THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

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 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 severe 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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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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