IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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

Plaintiff,

vs.

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

Defendant.

Civil Action No.: 19-C-370

Judge Christopher D. Chiles

AMENDED ORDER AND MEMORANDUM OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On September 14, 2020, Defendant, Paramount Senior Living at Ona, LLC (hereafter "Paramount"), timely filed and brought before this Honorable Court its Motion for Summary Judgment. In its dispositive motion, Paramount respectfully requests for the Court to issue a finding that Paramount is not liable for Plaintiff's claims under a theory of successor liability, and for the Court to dismiss Plaintiff's Complaint in its entirety.

In preparation of this Order, the Court has considered the following:

1. Defendant's Motion and accompanying Memorandum of Law in Support of Motion for Summary Judgment;
2. Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment;
3. Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment;

4. All evidentiary materials tendered in support of the aforesaid filings;

5. All relevant and applicable legal case law and statutory authority; and

6. Arguments and positions presented by counsel during the hearing conducted on November 5, 2020.

After undertaking a careful and deliberate review of the aforesaid materials, legal authority and argument presented by the parties, this Court enters the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT:

1. Plaintiff, Toni G. Milmoe (hereafter "Plaintiff"), in her capacity as the Executrix of the Estate of Thelma Marie Sturgeon, Deceased, commenced the instant action on August 21, 2019 by filing a Complaint under Civil Action No. 19-C-370 in the Circuit Court of Cabell County West Virginia.

2. In her Complaint, Plaintiff alleges claims of negligence and wrongful death with relation to the care provided for Thelma Marie Sturgeon (hereafter referred to as the "Decedent"), during her residency at the nursing home and/or assisted living facility located at 100 Weatherholt Drive, Ona, Cabell County, West Virginia (hereafter referred to as the "Ona Facility"). See Plaintiff's Complaint, generally.

3. Specifically, Plaintiff's claims of negligence and wrongful death stem from allegations related to the Decedent's care at the Ona Facility from August 20, 2016, when she became a resident, until November 13, 2017, when Decedent passed away. See Plaintiff's Complaint, ¶¶8, 9, 10, 11, 12.

4. According to the Complaint, Midland Meadows Senior Living, LLC (hereafter "Midland Meadows"), who Plaintiff alleges to have been the operator of the Ona Facility during

Decedent's residency, owed a duty to provide "appropriate healthcare and assisted living services, including, but not limited to, engaging in reasonable measures to implement an appropriate and adequate care plan" concerning Decedent's "safety, health and welfare." See Plaintiff's Complaint, ¶¶3, 14.

5. In sum, the crux of Plaintiff's Complaint stems from allegations that Midland Meadows "failed to implement and provide an adequate care plan" for the Decedent, and the conduct of its agents, servants and/or employees constituted "actionable negligence which was a significant contributing factor in causing serious personal injury" resulting in "medical expenses, pain, suffering, and an ultimate proximate cause" of Decedent's death. See Plaintiff's Complaint, ¶15.

6. Although Plaintiff alleges that Midland Meadows was the operator of the Ona Facility during the tenure of Decedent's residency, and recognizes that Passage Midland Meadows Operations, LLC (hereafter "Passage") was the subsequent operator of the Ona Facility prior to Paramount, Plaintiff asserted her claims solely against Paramount under a theory of successor liability.[1] See Plaintiff's Complaint, ¶¶18, 26, 35.

7. With respect to her claims under a theory of successor liability, Plaintiff alleges that Paramount is "accountable for the actions" of Midland Meadows "pursuant to legally recognized and precedential principles of successor liability. See Plaintiff's Complaint, ¶¶2, 3, 18, 26, 35.

8. In its Motion for Summary Judgment, Paramount argues that it cannot be held accountable for the acts of omissions of the prior operators of the Ona Facility, as there is no

[11] As illustrated by the Parties at the summary judgment hearing, it was determined during the course of discovery that Passage was the operator of the Ona Facility during the entire period of Decedent's residency.

record evidence to support and establish any such responsibility under Plaintiff's proposed theory of successor liability.[2]

9. In her Response in Opposition, Plaintiff contends that certain issues of material fact exist, and, as such, Paramount's dispositive motion should be denied.[3]

10. First, Plaintiff argues that material factual disputes remain with regard to the underlying transaction leading up to Paramount's assumption of the operations of the Ona Facility, i.e. the Operations Transfer Agreement, as she contends that certain "elements of the transaction were not in good faith."

11. Next, Plaintiff contends that material factual issues exist as to whether Paramount is a "continuation or reincarnation" of Passage, such that Paramount could be responsible under her theory of successor liability.

Paramount's Assumption of the Operations of the Ona Facility
Effective January 1, 2018 Under the Operations Transfer Agreement

12. Pursuant to an Operations Transfer Agreement entered into between Paramount and Passage, Paramount assumed the operation of the Ona Facility effective January 1, 2018. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement effective January 1, 2018.

13. Paramount's assumption of the operation of the Ona Facility was the result of Passage filing for Chapter 11 bankruptcy protection, under Case No. 3:17-bk-30092 in the

[2] At a scheduling conference conducted before the Court on December 6, 2019, the Parties agreed to conduct phased discovery, with the initial phase targeted to determine whether Paramount could be responsible under Plaintiff's theory of successor liability, with the understanding that the successor liability issue would be adjudicated through dispositive motions practice upon the conclusion of that initial phase of discovery.

[3] Although Plaintiff initially argued in her Response that Paramount's summary judgment motion was not yet ripe for consideration, due to her inability to conduct the deposition of James J. Cox, Paramount's Chief Executive Officer, Plaintiff's counsel effectively retracted her position at the hearing by stating that Mr. Cox's deposition was not necessary for adjudicating the issue of successor liability.

United States Bankruptcy Court for the Southern District of West Virginia, and following Passage's request to relinquish its operation of the Ona Facility through the approval of the Bankruptcy Court.

14. On December 29, 2017, the Honorable Frank W. Volk of the United States Bankruptcy Court for the Southern District of West Virginia entered an Order to grant Passage's Emergency Motion for Authorization to Enter into Operations Transfer Agreement and Related Transactions. See Exhibit B to Defendant's Memorandum of Law in Support of Motion for Summary Judgment, December 29, 2017 Order.

15. Pursuant to Judge Volk's Order, the relief requested in Passage's Emergency Motion was deemed to be "in the best interest of the Debtors [Passage], their estates, creditors, residents and employees," and, as such, said motion was granted and Passage was authorized to "enter into and implement" the Operations Transfer Agreement with Paramount. See Exhibit B to Defendant's Memorandum of Law in Support of Motion for Summary Judgment, December 29, 2017 Order.

16. As set forth within the Operations Transfer Agreement entered into between Paramount and Passage dated January 1, 2018, the transaction between the parties did not constitute an acquisition of the membership and/or ownership interests of Passage by Paramount, or the acquisition of all of Passage's assets. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement effective January 1, 2018.

17. Instead, Paramount merely assumed the operations of the Ona Facility effective January 1, 2018, and the only assets conveyed to Paramount under the Operations Transfer Agreement consisted of the operational items and supplies on hand needed to operate the

Facility, such as "linens, consumables and food stuffs, medical supplies, office supplies, and maintenance inventory." See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement; p. 2; Exhibit D, Defendant's Memorandum of Law, Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

18. Pursuant to the Operations Transfer Agreement, Paramount did not acquire Passage's "cash, cash equivalents, accounts receivable, notes receivable, capital stock, tax refunds, proprietary information and know-how and forms, including accounting and other proprietary software," as said assets were specifically identified as "Excluded Assets" under the Operations Transfer Agreement. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement; p. 2-3.

19. With respect to Passage's debts, liabilities and claims, the Operations Transfer Agreement specifically precluded Paramount from liability for any such debts, liabilities or claims. See Exhibit A, to Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement; p. 3-4.

20. In that regard, Paragraph 3 of the Operations Transfer Agreement, titled "Excluded Liabilities," specifically states as follows:

> Except as expressly provided in this Agreement, New Operator [Paramount] and New Manager [Paramount Health Holdings Group, Inc.] shall not assume any claims, lawsuits, liabilities, obligations or debts of Exiting Operator ("Excluded Liabilities"), including without limitation, (i) malpractice or other tort claims to the extent based on acts or omissions of Exiting Operator occurring before the Commencement Date, or claims for breach of contract to the extent based on acts or omissions of Exiting Operator occurring before the Commencement Date; ... (iii) any other obligations or liabilities incurred by Exiting Operator prior to the Commencement Date, including but not limited to rent to the landlord of the Facility; ... (v) any third party payor, civil monetary penalties,

> recoupments, or other liabilities, including any transferee or successor liabilities, whatsoever, relating to or as a result of operations of the Facility prior to the Commencement Date.

See Exhibit A, Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement, ¶3, pp. 3, 4.

21. Following the approval of the Bankruptcy Court, Paramount assumed the operation of the Ona Facility effective January 1, 2018 pursuant to the terms and conditions set forth within the Operations Transfer Agreement.

22. As Paramount only assumed the operation of the Ona Facility effective January 1, 2018, Paramount had no involvement in the care provided to Decedent during her period of residency.

Paramount Did Not Merge or Consolidate with Passage, and No Commonality of Members, Officers or Directors Ever Existed Between Paramount and Passage

23. Paramount did not acquire any of the membership or ownership interests of Passage as part of its assumption of the operation of the Ona Facility, and the transaction did not constitute the acquisition of all of Passage's assets. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement; Exhibit D, Defendant's Memorandum of Law, Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, p. 7.

24. Prior to entering into the Operations Transfer Agreement effective January 1, 2018, Paramount did not have any business relationship or affiliation with Passage. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

25. There has never been any commonality of the members, owners, officers or directors between Paramount and Passage, either before or after the execution of the Operations Transfer Agreement effective January 1, 2018. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

26. To that extent, it is unrefuted that none of Passage's members, owners, officers or directors, past or present, have ever held a membership or ownership interest in Paramount, or any of its affiliated entities. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

27. It is unrefuted that none of Passage's members, owners, officers or directors, past or present, have ever served as an officer, director or manager of Paramount, or otherwise participated in the management of Paramount's business affairs. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

28. Pursuant to Passage's bankruptcy filings and submissions, the sole member of Passage was Passage Healthcare, LLC, which, in turn, was (or is) owned by Andrew L. Turner and William F. Lasky, who served as Passage's principals and officers. See Exhibit F, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Findings of Fact and Conclusions of Law of Judge Frank W. Volk dated December 1, 2017, pp. 2, 3.

29. Neither Mr. Turner nor Mr. Lasky ever held a membership or ownership interest in Paramount.

30. Likewise, neither Mr. Turner nor Mr. Lasky ever served as a director, officer or manager of Paramount, or had any other involvement with the business affairs or operations of Paramount.

31. It is also unrefuted that there has never been any commonality of members, owners, officers or directors between Paramount and Midland Meadows, who was the operator of the Ona Facility prior to Passage. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

32. Ultimately, Paramount, and all of Paramount's related entities, are owned, controlled and managed by James J. Cox, and there has never been any commonality of members, owners, officers, or directors between Paramount and Passage, or between Paramount and Midland Meadows. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

II. CONCLUSIONS OF LAW:

A. Standard of Review

33. The West Virginia Rules of Civil Procedure provide that summary judgment shall be granted where "there is no general issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c) (1998). In determining when summary judgment should be granted, the West Virginia Supreme Court of Appeals has held:

> Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, Painter v. Peavy, 451 S.E.2d 755, 756 (1994). "Rule 56 was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied." Jividen v. Law, 461 S.E.2d 451, 459 (1995). "The mere contention that issues are disputable is not sufficient to preclude summary judgment." Conley v. Stollings, 679 S.E.2d 594, 600 (2009).

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attached by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Syl. Pt. 3, Williams v. Precision Coal Inc., 459 S.E.2d 329 (1995).

> To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.

Id., 459 S.E.2d at 337 (citations omitted).

B. Successor Liability

34. Pursuant to West Virginia common law, the purchaser of all of the assets of a corporation or similar entity is not liable for the debts or liabilities of the entity purchased. Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561, 563 (W. Va. 1995) (citing Syl. Pt. 2, Davis v. Celotex Corporation, 420 S.E.2d 557 (W. Va. 1992)) (emphasis added).

35. Certain exceptions to this general rule have developed, however, from which a basis for successor liability can be established under certain circumstances.

36. First, a successor corporation may be found liable for the debts and obligations of a predecessor corporation where there is 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." Davis v. Celotex Corp., 420 S.E.2d 557, 563 (W.Va. 1992).

37. Successor liability may also attach where there is a consolidation or merger of entities, or where the successor corporation constitutes a mere "continuation or reincarnation of its predecessor." Id.

Paramount Did Not Expressly or Impliedly Assume the Liabilities or Obligations of Passage, the Preceding Operator of the Ona Facility.

38. As a noted exception to the general rule of non-liability, a successor corporation or entity can be liable for the debts and obligations of a predecessor corporation where there is an "express or implied assumption of liability" by the successor. Id.

39. Pursuant to the clear and unambiguous terms of the Operations Transfer Agreement, however, Paramount did not agree, expressly or impliedly, to assume the liabilities or obligations of Passage.

40. In fact, the Operations Transfer Agreement expressly precludes Paramount from any such liability. In relevant part, Paragraph 3 of the Operations Transfer Agreement, titled "Excluded Liabilities," states as follows:

> Except as expressly provided in this Agreement, New Operator [Paramount] and New Manager [Paramount Health Holdings Group, Inc.] shall not assume any claims, lawsuits, liabilities, obligations or debts of Exiting Operator ("Excluded Liabilities"), including without limitation, (i) malpractice or other tort claims to the extent based on acts or omissions of Exiting Operator occurring before the Commencement Date, or claims for breach of contract to the extent based on acts or omissions of Exiting Operator occurring before the Commencement Date; ... (iii) any other obligations or liabilities incurred by Exiting Operator prior to the Commencement Date, including but not limited to rent to the landlord of

> the Facility; ... (v) any third party payor, civil monetary penalties, recoupments, or other liabilities, including any transferee or successor liabilities, whatsoever, relating to or as a result of operations of the Facility prior to the Commencement Date.

See Exhibit A, Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement, ¶3, pp. 3, 4.

41. Per the clear and unambiguous language of the Operations Transfer Agreement entered into between Paramount and Passage, the parties explicitly agreed that Paramount would not assume any liabilities for malpractice or tort claims based on acts or omission of Passage that occurred prior to January 1, 2018, including the claims asserted by Plaintiff in the instant action.

42. In an analogous case, Jordan v. Ravenswood Aluminum Corporation, which also involved the assertion of a wrongful death claim, the Supreme Court of Appeals affirmed the granting of summary judgment, and rejected the assertion of successor liability, based primarily upon the language of an asset purchase agreement. Jordan, 455 S.E.2d at 562.

43. In Jordan, the Supreme Court of Appeals addressed whether a successor corporation, Steiner Turf Equipment, Inc. ("Steiner Turf"), could be responsible for injuries sustained by a plaintiff arising from an accident involving a tractor that was negligently manufactured or designed by Steiner Turf's predecessor, Steiner Corporation.

44. Although certain assets and operations of Steiner Corporation were conveyed to Steiner Turf pursuant to an Asset Purchase Agreement, the decedent's estate acknowledged that the subject tractor was manufactured or designed by Steiner Corporation, and the claims against Steiner Turf were, like here, solely based on a theory of successor liability. Id. at 563.

45. At the summary judgment stage, Steiner Turf argued that it could not be held responsible under a theory of successor liability as it "neither designed nor manufactured the

tractor which had been involved" in decedent's death, and due to preclusive language contained within the parties' Asset Purchase Agreement with respect to such liabilities. Id.

46. In affirming the lower court's entry of summary judgment, the Supreme Court of Appeals concluded that Steiner Turf did not expressly or impliedly assume the debts or obligations of the Steiner Corporation as part of the Asset Purchase Agreement, and, therefore, Steiner Turf could not be held responsible under a theory of successor liability. Id.

47. In the instant action, the Operations Transfer Agreement entered into between Paramount and Passage, and in particular the "Excluded Liabilities" provision contained therein, illustrates that Paramount only agreed to assume the operations of the Ona Facility under the express condition that it would not assume any associated liabilities or claims based on the acts or omissions of the prior operators of the facility, including Passage.

48. In light of the holding rendered by the Jordan Court, and the clear and unambiguous language of the Operations Transfer Agreement at issue here, Paramount did not assume, either expressly or impliedly, the liabilities or obligations of Passage, which incurred prior to January 1, 2018 to give rise to successor liability.

Paramount Did Not Merge or Consolidate with Passage.

49. The Operations Transfer Agreement entered into between Paramount and Passage specifically states that the agreement was solely the result of the "Parties desire to provide for the orderly transfer of the operations of the Facility from Exiting Operator [Passage] to New Operator [Paramount]" effective January 1, 2018. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement, ¶D, p. 1.

50. Further, the Operations Transfer Agreement clarified that Passage only conveyed to Paramount the limited "facility supplies" needed to continue operating the Ona Facility, such

as "linens, consumables and food stuffs, medical supplies, office supplies, and maintenance inventory." See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement, ¶2(D), p. 2.

51. As such, Passage did not convey its significant or valued assets to Paramount, such as its cash and cash equivalents, accounts receivables, or proprietary information, as said assets were specifically identified as "Excluded Assets" under the Operations Transfer Agreement. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement, ¶2 (E), pp. 2, 3.

52. In light of such uncontroverted facts, the Operations Transfer Agreement between Paramount and Passage did not constitute a merger or consolidation of the entities, or a purchase of the substantial assets of Passage by Paramount. To the contrary, the Operations Transfer Agreement merely memorialized the parties' terms and conditions for Paramount to assume the operation of the Ona Facility due to Passage's insolvency and its inability to continue operating the facility.

There is No Evidence of Record to Signify that the Operations Transfer Agreement was the Result of Fraud or the Lack of Good Faith on Paramount's Part.

53. In his December 29, 2017 Order, Judge Volk not only authorized Passage to "perform all acts, to make, execute and deliver all assets, instruments and documents which may be required or necessary for the Debtors' [Passage's] performance under the OTA [Operations Transfer Agreement]," but he recognized that the transaction was "in the best interests of the Debtors, their estates, creditors, residents and employees." See Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Exhibit B, December 29, 2017 Order, pp. 1, 2.

54. Despite the greater good recognized within Judge Volk's Order, Plaintiff alleges in her Response that Paramount's "usurping of the primary assets of Passage with no known compensation does not constitute a good faith transaction," and that the "transfer of Passage's assets was not made for adequate consideration and provisions were not made for the creditors of Passage." See Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, p. 6.

55. Plaintiff's argument misses the mark, however, for the following reasons.

56. First, the Operations Transfer Agreement did not constitute a conveyance of Passage's "primary assets" as Plaintiff suggests, as the only assets conveyed to Paramount consisted of operational items and supplies needed for Paramount to continue operating the Ona Facility and for the uninterrupted care to its residents.

57. Instead, the Operations Transfer Agreement merely memorialized the terms and conditions upon which Paramount agreed to assume the operations of the Ona Facility, which, as recognized by Judge Volk, resulted in the continued employment of numerous employees, who would have otherwise been displaced, and, most importantly, the continued care for its residents.

58. Finally, outside of unsubstantiated conspiracy theories and arguments based purely on conjecture, Plaintiff has failed to point to any evidence of record to support her contention that the Operations Transfer Agreement was the result of bad faith on Paramount's part.

59. As the record is devoid of any evidence to suggest a lack of good faith or fraud on Paramount's part when entering into the Operations Transfer Agreement and assuming the operation of the Ona Facility, there is no basis to impose successor liability upon Paramount for acts or omissions allegedly committed by Passage.

Paramount Is Not a Mere Continuation or Reincarnation of Passage.

60. As noted herein, the general rule in West Virginia is that the "purchaser of all the assets of a corporation" is not liable for "the debts or liabilities of the corporation purchased." Carter Enterprises, Inc. v. Ashland Specialty Co., Inc., 257 B.R. 797, 802 (S.D. W. Va. Jan. 31, 2001) (citing Syl. Pt. 2, Davis v. Celotex Corporation, 420 S.E.2d 557 (W. Va. 1992)).

61. Like the exceptions noted above, successor liability can attach in situations where "a corporation which purchased a portion of another corporation's assets was a mere continuation or reincarnation of the selling corporation." Id. at 803 (citing Jordan, 455 S.E.2d at 564).

62. 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.

63. As signified in both the Operating Transfer Agreement and its verified discovery responses, Paramount did not acquire any of the membership and/or ownership interests of Passage as part of its assumption of the operations of the Ona Facility, and the transaction did not constitute an acquisition of Passage's substantial assets. See Exhibit A, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, Operations Transfer Agreement; Exhibit D, Defendant's Memorandum of Law, Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, p. 7.

64. To that extent, none of Passage's members, owners, officers or directors, past or present, ever held a membership or ownership interest in Paramount, or any of its affiliated entities; and none of Passage's members, owners, officers or directors, past or present, ever served as an officer, director or manager of Paramount or otherwise participated in the management of its business affairs. See Exhibit D, Defendant's Memorandum of Law in Support of Motion for Summary Judgment Answer to Interrogatory No. 4 of Plaintiff's Second Set of Combined Discovery, pp. 7-9.

65. In sum, Paramount had no pre-existing business relationship or affiliation with Passage prior to assuming the operations of the Ona Facility on January 1, 2018, and there has never been any commonality of the members, owners, officers and directors between Paramount and Passage.

66. As pointed out in Plaintiff's Response in Opposition, certain similarities existed between the operational affairs of Paramount and Passage following the entry of the Operations Transfer Agreement, such as Paramount's utilization of the same offices and equipment previously used by Passage; its continued employment of certain former employees of Passage; and its continued care of the residents of the Ona Facility. See Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, pp. 6, 7.

67. However, such operational similarities do not sufficiently support a claim for successor liability under a "mere continuation" theory pursuant to West Virginia law.

68. In Security Alarm Financing Enterprises, Inc. v. Parmer, 2014 WL 1478840, the Court addressed the issue of whether such operational similarities sufficiently supported a claim for successor liability under a "mere continuation" theory, where the successor business was still

"run by the same employees, using the same offices, equipment, telephone numbers, email addresses and Internet website." Id. at *10.

69. In rejecting plaintiff's argument, the Court recognized that the "principle consideration in determining whether one corporation is mere continuation or reincarnation of the other is whether only one corporation exists after completion of a transfer of assets and whether there is a common identity of directors and stockholders." Id. (citing Jordan v. Ravenswood Aluminum Corp., 455 S.E.2d 561, 564 (W.V. 1995)) (emphasis added).

70. In recognition of the legal principles and precedence established by West Virginia case law, the Court concluded that the defendant could not be liable under the continuation theory of successor liability, as the defendant was neither a director nor a shareholder of the prior corporation. Id.

71. In sum, the Court concluded that commonality of the owners, directors or officers is a required element to establish successor liability under the "mere continuation" theory.

72. As there is no commonality of members, owners, directors or officers in the instant action between Paramount and Passage, Paramount is not a mere continuation or reincarnation of Passage, and there is no basis to impose successor liability upon Paramount for Passage's prior acts or omissions under West Virginia law.

ORDER:

AND NOW, this _____ day of _____, 2021, upon consideration of the Motion for Summary Judgment filed by Defendant, Paramount Senior Living at Ona, LLC, all filings of record and the evidence and argument presented at hearing, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED, and Plaintiff's Complaint is DISMISSED as to Defendant, Paramount Senior Living at Ona, LLC. Plaintiff's Complaint as to Defendant, Midland Meadows Senior Living, LLC, is not dismissed and remains on the Court's active civil docket. Plaintiff's objections to this ruling are hereby noted. The Clerk of this Court is directed to mail certified copies of this Order to the following: Stephen Flesher, P.O. Box 1173, Barboursville, WV 25504; Matthew Stapleton, 400 Fifth Avenue, Huntington, WV 25701; and Douglas Hart, Burns White Center, 48 26th Street, Pittsburgh, PA 15222.

DATED this 11 day of March, 2021.

/s/ CHRISTOPHER D. CHILES

Christopher D. Chiles, Judge
Circuit Court, Cabell County, WV

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, JEFFREY E. HOOD, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT ENTERED ON MAR 11 2021
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAR 11 2021
, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA