No.: 21-0183

SUPREME COURT OF APPEALS OF WEST VIRGINIA

TONI G. MILMOE, Executrix of the Estate of THELMA MARIE STURGEON, Deceased,

Plaintiff below, Petitioner,

v.

PARAMOUNT SENIOR LIVING AT ONA, LLC, a West Virginia limited liability company, successor in interest to PASSAGE MIDLAND MEADOWS OPERATION, LLC, and MIDLAND MEADOWS SENIOR LIVING, LLC,

Defendants below, Respondents.

From the Circuit Court of Cabell County, West Virginia
Honorable Christopher Chiles
Civil Action No.: 19-C-370

PETITIONER'S BRIEF

Matthew P. Stapleton (WVSB #12334)
STAPLETON LAW OFFICES
400 5th Avenue
Huntington, WV 25701
(304)529-1130
Co-Counsel for Plaintiff below, Petitioner

W. Stephen Flesher (WVSB #1223)
Law Offices of W. Stephen Flesher, LLC
P.O. Box 1173
Barboursville, WV 25504
(304)417-2373
Co-Counsel for Plaintiff below, Petitioner

Douglas C. Hart (WVSB #12204)
Burns White Center
48 26th Street
Pittsburgh, PA 15222
(412)995-3000
Counsel for Defendant below, Respondent

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STANDARD OF REVIEW AND APPLICABLE LAW

"A circuit court's entry of summary judgment is reviewed de novo." *Estate of Helmick ex rel. Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994). In order to prevail on a motion for summary judgment, the moving party must prove "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. RCP 56(c). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963) (emphasis added). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casusalty & Sur. Co.*

"In determining on review whether there is a genuine issue of material fact between the parties, the supreme court will construe the facts in a light most favorable to the losing party." *Alpine Property Owners Ass'n v. Mountaintop Dev. Co.*, 179 W. Va. 12, 17, 365 S.E.2d 57, 62,

(1987). A genuine issue or dispute is simply one "about which reasonable minds could differ." *Dent v. Fruth*, 192 W. Va. 506, 510, 453 S.E.2d 340, 344 (1994). A material fact "is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. pt. 5, in part, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). The burden is entirely on the Respondent, as the moving party below, to show that the facts are so well-developed that there are no more genuine issues as to any material fact. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 2, *Justus v. Dotson*, 161 W. Va. 443, 242 S.E.2d 575 (1978) (Citing *Aetna Casualty & Sur. Co.*, Supra) (emphasis added).

In ruling on summary judgment, the courts are limited to the record before them, and are not free to supplement that record. "The court must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Cavender v. Fouty*, 195 W. Va. 94, 464 S.E.2d 736 (1995) (emphasis added).

STATEMENT OF THE CASE

This is an appeal from an Order granting summary judgment by the Cabell County Circuit Court. Petitioner is the Executrix of the Estate of Thelma Marie Sturgeon, her late mother. *App.* at 8. Ms. Sturgeon became a resident of a nursing home named Passage Midland Meadows Operations, LLC ("Passage") which had acquired the business from the former operator, Midland Meadows Senior Living, LLC. *App.* at 15. During her time at the facility in question, Ms. Sturgeon suffered a repeated course of slip and fall accidents as well as "eloping" from the

facility where in one instance she was found lying on the ground on the side of a nearby road. *App.* at 15-16. Plaintiff alleges that this continuous course of negligence by the facility in question caused serious personal injury to Ms. Sturgeon resulting in medical expenses, pain, suffering, and was an ultimate proximate cause of the death of Ms. Sturgeon on November 13, 2017. *App.* at 15-17.

Passage eventually filed for Chapter 11 bankruptcy protection. *App.* at 51. Passage's ownership consisted of two people, Mr. Andrew Turner and Mr. William Lasky. *App.* at 63. Paramount Senior Living at Ona, LLC, ("Paramount") was formed on December 13, 2017, for the sole purpose of taking over the assets of Passage and continuing the existing business of Passage including utilizing the same staff, management, equipment, and facility residents and servicing the nursing home facility's existing residents. *Add. To App.* at 247. Paramount's ownership consists of one person, James Cox. *App.* at 62. On January 1, 2018, Paramount also took possession of all of bankrupt Passage's facility supplies, medical supplies, and inventory and began to operate the facility as Paramount. *App.* at 68-88. Paramount began operating the same nursing home facility with virtually the same staff, operations' systems, and residents while Paramount paid no consideration, monetary or otherwise, to acquire the subject nursing home operation. *Id.* On January 2, 2018, the Trustee filed a motion to dismiss the Passage bankruptcy, which motion was granted, because debtor Passage had no further income, had no ability to fund the Chapter 11 bankruptcy plan, and was administratively insolvent. *Add. To App.* at 209-213. Importantly, Paramount has emphatically stated that it did not purchase Passage and there is no evidence of any consideration, monetary or otherwise, paid by Paramount to acquire the assets and business of Passage.

SUMMARY OF THE ARGUMENT

The Circuit Court erred in granting defendant's Motion for Summary Judgment by improperly applying and expanding the doctrine of purchaser liability immunity, pursuant to *Davis v. Celotex Corporation,* 420 S.E.2d 557 (W.Va 1992), which applies to a **purchaser** of all of the assets of another corporation. Respondent Paramount maintains it did not purchase the assets of the predecessor corporation, Passage, and there was no consideration paid by Paramount to acquire the operations from Passage. Therefore, purchaser liability does not apply to Paramount.

The Circuit Court also erred because, even if Respondent were to be considered a purchaser of the assets of Passage, Respondent meets two of the exceptions to the liability immunity generally granted to a purchaser of the assets of a predecessor. First, Petitioner contends that Paramount was a mere continuation of its predecessor, Passage, as Paramount gained the operational, material, medical assets, clientele, and human resources assets of Passage while Passage became defunct immediately following Paramount's take over. Further, Petitioner contends that an element of the transaction was not made in good faith as the operations and assets of Passage were transferred to Paramount with no known consideration exchanged between the entities.

Finally, The Circuit Court erred in granting defendant's Motion for Summary Judgment prior to the end of the discovery period and; thus, the matter was not ripe for a summary judgment order. Petitioner maintains there were yet to be determined facts as the Court's established discovery deadline had not passed at the time of the summary judgment hearing.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners maintain that oral argument is appropriate in this instance pursuant to Rule 19 & Rule 20 of the Rules of Appellate Procedure as this matter raises an assignment of error in the application of settled law, involves issues of first impression, and involves issues of fundamental public importance. Petitioner maintains the circuit court's error is plaint, and violates established tenants of the burden required under W.Va. RCP 56.

ARGUMENT

A. THE CIRCUIT COURT ERRED BY IMPROPERLY APPLYING AND EXPANDING AN INAPPLICABLE STANDARD AND ANALYSIS AS THE BASIS FOR GRANTING SUMMARY JUDGMENT.

The Court erred in granting defendant's Motion for Summary Judgment by improperly applying and expanding the doctrine of purchaser liability immunity pursuant to *Davis v. Celotex Corporation,* 420 S.E.2d 557 (W.Va 1992), which applies to a **purchaser** of all of the assets of another corporation. "In West Virginia, as in most jurisdictions, 'at common law, the **purchaser of all the assets** of a corporation was not liable for the debts or liabilities of the corporation purchased. This rule has since been tempered by a number of exceptions and statutory provisions." *Id.* (Emphasis Added).Respondent Paramount maintains and has repeatedly asserted it did not purchase the assets of the predecessor corporation, Passage, therefore purchaser liability immunity does not apply to Paramount. While Paramount obtained full control of the operations of Passage's nursing home, which it still operates today, Paramount paid no known consideration to take control of the business. As there was no consideration paid by Paramount, Paramount cannot be considered a purchaser and the immunity afforded to a purchaser does not

apply here.

Petitioner's first argument is pure and simple. Purchaser liability immunity does not apply to respondent as it, by its own admissions, was not a purchaser of the assets of its predecessor, Passage. The circuit court clearly erred by applying the standard for a purchaser of the assets of another company to the respondent as the respondent does not dispute it did not purchase the assets of its predecessor. Hypothetically, had respondent paid fair market value for the assets of Passage, petitioner would agree that respondent was not a proper party to this litigation; however, that is not the case. The circuit court erred by expanding the rule in *Davis* to extend beyond purchasers and to include non-purchasers.

This appears to be a question of first impression on this Court as to whether a non-purchaser of a business entity receives the same liability immunity that a purchaser receives. This Court should not expand the liability immunity beyond purchasers of all the assets of a corporation as it would discourage creditors and vendors from participating in West Virginia's economic business community and it promotes misleading business practices. In this case, numerous creditors, vendors, and those with claims against the now defunct predecessor, Passage, were left without recourse. Had respondent paid fair market value for the nursing home business, creditors and claimants would have no claim against Paramount because the value of assets they could attempt to collect from Passage would remain the same. This is the reasonable foundation on which purchaser liability immunity was created. However, Paramount simply took control the business and operations of Passage while leaving Passage defunct, and gained control of Passage's assets, and there was no consideration paid the creditors. Due to the lack of consideration, creditors lost their ability to pursue their claims against the assets previously held

by Passage, which became defunct. As a non-purchaser of those assets, purchaser liability immunity should not be applied to respondent.

B. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE PETITIONER DEMONSTRATED THE RESPONDENT FALLS UNDER EXCEPTIONS TO THE LIABILITY GENERALLY GRANTED TO SUCCESSOR CORPORATIONS.

While Petitioner contends the purchaser liability immunity under *Davis* does not apply to respondent as it was a not a purchaser, assuming, *arguendo*, *Davis* provides exceptions which the evidence in this matter indicates the petitioner has met; or, at a minimum, there is a factual determination to be had rendering this case inappropriate at this time for summary judgment. In West Virginia, the purchaser of the assets of a corporation can be held liable for the debts or liabilities of the corporation purchased when certain exceptions or statutory provisions are met. Syl. pt. 2, *Davis v. Celotex Corp.*, 187 W.Va. 566, 420 S.E.2d 557 (1992). The exceptions relevant to the instant case regarding successor liability are:

> A successor corporation can be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or **if some element of the transaction was not made in good faith**. Successor liability will also attach in a consolidation or merger.... Finally, such **liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor**.

Syl. pt. 3, Davis (emphasis added). Here, the evidence establishes that Paramount is a mere continuation of its predecessor, Passage. The evidence further establishes that the transaction was not made in good faith as there was not adequate consideration paid by Paramount to acquire the operations of Passage. There is absolutely no evidence indicating that Passage has remained in business.

1. The evidence establishes that Respondent was a mere continuation of it

predecessor.

To determine whether a corporation or entity is a mere continuation or reincarnation of another, the principle factors for consideration are: 1) whether only one corporation exists after completion of a transfer of assets; and 2) whether there is a common identity of directors and stockholders and/or owners between the two entities. *Security Alarm Financing Enterprises, Inc. v. Palmer*, 2014 WL 1478840, *10 (N.D. W.V. April 14, 2014); *Carter Enterprises, Inc.*, 257 B.R. at 803; *Jordan*, 455 S.E.2d at 564.

This case is demonstrative of a successor corporation that is a mere continuation of its predecessor. An analysis of the two factors in *Security Alarm Financing Enterprises, Inc. v. Palmer* show that one of the factors is met and one is not. The day after Paramount assumed the operations of Passage, the Trustee in Passage's bankruptcy filed a motion to dismiss the bankruptcy as debtor Passage had no further income, had no ability to fund the Chapter 11 bankruptcy plan, and was administratively insolvent. Clearly, the first factor has been met as Passage became defunct following the completion of the transfer of its assets.

Regarding the second factor, Passage's members, officers, and directors consists of two people, Mr. Andrew Turner and Mr. William Lasky. Paramount's members, officers, and directors consist of one person, James Cox. Due to the size of the members, officers, and directors of Paramount and Passage, the fact that these are different individuals carries little weight. Given that these are small closely held businesses that do not have a significant structure of members, officers, and directors, this factor should not be given the level of consideration as the first factor. Any interpretation of the transactions appears to involve three individuals whom benefitted from their transaction relating to the acquisition of the asset transfer to the detriment

of claimants and creditors.

In essence, the Court is presented with the issue of a corporation transferring a significant portion of its assets, for no known consideration and with the intent of going out of business, to a newly formed corporation created for the sole purpose of operating as an identical business with the same facility, operations, personnel, and resident customers. Public policy, and common sense, would dictate that this is clearly a continuation of the same business.

2. The evidence further establishes that the transaction was not made in good faith as there was not adequate consideration paid by Paramount to acquire the operations of Passage.

As discussed above, Petitioner contends that the vast majority, if not all, of the operational, material, medical assets, clientele, and human resources assets of Passage were transferred to Paramount with no known consideration paid between the entities. To reiterate some of the arguments made in Assignment of Error A above, respondent Paramount maintains and has repeatedly asserted it did not purchase the assets of the predecessor corporation and Paramount has produced no evidence of any consideration paid by Paramount for the assets of Passage it received. Petitioner contends that the absence of any evidence of any consideration constitutes an element of the transaction that was not made in good faith.

Paramount represented to the circuit court, absent a proffer of any proof, that Passage only transferred a limited amount of assets to Paramount. Further, the respondent did not, and Plaintiff believes cannot, identify any assets retained by Passage. Respondent has disregarded the primary assets it received including, but not limited to, a business with a full client base, an entire workforce to operate the business, and all the process and systems in place to operate the business. There is clearly a material factual issue regarding the value and significance of the

assets that were transferred to the respondent and the consideration paid for these assets.

Successor liability is a relatively undeveloped area of the law in West Virginia. While most states generally recognize that a successor company does not acquire the liabilities of its predecessor, some states require adequate consideration to account for creditors and claimants of the predecessor. For Example, in our neighboring state and respondent's home state of Pennsylvania provides, "the general rule is that when one company sells or transfers all of its assets to a successor company, the successor does not acquire the liabilities of the transferor corporation merely because of its succession to the transferor's assets." [452 Pa.Super. 116] *Dawejko v. Jorgensen Steel Company*, 290 Pa.Super. 15, 434 A.2d 106, 107 (1981) (citations omitted). However, the general rule does not apply and liability attaches to the successor when one of the following is shown: ...5) The transfer was not made for adequate consideration and provisions were not made for the creditors of the transferor..." *Simmers v. American Cyanamid Corporation*, 394 Pa.Super. 464, 576 A.2d 376, 386 (1990); *Childers v. Power Line Equipment Rentals, Inc.*, 681 A.2d 201, 452 Pa.Super. 94 (Pa. Super. Ct. 1996).

Here, a similar analysis should be adopted. In order to protect the creditors, lenders, and others who are crucial to West Virginia's economic business climate, this Court should provide protections where assets are transferred without adequate consideration. Petitioner contends that the transfer of the assets of Passage to Paramount for no consideration constitutes an element of the transaction that was not performed in good faith and the circuit court failed to recognize as such.

C. THE CIRCUIT COURT ERRED AS THIS CASE WAS NOT RIPE FOR SUMMARY JUDGMENT.

Your Petitioner alleges the case was not ripe for summary judgment. Respondent Paramount sought and obtained by agreement an early dispositive motion deadline in the Court's Scheduling Order and as later modified. Paramount moved for summary judgment within that time frame. Following motion oral argument held on November 5, 2020, and after each party thereafter had provided the Court with opposing memorandum Orders for the Court to consider, the Court granted Paramount's summary judgment motion.

Petitioner notes there remained sufficient time to discover additional facts as the Court's amended discovery completion deadline of December 24, 2020, had not passed at the time of the summary judgment motion hearing. Discovery was ongoing and was being conducted within the Court's discovery completion deadline when the dates for supporting and opposing summary judgment briefs were to be submitted and oral arguments had been heard. Paramount declined to fully respond to petitioner's outstanding written discovery (Plaintiff's combined 3rd Set), served on November 19, 2020, stating in its responses served on January 22, 2021, to Plaintiff's combines 3rd set of discovery that it was withholding providing responses pending the Court's summary judgment ruling. *App.* at 241, *Add. to App.* at 261-271. As such, Petitioner maintains the Court inappropriately granted summary judgment based upon the well-settled case law regarding an award of summary judgment. Petitioner notes there remained sufficient time to discover additional facts as the Court's amended discovery completion deadline of December 24, 2020, had not passed at the time of the summary judgment motion hearing.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court *reverse* lower

court's Order granting defendant's Motion for Summary Judgment and remand this matter back to the circuit court for further proceedings. The plaintiff additionally moves this Court for an award of any other general relief the Court may deem appropriate.

TONI G. MILMOE, Executrix of the Estate of THELMA MARIE STURGEON, Deceased

W. Stephen Flesher (WVSB #1223)
Law Offices of W. Stephen Flesher, LLC
P.O. Box 1173
Barboursville, WV 25504
(304)417-2373
Co-Counsel for Plaintiff

And

Matthew P. Stapleton (WVSB #12334)
Stapleton Law Offices
400 5th Avenue
Huntington, WV 25701
(304)529-1130
Co-Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, certify that a copy of the **"PETITIONER'S BRIEF"** was served upon the persons described below on the 8TH day of July, 2021, by US Mail, postage prepaid, in an envelope addressed and email as follows:

✓ Douglas C. Hart, Esq.
Burns White Center
48 26th Street
Pittsburgh, PA 15222
Counsel for Respondent

W. Stephen Flesher (WVSB #1223)
Law Offices of W. Stephen Flesher, LLC
P.O. Box 1173
Barboursville, WV 25504
(304)417-2373
Co-Counsel for Petitioner

and

Matthew P. Stapleton (WVSB #12334)
Stapleton Law Offices
400 5th Avenue
Huntington, WV 25701
(304)529-1130
Co-Counsel for Petitioner