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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

JUDGE R. LAWTON MCINTOSH, ANDERSON COUNTY

APPELLATE CASE NO.: 2019-001290

Debbie Bannister, Individually and as Personal Representative of the Estate of Hazel Clark, — Respondent

v.

Mary Sims Touchton; Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC — Appellants

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RESPONDENT'S INITIAL BRIEF

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Dated: June 23, 2020

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STATEMENT OF THE CASE

In March of 2017, Debbie Bannister, individually and as Personal Representative of the estate of her mother, Hazel L. Clark (hereinafter "Mrs. Clark"), filed and duly served two Complaints against Mary Sims Touchton, Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC. The first Complaint alleged the wrongful death of Mrs. Clark on September 7, 2015, and was filed pursuant to S.C. Code Ann. §15-51-20. The second Complaint asserted a survival action claim on behalf of Mrs. Clark, and was filed pursuant to S.C. Code Ann. §62-3-203.

The Complaints allege that the Defendants operated a community residential care facility, as defined by the South Carolina Department of Health and Environmental Control Regulation 61-84. The Complaints further allege that the Defendant Mary Sims Touchton owned, operated, directed, controlled, leased, provided management and/or consulting services to, and otherwise maintained the two defendant LLCs. The Complaints assert that the Defendants were negligent, grossly negligent, and negligent *per se* in the care, treatment, monitoring, and supervision of Mrs. Clark. The Complaints allege that the Defendants' acts and omissions were the proximate cause

of Mrs. Clark's injuries and death. The Complaints seek damages and punitive damages against the Defendants.

Appellants denied the allegations of negligence and gross negligence as alleged in the Complaints. Appellants pled the additional defenses of waiver, comparative negligence and that any damages sustained by Mrs. Clark were caused by additional intervening causes.

Prior to trial, the Wrongful Death and Survival Complaints were consolidated for judicial efficiency.

A jury trial was held in Anderson County, South Carolina, before the Honorable R. Lawton McIntosh on April 8, 2019 through April 11, 2019. Near the conclusion of the Respondent's case in chief, Appellants disclosed, for the first time, that Faith, Hope and Charity Retirement, LLC and The Resting Place, LLC, were legal entities created after Mrs. Clark's death. Appellants asserted that they were operating as a sole proprietorship at the time of Mrs. Clark's residency and death. The Appellant Mary Sims Touchton created the LLC entities after she became aware that she was being sued by Mrs. Clark's Estate.

Appellants then attempted to use this disclosure to move for a directed verdict as to the two LLCs, alleging that they were not in existence at the time of the alleged negligent acts and therefore were entitled to "nonsuit." The Court denied that motion.

Appellants presented their case and then renewed the motions for directed verdict. The Court denied the motions.

A charge conference was held by the Court. Appellants requested that a seperate verdict form be submitted to the jury for each Appellant individually. The court denied this request.

The jury found the Appellants liable for negligence and awarded Respondent $134,866.55 in actual damages for the Survival Action and $100,000.00 in actual damages for the Wrongful

Death action against the Appellants. The jury determined that the Appellants were grossly negligent in their treatment of Mrs. Clark and awarded punitive damages of $100,000.00 for the Survival Action and $200,000.00 for the Wrongful Death action against Appellants.

Appellants filed motions for judgment notwithstanding the verdict, new trial remittitur and dismissal of the two LLCs from the verdict. The trial court denied the motions by Form 4 Order filed June 14, 2019 with a written order to follow. The written order, denying Appellants' motions, was filed on July 9, 2019.

Appellants then filed a Notice of Appeal that was marked "received" by the Court of Appeals on August 2, 2019.

STATEMENT OF THE FACTS

Respondent asserts that the following facts are relevant to the issues presented for review, with references to the record on appeal, as required by S.C.A.C.R. 208. The Appellants have offered a Statement of Facts without consistent references to the record on appeal. Moreover, the Respondent asserts that the substantial majority of the matters contained in the Appellants' "Statement of the Facts" are wholly irrelevant to the issues presented by the Appellants for review.

Mrs. Clark was admitted to Faith Hope and Charity Retirement on July 10, 2015, after a hospitalization. (Tr. pp. 84-85, 89). Her daughter, Debbie Bannister, met with Appellant Touchton at the hospital wherein Touchton told her that her facility could take care of her mother. (Tr. pp. 85-87).

Faith Hope and Charity Retirement is a community residential care facility operated by the Appellants. (Tr. pp. 334-35).[1] Mrs. Clark first fell at the facility on July 11, 2015, the day

[1] Although the Respondent asserts that the Statement of Facts advanced by the Appellants is wholly irrelevant to the issues presented on appeal, there are misstatements set forth therein. The Appellants have alleged that they operate a Community Residential Care Facility (Tr. pp. 334-35). The Appellants go on to state that a community

after her admission and EMS was called to the scene. Mrs. Clark was taken to the hospital and returned to the facility by the time her daughter was notified. (Tr. p. 90).

On August 27, 2015, Mrs. Clark suffered at least two falls while under the care of the Appellants. (Tr. pp. 234 – 35). Evidence at trial revealed that Mrs. Clark likely suffered abuse and neglect while under the care of Appellants. (Tr. pp. 233 – 36). Mrs. Clark suffered a fractured arm, fractured vertebra, fractured ribs, a large facial hematoma, and multiple contusions about her body. (Tr. pp. 184 – 86). Mrs. Clark was hospitalized at Anmed Health for ten days. (Tr. p. 247).

On September 7, 2015, around noon, Mrs. Clark was transferred from the hospital to Hospice. She passed away about 6:00 p.m. that day. (Tr. p. 102).

The Appellant Touchton is the owner of the facilities known as Faith Hope and Charity Retirement and the Resting Place. (Tr. pp. 438 – 40). Appellant Touchton testified that she has one account in the name of the Resting Place. Out of that one account she pays both personal and business expenses. (Tr. p. 419). She takes cash out of that account for her personal needs, she pays her grandson's child support, she pays for insurance for her granddaughter, she pays for insurance for her son, she pays her son's health insurance, her granddaughter's health insurance, and she pays for her personal trips to the beauty salon. (Tr. pp. 416 – 18). She only has the one account

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residential care facility is not an assisted living facility and that somehow it provides less care than an assisted living facility provides. This is simply false. South Carolina Regulation 61-84, Section 101(L). provides as follows:

> "A Community Residential Care Facility…offers room and board and which, unlike a boarding house, provides/coordinates a degree of personal care for a period of time in excess of 24 consecutive hours for two or more persons, 18 years old or older, not related to the licensee within the third degree of consanguinity. It is designed to accommodate residents' changing needs and preferences, maximize residents' dignity, autonomy, privacy, independence, and safety, and encourage family and community involvement. Included in this definition is any facility (other than a hospital)., which offers or represents to the public that it offers a beneficial or protected environment specifically for individuals who have mental illness or disabilities. These facilities may be referred to as "assisted living" provided they meet the above definition of community residential care facility."

Appellants have tried to suggest that an assisted living facility provides some higher level of care than they provided to Ms. Clark and other residents. This is simply false and demonstrates a lack of candor toward the court and the jury in this trial.

for both the Resting Place and Faith, Hope and Charity Retirement. (Tr. 419). The checking account is in the name of The Resting Place. Employees would work at both of the Appellant facilities. (Tr. p. 427).

In March of 2017, Respondent served two Complaints against Mary Sims Touchton, Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC, alleging wrongful death and survival actions against the Appellants. (Complaint Wrongful Death, Complaint Survival Action).

After learning of the lawsuits against her, Appellant Touchton transferred her house into a life estate. (Tr. pp. 421 – 22). At the time of the transfer, Appellant Touchton knew of the two lawsuits filed against her. (Tr. p. 423). At the same time, Appellant Touchton transferred property to her grandchildren. (Tr. pp. 423 – 24). Appellant Touchton paid $50,000.00 in cash to pay off a house for her grandson. (Tr. p. 424). All transfers were made after Appellant was aware of the two lawsuits pending against her. (Tr. p. 424).

In November, 2018, Appellant Touchton sold the property located at 101 Coe Street and 207 East Shockley Ferry Road on which the facilities are located for $600,000.00. (Tr. pp. 428 – 29). Appellant Touchton holds a twelve year note on the property. (Tr. pp. 429 – 30).

At the time Mrs. Clark was in Appellant's facility, both the Resting Place and Faith, Hope and Charity Retirement were operated as a sole proprietorship. Subsequently, Appellant Touchton formed two LLCs "because all these years, I hadn't had anybody sue me. So when I got this message that somebody was suing me for money, I figured I needed it." (Tr. pp. 424 – 25).

Appellant Touchton is the only member of Appellant LLCs and there are no other board members. (Tr. p. 426). The LLCs in the instant case do not have any assets. (Tr. pp. 426 – 27). The sole purpose of the LLCs in this case is to hold the DHEC licenses for the facilities. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR DIRECTED VERDICT AS TO FAITH, HOPE AND CHARITY RETIREMENT, LLC, AND THE RESTING PLACE, LLC.

STANDARD OF REVIEW

In reviewing a trial court's decision to deny a motion for directed verdict, "the appellate court applies the same standard as the circuit court." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011). "As such, this court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the party opposing the motion . . . the appellate court will reverse the [circuit] court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Ralph v. McLaughlin,* 428 S.C. 320, 834 S.E.2d 213 (Ct. App. 2019).

Appellants assert that the trial court erred in failing to direct a verdict in favor of the LLC entities on the basis that the entities were not in existence at the time of the incidents giving rise to the complaints in this case. Appellants rely solely on *Hanson* [*sic*] as authority for their contention that the trial court erred in failing to grant a directed verdict as to the two Appellant LLCs. This reliance is misplaced. *Hansen v. Fields Co. LLC*, 409 S.C. 541, 763 S.E.2d 31 (2014), held that an LLC cannot be held liable for torts that its promotor committed before it came into existence. However, *Hansen* is distinguishable from the case at hand. *Hansen* involved the formation of an LLC with numerous new investors. In *Hansen,* the court expressed concern that innocent investors could be financially harmed due to tortious conduct they neither aided nor were aware of and therefore, may stifle investment by causing potential investors to fear that a corporation will be held liable for tortious conduct of which it had no knowledge. *Id.*

In this case, there are no investors in the LLCs. Appellant Touchton testified that she is the only member of the LLCs. (Tr. p. 426). There are no other board members of the LLCs. (Tr. p. 426). The LLCs in the instant case do not have any assets. (Tr. pp. 426 – 27). The sole purpose of the LLCs in this case is to hold the DHEC licenses for the facilities. *Id.* There are no "innocent investors" that can be unfairly harmed by the court's denial of Appellants' motion for directed verdict. The sole promoter of these LLC is not an innocent investor as was involved in *Hansen.* In the case at hand, the sole promoter, the sole member, and the only individual involved in any tortuous conduct both before and after the formation of the LLCs, was Appellant Touchton. *Hansen* expressly recognizes that a later formed corporate entity will be liable for the acts of its promoter if it ratifies the conduct or accepts the conduct by entering into the formation of the entity with full knowledge of the promoter's conduct. *See id.* Certainly, Appellant Touchton could not credibly argue that she was not aware of her own tortuous conduct or the potential liability to Mrs. Clark's Estate when she created these LLCs. When asked why she created the LLCs months after Mrs. Clark's death, Appellant Touchton admitted "because all these years, I hadn't had anybody sue me. So when I got this message that somebody was suing me for money, I figured I needed [the LLC]." (Tr. pp. 424 – 25).

Additionally, Appellants attempted to engage in trial by ambush. From the time Appellants answered these Complaints in the spring of 2017 until the trial commenced in April of 2019, Appellants never once alleged that the LLCs were improper parties. Respondent specifically inquired in Interrogatories posed to Appellants the following:

> *Indicate whether the Plaintiff has correctly named these Defendants. Without regard to liability, indicate whether the entities identified by the Plaintiff are the correct legal entities with respect to the allegations of the Plaintiff's Complaints. In the event that a change of ownership of the facility has occurred, set forth the correct legal entities with respect to the allegations of the Plaintiff's Complaints.*

Appellants answered the interrogatory on August 9, 2017 with the single-word reply: **"YES."** (Defendants' Answers to Plaintiff's First Interrogatories, p.1). Appellants intentionally misled Respondent into believing the correct legal entities were named. Appellants further failed to identify any change in ownership with respect to the allegations of the Complaints.

South Carolina Rules of Civil Procedure 17 provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." S.C.R.C.P. 17. Once the lawsuits were instituted, Appellant Touchton had over two years to contend that the LLCs were improper parties and seek their dismissal from the lawsuit. Because the rules permit a substitution of the correct party name, the only reasonable inference that can be drawn is that Appellants willfully withheld the identity of the proper parties to gain a strategic advantage or a legal "gotcha" over Mrs. Clark's family.

Appellant Touchton testified that she operated the two facilities as sole proprietorships. (Tr. p. 424). She further testified that the only function of the LLC was to hold the DHEC license. (Tr. pp. 426 – 27). Therefore, there could be no prejudice to Mrs. Touchton to substitute "Mary Touchton d/b/a Faith, Hope, and Charity" and "Mary Touchton d/b/a The Resting Place" as Appellants in this case. The ownership of the buildings, the receipts of revenues from both facilities and essentially every operation is performed by Appellant Touchton in her individual capacity. (Tr. p. 426).

Furthermore, because Mrs. Touchton is the sole member of both of the LLC's in this case, there is no prejudice in allowing the verdict and caption to stand with the named parties.

Even *assuming arguendo* that the Court was to determine that the two LLC entities should have been dismissed because of the timing of their formation, the Respondent asserts that the trial court was correct in holding that the successor entity LLCs are liable for the obligations of Appellant Touchton's sole proprietorships. In reaching this conclusion, the trial court was correct in denying Appellants' motions.

Under South Carolina law, successor entities will be liable for the obligations of their predecessor entities in four situations:

(1) When an agreement exists regarding assumption of debts;

(2) Circumstances of the transaction equate to a consolidation or merger of the two entities;

(3) The successor is a mere continuation of its predecessor (evidence of continuity of ownership).; or

(4) The transaction was fraudulent or intended to wrongfully defeat the creditors' claims.

See Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E. 97 (1924); *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (S.C. 2018).

The trial court cited *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.* Op. No. 2016-UP-168, 2016 WL 1359188 (Ct. App. Filed April 6, 2016) for reaching the conclusion that the LLC entities were liable for the acts or omissions of the predecessor entity. Appellants assert that this case was reversed by *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018) and therefore is not the state of the law in South Carolina. This is a disingenuous reading of the holding in that case. Although the Supreme Court reversed the lower courts, reversal was premised on finding the trial court engaged in an incorrect application of the doctrine of "mere continuation." The doctrine of successor liability, as established in *Simmons v. Mark Lift Indus., Inc.,* 366 S.C. 308, 622 S.E.2d 213 (2005), remains the law in this State. *See e.g.*

Voeltz v. Bridge Chas. Invs. E., LLC, 2019 U.S. Dist. LEXIS 30277 (D. S.C. 2019) (wherein the court applied the mere continuation doctrine finding summary judgment was inappropriate in favor of a successor entity); *Lane v. New Gencoat, Inc.,* 2020 U.S. Dist. LEXIS 53803 (D. S.C. 2020) (denying defendant's motion for summary judgment on the issue of successor liability).

In *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924), the South Carolina Supreme Court held that 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. The Court in *Simmons v. Mark Lift Indus.*, Inc., 366 S.C. 308, 332, 622 S.E.2d 213, 225 (2005) was asked to resolve a certified question from the district court as to whether the test set forth in *Brown, supra*, would permit a plaintiff to maintain a product liability case against a successor entity. The *Simmons* court found that a plaintiff could proceed against a successor entity with proper test being outline by the *Brown* decision.

This remains the law in South Carolina. The Supreme Court in *Eagle Window, supra*, clarified the "mere continuation" exception and declined to find that a successor entity was the "mere continuation" of its predecessor without a contemporaneous finding of commonality of officers, directors, *and* shareholders. *Eagle Window*, 424 S.C. at 264 (emphasis added). As discussed in detail below, the LLC entities in the case at hand meet the *Eagle Window* requirements of having commonality of officer, director, and shareholder. There is one and only one individual person associated with each and every entity in this case – the Appellant, Mary Sims Touchton.

It is important to note that Respondent must establish that only *one* of the exceptions set forth in *Simmons, Brown, and Eagle Window, supra*, apply in order for the courts to find that successor liability has attached. Respondent asserts that the trial court was correct in holding that *three* exceptions apply in the case at hand.

There Has Been A Consolidation Or Merger of the Entities

Appellant Touchton testified that her two facilities have always operated as one business and share a checking account. (Tr. p. 419). That checking account is in the name of the Resting Place. (Tr. p. 416). Touchton further testified that she operated the two facilities as a sole proprietorship. (Tr. p. 425). Revenues from both facilities are deposited into the one checking account. (Tr. p. 419). She uses her checking account to pay both personal and business expenses. (Tr. p. 417). Touchton owned the building, owned the facility, owned the business, received the profits, and did everything. (Tr. p. 426). It was all her. (Tr. p. 426).

The two LLCs have no assets other than to hold the DHEC licenses. (Tr. pp. 426 – 27). DHEC issued two licenses because the facilities are separate buildings. (Tr. p. 419). Touchton is the only member of the LLCs. (Tr. p. 426). There are no other board members. (Tr. p. 426).

The LLC entities are nothing more than a piece of paper that Appellant Touchton created in an effort to avoid liability. Everything about the facilities is exactly as it was before the LLCs were created. The LLC entities are a merger or consolidation of the sole proprietorship that Appellant Touchton operated during the time Mrs. Clark was in her facility. *Eagle Window, supra.*

The LLC Entities are a Mere Continuation of Touchton's Sole Proprietorship

As set forth above, *Eagle Window, supra*, clarified the "mere continuation" exception to successor liability. When there is commonality of ownership – substantially the same officers, directors, and shareholders – the mere continuation exception will apply. *See id.* The court noted

that where directors or officers that lack ownership exert such control and influence over a corporation that their continued presence is sufficient to establish successor liability – assuming arguendo that Appellant Touchton somehow lacks ownership, which is expressly denied, she exerts utter and total control over the facilities.

Touchton owned the building, owned the facility, owned the business, received the profits, and did everything. (Tr. p. 426). It was all her. (Tr. p. 426).

The two LLCs have no assets other than to hold the DHEC licenses. (Tr. pp. 426 – 27). DHEC issued two licenses because the facilities are separate buildings. (Tr. p. 419). Touchton is the only member of the LLCs. (Tr. p. 426). There are no other board members. (Tr. p. 426).

Appellant mistakenly contends that the trial court found that a "continuation of enterprise" was applied by the trial court and then alleges that this principle was rejected by the court in *Simmons*, *supra.* This contention misstates the holding of the trial court as well as the import of the *Simmons* decision.

The trial court found that the LLC entities were successor entities of the previous d/b/a or sole proprietorship on the following three bases: a consolidation or merger of the entities had occurred; the LLC entities were a mere continuation of the predecessor entity; and the transaction to create the LLCs was fraudulent or intended to wrongfully defeat the claims brought by Mrs. Clark's Estate. (Order p. 2).

Simmons provides that a South Carolina plaintiff may pursue a claim against a successor entity if at least one of the four exceptions applies. 366 S.C. at 312.

Touchton's Creation of the LLCs was Fraudulent/Intended to Defeat Respondent's Claims

"Whe[n] a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations" the successor corporation remains liable. *Eagle Window,* 424 S.C. at 269-70. Where

the changing of corporate hats is tainted by fraudulent intent, the successor entity remains liable – even if other exceptions are not satisfied. *See id.*

At the time Mrs. Clark was in Appellants' facility, both the Resting Place and Faith, Hope and Charity Retirement were operated like a sole proprietorship. Appellant formed the two LLCs after Mrs. Clark's death "because all these years, I hadn't had anybody sue me. So when I got this message that somebody was suing me for money, I figured I needed it." (Tr. pp. 424 – 25).

After Appellant Touchton was sued by Respondent, she engaged in a systematic attempt to shelter her assets from any judgment and become insolvent. Touchton transferred her house into a life estate after the lawsuits had been filed. (Tr. pp. 421 – 22). Touchton attempted to create the life estate five months after the lawsuits were initiated. (Tr. p. 423). Touchton transferred to her grandchildren certain real property located on Highway 187 after the Respondent had filed the lawsuits. (Tr. pp. 423 – 24). Touchton gave $50,000.00 in cash to pay off a house for her grandson. (Tr. p. 424). Just a few months prior to the trial, Touchton attempted to sell any interest in the businesses for $600,000 but holding that note for twelve years. (Tr. pp. 429-30).

Appellant Touchton has systematically disposed of assets, created LLCs, and attempted to render herself judgment proof as a direct result of the claims asserted against her by Mrs. Clark's family. The law does not allow an entity to engage in a pattern of fraudulent behavior to escape liability and then hide behind the successor entity as a shield.

Respondent has established each of the following: that the circumstances of the transaction equate to a consolidation or merger of the two entities; the LLCs are a mere continuation of the sole proprietorship; and the creation of the LLCs was fraudulent or intended to wrongfully defeat the creditors' claims. Respondent need only prove that one of these exceptions applies for the law to require a finding of successor liability. In considering all the evidence in a light most favorable

to the Respondent, as is required by the standard of review, the trial court properly denied Appellants' motions for directed verdict.

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR A NEW TRIAL NOTWITHSTANDING THE VERDICT.

STANDARD OF REVIEW

The grant or denial of new trial motions rests within the discretion of the circuit court and its decision will not be disturbed unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *See Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989). "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party." *See Ralph, supra.* To the extent that the relief the Appellants are actually seeking is a reversal based on the theory of judgment not withstanding the verdict, "... an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004) (*citing Strange v. S.C. Dep't of Highways & Pub. Transp.,* 314 S.C. 427, 445 S.E.2d 439 (1994)).

The Appellants allege that the trial court erred in failing to grant a new trial notwithstanding the verdict because the LLC entities did not exist at the time of the incidents giving rise to the Complaints. The Respondent asserts that this argument is identical to the Appellants' argument that the trial court erred in failing to grant their motion for directed verdict. For brevity and convenience of the Court, the Respondent adopts and incorporates by reference the entirety of argument and statement of the law in Section I above.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRECTION IN SUBMITTING A VERDICT FORM THAT ALLOWED FOR ALLOCATION.

STANDARD OF REVIEW

Rule 49 of the South Carolina Rules of Civil Procedure gives the trial court discretion as to the form of the verdict. "Error in the refusal to submit special interrogatories or special issues to the jury will constitute ground for reversal only if prejudice results to the complaining party." "The question of whether to grant a party's request for a special verdict form is a matter committed to the sound discretion of the trial court." *Id.* Further, "Error in the refusal to submit special interrogatories or special issues to the jury will constitute ground for reversal only if prejudice results to the moving party." *Id. See also Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (S.C. 1991) *quoting Smoak v. Liebherr-America, Inc.,* 281 S.C. 420, 315 S.E.2d 116 (S.C. 1984) (wherein the court held that the determination as to whether a special verdict form should be submitted to the jury is within the sound discretion of the trial judge). This determination will only be reversed if the court finds an abuse of discretion. *Id.*

Respondent asserts that the Appellants have abandoned the issue of a separate verdict form for each of the defendant entities.[2] The Appellants have asserted that the trial court abused its discretion in failing to submit to the jury a verdict form that allowed for each of the defendant entities. This is not supported by the law in South Carolina. Appellants contend that the trial court deprived each defendant of its separate right to argue it was not negligent. Appellants are not able to offer any precedent that a failure to allow a defendant's chosen verdict form is tantamount to a denial of the right to argue the defendant was not negligent. This contention is flawed. *See Bryson*

[2] The Respondent incorporates by reference each of the arguments set forth in the foregoing for the proposition that the Appellants were not entitled to a verdict form identifying individual liability.

v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Appellants cite to the case of *Sarvghal v. Sitton Buick Co., Inc.,* 312 S.C. 429, 440 S.E.2d 894 (Ct. App. 1994) while recognizing expressly that the case is "not on point." In fact, the *Sarvghal* case involved two cases involving two separate plaintiffs that were tried together. *Id.* The case involved the same defendant – and there was no argument that the defendants were entitled to a special verdict form. *Id.* This case is wholly inapplicable to the case at hand.

CONCLUSION

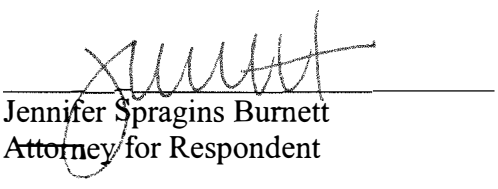
For each of the reasons set forth above, the Respondents assert that the trial court did not err in denying the Appellants' Motion for a Directed Verdict and in denying the Appellants' Motion for a New Trial. The trial court was correct in finding that successor liability applied to the LLC entities and in submitting those matters to the jury.

Appellants have not presented any authority for their contention that they were entitled to a separate verdict form for each defendant. That issue is abandoned.

The Respondent respectfully asserts that ruling of the trial court should be affirmed and fees and costs awarded to the Respondent consistent with the South Carolina Appellate Court Rules.

Respectfully submitted,

Harbin & Burnett, LLP

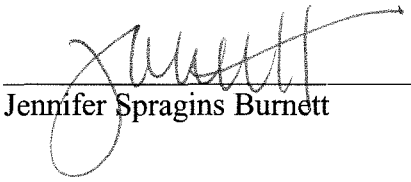


Jennifer Spragins Burnett
Attorney for Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Respondent complies with Rule 208, SCARC, and, further, complies with Supreme Court order dated August 13, 2007, regarding personal identifiers and sensitive information as well as Supreme Court Order dated March 20, 2020, regarding the operation of appellate courts during the coronavirus emergency.

HARBIN & BURNETT LLP



Jennifer Spragins Burnett

June 22, 2020

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

JUDGE R. LAWTON MCINTOSH, ANDERSON COUNTY

APPELLATE CASE NO.: 2019-001290

Debbie Bannister, Individually and as Personal Representative of the Estate of Hazel Clark, Respondent

v.

Mary Sims Touchton; Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC Appellants

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PROOF OF SERVICE

The undersigned hereby certifies that on June 23, 2020, the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal in the above-captioned matter was served upon counsel of record by placing a copy of the same in the US mail, sufficient postage affixed thereto, addressed as follows, and via electronic mail:

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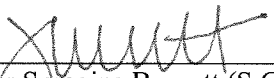

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Dated: June 23, 2020