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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-001290

Debbie Bannister, individually and as Personal Representative of
the Estate of Hazel L. Clerk, ...Respondents

vs.

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

APPELLANTS' FINAL REPLY BRIEF

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September 9, 2020

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REPLY TO RESPONDENTS' ARGUMENT I

In its reply to the Appellant's First Argument, the Respondents strive mightily to avoid the holding in Hanson v. Fields Co., LLC, 409 S.C. 541, 763 S.E.2d 31 (2014) that a limited liability company is not liable for torts that its promoter committed before it came into existence.

In an attempt to avoid Hanson, the Respondents argue that the Hanson holding was to protect new investors who had no knowledge of the promotor's tortious conduct. The Hanson court listed protection of innocent investors as one policy reason, among other policy reasons, for the holding that an LLC or corporation is not liable in tort for the preformation acts of its promotor. Policy reasons for a legal principle are not the legal principle itself.

Next, the Respondents argue that the two LLC Appellants ratified or accepted the conduct of the Appellant Touchton. The Respondents do not cite any conduct of the Appellant LLC's that even remotely suggest they ratified the alleged torts of Appellant Touchton. The reason for this omission by the Respondents is that there is none. In passing, the Hanson decision had one mention of ratification and that was in regard to contracts entered into before incorporation.

The next attempt to avoid the Hanson holding is to claim the Appellants somehow gained an advantage in hiding the date of the incorporation of the two Appellant LLC's. Exactly how this was a legal "gotcha" is never explained.

Next, the Respondents claim that the Court should simply change the name of the parties and make the Appellant "Mary Touchton, d/b/a". They cite no authority for this Court to charge the parties at the appellate stage because there is no authority to do so.

The Respondents next argue "no harm, no foul" should be applied instead of the principle announced in Hanson. The prejudice to Appellant Touchton in being tried with parties who are

not liable as a matter of law is obvious. It is not speculation to conclude that jurors will award more damages if they think there are more pockets to pay those damages.

The Respondents argue that the Appellant LLC's are successor entities of Appellant Touchton and are therefore liable for her tortious acts. Respondents cite Brown v. American Ry. Express Co., 128 S.C. 428, 123 S.E.2d 97 (1924) in support.

The four grounds for successor entities to be liable for the obligations of a predecessor are not present here. The first of the four grounds admittedly do not apply – there was no agreement between Appellant Touchton and the Appellant LLC's for the Appellant LLC's to assume the torts allegedly committed by Touchton.

As to the second Brown ground, there was no consolidation or merger of Appellant Touchton and the two Appellant LLC's as to trigger successor liability. Brown quoted with approval the holding in McAlister v. American Railway Express Co., 179 N.C. 556, 103 S.E. 129, 15 A.L.R. 1090.

> We cannot bring our minds to the conclusion that the defendant is liable for the debts of Southern Express Company upon the material facts of this case. The cases which hold that a new corporation must pay the debts of the original one are those where there was a reorganization, consolidations, amalgamation, or union, and the new company is subjected to liability for the debts and torts of the old company upon the ground of an implied assumpsit, or of fraud, or under the trust-fund doctrine, or because, by reason of the facts and circumstances, the complete absorption of the old company and its assets, including its franchise, being the leading and controlling one, it is completed substituted in its place, and thereby becomes the debtor to its creditors. It would be manifestly unfair, unjust, and contrary to equity that it should thus acquire all of the assets of the other corporation, and its franchise, both to be, and to do, leaving no one to be sued by its creditors and no property to satisfy its debts and other liabilities, and not itself become responsible for such debts and other liabilities. If it takes the benefit, it must, as has so often been said, take the burden, which equitably attaches, with it. But this case bears no resemblance to the ones just stated. There has been no reincorporation, reorganization, consolidation, merger, or anything else done. The Southern Express Company is still a live and going concern. It is exercising both its franchise to be, and to operate, and to conduct its business, and it is not even insolvent, but has enormous assets apart from the property assigned for

> commensurate and adequate value, to the Delaware corporation, which is the defendant here.

The Brown court approved the holding because in Brown, the predecessor corporation was still in existence with assets to satisfy the plaintiff's claim. Here, the Appellant Touchton transferred the DHEC license to the Appellant LLC's but nothing else. As the Respondents made clear, any other assets of Touchton were not transferred to the Appellant LLC's.

The third Brown ground for successor liability is the continuation of its predecessor. In support of its position, the Respondents seek support in Nationwide Nut. Ins. Co. v. Eagle Window & Door, Inc., 424 S.C. 256, 818 S.E.2d 447 (2018). That case concerned product liability which is a unique area of the law which deals with factors not found in the present facts of this case. The Appellant rendered services to clients, not products which were dangerous.

The Respondents acknowledge that the two Appellant LLC's have no assets other than the DHEC licenses. The record is bare of any value or market for the license. The licenses permit the operation of the residential care facilities legally.

Astonishingly, the Respondents state, "The LLC entities are nothing more than a piece of paper that Appellant Touchton created in an effort to avoid liability", (p. 11, Brief of the Respondents). The Respondents do not expound on that statement as to exactly how liability is to be avoided by Appellant Touchton. Respondents seem to argue that the Appellant LLC's are not separate legal entities entitled to be treated as such but mere fictions.

Finally, the Respondents argue that the creation of the Appellant LLC's was a fraudulent attempt to avoid Respondents' claims. They then recite transfers of property by Appellant Touchton to others that do not include the Appellant LLC's which were licensed to operate the facilities. The Appellant LLC's never owned any of the assets transferred by Appellant Touchton either before the transfer or after. Stated another way, the Appellant LLC's do not

have any assets to satisfy the judgment of their incorporation. For this reason alone, the fourth Brown exception does not apply.

REPLY TO RESPONDENTS' ARGUMENT III

A recitation of the undisputed facts demonstrates why the verdict form should have applied to each individual Appellant. Appellant LLC The Resting Place was not in existence at the time of the alleged tortious acts. The deceased was never a resident of The Resting Place.

The Appellant LLC Faith, Hope and Charity was not in existence at the time of the tortious acts. The deceased was never a resident of the Appellant LLC but a resident of the predecessors.

By lumping all three Appellants together, the jury could render a verdict against one but conclude the other two were not liable but had no way to say so.

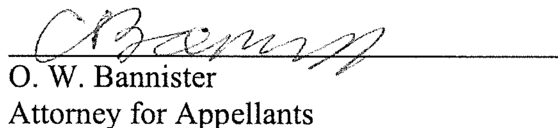
While legal authority is sparse or non-existent on civil verdict forms there are a legion of criminal cases which require a jury to consider each defendant separately. There is no logical reason that rule should not apply to civil defendants as well.

CONCLUSION

Appellants maintain a new trial is the only way to untangle the legal mistakes in this matter.

Respectfully submitted,

BANNISTER, WYATT & STALVEY, LLC



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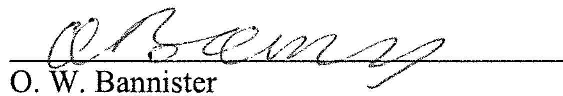
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211, *SCACR* 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.

BANNISTER, WYATT & STALVEY, LLC



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