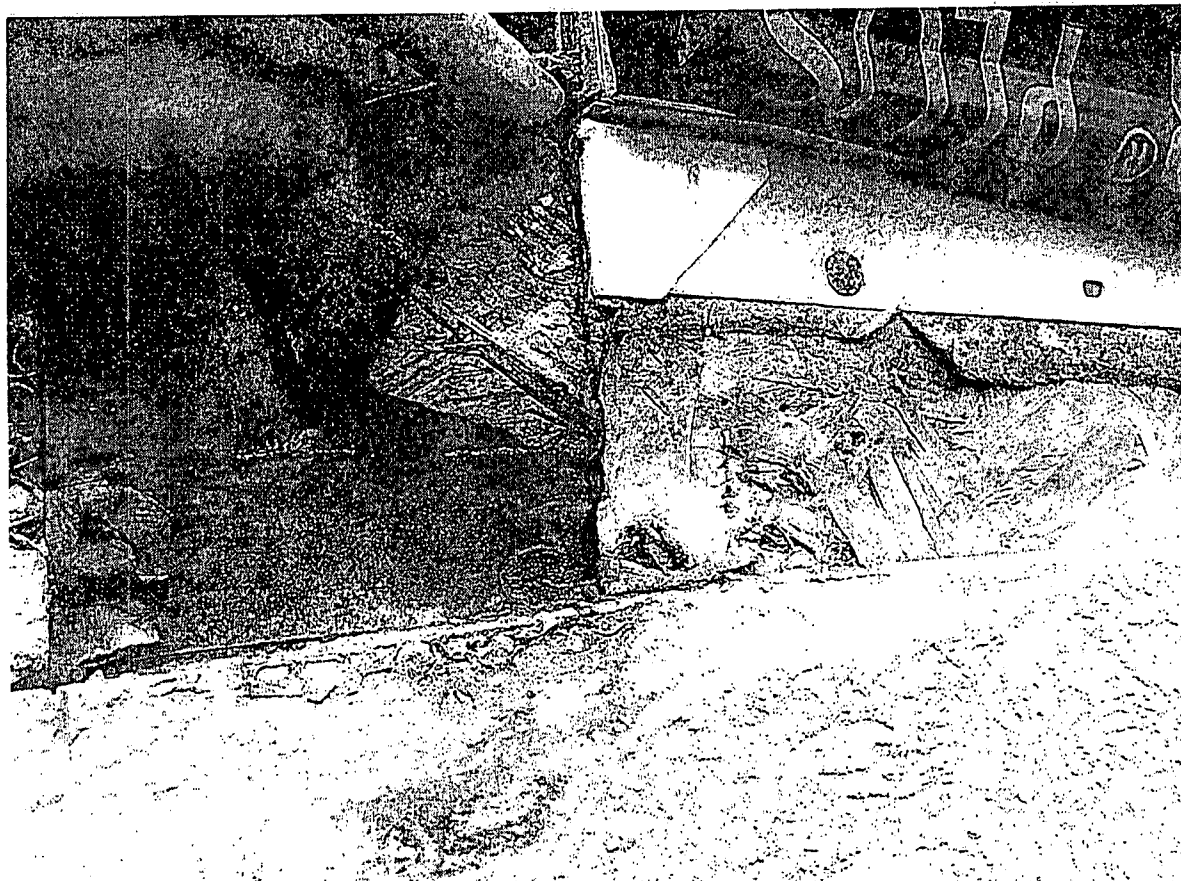




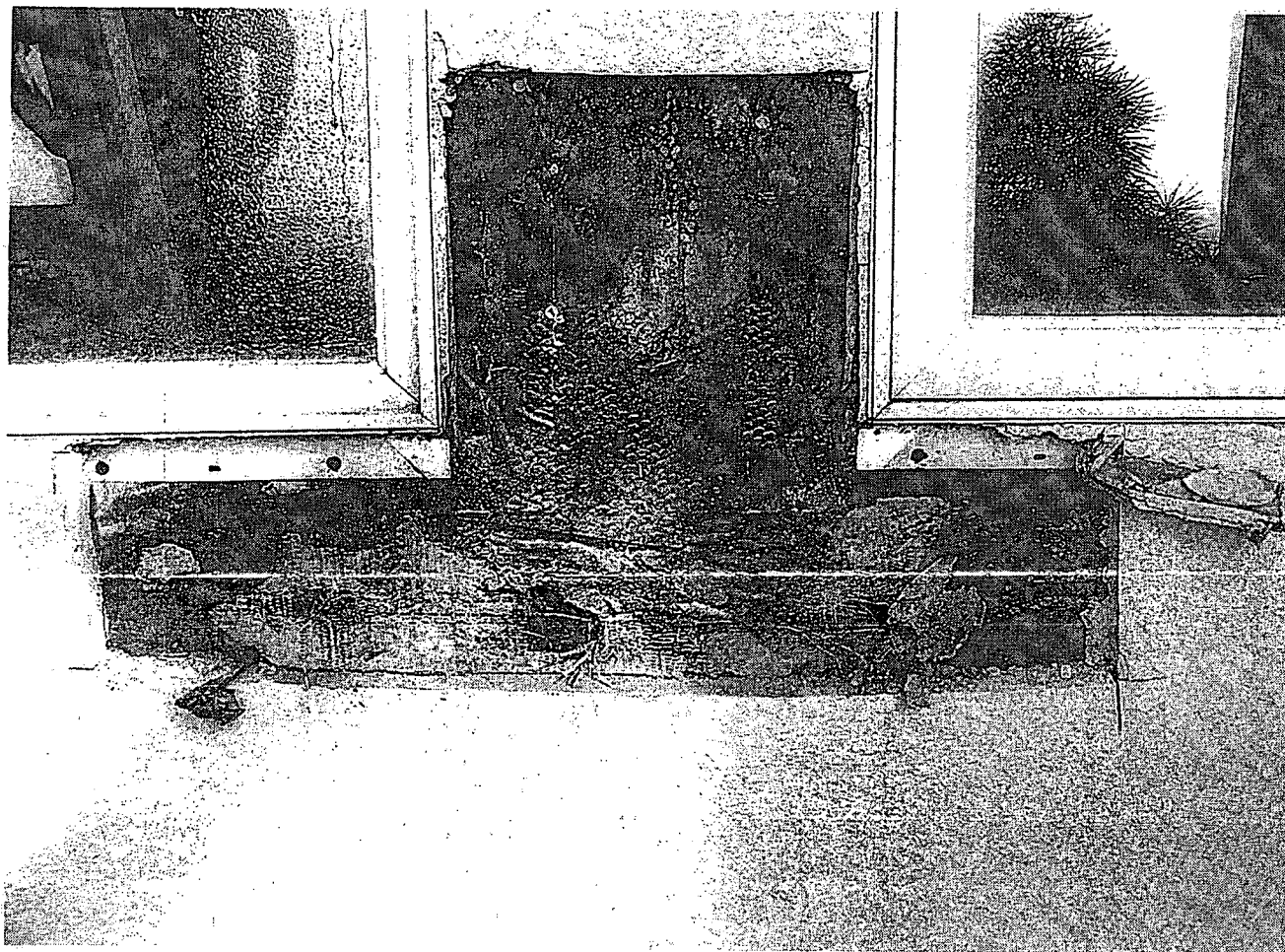


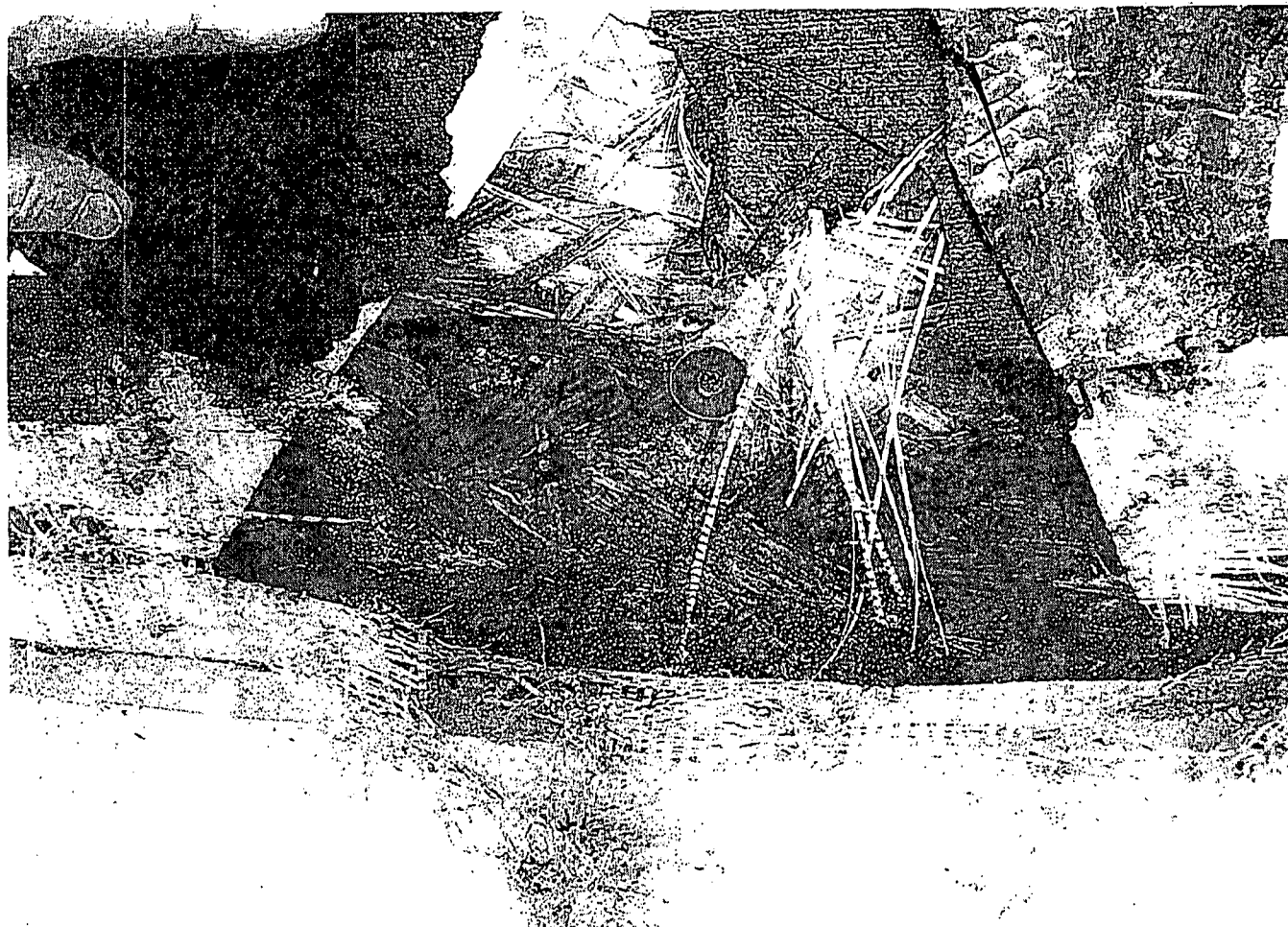


April 2005 Window Water Testing

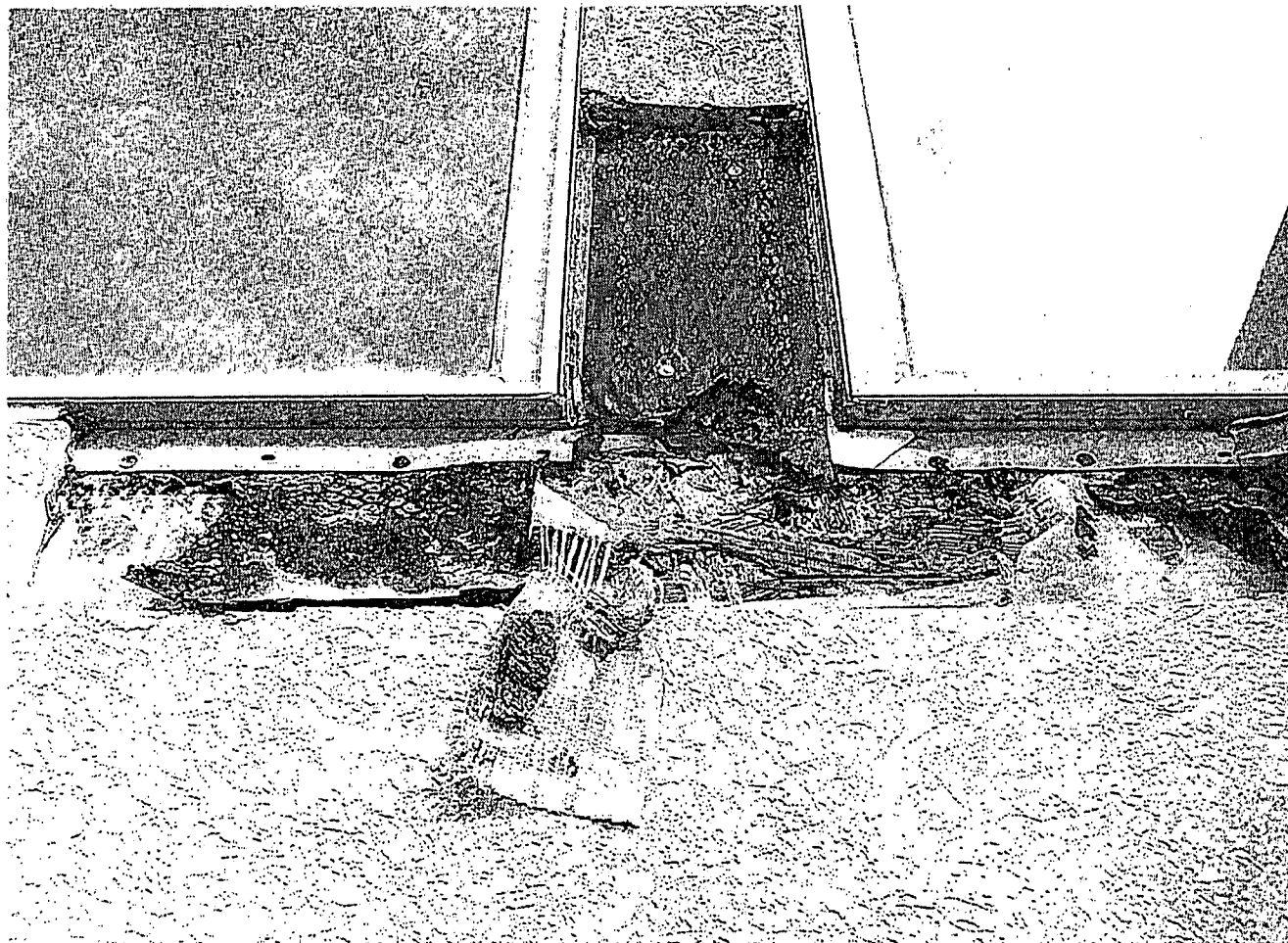


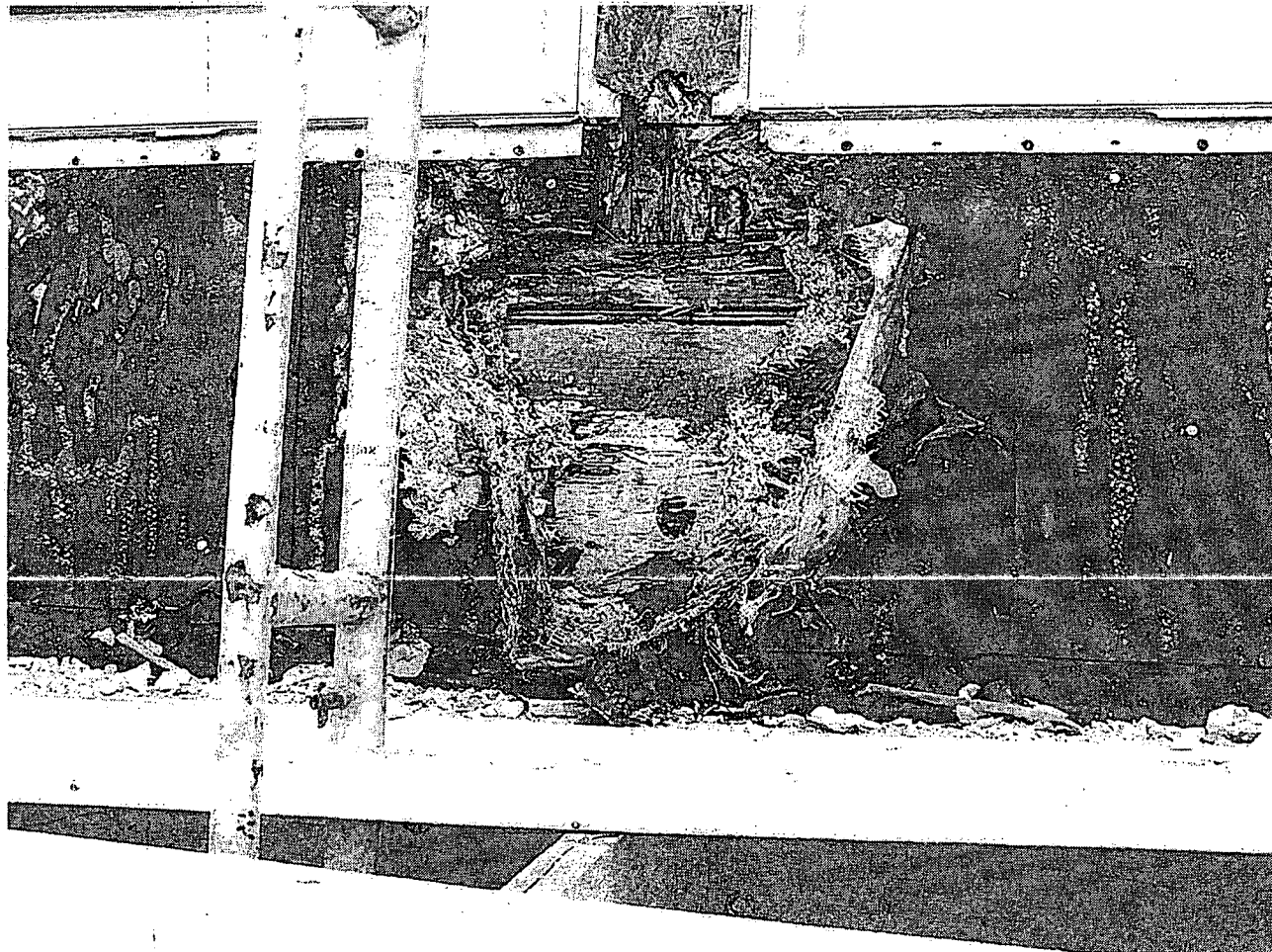
April 2005 Window Water Testing



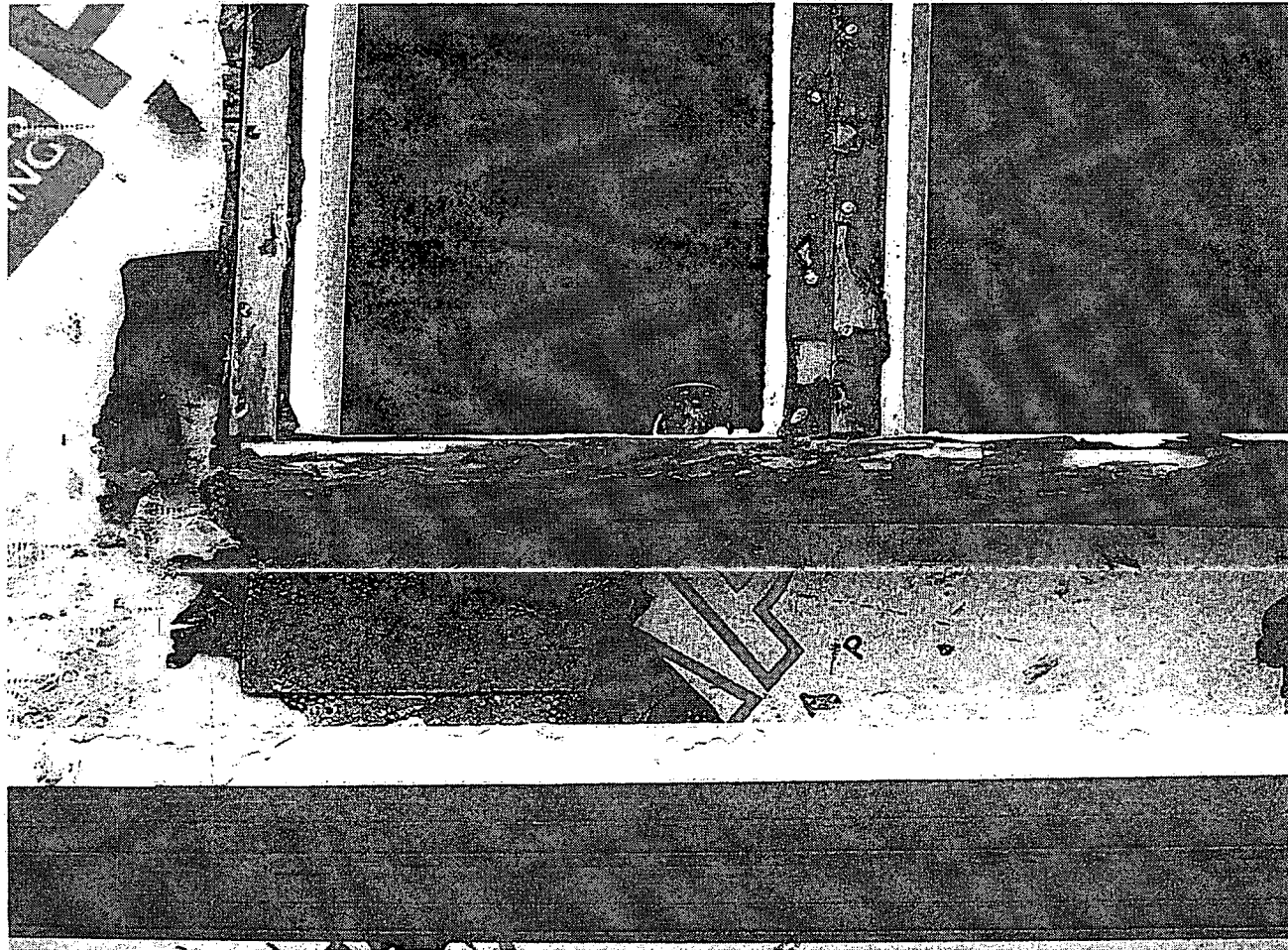








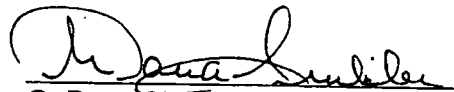




Certificate of Counsel

The undersigned hereby certifies that the Appendix to the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

12-8, 2014



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

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

v.

Eagle Windows & Doors, Inc. Appellant.

FINAL BRIEF OF APPELLANT

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1. THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGE 14 OF HIS ORDER OF JUDGMENT WAS IN ERROR WHEN HE RULED: "... A SUCCESSOR CORPORATION IS A MERE CONTINUATION OF ITS PREDECESSOR WHEN THE PREDECESSOR AND SUCCESSOR CORPORATIONS HAVE SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS. (CITING SIMMONS V. MARKLIFT INDUSTRIES, INC., 366 S.C. 308, 622 S.E.2d 213, 216 (2005). (EMPHASIS ADDED) BASED ON THE LANGUAGE USED BY THE COURT IN SIMMONS, TO PROVE THAT A MERE CONTINUATION EXISTS, A PARTY NEED ONLY SHOW THAT THE SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS; THUS PROVING THAT A SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS IS SUFFICIENT TO PROVE A MERE CONTINUATION.

2. THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGES 15, 16 OF HIS ORDER OF JUDGMENT WAS IN ERROR WHEN HE RULED: "EAGLE FOCUSES ON LINSALATA AND THE OFFICERS, SHAREHOLDERS OR DIRECTORS OF LINSALATA. LINSALATA IS NOT A PARTY TO THIS ACTION. PLAINTIFFS SUED EAGLE, NOT LINSALATA. EAGLE IS THE PROPER ENTITY THAT SHOULD BE ANALYZED IN DETERMINING THAT EAGLE IS A MERE CONTINUATION OF EAGLE."

1. THE RESPONDENTS WERE NOT ENTITLED TO ANY RECOVERY AT ALL FROM THE APPELLANT BECAUSE THEY FAILED TO PLEAD OR PROVE A DESIGN OR MANUFACTURING DEFECT IN THE WINDOWS.

2. THE RESPONDENTS WERE NOT ENTITLED TO RECOVER \$25,000.00 FOR WAIVER BY GILLIAM CONSTRUCTION COMPANY OF AMOUNTS CLAIMED IN THEIR COMPLAINT TO BE STILL DUE AND OWING BECAUSE PARAGRAPH 7 OF THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE ATTACHED TO RESPONDENTS' COMPLAINT RELEASED THE ABELS FROM ANY AND ALL OBLIGATIONS TO PAY ANY MONIES AT ALL.

3. COUNSEL FOR RESPONDENTS DID NOT HAVE THE RIGHT TO UNILATERALLY RELEASE APPELLANTS' CO-DEFENDANTS.

4. THE TRIAL JUDGE ERRED IN PROPERLY DETERMINING THE AMOUNT THE APPELLANT SHOULD PAY IN CONTRIBUTION GIVEN THE PROVISIONS OF THE APPLICABLE STATUTE AND SETTLEMENTS FROM BOTH THE SELLER OF THE WINDOWS AND THE STUCCO APPLICATOR.

5. THE TRIAL JUDGE ERRED IN ALLOWING PREJUDGMENT INTEREST WHEN, AT THE TIME THE CLAIM WAS MADE, THE SUM WAS NOT DEMANDABLE NOR WAS THE MEASURE OF RECOVERY FIXED.

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STATEMENT OF ISSUES ON APPEAL

WITH RESPECT TO SUCCESSION LIABILITY

1. WAS THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGE 14 OF HIS ORDER OF JUDGMENT IN ERROR WHEN HE RULED: "... A SUCCESSOR CORPORATION IS A MERE CONTINUATION OF ITS PREDECESSOR WHEN THE PREDECESSOR AND SUCCESSOR CORPORATIONS HAVE SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS. (CITING SIMMONS V. MARKLIFT INDUSTRIES, INC., 366 S.C. 308, 622 S.E.2d 213, 216 (2005) (EMPHASIS ADDED) BASED ON THE LANGUAGE USED BY THE COURT IN SIMMONS, TO PROVE THAT A MERE CONTINUATION EXISTS, A PARTY NEED ONLY SHOW THAT THE SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS, DIRECTORS OR SHAREHOLDERS; THUS PROVING THAT A SUCCESSOR CORPORATION HAS SUBSTANTIALLY THE SAME OFFICERS IS SUFFICIENT TO PROVE A MERE CONTINUATION." (R. p. 16)
2. WAS THE FINDING OF LAW MADE BY JUDGE HAYES AT PAGES 15, 16 OF HIS ORDER OF JUDGMENT IN ERROR WHEN HE RULED: "EAGLE FOCUSES ON LINSALATA AND THE OFFICERS, SHAREHOLDERS OR DIRECTORS OF LINSALATA. LINSALATA IS NOT A PARTY TO THIS ACTION. PLAINTIFFS SUED EAGLE, NOT LINSALATA. EAGLE IS THE PROPER ENTITY THAT SHOULD BE ANALYZED IN DETERMINING THAT EAGLE IS A MERE CONTINUATION OF EAGLE." (R. pp. 17-18)

WITH RESPECT TO CONTRIBUTION

1. WERE THE RESPONDENTS ENTITLED TO ANY RECOVERY AT ALL FROM THE APPELLANT WHEN THEY FAILED TO PLEAD OR PROVE A DESIGN OR MANUFACTURING DEFECT IN THE WINDOWS?
2. WERE THE RESPONDENTS ENTITLED TO RECOVER \$25,000.00 FOR WAIVER BY GILLIAM CONSTRUCTION OF AMOUNTS CLAIMED IN THEIR COMPLAINT TO BE STILL DUE AND OWING WHEN THE SETTLEMENT AGREEMENT AND MUTUAL RELEASE ATTACHED TO THE COMPLAINT, RELEASED THE ABELS FROM ANY AND ALL OBLIGATIONS TO PAY ANY MONIES AT ALL?
3. DID COUNSEL FOR RESPONDENTS HAVE THE RIGHT TO UNILATERALLY RELEASE APPELLANTS' CO-DEFENDANTS?
4. DID THE TRIAL JUDGE PROPERLY DETERMINE THE AMOUNT THE APPELLANT SHOULD PAY IN CONTRIBUTION GIVEN THE PROVISIONS OF THE APPLICABLE STATUTE AND SETTLEMENTS FROM BOTH THE SELLER OF THE WINDOWS AND THE STUCCO APPLICATOR?

5. DID THE TRIAL JUDGE ERR IN ALLOWING PREJUDGMENT INTEREST WHEN, AT THE TIME THE CLAIM WAS MADE, THE SUM WAS NOT DEMANDABLE NOR WAS THE MEASURE OF RECOVERY FIXED?

STATEMENT OF CASE

By their complaint, Nationwide Mutual Insurance Company (hereinafter "Nationwide") and its insured, Gilliam Construction Company, Inc. (hereinafter "Gilliam"), seek to impose successor liability on Eagle Window & Door Manufacturing, Inc. (hereinafter "Eagle, Inc.") for alleged defects in windows installed in a home constructed by Gilliam in 1999 and 2000 in Spartanburg, South Carolina for Renaul Abel and Karen Abel (hereinafter "the Abels").

After the project was completed and the named Defendants, as subcontractors and material suppliers, had completed their work, the Abels allegedly discovered deficiencies and defects in the home and its components and invoked the arbitration clause of the construction contract with Gilliam. None of the named Defendants participated in the arbitration proceedings, which were ultimately settled by Nationwide and Gilliam for \$210,000.00, as established by the Settlement Agreement and Mutual Release attached to the Plaintiffs' complaint as Exhibit A. (R. p. 28)

Thereafter, pursuant to S.C. Code § 15-28-20, Nationwide and Gilliam instituted the present action seeking contribution from the Defendants for "their share" of the settlement proceeds paid by Nationwide on behalf of Gilliam. The Defendants included American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman and Gary Churchill. All of the

Defendants subsequently settled, with the exception of Eagle, Inc., which denied its responsibility for any part of the settlement based on the terms of the Asset Sale Agreement approved by the Bankruptcy Court for purchase of the assets of the company which had originally sold the windows to a distributor which, in turn, sold them to Gilliam for the Abels' home; the windows were not manufactured or sold by the Defendant Eagle, Inc.

History Leading to the Sale of the Assets of Eagle to its Present Owner

The windows, which are the subject of this claim for the imposition of successor liability, were sold to the Defendant Window and Door Concepts, Inc. by a Delaware corporation chartered under the name of Eagle & Taylor Company, which then did business as Eagle Window & Door, Inc. (a fictitious name). (See Affidavit of Andrew Wickham, Exhibit A-2 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 126-127)

Eagle & Taylor Company, the Delaware corporation, was one of a number of wholly owned subsidiaries of American Architectural Products Company ("AAPC"), a publicly traded Delaware corporation. (See Exhibit A-2 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 126-127)

During the years August 1997 through August 1, 2003, Jonathan K. Schoenike was employed by AAPC as its General Counsel. During all relevant times he was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, he became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003.

(See Affidavit of Jonathan K. Schoenike, Exhibit B-2 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 130-131)

Commencing in August 1997, the officers of Eagle & Taylor Company included Frank Amedia as CEO, Dale Tucker as President, Joseph Dominijanni as Treasurer and James Phillips as Secretary. In October 1997, Jonathan Schoenike replaced James Phillips as Secretary. In 1999, David Beeken replaced Dale Tucker as President. In 1999, David Wolfe became the Assistant Secretary. In May 2001, Joseph Dominijanni replaced Frank Amedia as CEO and became CEO and Treasurer. (See Exhibit B-6 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. p. 131)

Throughout all relevant times, Eagle & Taylor Company operated two separate divisions; Eagle Window & Door, Inc. and Taylor Building Products, Inc., both ~~unincorporated~~ fictitious entities. Neither division was ever incorporated. (See Exhibit B-7 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 131-132)

Other individuals were identified as officers of Eagle Window & Door, Inc., but none of those officers, except for David Beeken, served as an officer of Eagle & Taylor Company. (See Exhibit B-8 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. p. 132)

In December of 2000, AAPC filed for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. As part of the bankruptcy case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company sought and obtained

permission from the Bankruptcy Court to sell to EWD Acquisition Co., a Delaware corporation wholly owned by Linsalata Capital Partners Fund IV, L.P. ("LinCap IV"), an Ohio Limited Partnership, substantially all of the assets of its division, Eagle Window & Door, Inc. (See Order of Bankruptcy Court dated April 19, 2002, Exhibit C to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 134-144) In May of 2002, the assets of Eagle & Taylor were sold to EWD Acquisition Co., wholly owned by LinCap IV. At that time, there were only two Directors of AAPC, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister owned between 72% and 73% of the company. Mr. Dominijanni owned 5% of the company. Neither David Beeken, nor any of the other officers of the fictitiously named division Eagle Window & Door, Inc. had any control of AAPC and if any of those officers had any stock in AAPC at all, it would not have amounted to more than between one tenth of one-hundredth percent to one-hundredth percent of AAPC. (See Exhibit B-9-11 to Appellant's Memorandum in Support to Motion for Summary Judgment, R. p. 132)

All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy case for the benefit of the creditors of AAPC. (See Exhibit B-12 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. p. 133)

The purchaser of the assets of Eagle & Taylor was LinCap IV through EWD Acquisition Co. (See Exhibit C, page 2, R. p. , and Press Release of AAPC dated May 8, 2002, Exhibit D to Appellant's Memorandum in Support of Motion for Summary Judgment, R. p. 135) None of the partners of Linsalata had any

connection with or ownership of Eagle & Taylor Company or AAPC. (See Exhibit A-11 and Exhibit B-14 to Appellant's Memorandum in Support of Motion for Summary Judgment, R. p. 128, 133)

Title to the assets was conveyed to EWD Acquisition Co. ("EWD"), a Delaware corporation created by LinCap IV. Thereafter, EWD changed its name to Eagle Window & Door, Inc.

In 2005, Andersen Corporation purchased Eagle, Inc. from Linsalata and it is now a wholly owned subsidiary of Andersen. In 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc.

ARGUMENTS

Successor liability was first considered by the Supreme Court of South Carolina in the case of Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924). In that suit, Brown, a customer of the Southern Express Company, brought an action against American to recover damages for the failure of Southern to deliver part of a shipment of automobile tires received by Southern for delivery to him. The trial court "held substantially that because the defendant [American] had acquired and taken over the business of [Southern] it should be held liable as a matter of law for the delicts and debts of its predecessor on grounds of public policy." 123 S.E. 98. The Supreme Court reversed, holding that:

In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: (a) that there was an agreement to assume such debts; (b) the circumstances surrounding the transaction must

warrant a finding that there was a consolidation of the two corporations; (c) or that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transfer was pretensive or the transaction fraudulent in fact." 123 S.E. 98,99.

Not until 2005 did the Supreme Court have another occasion to consider the issue of successor liability. In Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005), in response to a request from Judge Matthew Perry of the United States District Court of South Carolina, pursuant to Rule 228, SCACR, the Court granted certification from the District Court to address the following questions which are pertinent to the Motion for Summary Judgment filed by counsel for Eagle, Inc.

1. May a plaintiff maintain a product liability claim in South Carolina under a successor liability theory against a defendant which purchased only assets of a voluntarily bankrupt selling company in an arms-length and court-approved bankruptcy sale and the purchasing company did not approve of, participate in, cause, or contribute to the selling company's bankruptcy?

2. In the product liability context in South Carolina, what test is employed to determine whether there is successor liability of a company which purchased the assets of an unrelated company?

In Simmons, Plaintiff brought a products liability suit which was removed to Federal Court for injuries he sustained on August 9, 1999, when an elevated scissorlift aerial work platform supporting him collapsed. The platform had been designed, manufactured and sold in 1990 by Mark Industries, Inc. (Mark), a California corporation.

In July of 1991, Mark had filed for bankruptcy and the bankruptcy court entered an order on November 6, 1991 granting Mark's motion to sell specified assets for adequate consideration. Terex Corporation (Terex) was the winning bidder of the assets at an auction the next day. Following the auction, Mark and Terex entered into a purchase agreement providing, inter alia, that the sale was free and clear of liens and claims and there was no assumption of liability for products manufactured or sold to Mark. The assets purchased by Terex included the inventory of supplies, raw materials, work in progress, finished goods, trademarks, service marks, trade names, goodwill and all intellectual property, such as drawings, designs, blueprints, patents, licenses and technology.

In considering the two questions posed by Judge Perry, the Supreme Court found the following facts:

1. Simmons brought a product liability action in state court against Mark Industries, Inc., Terex Corp. (Terex), Lift Industries, Inc. and BPS. The case was removed to Federal Court.
2. Simmons was injured in a construction accident which occurred on August 9, 1999, when an aerial work platform collapsed.
3. The aerial work platform was designed, manufactured and sold by Mark Industries, Inc. (Mark) in 1990.
4. On July 15, 1991, Mark filed for Chapter 11 Bankruptcy.
5. The Bankruptcy Court entered a written order dated November 6, 1991 granting Mark's motion to sell certain assets and proceeded to hold a court-supervised public auction of assets.

6. Terex submitted the highest bid at public auction.

7. Terex and Mark entered into an arms-length Purchase Agreement for specified assets. Under the Agreement, 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 such as drawings, blueprints, patents, licenses and technology.

8. On November 13, 1991, the Bankruptcy Court approved the auction.

9. On December 5, 1991, Terex created Lift Industries, a separately incorporated subsidiary, and assigned its rights under the Purchase Agreement to Lift Industries.

10. Between December 10, 1991 and September 1992, Terex, through its wholly owned subsidiary Lift Industries, rehired many former Mark employees and started the construction of aerial work platforms that were comparable to the one involved in Simmons' accident.

11. Prior to the bankruptcy auction and order, neither Terex nor Lift Industries had any business relationship with Mark until purchasing its assets in the Bankruptcy Court auction. There has never been any commonality of officers, directors, or stockholders between Mark and Terex. (Emphasis the Court's)

Based on these facts, the Supreme Court advised the United States District Court that it could decide the case in accordance with existing South Carolina authority, assigning a footnote to Exception (3) (the successor company

was a mere continuation of the predecessor). The footnote referenced the 12 page dissent of Justice Burnett and held:

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 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. (Emphasis added)

The second sentence of this paragraph beginning with "only when" is an exact replica of Justice Burnett's Dissent at page 316.

In Simmons, after the certified questions were answered by the Supreme Court, Judge Perry granted the motion of Terex for summary judgment, holding, on the basis of Simmons:

In the present case, there is no commonality of officers, directors, and shareholders. The parties have certified that Terex did not have any business relationship with Mark until the purchase of assets supervised by the Bankruptcy Court. In addition, there is no, nor has there ever been, commonality of the officers, directors or stockholders between Terex or Lift Industries and Mark. Therefore the facts cannot support a finding that a 'mere continuation' exception applies. (Emphasis added)

(See Opinion of Judge Perry; Exhibit A to Appellant Supplemental Memorandum in Support of Motion for Summary Judgment, R. pp. 167-168)

The rulings of law articulated by Judge Hayes are in error and completely eviscerate the opinion of the Supreme Court in Simmons by establishing a test for successor liability which would allow a finding of successor liability based on

the existence of any one of the three tests enumerated by the Supreme Court, i.e. commonality of officers or commonality of directors or commonality of shareholders. The Supreme Court did not use the disjunctive or but instead used the conjunctive and, as did Judge Perry. Obviously, commonality of ownership could not be determined without consideration of stockholders who usually own all of the corporation.

The Court of Appeals in Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (2008) confirmed the Supreme Court's holding, stating: "In Simmons v. Marklift 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 sellers and purchasers." This was binding precedent for the lower court, but not even mentioned.

But not only did the Circuit Judge apply the wrong test to the evidence before him, he compounded his error by refusing to recognize the identity of the predecessor and the successor, i.e. AAPC/Eagle & Taylor Company and LinCap IV/EWD Acquisition.

It does not matter that Linsalata is not a party to the suit. The Court has to focus on the "predecessor and successor" in order to determine whether there existed ~~commonality of~~ ownership between those two parties before the bankruptcy.

AAPC owned all of Eagle & Taylor Company and determined to sell its assets to generate sufficient capital to pay its creditors and continue in business. It was the predecessor or seller. LinCap IV owned all of EWD Acquisition and

was the successor or purchaser. (See Asset Sale Agreement attached as Exhibit 1 to Corrected Exhibit A to Appellant's Memorandum in Support of Motion for Summary Judgment, R. pp. 59-122)

PROOF SUBMITTED BY EAGLE

Eagle obtained and filed with the lower court, 3 affidavits establishing that, pre-bankruptcy, there was no relationship between AAPC and its' wholly owned subsidiary, Eagle & Taylor Company or any of their employees and Linsalata Capital Partners Fund, IV, (LinCap) which, through its wholly owned subsidiary, EWD Acquisitions Co., on April 15, 2002 became the successful bidder for substantially all the assets of Eagle & Taylor Company for \$64,750,000.00. The facts set forth in the affidavits have never been questioned and the Plaintiff has offered no affidavits or taken any discovery to dispute them.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The first affidavit was from Andrew Wickham. He is currently the Finance and Business Integration Manager of Eagle Window & Door Manufacturing, Inc., a Delaware corporation originally created on April 10, 2002 by Linsalata Capital Partners Fund, IV, L.P. as EWD Acquisition Co. After the asset purchase, by amendment dated May 1, 2002, EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. (Eagle Inc.).

Mr. Wickham's affidavit establishes that:

"7. None of the officers of Eagle were officers, directors or shareholders of LinCap or any of the three corporations created by it in conjunction with the Eagle asset purchase until after the sale of the assets to EWD Acquisition, Inc. which changed its name to Eagle Window & Door, Inc." (Emphasis Added) (R. p. 127)

This was identical to what happened in the Simmons case as confirmed by the Supreme Court's findings in the last paragraph of the Court's Factual/Procedural Background.

"8. Effective May 6, 2002, Stephen B. Perry, the Senior Vice President and CFO of Linsalata Capital Partners Fund IV, LP, the then sole Director of Eagle Window & Door, Inc. (Eagle, Inc.), which was the successor by name change of EWD Acquisition, Inc., removed the existing officers of Eagle, Inc. and appointed himself as Chairman and the following officers:

David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller"

(See Exhibit 2) (R. p. 123, 128)

"9. Effective May 7, 2002, Stephen B. Perry then removed from office the Directors of Eagle, Inc. and appointed himself, Chairman, and Frank N. Linsalata and Ronald H. Neill, an attorney for Linsalata, as Directors. (See Exhibit 3)" (R. p. 124, 128)

"10. Not until sometime prior to January 27, 2003 was David Beeken made a Director of Eagle Window & Door, Inc. (See Exhibit 4)" (R. p. 125, 128)

"11. There was no commonality of ownership between LinCap and AAPC or Eagle & Taylor Company, nor did AAPC or Eagle & Taylor Company and LinCap have substantially the same officers, directors and shareholders." (R. p. 128)

The second affidavit obtained and offered to the court was given by Jonathan Schoenike, a 51 year old attorney at law, living and practicing law in Mahoning County, Ohio. His affidavit establishes:

"2. During the years August 1997 through August 1, 2003, I was employed by American Architectural Products Company ("AAPC") as its General Counsel, a publically traded corporation organized and existing under the laws of the State of Delaware. During all relevant times I was also the General Counsel for each and every subsidiary company of AAPC. In October 1997, I became Secretary of AAPC and each and every subsidiary company of AAPC and held that position through August 1, 2003." (R. pp. 130-131)

"4. At all relevant times, Eagle & Taylor Company, a corporation organized and existing under the laws of the State of Delaware, was a wholly owned subsidiary of AAPC, doing business as Eagle Window & Door, Inc., a fictitious name." (R. p. 131)

"9. In December 2001, AAPC filed a petition for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (the "Bankruptcy Case".) (R. p. 132)

"10. As part of the Bankruptcy Case, AAPC, through its wholly owned subsidiary Eagle & Taylor Company, sought and obtained permission from the Bankruptcy Court to sell substantially all of the assets of Eagle Window & Door, Inc. to Linsalata Capital Partners Fund IV, L.P. in May 2002 (the "Bankruptcy Sale")." (R. p. 132)

"11. At the time of the Bankruptcy Sale, AAPC had only 2 directors, to wit: George Hofmeister and Joseph Dominijanni. Mr. Hofmeister, either personally or through a series of trusts or other holding companies, owned between 72% and 73% of AAPC. Mr. Dominijanni owned approximately .5% of AAPC. At the time of the Bankruptcy Sale, neither David Beeken nor any of the other officers of the fictitiously named, Eagle Window & Door, Inc., had control of AAPC, and if such persons had any ownership interest in AAPC at all, such ownership interest would not have amounted to more than between one-tenth to one one-hundredth percent of AAPC." (R. p. 132)

"12. All equity interests in AAPC were eliminated through the plan of reorganization approved by the Bankruptcy Court in the Bankruptcy Case for the benefit of the creditors of AAPC." (R. p. 133)

"13. I am not aware of any relationship between David Beeken and each of the officers of the fictitiously named Eagle Window & Door, Inc. on the one hand and the Officers and Directors of Linsalata Capital Partners Fund IV, L.P. on the other." (R. p. 133)

"14. There was no commonality of ownership between AAPC and Linsalata Capital Partners Fund IV, L.P." (R. p. 133)

The third affidavit was given by Stephen B. Perry. He is 57 years old and a resident of Bentleyville, Ohio. He is Co-President and Senior Managing Director of Linsalata Capital Partners, which is a Cleveland, Ohio middle market private equity buyout firm. He has firm responsibilities for administration of investment partnerships including Linsalata Capital Partners Fund IV, L.P. (LinCap), which was the successful bidder for a substantial portion of the assets of Eagle & Taylor Company (E&T), which was a wholly owned subsidiary of American Architectural Products Company (AAPC).

In paragraph 2 and 3 of his affidavits, Mr. Perry recounts the events leading to LinCap's decision to become involved in the bankruptcy sale proceedings. (R. p. 170)

His affidavit at paragraph 4 establishes the complete absence of any prior connection between LinCap and Eagle & Taylor Company or its parent AAPC.

"4. Prior to this, LinCap had had no business dealings, nor any contact with Eagle & Taylor d/b/a Eagle Window & Door, Inc., or its parent, AAPC. Further, LinCap had played no role in approving of, participating in, causing or contributing to AAPC's bankruptcy." (R. p. 170)

"5. The Bankruptcy Court issued an Order on March 19, 2002 "(1) Scheduling Date and Time for Hearing on Sale of Eagle Assets: (2) Approving Procedures for Notice and Submission of Competing Bids: and (3) Approving Break-Up Fee" (the "Bidding Procedures" Orders), which provided, among other things, for the solicitation and submission of competing bids for the assets by no

later than April 9, 2002. LinCap submitted a Qualified Bid of \$50,150,000 and was thus entitled to participate in the auction of the assets." (R. pp. 170-171)

"6. Thereafter, an auction conducted by or on behalf of the Bankruptcy Court was held in Cleveland, Ohio on April 15, 2002." (R. p. 171)

"7. He, personally, was the bidder for LinCap and, after a considerable period of time and at least 15 competing bids, he emerged as the successful bidder on behalf of LinCap at a price of \$64,750,000. Immediately after the conclusion of the bidding, the parties, LinCap, by its affiliate EWD Acquisition Co., and AAPC/Eagle & Taylor d/b/a Eagle Window & Door, Inc., entered into an Asset Sale Agreement. (See page 2 of Bankruptcy Order). The Asset Sale Agreement did not assume and specifically excluded "any liability for damage to third parties resulting from acts, events, or omissions occurring prior to the Closing Date, . . ." ¶ 2.3(a)" (R. p. 171)

His affidavit also recounts the mechanics of the bidding process in paragraphs 5-7 culminating in the execution of an asset sales agreement which was signed only by Mr. Perry for LinCap and Mr. Dominijanni, the CEO of Eagle & Taylor and President and CEO of AAPC. At paragraph 17, Mr. Perry again confirms that at pre-bankruptcy there was no commonality of ownership between the two companies. (R. p. 174)

At paragraph 16, his affidavit also established that LinCap through its wholly owned subsidiary, EWD Acquisition Co. was the successor to AAPC/Eagle & Taylor Company d/b/a Eagle Window & Doors, Inc. which was its predecessor. (R. p. 174)

In both Simmons and Walton, the Supreme Court and the Court of Appeals focused on whether there was any pre-bankruptcy connection between the predecessor and successor companies. The affidavits of Messrs. Wickham, Shoenike and Perry conclusively establish that there was no commonality of ownership, i.e. the same officers, director and shareholders before the bankruptcy.

Excerpts from additional cases from other jurisdictions and treatises amplify the reasoning for the test enumerated in Simmons

The mere continuation exception applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [citing authority] In other words, the purchasing corporation is merely a 'new hat' for the seller, with the same or similar management and ownership. [citing authority] In determining whether one corporation is a continuation of another, the test 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. [citing authority] Therefore, "the key element of a 'continuation' is a common identity of the officers, directors and shareholders in the selling and purchasing corporation." Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Cir., 1977) (Emphasis added)

* * *

Although some of B&B's officers may have been employed by Eastern, mere employment is insufficient to warrant application of the continuation exception. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451 (11 Cir. 1985)

* * *

In support of his contention that Thuxmore was a "mere continuation" of Thuxmore Industries, the executor alleges that Thuxmore acquired all of its predecessor's assets, including the goodwill; undertook essentially the same manufacturing

operation as that of its predecessor, and at the same location; held itself out to the world as the ongoing concern of its predecessor; maintained, for a time, essentially the same personnel; made an active effort to maintain the same customers; required its predecessor to cease its ordinary business operation and to liquidate its business as soon as practicable; and assumed some of its predecessor's liabilities.

A common identity of the officers, directors, and stockholders in the selling and purchasing corporation is the key element of a "continuation." [citing precedent] When, however, the purchaser of all the assets of a corporation is a bona fide arm's-length transaction the "mere continuation" exception does not apply." Harris v. T.I., Inc., 413 S.E.2d 605, 609 (VA. 1992) (Emphasis added)

* * *

In the instant case there was presumably a continuity of actual manufacturing operations. The lands, buildings, machinery and trade names were sold, and it is apparent that the purchaser intended to make use of all these in the manufacture of the same type of product. It was also stipulated in the contract of sale that the purchaser would employ the vice-president, secretary and treasurer of Seybold at the respective individual's request. The length of required employment was one year. However, this provision was merely to insure the economic stability of those officers immediately after the transfer. The contract did not state the capacity in which they were to be employed. In short, there is no evidence of continuity of management. As stated previously, there was also no continuity of stockholder investment, and the selling corporation retained its separate identity well after the sale took place. Neither were there common directors or officers at the time of the sale. When one company purchases all the assets of another, it is to be expected that the purchasing corporation will continue the operations of the former, but this does not by itself render the purchaser liable for the obligations of the former. For liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller. *Bergman & Lefkowitz Insurance Ag. v.*

Flash Cab Co., 110 Ill. App. 2d 415, 24 N.E.2d 729 (App. Ct. 1969). The purchaser-movant was not such a continuation of Seybold as to render it liable for the latter's torts. McKee v. Harris-Seybold Company, 264 A.2d 98, 106 (NJ 1970)

* * *

It is equally well settled when the sale is a bona fide transaction, and the selling corporation receives money to pay its debts, . . . equal to the fair value of the property conveyed by it, the purchasing corporation will not, in the absence of a contract obligation or actual fraud of some substantial character, be held responsible for the debts or liabilities of the selling corporation. West Texas Refining & D. Co. v. Comm'r of Internal Revenue, 68 F.2d 77, 81 (10 Cir. 1933).

* * *

Continuation or reincarnation of the predecessor in the successor, such as would warrant imposition of liability for products liability claims on the successor, exists when there is such a continuity of ownership and control between the corporations that the transfer constitutes an arrangement whereby the same persons establish another corporation in order to take over and concentrate the control of the predecessor's property, or when the successor merely represents a new hat for the predecessor. The gravamen of the mere continuation exception to nonliability of a successor entity is continuation of the corporate entity rather than continuation of business operations. The focus is almost wholly on what happens to the corporate forms of the parties participating in the asset transaction; continuity of business, name, and management alone is not a sufficient basis for imposing liability.

The indicia of continuation include a common identity of the officers, directors, and stockholders in the selling and purchasing corporations; continuation of the business operations of the predecessor, evidenced by the use of the same name, the same location, and the same employees; and the existence

of only one corporation at the conclusion of the transaction, that is, the predecessor corporation must be extinguished. In order to recover under the mere continuation theory, it must appear that the successor corporation is the same legal entity, or the same legal person, as the predecessor.

AMERICAN LAW OF PRODUCTS LIABILITY 3D: Liability of Successor for Injury Caused by Product of Predecessor (Chapter 7) (Emphasis added)

* * *

§ 12 Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

COMMENTS & ILLUSTRATIONS: Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When

the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: 'one . . . who sells or distributes a defective product is subject to liability for harm . . . caused by the defective product.' (Emphasis added.) Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not 'sell or distribute' the defective product that caused the harm. 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: PRODUCTS LIABILITY, § 12

CONTRIBUTION - AMOUNT INVOLVED

THE PLAINTIFFS NATIONWIDE INSURANCE COMPANY, PHILLIP GILLIAM AND GILLIAM CONSTRUCTION COMPANY, INC. CANNOT RECOVER COMPENSATION FOR AMOUNTS CLAIMED IN THEIR COMPLAINT AS "WAIVER BY GILLIAM CONSTRUCTION OF AMOUNTS STILL DUE AND OWING UNDER THE CONTRACT."

The Settlement Agreement and Mutual Release, attached to the Complaint filed by Nationwide and Gilliam Construction Company, was entered

into on the 21st day of March 2006, by and between the Plaintiffs, Renaul N. Abel and Karen V. Abel, and Defendants Gilliam Construction Company, Inc. and Phillip A. Gilliam. This was more than 10 months before the Complaint in this action was filed on January 26, 2007. The sole consideration for the Settlement Agreement and Mutual Release was \$210,000.00. (See Settlement Agreement and Release attached to Respondents' Complaint, R. p. 29) There was no mention whatsoever of any further consideration and the allegations in the Complaint that the consideration included the "waiver by Gilliam Construction of amounts still due and owing under the Contract" is a complete fabrication. Not only was there no mention of such consideration, but in Paragraph 2 of the Settlement Agreement And Mutual Release, both Phillip Gilliam and Gilliam Construction Company, Inc. totally released the Abels from any and all obligations to pay any monies at all. In short, there were no claims against the Abels that survived the Settlement Agreement And Mutual Release and the testimony of witnesses to the contrary is without legal credibility.

CHANGE OF CAPTION – UNILATERAL RELEASE OF DEFENDANTS

The Plaintiffs after receiving settlements of two of the named Defendants, Hobbit Plastering, Inc., the stucco applicator, for \$41,000.00 and Window and Door Concepts, the window seller, for \$24,000.00, (Trial Transcript, pp. 45-46, R. pp. 276-277), apparently, without notice to Eagle or Eagle's counsel, began unilaterally dismissing Defendants named in its Complaint, for the sole purpose of isolating Eagle as the only Defendant.

First, SCRCP Rule 5(a) Service: When Required provides that: "unless otherwise ordered by the Court because of numerous Defendants or other reasons, all (1) written Orders; (2) Pleadings subsequent to the original Summons and Complaint, which includes (3) written motions, other than ones which may be read ex parte; shall be served on each of the parties of record". Eagle never received a copy of any Motion filed by the Plaintiffs to dismiss Defendants. Second, it is apparent from the testimony of Plaintiffs' witness Cindy Thomas that the dismissal of Defendants, other than those who settled, was for the purpose of isolating and exaggerating the pro rata share of liability of Eagle and attempting to avoid the proscription against considering relative degrees of fault mandated by S.C. Code §15-38-30. Ms. Thomas, when asked by counsel for Eagle, whether the Defendant Churchill wasn't a part of the joint liability, responded: "Well, we only collected from the plastering and then the distributor because those were the only ones, other than you guys, that we felt we needed to." (Trial Transcript, p. 47, R. p. 278).

Furthermore, § 15-38-20(A) provides: (A) Except as otherwise provided in this chapter, 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. (Emphasis Added)

Counsel for Plaintiffs in colloquy with the Court expressed his belief that even though he had initially joined at least 5 other Defendants and alleged in Paragraph 13 of the Complaint that "the Plaintiffs and Defendants have a

common liability to the Plaintiffs in the underlying action," Plaintiffs had a right to pursue whomever they pleased. Apparently, this strategy was extended to the unilateral release of other Defendants without notice to Eagle. §15-38-20 (A) of the contribution Act specifically recognizes that there is a right of contribution among all of the Defendants and in no event could any of them be released without notice to the others including Eagle. On this basis, Eagle requests that the caption of the case remain as officially filed.

PRO-RATA SHARE OF EAGLE'S LIABILITY, IF ANY

The case of Southeastern Freight Lines v. City of Hartsville, 443 SE 2d. 395 (S.C. 1994), established that, in a contribution action, the pro rata share of any liability must be shared equally by all those responsible for the common liability. Plaintiff's having alleged that all of the defendants share a common liability with the Plaintiffs, may not ignore the limitations imposed by prior settlements of those sharing the same exposure and particularly the ones which are exposed to the same liability such as the window Seller, Window and Door Concepts, Inc., Gilliam Construction Company, Inc. and Framer of the windows (Gary Churchill).

§ 15-38-30. Factors determining pro rata liability of Tortfeasors provides:

In determining the pro-rata share of Tortfeasors in the entire liability (1) "their relative degree or 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."

It is uncontradicted that the Plaintiffs settled with the Seller of the windows involved in this proceeding, the Defendant, Window and Door Concepts, Inc. for

the sum of \$24,000.00. The South Carolina Uniform Commercial Code, §36-2-714, Buyer's Damages for breach in regard to accepted goods and § 36-2-715 give the assignees of the Purchasers of the windows the same rights as they would have against the manufacturer and, the fact that the assignees settled with the Seller for \$24,000.00, is the best evidence of the applicable pro-rata share.

After having identified the parties sharing the common liability for the damages to the Abels' house and purchasing their release from the claims by the Abels without allocating liability for the trades included, the Plaintiffs cannot equitably decide to isolate Eagle as the only party liable for the damages to the Abels' house. Nor can they attempt to eliminate their liability by allocating the damages to Eagle and dividing by two. S.C. Code §15-38-30 specifically provided that **"In determining the pro rata shares of tortfeasors in the entire liability (1) their relative degrees of fault shall not be considered."** Applying principles of equity applicable to Contribution generally, there is no basis for exceeding the pro-rata share of the window seller which was \$24,000.00.

PREJUDGMENT INTEREST

Prejudgment Interest cannot be awarded to the Plaintiffs in this case. "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, if the sum is certain or capable of being reduced to certainty...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." Babb v. Rothrock, 310

S.C. 50, 426 S.E. 2d. 789 (S.C. 1993) (Emphasis added). Keaner v. Lowcountry Pediatrics, 372 S.C. 136, 642 S.E. 2d. 53 (S.C. App., 2006).

The Plaintiffs' claim arose when they filed and served their Complaint against Eagle, American Architectural Products Corporation, Window and Door Concepts, Inc., Charles Goad, Hobbit Plastering, Inc., Phillip L. Bender, Upstate Waterproofing, Inc., Dale Coleman, and Gary Churchill. At that time, the mediation had not even taken place and no one knew what settlements might be reached.

In response to Eagle's Requests to Produce for all settlement agreements, only the Settlement Agreement and Mutual Release with the Abels was produced. However, Cindy Thomas testified at the hearing that the Plaintiffs settled with the stucco applicant for \$41,000.00 (Trial Transcript, p. 45, lines 14-17, R. p. 276) and with the window seller for \$24,000.00. (Trial Transcript, p. 46, lines 3-7, R. p. 277)

The claim has never been demandable nor liquidated and has been substantially reduced by the two settlements which Plaintiffs contend should not be considered because they say they are unrelated to the water damage which they seek to pin on Eagle. It is difficult to understand their position with respect to the settlements already consummated as they both were made by members of the class for which the Plaintiff purchased releases from any claim of the Abels. In their Complaint for Contribution, they create a single class for contribution composed of all the subcontractors and material providers who were involved in the construction of the Abels' house. The settlements have to be considered and

are proof that the payment of the claim was not demandable at the time of Plaintiffs' suit and still is in question at this time. Furthermore, the measure of recovery is still very much in doubt as the statute allows a number of alternatives. This is simply a joint tortfeasor claim and is not "an obligation to pay money either by agreement of the parties or by Operation of Law" as required by Babb. If Prejudgment Interest were payable in a case like this, it would be payable in any tort claim and it is not.

CONCLUSION

In this case, Linsalata paid \$64,750,000.00 for the assets, and the Bankruptcy Court found in its order authorizing the sale that:

EWD Acquisition is a "good-faith purchaser" within the meaning of Bankruptcy Code § 363(m), as the Court is unaware of any evidence in the record that would tend to demonstrate that EWD Acquisition engaged in anything other than arm's length negotiations in good faith or in any conduct that would permit the Final Agreement to be avoided under Bankruptcy Code § 363(n).

See Order Approving Asset Sale, Exhibit C, page 6, ¶ (n), to original Memorandum in Support of Motion for Summary Judgment. (R. p. 139)

Eagle & Taylor Company did not survive. Indeed its demise was required by Article 14 § 14.2 of the Asset Sale Agreement which provided:

14.2 Change of Name of Seller.
Immediately upon the occurrence of the Closing, each Seller Party shall cease using, and thereafter refrain from using, all names that include the word 'Eagle' including the names 'Eagle and Taylor Co.' and 'Eagle Window and Door, Inc.' and all derivatives thereof, and as soon as possible after the Closing, Seller will take all actions necessary to change its

corporate name to a name that does not include the word 'Eagle' or 'Eagle and Taylor Co.' or any derivation thereof and its assumed name to a name that does not include the word 'Eagle' or 'Eagle Window & Door, Inc.' or any derivation thereof.

§ 14.3 also contains an agreement not to compete as to each of the seller parties. (R. pp. 114-115)

In short, this case is identical to the Simmons case and the case of Walton v. Mazda of Rock Hill et al., 376 S.C. 301, 657 S.E.2d 67 (2008). Both require this Court to dismiss the case against Eagle for contribution.

What the Respondents advocate and the Judge embraced is the "Continuity of Enterprise" or "Product Line" exceptions which were precisely what Justice Burnett urged and were soundly rejected.

Obviously Linsalata would not have paid \$64,750,000 for the assets of AAPC/Eagle & Taylor Company if it was not going to continue the operation of the company. But the predecessor had nothing to do with the operation after the purchase of assets, which was held by the Bankruptcy Court to be an arms-length transaction for value.

The purpose of the test enunciated by the Supreme Court was not to prevent the continued operation of the company whose assets were purchased in the bankruptcy proceeding but to make sure that the company filing for bankruptcy was not using the bankruptcy court for the purpose of defrauding creditors. That is best explained by the Supreme Court of Virginia in the case of Harris v. T.I., Inc., supra.

On the basis of the arguments with respect to successor liability submitted to the Court, it is respectfully submitted that this Court should reverse the decision of Judge Hayes and enter judgment for the Appellant. Failing in that, it is respectfully submitted that the monetary Judgment imposed by Judge Hayes is flawed by all of the issues set forth on the issue of Contribution and should be dismissed or drastically reduced. It should certainly not exceed the settlement of the window seller, \$24,000, since the statute mandates that degrees of fault shall not be considered.

Respectfully submitted,

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November 12, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, Presiding Judge Seventh Judicial Circuit

Appellate Case No.: 2014-001151

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

v.

Eagle Windows & Doors, Inc.....Appellant

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

WITH RESPECT TO SUCCESSOR LIABILITY

- I. The lower court was correct in holding that Eagle Windows and Doors, Inc was a mere continuation of predecessor corporation and thus subject to successor liability
- II. The lower court was correct in holding that successor liability looks to the predecessor and successor corporation, not its parent corporation

WITH RESPECT TO CONTRIBUTION

- III. The lower court was correct in finding that Respondents submitted sufficient evidence to establish that the windows manufactured by Appellant caused the damage at issue in this lawsuit
- IV. The lower court was correct in awarding \$25,000.00 waived by Respondents as consideration for the underlying settlement
- V. Respondents had no right to require additional Defendants in the case to lower its proportionate liability
- VI. The lower court was correct in awarding pre-judgment interest

STATEMENT OF THE CASE

This is an appeal of a judgment on a cause of action for contribution. The case was tried non-jury. The original litigation which preceded the present case was commenced by Renaul Abel and Karen Abel against Gilliam Construction Company, Inc. alleging defective construction and/or materials in a home built for them by Gilliam Construction Company, Inc. in Landrum, South Carolina at the Cliffs of Glassy in 1999. That case was transferred to arbitration and the material suppliers and subcontractors for the home were invited to participate in the arbitration, which they each declined.

The arbitration claim was settled in 2006 prior to an arbitration trial. The settlement exceeded \$245,000 was paid by Gilliam Construction Company, Inc. and its insurer, Nationwide Mutual Insurance Company. Thereafter, Gilliam Construction Company, Inc. and Nationwide Mutual Insurance Company (hereinafter collectively referred to as "Nationwide", "Gilliam" or "Respondents") brought a contribution action against the various subcontractors and materials providers to recover settlement amounts paid to Renaul and Karen Abel which included monetary payments, repairs and funds expended, and a waiver of amounts due to Gilliam on the 1999 contract. As to Eagle Window & Door, Inc. (hereinafter "Eagle", "Eagle Window & Door" or "Appellant") Respondents alleged that it manufactured and sold defective windows which allowed water intrusion into the Abel's home. The contribution Complaint was filed on January 26, 2007.

In lieu of filing an Answer, Eagle filed a Motion to Dismiss on April 11, 2007 based upon South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). Eagle's motion asserted that the manufacturer of the windows, Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc., no longer existed and was immune to suit due to a 2002 bankruptcy order selling the assets

of Eagle & Taylor Company, d/b/a Eagle Window & Door, Inc. to EWD Acquisition Co., now doing business as Eagle Window & Door, Inc. Respondents served interrogatories and requests for production on May 7, 2007, specifically requesting information on corporate successor liability and subject matter jurisdiction arguments made by Eagle and based upon the analysis in *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005). Eagle never responded to those written discovery requests.

Eagle's Motion was heard on September 6, 2007, and granted by the Honorable Judge J. Derham Cole on September 26, 2007. Judge Cole issued a form Order on September 26th, 2007, and Eagle's counsel drafted and forwarded a proposed Order to the lower court which was signed on December 21, 2007, and filed on January 2, 2008. Gilliam filed a motion to reconsider on October 2, 2007. Counsel for Respondents served Eagle with requests for admissions on November 12, 2007. Those requests for admissions were also directly related to Eagle's Motion to Dismiss and the issue of corporate successor liability.

On December 7, 2007, counsel for Eagle filed a Protective Order from Gilliam's requests for admission. On January 21, 2008 Respondents filed a Motion to Compel Eagle's responses to Respondents' Interrogatories and Requests for Production, as well as the Requests to Admit. Respondents submitted a Brief in Support of a Motion to Reconsider, Motion to Compel and in Opposition to Eagle's Motion for Protective Order. Respondents' motion was heard on March 26th, 2008, and denied by the Honorable Judge J. Derham Cole on January 21st, 2009. On January 29th, 2009, Respondents timely filed a Notice of Appeal relating to the order granting dismissal of Eagle and the order denying Respondents' Motion to Reconsider.

On March 15, 2011, The South Carolina Supreme Court heard oral arguments concerning Respondents' appeal of the Trial Court's Order Granting Eagle's Motion to Dismiss. The South

Carolina Supreme Court, in an Order filed on August 22, 2011, reversed the trial court's ruling. *Nationwide Mut. Ins. Co., Inc. v. Eagle Windows & Doors, Inc.*, 394 S.C. 54, 714 S.E.2d 322 (2011). The South Carolina Supreme Court held: (1) that contribution action was not barred by bankruptcy asset sale order's "free and clear" provisions; and (2) that bankruptcy court did not retain jurisdiction over contribution claim brought by a contractor and its insurer against debtor window manufacturer's successor. *Id.* The South Carolina Supreme Court further stated that the case should proceed in state court based upon the successor liability rules set forth in *Simmons v. Mark Lift Indust., Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005) and *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

Once the case was returned to circuit court, Appellant filed a Motion for Summary Judgment asserting that Eagle was not subject to successor liability. A hearing was held before The Honorable Roger L. Couch on October 16, 2012. By Order dated March 5, 2013, the Court denied Appellant's Motion for Summary Judgment. Appellant filed an appeal of that order which was dismissed as untimely.

On December 9, 2013, a bench trial was conducted in Spartanburg County before the Honorable J. Mark Hayes. After hearing the evidence submitted at trial, the lower court, by order dated April 29, 2014, found in favor of the Respondents and awarded a judgment which included pre-judgment interest. (R.p. 3-22) On May 27, 2014, Appellant filed a Notice of Appeal.

On June 16, 2014, Appellant filed a Motion for Certification to the South Carolina Supreme Court. By order of the Supreme Court of South Carolina dated August 6, 2014, Appellant's Motion for Certification was denied.

STATEMENT OF FACTS

The South Carolina Supreme Court held that subject matter jurisdiction exists in this case based upon the South Carolina Supreme Court's prior rulings that a plaintiff may maintain a state law-based product liability claim under successor liability theory against a successor corporation which purchased the predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 622 S.E.2d 213 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

The facts as described by the Court in the Order and as identified during the trial are as follows:

I. Stipulations

Both Appellant and Respondents stipulated to the admissibility of several documents at trial. Among the documents admitted were the following:

1. Affidavit of Stephen Perry (R. p. 406-419);
2. Eagle's Answers to Respondents' Interrogatories date 10/28/2011 (R. p. 424-435);
3. Corrected affidavit of Andrew Wickham (R. p. 420-423);
4. Eagle Window and Door websites dated 09/06/2007, 04/17/2007, and 09/06/2007 (R. p. 436-438; R. p. 439-440; and R. p. 441-442); and
5. Eagle Window's responses to Respondents' Request to Admit dated October 18, 2011 (R. p. 401-405).

Those documents include the following information:

A. Eagle Website

The business presently known as Eagle Windows was founded as Cardaco and Company in 1886. (R.p 436-438) It progressed "through this vast series of name changes" and "eventually

became Caradco in 1958.” (R.p 436-438) At the time “it remained one of the largest Window and Door Manufactures in the country...”(R.p. 436-438) Thereafter, Eagle was sold to Masco Corporation in 1987 and then to American Architectural Products Corporation in 1996. (R.p 436-438) In 2000, Eagle moved to a brand new 39,000 square foot manufacturing facility and continued manufacturing aluminum clad wood windows and doors. (R.p. 436-438) In 2001, American Architectural Products Corporation filed for bankruptcy and sold “it’s only profitable company” to Linsalata Capital Partners in April of 2002. (R.p 436-438) During this time period, President and CEO, David Beeken worked at Eagle from high school through present day, including guiding Eagle through the bankruptcy of 2002. (R.p. 441-442) “Throughout this tumult, one of Eagle’s consistent aspects has been Beeken’s leadership and commitment. (R.p 441-442) His guidance has kept employees motivated and eager to make Eagle soar.” (R.p 441-442)

Linsalata “to a great extent takes a handoff approach to running a successful companies like Eagle Window & Door”. (R.p 439-440) “We work closely with management teams in developing and buying into the strategies, but it is up to management to utilize that strategy and manage that capital wisely to grow the business...without the appropriate level of autonomy it would be difficult for the team to approach that”. (R.p 439-440)

B. Affidavit of Stephen B. Perry

The Affidavit of Stephen B. Perry indicated that he personally met with and was the successful bidder to purchase Eagle and Taylor doing business as Eagle Window and Door Inc., on April 15, 2002 through EWD Acquisition Company. On April 30, 2002, EWD Acquisition Company changed its name back to Eagle Window and Door Inc. Prior to the sale David Beeken was the president of Eagle Window and Door Inc., Charles Daoud was the executive vice

president of Eagle Window and Door Inc., Steven R. Stoppelmoor was the vice president of finance for Eagle Window and Door, Inc., Ronald Vander Weerd was the vice president of engineering for Eagle Window and Door, Inc., and Andrew Wickham was the controller for Eagle Window and Door, Inc. All of those individuals remained in their positions during and after the sale. Further David Beeken was added as a director of Eagle Window and Door, Inc. David Beeken, Charles Daoud, Ronald Vander Weerd, and Andrew Wickham were also shareholders. (R.p 406-419)

C. Affidavit of Andrew Wickham

The corrected Affidavit of Andrew Wickham indicated that he is the financing business integration manager for Eagle Window and Door Manufacturing, Inc. formerly known as EWD Acquisition Company and Eagle Window and Door. Again, Mr. Wickham's Affidavit indicated that Charles Daoud, Ronald Vander Weerd, Steven R. Stoppelmoor, David Beeken and Andrew Wickham were all officers of Eagle prior to and after the sale. David Beeken also became a director of Eagle Window and Door, Inc., sometime prior to January 27, 2003. (R.p.420-423)

D. Discovery

Appellant's responses to requests for admissions dated October 18, 2011 admit that Mr. Beeken was the president of Eagle and Taylor Company doing business as Eagle Window and Door Inc., from 2000 through May 6, 2002. (R.p 401-405) After May 6, 2002, Mr. Beeken was the president of Eagle Window and Door, Inc. and subsequently became the president of Eagle Window and Door Manufacturing, Inc. when it changed its name again on April 1, 2007. Mr. Beeken has been the president of Eagle Windows & Doors, Inc, in every incarnation, from 2000 to present. (R.p. 401-405)

The application form and certificate of authority of the Secretary of State of Iowa indicated that EWD Acquisition Company was created on April 10, 2002. It indicated that David Beeken, Charles Daoud, Steven R. Stoppelmoor, Ronald Vander Weerd, Gregory Taber, and Andrew Wickham were all directors and officers of EWD Acquisition Company. (R.p 401-405)

Appellant's Answers to Interrogatories dated October 28, 2011, indicate that the above officers and directors were officers and directors from 2000 through the present day. (R.p 432-435) Those discovery responses also indicated that David Beeken, Andrew Wickham, Ronald Vander Weerd, Charles Daoud, and Steven R. Stoppelmoor were shareholders of Eagle Windows prior to and after the sale of the company.

E. Testimony

In addition to the documents admitted by stipulation, Respondents called three witnesses: Phillip Gilliam, Cindy Thomas, and Randy Still.

1. Testimony of Phillip Gilliam

Phillip Gilliam is the owner of Gilliam Construction Company. Mr. Gilliam testified about his construction contract with Renual Abel, the issues with the home, and the subsequent lawsuit and arbitration. He testified that he purchased windows which were manufactured by Eagle Windows and Doors at the direction of Mr. Abel. (Supp. R.p. 8) Based upon his investigation, the investigation of experts, and water testing done on the house, it was determined that the windows purchased from Eagle Windows and Doors were defective and leaking. (Supp. R.p 9-10) Mr. Gilliam testified that his contract with Mr. Abel required him to provide the Abels with a house free from defects. (Supp. R. p. 7) As the home contained defective windows, he was forced to defend himself in arbitration and ultimately settled the case. During the arbitration

proceedings, Eagle Windows and Doors was offered an opportunity to participate and defend its Windows. They refused to do so. (Supp. R. p. 8)

During the investigation, testing was done on the windows. Eagle Windows and Doors was invited to attend and participate. (Supp. R. p. 10) Eagle Windows and Doors sent a technician who did not participate but observed the water testing. (Supp. R. p. 11) That person made no suggestions, complaints, or otherwise criticized the water testing at all. (Supp. R. p. 11) The results of the water testing on the windows indicated that the windows were defective and leaked. (Supp. R. p. 10) Due to the defective windows water was able to migrate behind the stucco on the home and destroyed and damaged framing and sheathing on the home. (Supp. R. p. 12) A substantial repair was necessary to repair the home due to those windows. (Supp. R. p. 12-13) Instead of removing and replacing all of the windows, the stucco, and the damaged framing of the home a scope of repair was created to repair any damaged framing and sheathing and install a copper window dam which would collect and expel any water running through the windows to the outside of house. Mr. Gilliam testified that this was a much cheaper, efficient and reasonable manner to repair the issues with the windows. (Supp. R. p. 14)

Mr. Gilliam further testified that any repair of the stucco and the window rough openings was necessitated due to the defective and leaking windows. (Supp. R. p. 14-15) Further, Mr. Gilliam testified that he and his company fulfilled their obligations as a general contractor because they did not know and could not have known that the windows selected by Mr. Abel were defective and would leak. (Supp. R. p. 16) He testified that the windows were installed pursuant to code and industry-standard and the installation of the stucco was installed and applied pursuant to industry-standard. (Supp. R. p. 15) Based upon his investigation and

analysis, Mr. Gilliam testified that he attributed 100% fault for the repair to the defective windows and attributed no-fault for the repair to Gilliam or any other party. (Supp. R. p. 16)

Mr. Gilliam testified that the settlement was reasonable. He testified that the Abel's demand was in excess of \$250,000. Based upon the demand and the fact that the windows were defective, the case was settled with the Abels for \$235,000: Nationwide paid \$200,000 cash, while Gilliam Construction paid \$10,000 cash from Gilliam Construction, and waived \$25,000 owed by the Abels to Gilliam Construction. A release was drafted and executed which extinguished the liability of Eagle. Thereafter, the contribution suit was filed to recover from Eagle.

Mr. Gilliam testified that other parties were sued in contribution for damages separate from the \$235,000.00 settlement. He testified that Gilliam sued Coleman Waterproofing for a \$5,000.00 repair to below grade waterproofing which was paid for directly by Gilliam Construction Company. That \$5,000.00 was not included in the scope of repair implemented by the Abel's and was not a basis for the \$235,000.00 settlement and should not be included in this contribution action. He testified further that any other Defendants in the contribution action were similarly unrelated to the \$235,000.00 settlement and their separate settlements and prior participation in the contribution action should not count against the \$235,000.00 settlement.

Mr. Gilliam testified that his investigation revealed that Eagle no longer considered itself Eagle. Despite his knowledge of the construction industry and the materials used therein, he had never been notified at any point until after the lawsuit was filed that Eagle had been "sold" to a new company and no longer honored its products manufactured prior to that sale or honored the warranties on those products. (Supp. R. p. 1-36)

2. Testimony of Cindy Thomas

Cindy Thomas is an adjuster for Nationwide Mutual Insurance Company. She testified that a lawsuit was filed by the Abels against Nationwide's insured, Gilliam Construction Company. After investigation, defense, and analysis and consultation with defense counsel, Nationwide determined that the best course of action was to settle the case for \$200,000. Phil Gilliam added an additional \$10,000 in cash and waived \$25,000 owed to it by the Abels. (R.p. 272) Based upon her experience and knowledge of the file, she believed that the settlement was reasonable. (R.p. 273) She also testified that the release executed was drafted to expunge the liability of Eagle. (R.p. 275)

3. Testimony of Randy Still

Randy Still testified on behalf of Respondents although he was originally hired by the Abels to testify against Gilliam Construction. (R.p. 238) Randy Still is a professional engineer who worked with H2L Consulting Engineers. After giving his education, experience and qualifications, he was admitted as an expert in residential construction, building products, and building envelopes. (R.p. 237-238) Counsel for Eagle made no objection to Mr. Still's qualifications as an expert.

Mr. Still testified that he was hired by Karen and Renaul Abel to investigate the allegations of construction defects at the Abel house. During his investigation a water test was performed on the windows to determine if they were leaking. (R.p. 241) The manufacturer of the windows; Eagle was invited to participate. (R.p. 241) Although a representative of Eagle attended the water testing they did not participate or add any observations or suggestions. The water testing on the windows revealed that the windows leaked, were defective, and caused damage to the framing and sheathing behind the stucco. (R.p. 242-247) Based upon that investigation and testing Mr. Still offered testimony that the windows were defective. (R.p. 245)

He further testified that damage occurred due to the leaking windows which necessitated removal of stucco to repair the windows and damaged framing, repairs to the rough opening windows, and repair to damaged sheathing.

Mr. Still prepared a scope of repair which limited the amount of stucco removed so that the windows could be fitted with a copper window dam under each window which would collect and expel the water out of the building envelope. All damage was located and repaired. He testified that his scope of repair was the most efficient and economical repair and it was used by the Abels to repair the home.

Mr. Still also testified that Gilliam Construction did not breach any construction standard which caused any of the damages at the Abel household. He testified that a general contractor has a duty to oversee, coordinate, and supervise sub-contractors. The general contractor also has the obligation to select and purchase quality non-defective materials. In his opinion, Mr. Still believed that Gilliam construction could not have suspected or known that the windows selected by Abel were defective and leaking. He testified that the defective windows were 100% at fault for all of the damage to the Abel house. (R.p. 252-253; R.p. 266-267)

Randy still testified that reports of other experts, including Construction Science and Engineering and Summit Engineering, supported his findings. Both of those reports found that the windows were leaking and caused the damages. Randy still introduced photographs of the leaking windows, the installation of the windows, and the damage caused by the Windows. (R.p. 235-269)

STANDARD OF REVIEW

"In an action at law, on appeal of the case tried without a jury, findings of fact of the judge will not be disturbed on appeal unless found to be without evidence which reasonably

supports the judge's findings; the rule is the same where the judge's findings are made with or without a reference." Const. art. 5, § 5; Code 1962, §§ 15-122, 15-123; *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

"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. Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010). The Court's scope of review on appeal from an action at law tried without a jury is limited to determining whether the findings are supported by competent evidence and correcting errors of law. *Id.*

In an action at law, when a case is tried without a jury, the trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence. Stated another way, the trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. The trial court's findings in such a case are equivalent to a jury's findings in a law action. *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 127, 631 S.E.2d 252, 255-56 (2006).

ARGUMENT

I. The lower court was correct in holding that Eagle Windows and Doors, Inc. was a mere continuation of predecessor corporation and thus subject to successor liability

The lower court properly found that the Appellant, Eagle, was a mere continuation of its predecessor corporation. In South Carolina, a Plaintiff may maintain a state-based product liability claim under a successor liability theory against a successor corporation which purchased a predecessor's assets in a voluntary sale approved by the Federal Bankruptcy Court. *Simmons v.*

Marklift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). The South Carolina Supreme Court in *Brown* stated:

In the absence of a statute, a successor or purchasing company ordinarily is not liable for the debts of a predecessor or selling company unless (1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrants a finding of a consolidation or merger of the two corporations, (3) the successor company was a mere continuation of the predecessor, or (4) the transaction was entered into fraudulently for the purpose of wrongfully defeating creditors' claims. *Id.* at 123 S.E.2d 97 (emphasis added). The test used to determine whether a successor corporation is a mere continuation of its predecessor was set forth in *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005). That court held that a successor corporation is a mere continuation of its predecessor corporation when the predecessor and successor corporations have substantially the same officers, directors, or shareholders. *Simmons v. Marklift Industries, Inc.*, 366 S.C. 308, 313, 622 S.E.2d 213, 216 (2005).

At the trial of this case, the Circuit Court heard testimony and received evidence establishing that Appellant's pre- and post-bankruptcy corporations had many of the same officers, directors, and shareholders and ruled that, "The predecessors and successor Eagle companies shared directors, officers, and shareholders" as a finding of fact. David Beeken, Andrew Wickham, Ronald Vander Weerd, Charles Daoud, and Steven R. Stoppelmoor were shareholders of Eagle Windows prior to and after the sale of the company. (R.p. 3-22) Eagle's President, David Beeken, was the President of Eagle prior to and after the sale. (R.p. 3-22) Further, prior to and after the sale, the following individuals were officers of Eagle: Charles A.

Daoud, David Beeken, Steven R. Stoppelmoor, Ronald Vander Weerd and Andrew Wickham.
(R.p 2-22)

Thus, post-sale, of the eight officers appointed to lead Eagle, five of the eight were officers of pre-sale Eagle, including President, Vice President, Vice President of Finance, Vice President of Engineering and Controller. Further, David Beeken, Charles Daoud, Steven R. Stoppelmoor, Ronald Vander Weerd, Gregory Taber, and Andrew Wickham were directors of Appellant pre- and post-bankruptcy. As the evidence supported the Court's findings, the court's ruling should not be disturbed.

The mere continuation exception seeks to prohibit corporations from changing hats for the sole purpose of escaping debts and liabilities if the predecessor and successor corporation are just a mere continuation of the same entity. The exception utilizes the test enunciated in *Simmons* to determine if the predecessor and successor are a mere continuation as shown by the overlap of officers, directors, and shareholders. Justice Burnett stated "[t]he corporate fiction and the rules surrounding it have been of inestimable service in the affairs of business, but they must be applied in such a manner as to promote justice, not to hinder or defeat it." *Id.* at 323 (citing *Long v Carolina Baking Co.*, 190 S.C. 367, 377, 3 S.E.2d 46, 50 (1939)). Justice Burnett, citing another case with similar facts cited the strong language used by that Court:

The [successor's] position does not appeal to us; it is an attempt to dodge the damages that [the plaintiff] has sustained by a quirk and technical question of law, and smacks too much of a skin game, and hand stacked and dealt to dealer from the bottom of the deck...By its action [the successor] has allowed the [predecessor] to go out of existence and now proposes to let the [plaintiff] whistle for his money, and by its technicality, which would besmirch the character of any honest man, smacks its lips and licks its chops and congratulates itself on its shrewdness in avoiding its payment of a just claim.

Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 318, 622 S.E.2d 213, 218 (2005) at 318 (citing *Brabham v. Southern Express Co.*, 124 S.C. 157, 117 S.E. at 368 (1922)).

This decision is in line with the majority of other jurisdictions and comports with the doctrines of fairness and justice. Justice Burnett strenuously opined that the stroke of a corporate pen or blind adherence to unfair rules out of touch with modern realities did not promote justice or allow intelligent adjudication of issues which touched upon the Bankruptcy Court's perceived jurisdiction.

Although the *Simmons* court denied Justice Burnett's request for clarification, it is important to note that it analyzed many of the elements cited by Justice Burnett. That court recorded that the predecessor corporation only operated the manufacturing facility for several months and then closed the plant. It then relocated the assets and equipment to another state. Only three employees of the predecessor continued with the successor and none were officers or directors. Further, the successor corporation operated under a different name than the predecessor corporation and both were defendants in the lawsuit.

This case is substantially different as the Defendant in this case is both the successor and predecessor corporation and both have the same name. Additionally, the evidence reflects that there was no change in operation, facilities, name, or products at Eagle. The directors and officers were and still are essentially the same even through another sale. Appellant's marketing materials indicate that nothing has changed at Eagle and it considered itself autonomous from both AAPC and Linsalata. In this case, the successor corporation has the same name, location, leadership, manufacturing facility, employees, and products and holds itself out as a continuation of a company founded in 1886. Appellant even admitted in its marketing material that Linsalata "to a great extent takes a handoff approach to running a successful companies like Eagle". "We work closely with management teams in developing and buying into the strategies, but it is up to management to utilize that strategy and manage that capital wisely to grow the

business...without the appropriate level of autonomy it would be difficult for the team to approach that". Appellant did not consider Linsalata as the face of Eagle, but rather simply another parent company in a long list of parent companies. Eagle represented itself as consistent and able to make it through this "vast series of name changes" due to its President's "leadership and commitment." That President, Mr. Beeken, is the same president that runs it today. Eagle continues to occupy the same space, manufacture the same products with the same employees, and markets, manufactures, and continues to sell the same products under the same company name. Appellant accepted the goodwill and name recognition of the Eagle Window brand but has specifically attempted to extinguish any potential liability arising from that goodwill despite its complete failure to notify owners of Eagle windows manufactured, marketed, and sold prior to April 2002 that it no longer honored those products or claimed them as its own.

Eagle, by the stroke of a pen, attempted to end its liability globally, totally, and permanently although there was no financial need to do so. Eagle was not forced into bankruptcy by economics, but rather was dragged though it by its parent company's bankruptcy. As such, the ordinary purpose of bankruptcy was not present for Eagle. Ordinarily bankruptcy's purpose is to provide the debtor with a fresh start, freeing it from the obligations and responsibilities consequent upon financial misfortune so that it may continue to survive. CJS Bankruptcy § 2. In this case, Eagle was American's only profitable company. Eagle did not require the intervention of the Bankruptcy Court or the protection afforded by it. Therefore, it should not be allowed to use its parent company's fortuitous bankruptcy as a sword with which to sever its entire pre-bankruptcy obligations.

Appellant's argument that *Simmons* requires a finding that the mere continuation doctrine requires overlap of officers, directors, and shareholders is moot and without merit. As the court

found that officers, directors, and shareholders were shared between the corporations, the analysis is unnecessary. (R.p 3-22) It is clear in this case that each of the requirements is satisfied and Eagle, in fact, did continue its operation with all of the same leaders, employees, facilities, products, designs, and marketing materials. The lower court found that the analysis of whether the *Brown* and *Simmons* courts intended overlap of officers and directors or officers or directors was unnecessary because the Respondents proved, and the Appellant did not refute, that officers, directors, and shareholder continued in the successor corporation from the predecessor corporation. Therefore, the lower court properly found that Appellant's commonality of officers, directors, and shareholders in both the predecessor and successor was sufficient to satisfy the mere continuation exception and deem it liable in this action. Appellant's argument should be denied and the Circuit Court's finding that Eagle is a mere continuation of Eagle should be upheld.

II. The lower court was correct in holding that successor liability looks to the predecessor and successor corporation, not its parent corporation

The court's focus on the pre and post-bankruptcy Eagle corporations was required by the rulings in *Simmons* and *Brown*. The rulings in *Simmons* and *Brown* require an analysis of the predecessor and successor corporations, not an analysis of their parent or subsidiary corporations. Appellant's focus on Linsalata and the officers, shareholders and directors of Linsalata is misplaced and fails to understand the purpose of the exception. Linsalata was not a party to this action. Respondents sued Eagle, not Linsalata. In fact, Linsalata has since sold Eagle and it is now owned by Anderson windows, yet the officers in place in 2000 are still in place today. The Court properly held that Eagle was the proper entity to analyze in determining that Eagle is a mere continuation of the same corporation.

Appellant's argument that the court should look to some other corporation, not the corporation accused of being a mere continuation, is illogical. Appellant's concern about the ownership and leadership of the corporation is addressed by the test itself. The test specifically looks at overlap of officers, directors, and shareholders. An analysis of a completely separate corporation to find overlap would defeat the purpose of the analysis in the first place. Instead, the test used by the exception looks directly at the corporation accused and evaluates whether it retained the same officers, directors, and shareholders and thus continued to conduct business as usual while trying to escape debts and liabilities. There is no need to climb the corporate chain of ownership looking at various boards, shareholders, and stakeholders in a never ending process.

Therefore, as indicated by the Circuit Court, based upon the evidence and testimony, Eagle was the appropriate entity to analyze for the mere continuation doctrine and was a mere continuation of its identically named predecessor. Therefore, Appellant's argument that the Circuit Court erred in its finding of a mere continuation should be denied. As the evidence supported the court's findings, the court's ruling should not be disturbed.

III. The lower court was correct in finding that Respondents submitted sufficient evidence to establish that the windows manufactured by Appellant caused the damage at issue in this lawsuit

Respondents submitted unrefuted and unchallenged evidence that the windows manufactured by Appellant were defective and caused the damages at issue in the case. Further, Appellant offered no evidence of its own to contradict the evidence submitted by Respondents. At trial, Respondents submitted testimony from expert Randy Still and from the owner of Gilliam Construction, Phillip Gilliam. Randy Still was qualified, without objection, as an expert in residential construction, building envelope, and building products including windows. (R.p

237-238) Mr. Still performed destructive investigation of the home at issue to look for defects causing water infiltration, performed moisture testing with moisture meter, and performed water tests on the windows. (R.p. 239) As a result of his testing, Mr. Still found that, "the corners of the windows leaked in the miter joint" (R.p. 242) Mr. Still further testified that the windows were not supposed to leak and therefore the windows were defective. (R.p. 245) He further testified that the leaking and defective windows caused damage to the home. (R.p. 247) Finally, Mr. Still testified that the leaking windows necessitated the entire scope of repair for the home. (R.p. 253)

Additionally, Mr. Gilliam was qualified, without objection, as an expert in residential construction, building envelopes, and building products. (Supp. R. p. 5, lines 14-25 and Supp. R. p. 6, lines 17-22.) Mr. Gilliam testified that he performed an investigation of the home and the cause of water intrusion and found that the windows leaked at the miter joint of the frame. (Supp. R.p. 9, line 12) Based upon his investigation and experience he found that the windows were defective. (Supp. R.p. 10, lines 13-19.) He further testified that he personally inspected all of the windows when they arrived and they were not damaged. (Supp. R.p. 23, lines 11-23.) As the evidence supported the court's findings, the court's ruling should not be disturbed.

IV. The lower court was correct in awarding \$25,000.00 waived by Respondents as consideration for the underlying settlement

Any damages suffered by Respondents in settling the underlying case and satisfying the homeowner are proper damages. Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in

before the wrongful injury occurred. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375-76 (2005).

Respondents offered testimony and evidence that a relevant portion of the settlement paid in the underlying case was the release of \$25,584.00 still owed to Gilliam by the Abels. (Supp. R.p. 18, lines 8-14.) Further, Mr. Gilliam testified that Mr. Abel admitted that he owed the \$25,584.50 in a letter which was admitted into evidence as Plaintiff exhibit #3. (Supp. R.p. 20, lines 1-15; R.p. 351) Mr. Gilliam testified that he signed a release of the Abels for the \$25,584.00 owed by them to Gilliam Construction as part of Respondents' concessions and consideration for the settlement. (Supp. R.p. 31, lines 4-25; R.p. 352-363) Appellant offered no evidence or testimony that the \$25,584.50 was not part of the consideration for the release.

Mr. Gilliam also offered testimony that he incurred damages separate from the \$235,000 in the form money owed and costs incurred on issues separate from the windows. Those damages were not alleged against Appellant in the contribution case. Therefore, the Appellant's argument that the \$25,584.50 should not be included as damages is without support and should be denied. As the evidence supported the Court's findings, the court's ruling should not be disturbed.

V. Respondents had no right to require additional Defendants in the case to lower its proportionate liability

Appellant had no right and can cite no authority which gave it a right to keep additional defendants in the case to lower its proportionate liability. The court correctly found that all of the evidence and testimony supported a finding that Eagle's defective windows were the sole cause of the damage and needed repairs and the damages awarded. Both Mr. Still and Mr. Gilliam testified that the stucco or the window installation was not the cause of the water

intrusion or the Randy Still repair scope. (Supp. R. p. 25, lines 15-24.) As the evidence supported the Court's findings, the court's ruling should not be disturbed.

The lower court also found that all prior defendants were dismissed from the action prior to trial. (Supp. R. p. 34) Phillip Gilliam testified that the prior defendants' liability and damages were separate and apart from the liability and damage alleged against Eagle and therefore should not be included in the determination of shares of liability. (Supp. R.p. 1-36) Specifically, he testified that Dale Coleman and Upstate Waterproofing did not have any involvement in or common liability for the window and stucco repair necessitated by the leaking windows. He testified that Dale Coleman and Upstate Waterproofing caused Gilliam to expend money and labor to repair a water proofing issue which was not alleged against or sought from Respondents. Therefore, Dale Coleman, Upstate Waterproofing, and the other prior defendants should not be included for purposes of identifying the number of parties used to create the denominator as their work and the damages arising from that work. The prior Defendants were separate and apart from the work and damages caused by Appellant's windows. If those parties came to trial, different allegations, testimony, evidence, and damages would have been submitted for each, separate from Eagle. Respondents would have argued against using Eagle as an additional denominator in each of those cases as the allegations, evidence, and damages would have been different – such as those of the waterproofing. Appellant introduced no evidence to refute Gilliam and Still's testimony that the entirety of the Still repair scope and cost was necessitated by the leaking windows.

Based on this testimony and evidence and absent testimony or evidence to the contrary, the lower court correctly found that the prior defendants should not be included in the determination of shares of liability or reduction in damages. Based upon all of the evidence and

absent any evidence to the contrary the court was correct that any liability for the settlement paid to Mr. Abel should be divided pro rata equally between Plaintiff and Defendant. As all of the evidence reasonably supported the judge's findings the court's finding should not be disturbed.

VI. The lower court was correct in awarding pre-judgment interest

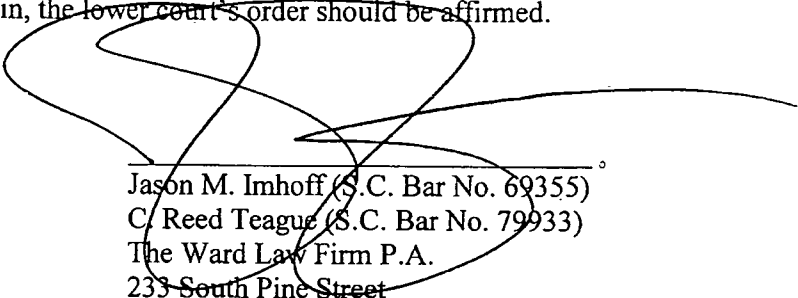
Pre-judgment interest was properly awarded as the amount paid for settlement in 2006 was fixed at the time the claim arose. Pre-judgment interest is recoverable on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." *Smith-hunter Const. 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." *Id.* "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.* A judgment debtor is required to pay interest on his debt as compensation for his continued retention and use of the creditor's money beyond the date payment was due. *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 134, 631 S.E.2d 252, 259 (2006) (awarding pre judgment interest despite contractor's defense that the amount was unclear and should be offset by delays of the subcontractor).

In this case, as set forth in the Complaint and as established at trial, the measure of recovery was fixed on the date the underlying case was settled. The measure of recovery was fixed by the conditions set forth in the settlement agreement between Plaintiffs and Renaul and Karen Abel. Respondents and Appellant do not dispute the amount in controversy, it was always the amount paid to the homeowner to settle the underlying case. Although Appellant do not believe it should be required to pay the \$25,000 waiver or 50% of the total settlement, Appellant

do not dispute the amount and, as set forth above, introduced no evidence to counter that amount as a valid damage. Thus, as the Court found in *Smith-Hunter Const. Co., Inc.*, the amount of damages in this case owed to Plaintiffs were "capable of being reduced to a sum certain." *Id.* As the evidence supported the Court's findings, the lower court's ruling should not be disturbed.

CONCLUSION

For the reasons stated herein, the lower court's order should be affirmed.



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COMPANY, INC.

December 15, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, Presiding Judge Seventh Judicial Circuit

Appellate Case No.: 2014-001151

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

v.

Eagle Windows & Doors, Inc.....Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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SC Court of Appeals

Case No. 2007-GP-42-298
Appellate Case No. 2014-001151

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

Respondent

v.

Eagle Windows & Doors, Inc.

Appellant

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

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

v.

Eagle Windows & Doors, Inc., ... Appellant.

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RESPONDENTS' STATEMENT OF THE CASE

At page 7 and 8, C and D, of Respondents' Statement of the Case, the Respondents make a number of statements that are incorrect with respect to the structure of the entities owned by the predecessor company American Architectural Products Company (AAPC). Based on the affidavit of Jonathan Schoenike, General Counsel for AAPC and its companies, (Schoenike Affidavit, Exhibit B to Memorandum in Support of Motion for Summary Judgment) (R. pp. 130-133), the affidavit of Andrew Wickham, Controller of the fictitious entity Eagle Window (Corrected Affidavit filed September 24, 2012) (Wickham Affidavit) (R. pp. 420-423), and the affidavit of Stephen Perry, Co-President and Senior Managing Director of Linsalata Capital Partners (Linsalata), a Cleveland, Ohio middle market private equity buyout firm (Perry Affidavit, p. 1, ¶ 1, Exhibit C to Supplemental Memorandum in Support of Motion for Summary Judgment) (R. pp. 169-170), the correct structure is as follows:

Eagle & Taylor Company, a Delaware corporation (Eagle & Taylor), was the wholly owned subsidiary of AAPC. Eagle & Taylor did business as Eagle Window & Door, Inc. (Eagle Window), a fictitious name, and Taylor Building Products, Inc., also a fictitious name. (Schoenike Affidavit, p. 2, ¶ 4) (R. pp. 130-131)

In 1999, David Beeken became president of Eagle & Taylor Company. (Schoenike Affidavit, p. 2, ¶ 6) (R. p. 131) Pre-bankruptcy, David Beeken was neither a director nor a shareholder of Eagle & Taylor. (Schoenike Affidavit, p. 2, ¶ 5, 6) (R. p. 131) In December of 2000, AAPC filed a petition for reorganization under the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio. (Schoenike Affidavit, p. 3, ¶ 9) (R. p. 132)

While the fictitious company Eagle Window had a number of officers other than Beeken, none of them were officers of Eagle & Taylor. (Schoenike Affidavit, p. 3, ¶ 8) (R. p. 132)

The other officers of the fictitious entity Eagle Window were Ronald Vander Weerd, Vice President of Engineering and Quality Assurance; Charles Daoud, Executive Vice President; and Steven Stoppelmoor, Vice President of Finance. Aside from Beeken, none of the officers of Eagle Window were officers, directors or shareholders of Eagle & Taylor. (Schoenike Affidavit p. 3, ¶ 8; Wickham Affidavit) (R. pp. 132, 126-128)

The Respondents state that an application form and Certificate of Authority of the Secretary of State of Iowa indicated that David Beeken, Charles Dauod, Steven Stooplemoor, Ronald Vander Weerd, Gregory Taber and Andrew Wickham were all directors and officers of EWD Acquisition Company (EWD) and reference Respondents' Request to Admit dated October 18, 2011. (R. p. 401) However, EWD was the wholly owned subsidiary of Linsalata, and the only director and officer of EWD was Stephen Perry. None of the people named by Respondents were ever directors, officers, or shareholders of EWD. (Perry Affidavit, p. 2, ¶ 4; p. 3, ¶ 8; p. 4, ¶ 9-12) (R. pp. 170-172) Respondents also allege that Appellant's Answers to Interrogatories, dated October 28, 2011, indicate that the above officers and directors were officers and directors from 2000 to the present date. (Page 8) (R. p. 431) Respondents further allege that those discovery responses also indicated that those officers were shareholders of Eagle Window prior to and after the sale of the company. Those assertions are unsupported. None of those officers were ever shareholders or directors of Eagle Window, and Eagle Window, as a fictitious entity, had no shareholders. (See Affidavit of Schoenike and Wickham referenced above) Furthermore there was never any commonality of ownership, i.e. the same officers, directors and shareholders, between AAPC and Eagle & Taylor d/b/a Eagle Window & Door, Inc. and Linsalata or EWD (Shoenike Affidavit, p.4, ¶ 14; Wickham Affidavit, p. 3, ¶ 11; and Perry Affidavit, p. 6, ¶ 17) (R. p. 133, 128, 174)

ARGUMENT

In their argument, the Respondents continue to refuse to apply the test for successor liability required by this Court in Walton v. Mazda of Rock Hill, 376 S.C. 301, 657 S.E.2d 67 (not even mentioned in their brief) and the Supreme Court in Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213.

The Respondents would argue that the predecessor corporation should be the fictitious Eagle Window and Door, Inc., which has no legal standing, and that the successor should be the incorporated EWD, Inc., which changed its name to Eagle Window & Door, Inc., after the bankruptcy. However, in Walton, this Court emphasized that the predecessor and the successor are properly the seller and the purchaser. The Walton case involved a warranty claim against the purchaser of the assets of an automobile dealership. On August 31, 2002, the plaintiff had purchased a vehicle and a warranty contract issued by C.A.R.S. from Mazda of Rock Hill, a.k.a Faile Enterprises, Inc. On December 19, 2002, Faile Enterprises entered into an asset purchase agreement with Mazda of Rock Hill. In January 2003 Walton brought the vehicle to the dealership for repair. At that time Walton was told of the sale and the purchaser refused to honor the claims. The sale and transfer of the dealership closed on March 27, 2003. At that time the purchasers assigned the asset purchase agreement to Mazda of Rock Hill (Mazda). Walton sued a number of entities, including Mazda, alleging various claims including the Mere Continuation Exception to Successor Liability. The Court held, in a Per Curium Opinion:

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. . . . As discussed, McManus and Sigmon did not have any relationship with Mazda of Rock Hill except for the purchase of the assets of the dealership. (Emphasis added)

Walton establishes what the Supreme Court meant by predecessor and successor, that is, the Seller and Purchaser.

In the present case, the Seller and Purchaser are defined in the Asset Sale Agreement attached to the Memorandum in Support of the Appellant's Motion for Summary Judgment:

ASSET SALE AGREEMENT

Between

AMERICAN ARCHITECTURAL PRODUCTS CORPORATION

And

EAGLE & TAYLOR COMPANY,

As the Seller Parties

And

EWD ACQUISITION CO.

As Buyer

Dated as of

April 15, 2002

(R. p. 65) Thus, under the test outlined in Walton, the proper predecessor corporation is AAPC/Eagle and Taylor Company, and the successor corporation is EWD, the wholly owned subsidiary of Linsalata.

The test for commonality of ownership between predecessor and successor corporations, necessary for finding a successor corporation liable for the actions of its predecessor, is found in the Supreme Court's decision in Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E.2d 213. Simmons involved almost identical facts to the case now before this Court. Simmons was injured in 1999 when an elevated scissorlift aerial work platform supporting him collapsed. He brought a products liability

suit against Terex Corporation, which had purchased the assets of the manufacturer of the scissorlift, Mark Industrial (Mark), in 1991 in a bankruptcy sale. The only basis for the action was a successor liability theory. The Supreme Court found:

Terex did not have any business relation with Mark until purchasing its assets in the Bankruptcy Court action. There has never been any commonality of officers, directors or stockholders between Mark and Terex.

622 S.E. 2d 216 (Emphasis the Court's).

It is significant to note that the decision of the Supreme Court denying successor liability included a twelve page dissent by Justice Burnett in which he raised every argument that could have been articulated for successor liability, including the continuity of enterprise exception urged by the Respondents.

The Majority had the opportunity to read and analyze Justice Burnett's dissent and held, in footnote 1 to their decision, which is both a critique of his argument and a rejection of his advocacy:

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 has found it applicable only when there is a 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.*** 622 S.E.2d 217 (*Emphasis the Court's) (**Emphasis added).

Judge Hayes opined that the underlined language allows a finding of successor liability to be based on a finding of commonality of officers, or a finding of commonality of directors, or a finding of commonality of shareholders. However, it is obvious that the final italicized sentence, requiring commonality of officers, directors, and shareholders, is the holding of the Court's Majority.

In the present case, prior to the bankruptcy sale, there was never any commonality of ownership (i.e the same directors, officers, and shareholders) required by the Court in Simmons. It is clearly established by the three affidavits, and it is unrefuted by the Respondents, that Linsalata and EWD never had any commonality of ownership with AAPC and/or Eagle & Taylor and/or Eagle Window until after the bankruptcy. Accordingly, if one considers the proper predecessor and successor corporations, there can be no successor liability.

CONCLUSION

The holding of the Court of Appeals in Walton is binding precedent in this case and, in light of that holding, the Respondents cannot seek to impose a different test for successor liability than the test required by the Court of Appeals. Furthermore, the test urged by the Respondents is the continuity of enterprise exception, which was rejected by the majority opinion in Simmons. Judgment must be entered for the Appellant.

Respectfully submitted,

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Attorney for Appellant

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November 12, 2014

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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 Gilliam² 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 Appeal⁵

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).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168
Heard November 12, 2015 – Filed April 6, 2016

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

v.

Eagle Windows & Doors, Inc., ... Appellant.

PETITION FOR REHEARING
of APPELLANT EAGLE WINDOWS & DOORS, INC.

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Appellant Eagle Windows & Door, Inc. petitions for rehearing of this case pursuant to Rule 221, SCACR. For reasons set forth in the dissenting opinion, and also in the legal and factual arguments of the Appellant, Appellant respectfully submits that the majority opinion in this case misapprehends the law and overlooks matters in the Record.

The majority opinion in this case misapprehends the test established by the Supreme Court for the determination of whether a successor corporation is a “mere continuation” of its predecessor for the purpose of establishing the liability of a successor corporation for the debts or deeds of its predecessor. In South Carolina, “a successor or purchasing company ordinarily is not liable for the debts of the predecessor or selling company.” *Simmons v. Mark Lift Indus., Inc.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005). Because of South Carolina’s public policy which, as Justice Konduros notes in her dissenting opinion in this case, favors the “unfettered transfer of assets between businesses,” a purchasing corporation will only be held liable for the debts or deeds of its predecessor corporation if “(1) there was an agreement to assume such debts, (2) the circumstances surrounding the transaction warrant 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* at 312, 215 (emphasis added). The mere continuation exception is applicable “only when there is commonality of ownership” between the seller and purchaser corporations; the exception requires that the predecessor and successor have substantially the same officers, directors, and shareholders. *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008), *cert. denied* October 8, 2008, *citing Simmons*.

The majority opinion in this case improperly holds that “the evidence supports the circuit court’s finding that Eagle is liable to Nationwide because Eagle was a mere continuation of EWD.”

In so doing, the Court has misapprehended the test for the mere continuation exception, which requires commonality of ownership, and has relied instead on a theory of continuity of enterprise, which was rejected by the Supreme Court in *Simmons*. In his lengthy dissenting opinion in *Simmons*, Justice Burnett argued passionately that South Carolina should adopt the doctrine of continuity of enterprise in imposing successor liability. Burnett urged the Court to consider factors such as whether a successor “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;” “whether the successor continued to manufacture substantially the same product line as the processor;” “whether the successor retained the predecessor’s managers, employees, or sales force;” and “whether the successor continued to use the predecessor’s equipment, supplier, dealer, or customer lists.” *Simmons* at 318-324 (Burnett, J., dissenting).

Nevertheless, the majority of the Supreme Court, in a succinct footnote, rejected Burnett’s dissenting twelve pages of analysis and held that successor liability may be imposed only where there is commonality of ownership. *Simmons* at 312 n.1, 215 n.1. After acknowledging the dissent’s argument, the Court stated its holding: “We decline to extend the exception to cases in which there is no such commonality of officers, directors and shareholders.” *Id.* (Emphasis added). This holding of the majority was later acknowledged by the Court of Appeals in the case of *Walton v. Mazda*, which cites *Simmons* for the proposition that the “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.” 376 S.C. 301, 307, 657 S.E.2d 67, 70.

Justice Few’s opinion for the majority in the present case mistakenly considers various factors to find a continuity of enterprise (as Burnett’s dissent urged), rather than properly restricting analysis to commonality of ownership (as the Court ultimately held). Justice Few

remarks that “Eagle continued manufacturing windows and doors in the same location with the same name and capitalizing on that continuity in its website marketing;” he also factors into his decision the evidence that “Eagle accepted and benefited from the goodwill, name recognition, and history of the Eagle brand.” In considering such factors, Justice Few misapprehends binding precedent, which rejected Justice Burnett’s proposed analysis and instead required that the Court look solely to commonality of ownership in imposing successor liability. There is no commonality of ownership in the present case, as Justice Konduros recognizes in her dissent, and as the record demonstrates, because “there is no commonality of shareholders.” This lack of commonality was clearly established by three affidavits and unrefuted by the Respondents.

Furthermore, the majority opinion of the Court of Appeals in this present case overlooks and misapprehends factual evidence in the Record. Admittedly, the facts in this case are complicated as they pertain to the identity of the proper Predecessor and Successor corporations (relevant to ascertaining whether there has been a “mere continuation” of ownership). The majority of the Court, in its effort to find commonality of ownership, mistakenly compares the wrong entities. As the record demonstrates, the proper predecessor and successor corporations are in fact the Seller and Purchaser parties in the bankruptcy sale, i.e. AAPC/Eagle & Taylor (the Seller) and EWD Acquisition Co. (the Buyer). As the Record demonstrates, those entities never had any commonality of ownership.

As to the issue of whether Nationwide failed to prove a design or manufacturing defect in the windows, the majority opinion of the Court of Appeals overlooked Appellant’s arguments in the Record when it determined that Eagle abandoned the issue. While the meat of Appellant’s argument on that issue was mistakenly left out of its brief, the issue itself was not abandoned because it was properly submitted to the Court under the Statement of Issues on Appeal, effectively

preserved in its entirety in the Record, and also raised in the course of oral argument. Rule 208(b)(1), SCACR, states: "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." This rule implies that, conversely, the Court *will* consider those issues that *are* set forth. Further, the Appellant's argument on the issue was fully fleshed out and preserved in the Record in Appellant's Memorandum in Opposition to Plaintiff's Proposed Order of Judgment. (ROA 206-ROA 208). Rule 210(h), SCACR, "Review Limited to Record on Appeal," states that "the appellate court will not consider any fact which does not appear in the record." This rule suggests that the converse is true, and that the court will therefore consider those things that appear in the record. Finally, the issue was raised in oral argument before the Court and should not be deemed to have been abandoned.

For the foregoing reasons, Appellant Eagle Window & Door, Inc. respectfully requests that this Court grant its Petition for Rehearing in this case.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168
Heard November 12, 2015 – Filed April 6, 2016

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

v.

Eagle Windows & Doors, Inc., ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on the Respondents, Nationwide Mutual Insurance Company and Gilliam Construction Company, Inc., by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondents' attorney of record, Jason M. Imhoff, at his office at The Ward Law Firm, 233 South Pine Street, Spartanburg, South Carolina, 29302, on April 19, 2016.



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The South Carolina Court of Appeals

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

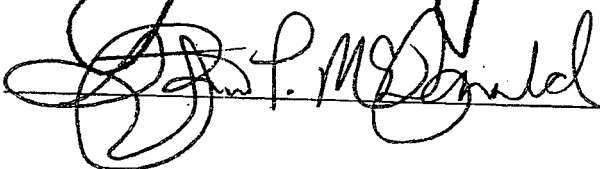
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Eagle Window & Doors, Inc., Appellant.

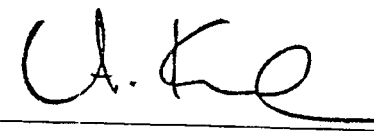
Appellate Case No. 2014-001151

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.
 J.

I would grant the petition for rehearing.

 J.

Columbia, South Carolina

cc:

G. Dana Sinkler, Esquire
Jason Michael Imhoff, Esquire

FILED

June 9, 2016

Carl Reed Teague, Esquire
The Honorable J. Mark Hayes, II