Nos. 12-2440; 12-3029
ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Brian Teed, Marcus Clay, et al.

Plaintiffs-Appellees,

v.

Thomas & Betts Power Solutions, LLC,

Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

District Court Case No. 3:08-cv-00303-bbc
District Court Case No. 3:09-cv-00313-bbc

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES BRIAN TEED, MARCUS CLAY, ET AL.

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Appellate Court No: 12-2440; 12-3029

Short Caption: Teed, Clay, et al. v. Thomas & Betts Power Solutions, LLC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 circuit, state, and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent setting litigation and has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized. NELA's interest in this case is in assuring that the district court's application of the substantial continuity standard for successor liability to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. is affirmed because the substantial continuity standard provides greater protection to the rights of aggrieved employees when corporate changes occur.

SUMMARY OF ARGUMENT

The district court correctly determined that the "substantial continuity" test for successor liability applies to cases arising under the FLSA. Applying that test, the district court correctly held that Appellant is the successor to JT Packard & Associates ("JT Packard").

The substantial continuity test developed in U.S. Supreme Court cases addressing labor relations issues. The Court established that analysis in light of the substantial

federal policy of preventing industrial strife and protecting workers. Federal courts throughout the nation have subsequently applied the substantial continuity analysis to numerous employee protection statutes, including the FLSA. This Court has repeatedly recognized the important federal interests behind expanding the substantial continuity analysis beyond labor relations to other employment statutes, and should apply the substantial continuity analysis to the facts of this case.

ARGUMENT

I. DEVELOPMENT OF THE "SUBSTANTIAL CONTINUITY" SUCCESSOR LIABILITY STANDARD

a. Labor Relations Decisions.

The federal doctrine of successor liability originated in cases interpreting the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq.* and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*. In John Wiley & Sons, Inc. v. Livingston, the Supreme Court considered whether an employer must arbitrate with a union as required by a collective bargaining agreement between the union and a previous employer with which the employer merged. 376 U.S. 543 (1964). The Court held that such a merger did not "automatically terminate all rights of the employees" covered by the collective bargaining agreement, and that, in appropriate circumstances, the merged employer would be required to arbitrate under the provisions of the collective bargaining agreement. Id. at 548. The Court concluded that due to the "substantial continuity of identity in the business enterprise," evidenced by the transfer of employees to the new

company following the merger, the new company was obliged to arbitrate under the collective bargaining agreement. Id. at 551.

In reaching this conclusion, the Court recognized the important role of labor arbitration as "the substitute for industrial strife." Id. at 549 (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)). The Court reasoned that it would "derogate from the federal policy of settling labor disputes by arbitration" if a corporate change automatically extinguished a duty to arbitrate, particularly "where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same." Id. at 549 (citation omitted). As the Court explained:

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the wellbeing of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

Id. The Court subsequently applied this principal to a situation in which a company providing security services was supplanted by a new company who hired the majority of the first company's employees. See N. L. R. B. v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 287 (1972) (concluding that the new company was required to bargain with the first company's union, but that the new company was not bound by terms of the collective bargaining agreement negotiated by the first company); See also Howard Johnson Co.,

Inc. v. Detroit Local Joint Executive Bd., Hotel & Rest. Emp. & Bartenders Int'l Union, AFL-CIO, 417 U.S. 249, 250, 263 (1974) (determining that a new employer was not a successor under the substantial continuity test where the new employer only hired a "small fraction" of the first company's employees).

In 1973 the Supreme Court applied these principals to a situation in which a second company purchased the first company, with knowledge of an unfair labor practice of the first company. Golden State Bottling Co., Inc. v. N.L.R.B., 414 U.S. 168, 180. The Court held that "a *bona fide* purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor . . ." Id. The Court described a successor corporation as one which "has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." Id. at 184. The Court noted that this approach did not require "the [National Labor Relations] Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application." [1] See Id. at 182, n.5, 184. Applying this standard to the facts of the case,

[1] This "substantial continuity" approach is less restrictive than the traditional common law approach to successor liability. See Golden State, 414 U.S. at 182, n.5; Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1326 (7th Cir. 1990); EEOC v. G-K-G, Inc., 39 F.3d 740, 747-48 (7th Cir. 1994) ("[W]hen a claim arising from a violation of federal rights is involved, the courts allow the plaintiff to go against the purchaser of the violator's business even if it is a true sale and not a reorganization.").

the Court determined that the substantial continuity test had been met and required the successor company to reinstate the ill-treated employee with back pay. Id. at 188.

Subsequently, in Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 43 (1987) the Court further refined the substantial continuity approach to successor liability that had been developed in John Wiley & Sons, Golden State, Howard Johnson, and Burns. The Court stated that successor liability was determined through a "totality of circumstances" test, and requires consideration of whether the business of both employers is essentially the same; whether the employees have the same jobs in the same working conditions, with the same supervisors, as the old company; and whether the new company uses the same production process, produces the same products and sells to the same customers. Id. at 43.

b. Citing Important Federal Policy of Protecting Employee Rights, This Court has Applied the Substantial Continuity Standard to Several Employee Protection Statutes.

Following the development of this standard in the labor relations context, this Court has applied the substantial continuity test for successor liability when employee rights are at stake. See Musikiwamba v. ESSI Inc., 760 F.2d 740, 794 (7th Cir. 1985) (§ 1981 discrimination); Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1236 (7th Cir. 1986) (Title VII); E.E.O.C. v. Vucitech, 842 F.2d 936, 946 (7th Cir. 1988) (Pregnancy Discrimination Act claims under Title VII); Upholsterers' Int'l Union Pension Fund, 920 F.2d at 1327 (ERISA); EEOC v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (ADEA).

This Court's application of the substantial continuity analysis from labor relations cases to other employee rights legislation makes sense, because of the similar policy

interests involved. See Wheeler, 794 F.2d at 1237 (In the context of labor and anti-discrimination protections, "judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies."); Brennan v. Nat'l Tel. Directory Corp., 881 F. Supp. 986, 992 (E.D. Pa. 1995) ("[A]pplicability of the doctrine hinges on the need to protect a plaintiff where the offending entity is substituted by another company.")

In applying the substantial continuity test to a § 1981 claim, this court noted that it was motivated by three considerations. Musikiwamba, 760 F.2d at 746. The first was an "overriding federal policy against unfair and arbitrary employment practices." Id. As this Court explained, "The special concern with employment practices cannot be sufficiently underscored. In passing both the NLRA and the antidiscrimination statutes, it is clear that Congress' main objective was to eradicate practices that arbitrarily interfered with a person's ability to earn his livelihood." Id.

Second, this Court pointed out that an employee aggrieved by an unfair labor practice is "helpless" to protect his interests when a change to the business occurs. Id. The Court noted that in the case of a change of employer, an employee who had been deprived of an employment benefit (such as a job, a promotion, or a claim for relief) has been deprived of something is unobtainable from a source other than the employer or a successor. Id. Third, the Court stated that the successor is able to provide relief "at minimum cost." Id.

c. Other Circuits Routinely Apply the Substantial Continuity Standard When Employee Rights are at Stake.

In light of the important federal policy of protecting employee rights, this Court's sister circuits have for decades taken a similar approach to this Court, applying the substantial continuity analysis to a wide array of employee protection statutes. See Einhorn v. M.L. Ruberton Const. Co., 632 F.3d 89, 95 (3d Cir. 2011) (ERISA); Rojas v. TK Commc'ns., Inc., 87 F.3d 745, 749-50 (5th Cir. 1996) (Title VII); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1095 (6th Cir. 1974) (Title VII); Leib v. Georgia-Pacific Corp., 925 F.2d 240, 246 (8th Cir. 1991) (Vietnam Era Veterans' Readjustment Assistance Act); Bates v. Pac. Maritime Ass'n, 744 F.2d 705, 709 (9th Cir. 1984) (Title VII); Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 781 (9th Cir. 2010) (FMLA); Criswell v. Delta Air Lines, Inc., 868 F.2d 1093, 1094 (9th Cir. 1989) (ADEA); Trujillo v. Longhorn Mfg. Co., Inc., 694 F.2d 221, 224 (10th Cir. 1982) (Title VII); In re Nat'l Airlines, Inc., 700 F.2d 695, 698 (11th Cir. 1983) (Title VII); Sec'y of Labor v. Mullins, 888 F.2d 1448, 1454 (D.C. Cir. 1989) (Mine Safety and Health Act).

II. THIS COURT SHOULD AFFIRM THE APPLICATION OF THE SUBSTANTIAL CONTINUITY STANDARD TO THE FLSA.

a. Other Federal Courts Have Applied the Substantial Continuity Standard to Cases Arising Under the FLSA.

Until now, this Court has not had occasion to consider the application of the substantial continuity test to the FLSA, but other federal courts have considered the matter, and determined without difficulty that the substantial continuity test should apply to cases arising under the FLSA. The Ninth Circuit considered the issue in detail in

Steinbach v. Hubbard, 51 F.3d 843 (9th Cir. 1995). There, the court reflected on the purpose of the FLSA, which is to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living." 51 F.3d at 845; 29 U.S.C. § 202. The court stated that this purpose is "as fully deserving of protection as the labor peace, anti-discrimination, and worker security policies underlying" other employee protection statutes. Steinbach, 51 F.3d at 845. For that reason, the court concluded that the substantial continuity test should be applied to successor liability under the FLSA. Id.

As the result of these similar underlying policies, other federal courts have reached the same conclusion. See Powe v. May, 62 Fed. Appx. 557, at *1 (5th Cir. 2003) (assuming without deciding that the substantial continuity test applies to a case under the FLSA); Chao v. Concrete Mgmt. Res., L.L.C., Civ. No. 08-2501-JWL, 2009 WL 564381, at * 3 (D. Kan. Mar. 5, 2009) ("The court believes that the Tenth Circuit, if faced with the issue, would conclude that successor liability exists under the FLSA."); Brock v. LaGrange Equip. Co., Civ. No. 86-0-170, 1987 WL 39105, at *1 (D. Neb. July 14, 1987) ("The policies of the FLSA, like those of the [LMRA], implicate concern for employees who are especially in need of help . . . [and may be] without meaningful remedy when title to the employing business operation changes hands.") (citations omitted); Battino v. Cornelia Fifth Ave., LLC, 861 F. Supp. 2d 392, 403 (S.D.N.Y. 2012) (applying the substantial continuity test to the FLSA); Kaur v. Royal Arcadia Palace, Inc., 643 F. Supp. 2d 276, 289, n.10 (E.D.N.Y. 2007) (same); Cooke v. Jasper, Civ. No. H-07-3912, 2010 WL 4312890, at *5 (S.D. Tex. Oct. 25, 2010) (same).

b. The District Court Correctly Applied the Substantial Continuity Standard to the FLSA.

Given the widespread agreement amongst courts that the substantial continuity test applies to employee protection statutes generally, and the FLSA in particular, it is plain that the district court did not err in applying the substantial continuity test to this case. As this Court recognized in Musikiwamba, there are three factors which militate in favor of applying the substantial continuity test: the "overriding" federal policy of protecting employees from unfair labor practices; employees' helplessness to protect their rights in the face of employer's change; and the ability of the successor to provide relief at minimum cost. See Musikiwamba, 760 F.2d at 746. There can be no dispute that all of these concerns apply to the FLSA. See Steinbach, 51 F.3d at 845 (considering these interests in applying the substantial continuity test to the FLSA); Battino, 861 F. Supp. 2d at 403 (S.D.N.Y. 2012) (The "FLSA's provisions regarding employee wages and hours invoke the same concerns as the other laws for which courts have applied the substantial continuity test."). For these reasons, the district court did not err in applying the substantial continuity test in this case.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT SUCCESSOR LIABILITY EXISTS HERE.

The district court correctly applied the substantial continuity test to the facts of this case and correctly determined that successor liability exists here. The district court applied the following factors: "(1) whether the successor employer had prior notice of the claim against the predecessor; (2) whether the predecessor is able, or was able prior to the purchase, to provide the relief requested; and (3) whether there has been a sufficient

continuity in the business operations of the predecessor and successor." Wheeler, 794 F.2d at 1236.[2] As this Court noted in Musikiwamba, the first two factors "are critical to the imposition of successor liability. 760 F.2d at 750. However, the "nature and extent of [successor] liability is subject to no formula, but must be determined upon the facts and circumstances of each case." MacMillan, 503 F.2d at 1092; See also Howard Johnson, 417 U.S. at 262, n.9 (describing the fact-specific nature of the successor liability analysis).

a. Appellant was on Notice of the Claims.

There is no question that Appellant had notice of the claims at issue in this case before it purchased the assets of JT Packard. In the receivership process, the three bidders on JT Packard assets had to sign an asset purchase agreement which specifically addressed the lawsuits. A description of the claims in the asset purchase agreement for JT Packard referred to a state court order which stated that the Teed and Clay Plaintiffs intended to pursue lawsuits against the buyer of JT Packard on a successor liability theory. During the sales process, JT Packard told potential buyers about the lawsuits but stated that these liabilities would not be included in the sale of assets. On January 19, 2010, a Wisconsin county court approved the sale and explicitly stated that Appellant would not be deemed a successor to JT Packard, but noted that Appellant was on notice of the lawsuits against JT Packard and that both parties could assert any claims and

[2] The Wheeler court noted that the third factor is an "amalgamation" of several "indicia of continuity" set forth in Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974).

defenses they have against each other. See Bates v. Pac. Mar. Ass'n, 744 F.2d 705, 710 (9th Cir. 1984) (finding successor liability where the successor had "actual knowledge of the obligation).

b. The Predecessor is Unable to Provide Relief.

Second, as this Court noted in Musikiwamba, "it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief . . ." 760 F.2d at 750. However, it is important to note that element must not be proven in all cases. See Vucitech, 842 F.2d at 946 (Reasoning that "the proper approach to . . . successor liability is not to erect a set of hoops to force plaintiffs to jump through but to ask whether such liability would strike a reasonable balance between the interest in fully sanctioning unlawful conduct and the interest in facilitating the market in corporate and other productive assets."); E.E.O.C. v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (describing the substantial continuity test but not requiring a showing that the predecessor is incapable of providing relief).

Nevertheless, there is no dispute that the predecessor, JT Packard, is currently unable to provide relief. Furthermore, before the sale of JT Packard assets, it was a profitable business which would have been able to provide relief. The district court was therefore correct in observing, even if this requirement must be shown, that there is no risk, under the facts of this case, that imposing successor liability could "severely inhibit the reorganization or transfer of assets of a failing business." Musikiwamba, 760 F.2d at 751.

c. There is Continuity of Operations and Workforce.

The last factor considered in the substantial continuity analysis is the continuity in operations and workforce of the predecessor employees. Musikiwamba, 760 F.2d at 751. Appellant made offers of employment to 254 of 296 of the employees of JT Packard. Appellant continues to use the JT Packard name, operate out of the old JT Packard location, use the same phone number, and offer goods and services which are similar to the goods and services offered before the sale. See G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (affirming successor liability where the successor "retained most of [the predecessor's] personnel, including most of its management personnel and all its salesmen in the Chicago area, and did not institute major changes until a year after the acquisition."); Bates, 744 F.2d at 710 (finding successor liability where the successor "provides the same service, using the same equipment. The location and customers are the same. Most important, [the successor] uses many of the same personnel.") Finally, Appellant does not appear to contest this element in its briefing and has therefore waived this argument.

CONCLUSION

For these reasons, the court's decision should be affirmed. The court correctly applied the substantial continuity test and correctly determined that Appellant is the successor to JT Packard.

Date: *December 12, 2012*

Respectfully Submitted,

s/David E. Schlesinger

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Dated: *December 12, 2012*

s/David E. Schlesinger
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