APPEAL NO. 21-0183

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

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

Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

BRIEF OF RESPONDENT, PARAMOUNT SENIOR LIVING AT ONA, LLC

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COUNTERSTATEMENT OF THE CASE

I. Procedural History

Petitioner/Plaintiff, Toni Milmoe, as Executrix of the Estate of Thelma Marie Sturgeon (hereafter "Petitioner"), initiated the instant action by filing a Complaint in Civil Action on August 21, 2019, in the Circuit Court of Cabell County, West Virginia. (App. 1-7). The crux of Petitioner's Complaint stems from allegations related to the care received by her mother, Thelma Marie Sturgeon (hereafter "Decedent"), during her residency at a nursing home and/or assisted living facility located at 100 Weatherholt Drive in Ona, West Virginia (hereafter referred to as the "Ona Facility"). In short, Petitioner's claims are premised upon allegations of negligence related to the care provided to Decedent at the Ona Facility over the course of approximately fifteen (15) months, from August 20, 2016 until November 13, 2017, when Decedent passed away. (App. 1-7). In her capacity as the Executrix of Decedent's Estate, Petitioner commenced the instant action against Paramount Senior Living at Ona, LLC (hereafter "Paramount" or "Respondent"), the current operator of the Ona Facility, and asserted claims of negligence and wrongful death. As Paramount only assumed the operation of the Ona Facility effective January 1, 2018, and never provided care for Decedent prior to her passing, Petitioner asserted her claims against Paramount under a theory of successor liability.

In response to Petitioner's Complaint, Paramount filed its Answer and Affirmative Defenses on September 30, 2019. (App. 26A-40A). Shortly thereafter, an initial scheduling conference was held before the Circuit Court on December 6, 2019, at which time the Court, with the involvement of Petitioner and Paramount, established pretrial deadlines and trial dates. During this status conference, the parties mutually agreed to conduct discovery in phases, with the first phase specifically designed to focus on whether Paramount could be liable under

Petitioner's proffered successor liability theory, together with a correlating deadline for dispositive motions specific to the successor liability issue. (Petitioner Br., 11). With the Circuit Court's blessing, a Scheduling Order was entered on December 9, 2019 to reflect, in addition to the other applicable deadlines and dates, the parties' agreement concerning phased discovery. (App. 27-29). Although the initial phase of pointed discovery took longer than anticipated in light of the pandemic, the parties came to an agreement in scheduling argument for the dispositive motions specific to the successor liability issue, as well as the associated filing deadlines - and those agreed upon deadlines were included in the Notice of Hearing and Modified Briefing Schedule entered by the Circuit Court on September 1, 2020. (App. 45). In accordance with the deadlines agreed upon by the parties and established by the Circuit Court, Paramount filed its Motion for Summary Judgment on September 14, 2020.

Following extensive briefing by the parties, and oral argument before the Honorable Christopher D. Chiles on November 5, 2020, the Circuit Court granted Paramount's Motion for Summary Judgment by entering its Order and Memorandum Opinion on February 10, 2021. (App. 244-262). Per the Order entered, Petitioner's Complaint was dismissed in its entirety.[1] (App. 262). Following an Amended Order being entered on March 11, 2021, Petitioner has now appealed that dispositive Order.

[1] Following the entry of the Circuit Court's Order and Memorandum Opinion dated February 10, 2021, which dismissed Petitioner's Complaint in its entirety, Petitioner and her counsel have embarked on a series of procedural maneuvers that resulted in the Circuit Court's entry of an Amended Order on March 11, 2021. (App. 281). Although the Amended Order does not disturb the dispositive nature of the prior Order concerning Petitioner's claims against Paramount, it preserves Petitioner's claims against Midland Meadows Senior Living, LLC, who was never a participant in this case and, prior to the entry of the Amended Order, Paramount was unaware of its status as a party.

II. Pertinent Facts

As noted at the outset, Petitioner's claims pertain to Decedent's care while she was a resident at the Ona Facility during the period of August 20, 2016 until November 13, 2017, when Decedent ultimately passed away. In her Complaint, Petitioner avers that Midland Meadows Senior Living, LLC (hereafter "Midland Meadows") was the operator of the Ona Facility during the period of Decedent's residency, and, as such, Midland Meadows owed a duty to provide Decedent "with appropriate healthcare and assisted living services, including but limited to engaging in reasonable measures to implement an appropriate and adequate care plan" concerning her "safety, health and welfare." (App. 15-17). Ultimately, the basis of Petitioner's claims stems from allegations that Midland Meadows "failed to implement and provide an adequate care plan" for Decedent, and that the conduct of Midland Meadows' agents, servants and/or employees constituted "actionable negligence which was a significant contributing factor in causing serious personal injury" to Decedent, and that said conduct was the "ultimate proximate cause of her death." (App. 15-17). Although Petitioner identifies Midland Meadows as the operator of the Ona Facility during Decedent's residency, and Passage Midland Meadows Operations, LLC (hereafter "Passage") as the subsequent operator of the Ona Facility prior to Paramount, she elected to target Paramount as the culpable party under a theory of successor liability. (App. 15-17).

During the course of discovery, it was revealed that Passage, and not Midland Meadows, operated the Ona Facility during the entire period of Decedent's residency. (App. 51-53, 122-151). Further, Paramount only assumed the operation of the Ona Facility effective January 1,

2018 pursuant to an Operations Transfer Agreement that it entered into with Passage.[2] (App. 68-91). Per the Operations Transfer Agreement, and as established during the course of discovery, Paramount is not the owner of the Ona Facility or the subject real property. (App. 110-111). Instead, Paramount occupies the Ona Facility in its capacity as a subtenant, as the subject real property and structure, i.e. the Ona Facility, is owned by Welltower, Inc. and and HCRI Pennsylvania Properties Holding Company (hereafter collectively referred to as "Welltower"). (App. 110-111). As accurately noted in Petitioner's Brief, Paramount's assumption of the operation of the Ona Facility was the result of Passage filing for Chapter 11 bankruptcy protection and, ultimately, Passage's request to relinquish its operation of the Ona Facility through the approval of the Bankruptcy Court. (App. 93-95). To illustrate the manner in which Paramount assumed control of the operation of the Ona Facility, the Honorable Frank W. Volk of the United States Bankruptcy Court for the Southern District of West Virginia entered an Order on December 29, 2017 to grant Passage's emergency request to enter into the Operations Transfer Agreement with Paramount.[3] (App. 93-95).

As set forth within the Operations Transfer Agreement effective January 1, 2018, the transaction between the parties did not constitute an acquisition of Passage's membership or ownership interests by Paramount, or the acquisition of all, or even a significant portion, of Passage's assets. Instead, Paramount merely assumed the operation of the Ona Facility effective

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[2] A true and correct copy of the Operations Transfer Agreement entered into between Paramount Senior Living at Ona, LLC and Passage Midland Meadows Operations, LLC and Passage Healthcare, LLC effective January 1, 2018 was attached as Exhibit A to Paramount's Motion for Summary Judgment and Memorandum of Law filed on September 14, 2020. (App. 67-91).

[3] A true and correct copy of the Order of Court entered on December 29, 2017 by Chief Judge Frank W. Volk of the United States Bankruptcy Court for the Southern District of West Virginia in Case No. 17-30092, was attached as Exhibit B to Paramount's Motion for Summary Judgment and Memorandum of Law filed on September 14, 2020. (App. 93-95).

January 1, 2018, and the only assets that transferred from Passage to Paramount consisted of the operational items and supplies on hand needed to operate the Facility, as well as certain trust funds previously maintained by Passage for the Facility's residents. (App. 59-60, 68-70, 75, 113-115). Paramount did not receive, however, any of Passage's significant assets, such as its cash and cash equivalents, accounts receivables, notes receivables, or proprietary information - as any assets of such significance were specifically excluded from the transaction. (App. 59-60, 69-70, 89). In sum, the Operations Transfer Agreement between Paramount and Passage merely memorialized the terms associated with Paramount's assumption of the operation of the Ona Facility, in light of Passage's financial inability to do so. (App. 50-52, 59-60, 67-91).

As also established during the course of discovery, Paramount did not have any business relationship with Passage prior to entering into the Operations Transfer Agreement on January 1, 2018, or at any time thereafter. (App. 62-63, 102, 113-115). In that regard, there has never been any commonality of members, owners, officers or directors between Paramount and Passage. (App. 62-63, 113-115). Specifically, none of the members, owners, officers or directors of Passage, past or present, have ever held a membership or ownership interest in Paramount or any of its affiliated Paramount-entities; and 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 its business affairs.[4] (App. 62-63, 113-115).

Despite the legal wrangling Petitioner has performed in order to preserve her alleged claims against Midland Meadows following Paramount's dismissal, it appears from her Brief that Petitioner had finally now recognized that Passage, and not Midland Meadows, was the sole

[4] A true and correct copy of Paramount's Answers and Objections to Plaintiff's Second Set of Combined Interrogatories and Requests for Production of Documents, as verified by James J. Cox, Paramount's President and Chief Executive Officer, was attached as Exhibit D to Paramount's Motion for Summary Judgment and Memorandum of Law in Support Thereof filed on September 14, 2020. (App. 106-120).

operator of the Ona Facility during Decedent's residency. (Petitioner Br., 2-3). In any event, and similar to the non-existent nature of any business relationship that it ever had with Passage, Paramount has never had any business relationship and/or affiliation with Midland Meadows either. (App. 115-116).

In sum, Petitioner's claims are premised upon allegations of negligent care provided by the operator of the Ona Facility, Passage, during the period of Decedent's residency from August 20, 2016 through November 13, 2017. As Paramount only assumed operations of the Ona Facility on January 1, 2018, it clearly had no involvement in Decedent's care. Nonetheless, Petitioner has elected to target her claims against Paramount under a theory of successor liability. After more than nine (9) months of discovery specific to the successor liability theory, and following extensive briefing and oral argument, the Circuit Court concurred with Paramount's contention that it cannot be held accountable for the acts or omissions of the prior operator of the Facility, and granted Paramount's Motion for Summary Judgment on February 10, 2021.

SUMMARY OF ARGUMENT

As noted above, the instant action arises from allegations of negligent and inadequate care provided to Decedent, Thelma Sturgeon, during her residency at the Ona Facility, a nursing home and/or assisted living facility located in Ona, West Virginia, from August 20, 2016 until November 13, 2017, when she passed away. Petitioner, Toni G. Milmoe, in her capacity as the Executrix of Decedent's Estate, commenced the instant action by filing a Complaint against Paramount asserting claims of negligence and wrongful death. As Paramount only assumed the operation of the Ona Facility effective January 1, 2018, and following Decedent's passing, Petitioner's claims are based solely upon a theory of successor liability.

To the extent that the allegations of the Complaint accurately depict the care that Decedent received at the Ona Facility, it would appear that her residency may have been mired by a series of unfortunate episodes that could potentially qualify as substandard care. However, based on the facts of this case, such episodes simply cannot impart liability upon Paramount. Specifically, Paramount had no involvement in the care provided to Decedent and, pursuant to longstanding West Virginia law, it cannot be held accountable for any substandard care provided by the prior operators of the Ona Facility.

Pursuant to well-established West Virginia 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). Of course, Paramount recognizes that certain exceptions to this general rule have been established over the course of time, and that said exceptions can provide a basis for successor liability under certain circumstances. As the Circuit Court correctly determined at the summary judgment stage, however, those exceptions are simply inapplicable here.

As is clear from reviewing the Circuit Court's Order and Memorandum Opinion, a thorough analysis was performed concerning Petitioner's claim under the guise of successor liability, and each of the established exceptions were carefully examined. Perhaps recognizing that the record is stacked against her, Petitioner proffers desperate and confusing arguments in her Brief with respect to the Circuit Court's legal analysis, while mischaracterizing material facts in the process, and falsely contends that she was not afforded sufficient time to conduct discovery. Despite such smoke and mirrors, the evidentiary record unquestionably confirms that Paramount cannot be held accountable for Decedent's care under a theory of successor liability,

and no genuine issue of material fact in that regard could ever be developed through additional discovery.

Accordingly, the Circuit Court correctly determined that Paramount is not liable to Petitioner under any theory of successor liability, and its Order granting summary judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

As it believes that Petitioner's appeal is wholly without merit, Paramount does not favor oral argument pursuant to the provisions of Rule 18(a) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. Counterstatement of Standard of Review

This Court's review of an order granting summary judgment is plenary, as it will be examining the grounds upon which the circuit court relied in granting summary judgment. See Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."). As this Court stated in syllabus point three of *Painter*, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Id. at 190, 451 S.E.2d at 756. This Court views the facts in the light most favorable to Petitioner, as the losing party. See Masinter v. WEBCO Co., 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980).

When granting a motion for summary judgment, a circuit court must make factual findings sufficient to permit meaningful appellate review. See Syl. Pt. 3, Fayette Cty. Nat'l Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997) ("Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set

out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed."). "If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact." Syllabus Point 4, Aetna Casualty & Surety Company v. Federal Insurance Company of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

II. The Circuit Court Applied the Correct Legal Standard and Analysis When Determining that Paramount Could Not Be Responsible Under a Successor Liability Theory. (Assignment of Error I).

According to Petitioner, the Circuit Court erred in granting summary judgment by "improperly applying and expanding an inapplicable standard" to the circumstances surrounding Paramount's assumption of the operation of the Ona Facility, and in its legal analysis concerning successor liability. (Petitioner Br., at 4, 5, 6). Specifically, Petitioner contends that the Circuit Court improperly applied a standard she refers to as "purchaser liability immunity," whatever that is, when rendering its decision. Instead, Petitioner suggests that this case may involve an issue of "first impression" for this Honorable Court to consider, which would involve determining "whether a non-purchaser of a business entity receives the same liability immunity that a purchaser receives." (Petitioner Br., p. 6). For the following reasons, Petitioner's disjointed and confusing argument should be summarily dismissed.

From the outset, Petitioner's argument concerning the Circuit Court's application of an "inapplicable standard" was never raised or otherwise preserved in her arguments or submissions to the Circuit Court. In fact, in Petitioner's briefing in response to Paramount's summary judgment motion, she cited the same cases and legal precedent as Paramount, only with her argument premised upon a different and more distorted application of said legal precedent against the facts of this case. (App. 177-188). At no point prior in her briefing to the Circuit

Court did Petitioner argue that a different legal analysis or standard was applicable to this case, and, of course, she never identified an alternative analysis or standard that she believed to be more appropriate.

As the "general rule" of the Supreme Court for several years, "when nonjurisdictional questions have not been decided at the Circuit Court level and are then first raised before this Court, they will not be considered." In re E.B., 729 S.E.2d 270, 303 (W. Va. 2012) (citing Whitlow v. Bd. of Educ. of Kanawha Cnty., 438 S.E.2d 15, 18 (W. Va. 1993)). As Petitioner never challenged the standard or legal analysis in her summary judgment briefing, she has likewise failed to preserve such an argument for this Court's consideration. Accordingly, Petitioner's belated attempt to challenge the legal analysis and standard applied by the Circuit Court should be rejected.

In any event, and to the extent that the Court is willing to consider Petitioner's belated and convoluted argument, it is without merit and should be rejected anyway for a multitude of reasons. In her Brief, Petitioner makes confusing references to a "doctrine of purchaser liability immunity" which, at least pursuant to Paramount's research, does not exist. Further, Petitioner requests for this Court to clarify whether this non-existent cloak of "purchaser liability immunity" extends to a "non-purchaser of a business entity." (Petitioner Br., 6). In short, Petitioner seemingly contends that because Paramount did not purchase all of Passage's assets, and because Paramount "paid no known consideration" when it assumed the operation of the Ona Facility, it constitutes a "non-purchaser of a business entity" that should not be afforded the alleged "immunity" provided under Davis v. Celotex Corporation, 420 S.E.2d 557 (W.Va. 1992).

First, and aside from Petitioner's apparent confusion concerning the applicable law, Paramount has never claimed to be entitled to any such shield of immunity as Petitioner suggests

exists. Instead, Paramount fully understands and recognizes that there are certain exceptions to the general rule of non-liability where a successor entity can be accountable for the acts or omissions of its predecessor. However, Petitioner is apparently missing the point as to the importance of the fact that Paramount did not merge or consolidate with Passage, and that it did not purchase Passage's substantial assets or its shareholder or membership interests. Petitioner contends that such facts make Paramount a "non-purchaser of a business entity" for which a new legal standard and analysis should be applied with respect to prospective successor liability. (Petitioner Br., pp. 5-6). Petitioner's contention is misplaced. To the contrary, such facts illustrate that Paramount is simply not a "successor" to Passage for purposes of attaching successor liability.

As recently recognized by Justice Hutchison in his concurrence in Henzler v. Turnoutz, LLC, the applicable legal definition of a successor is "a corporation that through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of another corporation." Henzler v. Turnoutz, LLC, 844 S.E.2d 700, 710 (W. Va. 2020) (citing BLACK'S LAW DICTIONARY). In the instant action, Petitioner has presented no evidence to support that any such amalgamation, merger, or consolidation occurred between Paramount and Passage, because no such transaction occurred. Here, the only evidence of successor status for Paramount is it assumed the operation of the Ona Facility, as owned by Welltower, on January 1, 2018, because Passage was financially unable to continue doing so. Similar to the factual circumstances in Henzler, such a scenario constitutes "a change of tenants using real estate" and "not a legal, corporate successorship." Id.

Finally, and to the extent that Paramount could potentially be considered a successor of Passage, which is denied, the Circuit Court's legal analysis and application of legal precedent

was on point with respect to Paramount's dispositive motion. As recognized by the Circuit Court, and pursuant to longstanding West Virginia law, the purchaser of all the assets of a corporation or similar entity is not liable for the debts or liabilities of the entity purchased.[5] 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). As also correctly noted by the Circuit Court, certain exceptions to this general rule have developed over the course of time from which a basis for successor liability could arise. In review of its Memorandum Opinion, the Circuit Court thoroughly considered and analyzed the factors relative to these prospective exceptions when adjudicating Paramount's summary judgment motion, which, despite Petitioner's argument to the contrary, constituted the proper analysis concerning Petitioner's claims and Paramount's dispositive motion.

III. The Evidentiary Record Establishes that Paramount Cannot Be Liable for Successor Liability Under Any of the Established Exceptions.

As set forth above, 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)) (emphasis added). As also noted, however, 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

[5] Apparently, Petitioner is confusing the general rule of non-liability for the corporate purchaser of another corporate entity's assets, in that she holds it akin to a shield of "immunity" for successor liability purposes. In taking her argument to the next level, Petitioner is apparently trying to create a new theory of "non-purchaser" liability. Although Petitioner does not provide any examples as to how her newly created theory of liability would apply from an operational standpoint, it would appear that a new tenant to a commercial property should now be responsible for the acts or omissions of the former tenant, or, alternatively, for the donee of a gifted vehicle to be held accountable for an accident caused by the vehicle's former owner. In short, Petitioner is trying to stretch the successor liability to attach to entities that are not successors in the first place.

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). 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.

In addition to her strained argument that the Circuit Court applied an inappropriate legal standard, Petitioner further contends that the evidence "demonstrates" that two of the aforementioned exceptions have been satisfied. First, Petitioner alleges that the evidentiary record establishes that Paramount is a mere continuation or reincarnation of its predecessor, Passage. (Petitioner Br., pp. 7-9). Second, Petitioner challenges Paramount's underlying transaction, i.e. the Operations Transfer Agreement, alleging that it was not made in good faith. Of course, neither of Petitioner's arguments are supported by the evidentiary record, which has already been thoroughly examined by the Circuit Court, or by governing West Virginia law.

A. Paramount Is Not a Mere Continuation or Reincarnation of Passage.

As an exception to the general rule of non-liability, 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." Carter Enterprises, Inc., 257 B.R. 797 at 803 (citing Jordan, 455 S.E.2d at 564). 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. Despite

Petitioner's allegations to the contrary, Paramount is not a "mere continuation or reincarnation" of Passage.

From the outset, and 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 a full acquisition of Passage's assets. (App. 61-62, 69-70, 89, 113-115). To the contrary, only certain limited operational assets were transferred to Paramount under the Operations Transfer Agreement, specifically consisting of items and supplies on hand necessary to operate the Ona Facility. (App. 61-62, 69-70, 89, 113-115).

Moreover, the evidentiary record in this case also confirms that 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 members, owners, officers or directors between Paramount and Passage. (App. 113-115) (emphasis added). To that extent, none of the members, owners, officers or directors of Passage, past or present, have 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, have ever served as an officer, director or manager of Paramount or otherwise participated in the management of its business affairs. (App. 113-115). As set forth in Paramount's verified discovery responses, the sole member of Defendant, Paramount Senior Living at Ona, LLC, is Paramount Health Holdings Group, LLC - which is solely owned by James J. Cox, the Chief Executive Officer of Paramount/Respondent. (App. 110-115). Ultimately, Paramount - and all of the Paramount-related entities - are owned, controlled and managed by James J. Cox, and

there has never been any commonality of members, owners, officers of directors between Paramount and Passage or Midland Meadows. (App. 110-116).

Conversely, and although Paramount has no understanding of the composition of Passage's current membership or ownership structure, Paramount obtained and produced documents through the course of discovery to signify that during the period of Passage's bankruptcy proceeding from March 13, 2017 through January 18, 2018, the sole member of Passage was Passage Healthcare, LLC, which, in turn was owned by Andrew L. Turner and William F. Lasky, who served as Passage's principals and officers.[6] (App. 154-155). As confirmed in Paramount's verified discovery responses, neither Mr. Turner nor Mr. Lasky ever held a membership or ownership interest in Paramount; served as a director, officer or manager of Paramount; or had any other affiliation with the business affairs or operations of Paramount.

Finally, and despite Petitioner's continuing allegation that Passage is "defunct," "had no further income" and was "administratively insolvent" following its bankruptcy proceeding, Petitioner fails to forward a scintilla of evidence to support such self-serving allegations. (Petitioner Br., pp 7-8.). To the contrary, and although Passage's Chapter 11 Bankruptcy reorganization proceeding was ultimately dismissed, from the public information available through the West Virginia Secretary of State, Passage is still recognized as an active and registered limited liability company in West Virginia, and it does not appear that Passage has engaged in any efforts to wind up, conclude or dissolve its affairs as a limited liability company. (App. 63). In fact, and despite Petitioner's ongoing assertions that Passage is defunct and no longer exists here at the appellate level, it is interesting to note that Petitioner filed an Amended

[6] A true and correct copy of the Findings of Fact and Conclusions of Law entered by the Honorable Frank W. Volk of the United States Bankruptcy Court for the Southern District of West Virginia on December 1, 2017 as Document No. 544 in Case No. 17-30092, is attached to Paramount's Motion for Summary Judgment and Memorandum of Law In Support Thereof as Exhibit F (App. 152-175).

Complaint in the pending case at the Circuit Court level on June 21, 2021, which she has since served upon Passage, and to which Passage has recently filed a Motion to Dismiss on July 21, 2021.[7] Under such circumstances, Petitioner's argument that Passage is "defunct" and "no longer exists" is not only unsupported by any record evidence, but is contrary to her own pleadings and the docket at the Circuit Court.

In addition to her unfounded allegations concerning Passage's "defunct" status, Petitioner misapplies and misconstrues the second factor of the "mere continuation" analysis concerning the commonality requirement of owners, officer or directors. 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. Although Petitioner readily admits that there is no commonality of members, officers or directors between Paramount and Passage, she simply brushes it off by stating that "this factor should not be given the level of consideration as the first factor," in light of the fact that "these are small closely held businesses that do not have a significant structure of members, officers, and directors." (Petitioner Br., p. 8). Of course, Petitioner fails to point to any case law or legal precedent in support of her contentions - because there is none.

Finally, and as expected, Petitioner again points to certain similarities between the operational affairs of Paramount and Passage following the entry of the Operations Transfer Agreement, in an effort to promote her "mere continuation" theory of successor liability. Similar to her argument at the summary judgment proceeding, Petitioner points to similarities concerning the "facility, operations, personnel, and resident customers" following Paramount's assumption

[7] As Petitioner's Amended Complaint in Civil Action No. 19-C-370 was not filed until June 21, 2021, a copy of the Amended Complaint is not included within the Appendix filed as part of the instant appeal. Likewise, the Motion to Dismiss filed by Passage on July 21, 2021 is also not included within the Appendix.

of the operations of the Ona Facility. (Petitioner Br., p. 9). In light of the expedited timeframe that Paramount faced when agreeing to assume the operations of the Ona Facility, and as acknowledged before the Circuit Court, Paramount does not deny that it continued to employ certain former employees of Passage's, or that it utilized the same offices and equipment that Passage previously used. (App. 64-65). As recognized by the Circuit Court and applicable West Virginia law, however, such similarities between the operational affairs of the two entities are neither instructive nor relevant with regard to establishing successor liability.

In an analogous case, Security Alarm Financing Enterprises, Inc. v. Parmer, 2014 WL 1478840, the Court for the Northern District of West Virginia was similarly faced with determining whether such operational similarities sufficiently supported a claim for successor liability under a "mere continuation" theory. In that case, the plaintiff argued that Parmer, through her use of another entity, MB Security, was liable as a successor because the business was still "run by the same employees, using the same offices, equipment, telephone numbers, email addresses and Internet website." Id. at *10. In rejecting plaintiff's argument, the Court recognized that the "principle consideration in determining whether one corporation is a 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.Va. 1995)). In its application of the principles established by West Virginia case law, the Court concluded that Parmer could not be deemed liable under the continuation theory of successor liability, as she was neither a director nor a shareholder of the prior corporation. Id.

In the instant appeal, there is clearly no commonality of members, owners, directors or officers between Paramount and Passage. Moreover, and as set forth above, Petitioner has failed

to advance any evidence whatsoever in support of her ongoing contention that Passage no longer exists or is "defunct." In fact, the recent developments at the Circuit Court level seemingly indicate that Passage not only still exists, but has the financial wherewithal to vigorously defend against Petitioner's claims.

B. The Evidentiary Record is Devoid of Any Evidence that the Operations Transfer Agreement was the Result of Fraud or the Lack of Good Faith on Paramount's Part.

As set forth above, Paramount's involvement in the Ona Facility was precipitated by Passage's filing of a petition for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. (App. 92-96). As such, Passage was mandated to seek the approval of the Bankruptcy Court before entering into the Operations Transfer Agreement. In that regard, Chief 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 Debtors' [Passage's] performance under the OTA [Operations Transfer Agreement]," but he also recognized that the transaction was "in the best interests of the Debtors, their estates, creditors, residents and employees." (App. 93-94). In sum, the Operations Transfer Agreement entered into between Passage and Paramount, which resulted in the continued employment for numerous employees and continued care for the residents of the Ona Facility, was clearly not the result of fraud or bad faith.

Despite the fact that the Operations Transfer Agreement was scrutinized and approved by the Bankruptcy Court prior to being effectuated between Paramount and Passage, Petitioner alleges bad faith on Paramount's part based on unsupported allegations and blatant falsities that are not supported by, or completely contrary to, the evidentiary record. In that regard, Petitioner falsely alleges that Paramount "has produced no evidence of any consideration paid by

Paramount for the assets" it received; that Paramount made representations to the Circuit Court "absent a proffer of any proof, that Passage only transferred a limited amount of assets to Paramount;" and that Paramount "did not, and Plaintiff [Petitioner] believes cannot, identify any assets retained by Passage." (Petitioner Br., p. 9). Apparently, Petitioner, or more likely her counsel, failed to perform a thorough review of the evidentiary record when making such outlandish and unsupported statements in her Brief. In any event, said statements are not only unsupported by the record, but are patently false.

First, and with respect to Petitioner's misleading allegations concerning the lack of consideration paid by Paramount and the assets that it received when assuming the operations of the Ona Facility, Petitioner has apparently failed to review the Operations Transfer Agreement that is the subject of this case in detail, despite the fact that it was produced in discovery several months ago, and otherwise failed to read any of Paramount's discovery responses or submissions to date. (App. 68-91).

As set forth in Paramount's summary judgment submission and again here, the Operations Transfer Agreement specifically identifies the assets that were conveyed to Paramount pursuant to the transaction, as well as those that were excluded. (App. 59-60, 69-70, 89). As set forth in the Operations Transfer Agreement and restated several times now, 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." (App. 59-60, 69-70). Despite Petitioner's unsupported contention to the contrary, Passage did not convey or relinquish its entitlement to any significant assets to Paramount, such as its cash and cash equivalents, accounts receivables, notes receivable, or proprietary information, under the Operations Transfer Agreement. (App. 59-60, 89). With

respect to those types of assets, Paragraph 2(E) of the Operations Transfer Agreement, titled "Excluded Assets," provided as follows:

> Except as expressly set forth herein, no other assets of Exiting Operator [Passage] shall be transferred to New Operator [Paramount], and no other assets of Exiting Operator shall be included as Transferred Assets for the purposes of this Agreement. Without limiting the generality of the foregoing, and notwithstanding anything to the contrary contained in this Agreement, the following assets of Exiting Operator shall not be transferred to New Operator and shall not constitute Transferred Assets: all cash, cash equivalents, accounts receivable, notes receivable, capital stock, tax refunds, proprietary information and know-how and forms, including accounting and other proprietary software, equipment and other items that are leased/licensed pursuant to leases/licenses that are not assigned to New Operator, and any other items specifically designated as an excluded asset....

(App. 89).

As is obvious when reviewing Paramount's summary judgment filing and the transcript of the summary judgment argument before, Petitioner's allegations concerning representations made by Paramount to the Circuit Court "absent a proffer of any proof" is blatantly false. To the contrary, Paramount has continuously pointed to the specific provisions of the Operations Transfer Agreement to identify the limited and nominal nature of the assets that it received when assuming the operation of the Ona Facility. (App. 59-60, 315-328).

Similarly, Petitioner's continuing allegation of bad faith based simply on an alleged lack of consideration being "paid by Paramount" is equally misleading and irrelevant, and constitutes nothing more than arm-chair quarterbacking and second-guessing the Bankruptcy Court and its approval of the Operations Transfer Agreement. As stated above, Paramount was not purchasing Passage's substantial assets as part of the Operations Transfer Agreement, and, as such, Paramount did not pay consideration as part of the transaction - other than absorbing the financial risk associated with assuming the operation of a failing facility. From Petitioner's illogical viewpoint, she apparently expected Paramount to pay significant remuneration to

assume the operation of a failing facility that left its prior operator mired in bankruptcy. Regardless, the only assets conveyed to Paramount were incidental in nature and consisted of those needed to continue to operate the Ona Facility.

Finally, and as noted and recognized in Petitioner's summary judgment response, it was Welltower - and not Paramount - that received the bulk of Passage's assets, its "primary assets," as part of the bankruptcy proceeding, including Passage's cash and accounts receivable balances. (App. 178-179). Despite acknowledging Welltower's receipt of Passage's significant assets in her own filings, Petitioner continues to assert contradictory and unsubstantiated allegations concerning the "significance of the assets" conveyed to Paramount. (Petitioner Br., p.p. 9-10).

Like her other arguments, Petitioner's allegations of bad faith on Paramount's part are neither substantiated by the evidentiary record nor the law. In recognition of the lack of any meaningful evidence to support Petitioner's allegations, the Circuit Court correctly concluded that her bad faith argument lacked merit.

IV. The Circuit Court Correctly Determined that the Matter Was Ripe for Summary Judgment, as the Evidentiary Record is Devoid of Any Evidence to Support Successor Liability Under any Theory and No Further Discovery Is Warranted or Necessary (Assignment of Error III).

Next, and similar to her argument at the summary judgment stage, Petitioner contends that Paramount's dispositive motion was not ripe when granted. (Petitioner Br., pp. 10-11). For the following reasons, however, Petitioner's contention that Paramount's dispositive motion was prematurely granted is misplaced.

First, and as Petitioner recognizes in her Brief - the parties mutually agreed to conduct discovery in phases, with the first phase targeted at whether Paramount could be liable under a successor liability theory, together with a correlating dispositive motion deadline being established specific to that issue. (Petitioner Brief., p. 11). The tiered or phased discovery was

discussed at the initial status conference held on December 6, 2019, agreed upon by the parties, and, with the Circuit Court's blessing, reflected in the initial Scheduling Order entered on December 9, 2019. (App. 27-29). Although Petitioner obviously recognized the benefit of conducting discovery in phases at the time, she is apparently second-guessing her decision in light of Paramount's summary judgment motion being granted.

In addition to Petitioner's agreement to conduct discovery in phases, it must be pointed out that the parties jointly agreed upon enlargements and extensions of time with respect to the discovery deadlines and summary judgment dates, which were leniently and gratuitously granted by the Circuit Court at every turn. (App. 34, 38-39, 45). In fact, and with respect to the dispositive motion schedule that was ultimately followed, the hearing date and corresponding briefing schedule were jointly agreed upon by the parties before being presented to the Circuit Court as the Notice of Hearing and Modified Briefing Schedule that was entered on September 1, 2020. (App. 45). To signify the meritless argument now being advanced by Petitioner on appeal, she unquestionably would not have agreed to the deadlines set forth in the aforementioned Notice had she truly believed additional discovery was needed on the successor liability issue.

Next, and when questioned by the Circuit Court during the summary judgment argument as to whether Petitioner felt that a certain deposition was needed with respect to the successor liability issue, Petitioner's counsel stated that it was not. (App. 333-334). Despite her counsel's own response to the Circuit Court's inquiry at the summary judgment argument, Petitioner incredibly alleges error on the Circuit Court's behalf within her appeal. (Petitioner Br., pp. 10-11). In light of such circumstances, Petitioner's contention is not only misplaced, but also disingenuous.

Finally, and aside from her other disingenuous arguments concerning the premature nature of the Circuit Court's granting of Paramount's dispositive motion, it must be pointed out that there are certain logistical steps that a non-moving party must take if it believes that a summary judgment motion is premature and further discovery is necessary. Specifically, this Court explained those "relative burdens" in Syllabus Point 3 of Williams v. Precision Coil, Inc., as follows:

> 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 a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked 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.

Henzler v. Turnoutz, LLC, 844 S.E.2d 700, 704 (W. Va. 2020) (quoting Syl. Pt. 3, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995)).

In sum, the discovery and dispositive deadlines established in the Circuit Court's Scheduling Orders were changed and modified with great leniency in the instant action, and the parties, including Petitioner, mutually agreed to the deadlines established throughout. For that reason alone, it is clear that Petitioner's allegation of error is disingenuous. However, in the event that Petitioner truly believed that additional discovery concerning the successor liability issue was necessary, Petitioner should have submitted an affidavit in accordance with the Supreme Court's directive in Henzler, or, alternatively, informed the Circuit Court when the issue was broached at the summary judgment argument. Despite being presented with several opportunities, Petitioner failed to ever raise such a concern.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Respondent, Paramount Senior Living at Ona, LLC, respectfully prays that this Honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,

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Dated: August 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **BRIEF OF RESPONDENT, PARAMOUNT SENIOR LIVING AT ONA, LLC**, was served upon all counsel of record, via first-class United States mail, postage prepaid, this 25th day of August, 2021, as follows:

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