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**SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO.: 21-0183**

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

FILE COPY

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 REPLY

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ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT ERRED BY IMPROPERLY APPLYING AND EXPANDING AND INAPPLICABLE STANDARD AN ANALYSIS AS THE BASIS FOR GRANTING SUMMARY JUDGMENT.
- B. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE PETITIONER DEMONSTRATED THE RESPONDENT WAS A MERE CONTINUATION OR REINCARNATION OF ITS PREDECESSOR.
- C. THE CIRCUIT COURT ERRED AS THIS CASE WAS NOT RIPE FOR SUMMARY JUDGMENT.

STATEMENT OF THE CASE

Petitioner relies upon the Statement of the Case set forth in her previously submitted Petitioner's Brief.

SUMMARY OF ARGUMENT

Petitioner relies upon the Summary of Argument set forth in her previously submitted Petitioner's Brief.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners continues to 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 plain, and violates established tenants of the burden required under W.Va. RCP 56.

ARGUMENT

Petitioner maintains that her brief speaks for itself and will not reiterate her brief herein. However, Respondent has misconstrued and confused the relatively straight forward positions of the Petitioner. For this reason, Respondent's misunderstandings must be addressed. While Respondent's extensive Response attempts to muddy the waters of the actual arguments made by Petitioner, yet, the legal analysis required herein is quite simple: 1) what law did the Respondent rely on for purposes of its dispositive motion, 2) does this law apply to the Respondent, and 3) if the law does apply to Respondent, does Petitioner meet an exception to this law. As further detailed below, Petitioner asserts this law does not apply to Respondent and that, even if the law did apply to Respondent, Petitioner falls within exceptions to the law.

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

As pointed out by Respondent, Justice Hutchinson recently acknowledged the legal definition of a successor as "a corporation that, through amalgamation, consolidation , or other assumption of interests, is vested with the rights and duties of an earlier corporation." *Henzler v. Turnoutz, LLC*, 844 S.E.2d 700, 710 (W. Va. 2020) (citing BLACK'S LAW DICTIONARY) (Emphasis added). Simply put for purposes of this appeal, when a corporation assumes the interests of a preceding corporation it is vested with the rights and duties of the earlier corporation. Here, Respondent assumed the full operations of the earlier corporation, Passage. While Respondent contends there is no evidence of an amalgamation, merger, or consolidation, which Petitioner does not argue, Respondent fails to address assumption of interests. This is

likely because there is no plausible evidence to support an argument that Respondent did not assume the interests of the previous nursing home when it signed an "Operations Transfer Agreement," in which Respondent completely took over all of the operations of the prior corporation. Given this Court has apparently adopted the Black's Law Dictionary (2019 Ed.) definition of what constitutes a "successor," clearly, Respondent Paramount assumed many if not all of the business rights and duties of its predecessor, Passage Midland Meadows. As evidenced by Paramount's actions and pursuant to the written terms of the "Operating Transfer Agreement," Paramount thus became vested with the rights and duties of the earlier corporation, Passage. Paramount as a result clearly meets this Court's definition of a successor in interest.

Respondent's dispositive motion relied upon *Davis v. Celotex Corporation*, 420 S.E.2d 557 (W.Va 1992) which states, "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.'" (Emphasis added) *App.* at 51; *Resp't Resp.* at 12. Petitioner contends this does not apply to Respondent as it was not the purchaser of all the assets of the predecessor company, Passage. Further Respondent does not dispute that it is not a purchaser of all of the assets of its predecessor: "It [Paramount] did not purchase Passage's substantial assets." *Resp't Resp.* at 12.

Respondent has overlooked, perhaps intentionally, a vital step in the analysis to show how this law applies to Respondent. Respondent simply states the law yet contends Petitioner does not meet any of the exceptions to the law. Petitioner maintains this law does not apply to Respondent and the circuit court erred by extending the law in *Davis* relating to a "purchaser of

all the assets” to the Respondent.

Respondent asserts that Petitioner references for the first time in her appellate brief the liability immunity granted to purchasers of all the assets of a corporation under *Davis* does not apply to the Respondent. A review of the record below clearly demonstrates this claim is not accurate. Petitioner specifically proffered to the circuit court, “We believe the legal arguments here are actually irrelevant, because to be frank, the legal argument section of the original memo on page eight of the motion, pursuant to West Virginia common law, the purchaser of all of the assets of a corporation, or similar entity, is not liable for debt or liabilities of the entity purchased. This was not a purchase. These rules and exceptions that the Defendant is talking about, they don’t apply here. They did no purchase the entity.” *App.* at 342-343.

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

Petitioner reiterates that her brief speaks for itself but is compelled to clarify confusion and misinformation contained the Respondent’s Response.

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

Respondent asserts it had no pre-existing relationship to its predecessor, Passage. While the Petitioner does not dispute this, the Court should be aware that Paramount was not formed until December 13, 2017, and was formed 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. Given this, the lack of a pre-existing relationship should be given little to no weight as Paramount did not exist prior to its dealings with its predecessor, Passage.

Respondent further asserts there is no evidence that the predecessor Passage became defunct following Respondent's assumption of Passage's operations. Passage filed for Chapter 11 bankruptcy prior to Respondent's acquisition of Passage's operations. Once Respondent's took over Passage's operations, the United States Trustee moved to dismiss the Passage bankruptcy on the grounds that Passage "no longer operate[s] the Senior-Care Facilities and will receive no further income" and are "administratively insolvent." *App.* at 210. Respondent represents that Passage is still active with the West Virginia Secretary of State, however, Passage was terminated for failure to file annual reports with its last report being filed in 2017, the year before Respondent assumed the operations. *See* West Virginia Secretary of State website, <https://apps.sos.wv.gov/business/corporations/organization.aspx?org=343207>. Further, both Petitioner and Respondent have tried to locate Passage over the course of this litigation without success. Respondent confirmed this at oral argument before the circuit court, "Admittedly, and I acknowledge, they tried to reach out to Passage, they can't find Passage, I can't find Passage. I have no idea where they are at." *App.* at 325. While Petitioner acknowledges she was able to locate the insurance carrier for Passage which appears to have recently made an appearance in the underlying case, it is clear Passage became defunct following Paramount's assumption of Passage's operations and assets.

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.**

Respondent contends that the Bankruptcy Court allowing the parties to sign the

Operations Transfer Agreement defeats any questions relating to Petitioner's assertion that where 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 constitutes an element of the transaction that was not made in good faith. However, Judge Volk's Order does not address any of the primary issues this Court is considering on appeal. Respondent merely speculates on the rational behind Judge Volk's Order without offering evidence. Judge Volk's Order does not address the successor in interest issues, it does not address handling of the liabilities of Passage, and it does not interpret or speak to the enforceability of the provisions of Operating Transfer Agreement.

CONCLUSION

For the foregoing reasons, Petitioner 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.

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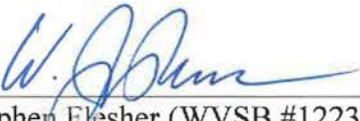
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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, certify that a copy of the **"PETITIONER'S REPLY"** was served upon the persons described below on the 15th day of September, 2021, by US Mail, postage prepaid, in an envelope addressed and email as follows:

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