No. 124753

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. ILLINOIS DEPARTMENT OF HUMAN RIGHTS,	)	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-0806
Plaintiff-Appellee,	)	There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 15 CH 13917
v.	)	
OAKRIDGE HEALTHCARE CENTER, LLC,	)	The Honorable FRANKLIN U. VALDERRAMA, Judge Presiding.
Defendant-Appellant,	)	
and	)	
OAKRIDGE NURSING & REHAB CENTER, LLC a/k/a OAK RIDGE REHABILITATION CENTER,	)	
Defendant.	)	

BRIEF OF PLAINTIFF-APPELLEE

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellee

AARON T. DOZEMAN
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 793-1473
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
adozeman@atg.state.il.us

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Page(s)

NATURE OF THE CASE

Plaintiff-Appellee People of the State of Illinois *ex rel.* Illinois Department of Human Rights (State) filed a complaint in the circuit court to enforce an order of the Illinois Human Rights Commission (Commission), against Defendant Oakridge Nursing & Rehab Center, LLC (Oakridge Nursing) and Defendant-Appellant Oakridge Healthcare Center, LLC (Oakridge Healthcare). Oakridge Healthcare moved for summary judgment, which the circuit court granted. The appellate court reversed. This Court allowed Oakridge Healthcare's petition for leave to appeal. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether Illinois courts should adopt the successor liability doctrine used for violations of federal labor and employment statutes for violations of the Illinois Human Rights Act (Act).

2. Independent of whether Illinois courts adopt the federal successor liability doctrine for violations of the Act, whether the appellate court correctly determined that a reasonable fact finder could conclude that the asset transfer from Oakridge Nursing to Oakridge Healthcare — which lacked negotiations, consideration, or any exchange of value — was done for the fraudulent purpose of avoiding liabilities, including a pending discrimination charge by one of Oakridge Nursing's employees.

STATEMENT OF FACTS

I. The State filed an action against Oakridge Nursing and its successor Oakridge Healthcare to enforce the Act.

The Commission concluded that Oakridge Nursing violated the Act when it discriminated against Jane Holloway, one of its employees. C26–32.[1] Oakridge Nursing later failed to comply with the Commission's order finding it liable for those violations. C36. The State then filed an action to enforce the Commission's decision against Oakridge Nursing and Oakridge Healthcare, the successor company that bought Oakridge Nursing's assets shortly after Holloway filed her discrimination charge. C3–10.

II. Oakridge Healthcare moved for summary judgment before answering the complaint or conducting any discovery.

Before discovery commenced, Oakridge Healthcare moved for summary judgment on the basis that it could not be liable for Oakridge Nursing's liabilities as a matter of law. C221–35. It supported its position by relying on the common law doctrine of corporate successor non-liability, a general rule that a successor company is not liable for the liabilities of the predecessor company from which it bought assets. C226–35. Oakridge Healthcare also argued that no exception to that general rule applied, which imposes liability on a successor when

(1) there was an express or implied agreement of assumption of liability;

[1] This brief cites the common law record on appeal as "C__" and the report of proceedings as "R__." The appellant's brief is cited as "AT Br. __."

(2) the transaction amounts to a merger, consolidation, or a *de facto* merger of the transferor and the transferee;

(3) the transferee is a mere continuation or reincarnation of the transferor; or

(4) the transaction was for the fraudulent purpose of escaping liability for the transferor's obligations.

C227 (citing, among others, *Vernon v. Schuster*, 179 Ill. 2d 338, 345 (1997)). In particular, Oakridge Healthcare argued that the asset transfer agreement specifically disclaimed Oakridge Nursing's liabilities, the asset transfer did not constitute a merger, Oakridge Healthcare was not a mere continuation of Oakridge Nursing because there was no continuity of ownership between the two companies, and the asset transfer was not a fraudulent transfer intended to avoid liability. C230–35. The motion also was supported by the affidavits of Eli Atkin, an owner of Oakridge Healthcare and a manager of Oakridge Properties, C55–58, and Helen Lacek, a former owner of Oakridge Nursing, C60–63.

III. The facts on summary judgment derived from the discovery allowed under Rule 191(b).

Because no discovery had been conducted, the State submitted an affidavit under Supreme Court Rule 191(b) stating that it needed discovery before it could respond to the motion. C295–303. After deposing Helen and Eli, as allowed by the circuit court, C469, the following facts were established.

A. Since 1990, Helen and Eli have worked together at several companies in the nursing home industry.

Helen began her career in the nursing home industry in 1990 at Care Plus Management as a regional nurse consultant. C545. There, she met Eli, a regional manager. C551, C614. A few years later, she met Joel Atkin, Eli's brother, and worked with him on various consulting projects in Illinois and Missouri. C555–56.

Helen left Care Plus Management to become a manager at Century Village, another nursing home facility. C545. Eli also worked at Century Village as a manager. C552.

After Century Village, Helen became a member of a facility called Hampton Plaza and was its director of operations. C550. Donna Atkin, Eli's wife, C55, also worked at Hampton Plaza in marketing and as a physician liaison, C550. Jay Orlinsky, Eli's brother-in-law, C55, also worked at Hampton Plaza, C557.

Helen later became the director of operations for Innovative Healthcare Associates, a company that oversaw five or six nursing home facilities. C545–46. Eli was the corporate executive officer for Innovative Healthcare Associates. C552.

Helen left Innovative Healthcare Associates and worked for McAllister Nursing & Rehab, LLC, where she became a member at some point with Donna and Jay, C543, C545, though Eli believed that the members of that company were himself, Helen, Yael Atkin (Joel's wife), Jay, and a company called Ability Insurance, C604. McAllister Nursing & Rehab operated a nursing home facility, which was owned by McAllister Nursing & Rehab Properties, LLC, a company established around the same time as McAllister Nursing & Rehab. C543–44, C605–06. McAllister Nursing & Rehab Properties' members were Joel, Donna, Ability Insurance, and Helen, while Eli was a manager. C605, C622.

B. In 2008, Joel, Jay, and Donna established Oakridge Nursing & Rehab Properties, LLC, while Helen and her husband established Oakridge Nursing.

In spring 2008, Oakridge Nursing & Rehab Properties, LLC (Oakridge Properties) was established, and its members were Joel, Jay, and Donna, while its managers were Eli, Joel, and Jay. C55. It acquired the land and existing 73-bed nursing home facility, then known as Oakridge Convalescent, from Acerra-Oakridge, a company owned by Mike and Lynn Acerra. C55, C552–53, C558–59.

At the same time, Helen and her husband John established Oakridge Nursing. C60, C531. Helen was the manager of the company and license administrator. C60, C530–31.

Oakridge Nursing acquired the assets of Acerra-Oakridge that were needed to run the facility. C564. Then, without negotiations, Oakridge Nursing entered into a lease agreement with Oakridge Properties to use its property to operate a nursing home. C559–60. Thus, the former assets of Oakridge Convalescent (owned by Acerra-Oakridge) were split between two entities: Oakridge Nursing owned the nursing home assets of the business, while Oakridge Properties owned the underlying property and building and was Oakridge Nursing's landlord. C558–60.

C. The Commission's judgment against Oakridge Nursing.

About three years later, in February 2011, Holloway, a nurse at Oakridge Nursing, filed a discrimination charge against Oakridge Nursing with the Illinois Department of Human Rights (Department). C13, C578. Oakridge Nursing received notice of the charge by certified letter, and Helen forwarded the letter to the company's attorney. C578. At some point, Helen participated in a hearing at the Department. C579.

In July 2012, the Department filed a complaint with the Commission on Holloway's behalf. C13. The complaint alleged that Holloway was impermissibly suspended and discharged due to her age and physical disabilities. C13–21.

Oakridge Nursing was served with the complaint but no person filed an appearance with the Commission, an order of default was issued against it, and despite notice of the hearing, no representative attended. C26.

In April 2014, the Commission awarded Holloway $30,880 and ordered Oakridge Nursing to remove any reference to the discrimination charge from her personnel records and to cease and desist from further unlawful discrimination. C30, C32.

Three months after issuing its order, the Commission issued another order directing the Department to commence an action seeking an order from the circuit court requiring Oakridge Nursing, along with "its agents, servants, successors and assigns[,] to comply with the" Commission's order. C36, C467.

D. Oakridge Nursing's decline.

Meanwhile, Oakridge Nursing had been operating and paying its rent to Oakridge Properties. C566. But in June 2011, a few months after Holloway filed her discrimination charge, Oakridge Nursing determined that it had financial troubles. C532. At that time, the State of Illinois stopped making Medicaid payments to it, and such payments did not resume until mid-2012. C566.

Oakridge Nursing continued to pay its payroll, but stopped paying rent. C532, C566. Pursuant to its lease agreement, Oakridge Nursing gave six months' notice to Oakridge Properties that it was unable to continue renting the property. C532–33. Under the lease agreement, there was a mandatory early termination "breakup fee" of $210,000, payable in six installments of $35,000 over six consecutive months. C83, C327, C563. This fee was "absolutely, unconditionally and irrevocably personally guaranteed by Helen[.]" C83, C327.

E. Oakridge Nursing cancelled its lease and transferred its assets to Oakridge Healthcare.

In November and December 2011, Eli formed Oakridge Healthcare with his sister-in-law, Yael, and Eli also served as its manager. C56, C606–07.

On December 19, 2011, Oakridge Healthcare, Oakridge Nursing, and Oakridge Properties entered into a "Lease and Option Termination, Cancellation and Indemnity Agreement" (termination agreement). C145–66, C387–408. Under the termination agreement, the lease between Oakridge Nursing and Oakridge Properties was assigned to Oakridge Healthcare and Oakridge Properties, effective January 1, 2012. C145–66, C387–408, C615–16. The termination agreement also contained an indemnity clause, providing that Oakridge Nursing indemnified Oakridge Properties and Oakridge Healthcare for any claims of any employee arising from its operation of the facility. C151–52, C393–94.

Oakridge Nursing owed $244,262.15 in back rent. C147, C389. Under the termination agreement, Oakridge Nursing was required to pay the past due rent and Helen and John "personally, absolutely, unconditionally and irrevocably" guaranteed the debt. C147–48, C389–90. They also owed the lease break-up fee, but Helen did not know if it was ever paid because John handled "the financial stuff." C565.

In addition to assigning the lease to Oakridge Healthcare, Oakridge Nursing entered into an "Operations Transfer Agreement" (transfer agreement) with Oakridge Healthcare, transferring all assets from Oakridge Nursing to Oakridge Healthcare. C169–219, C410–60.

Oakridge Healthcare was the only company that "came to the table" to acquire Oakridge Nursing's assets, C569–70, although Helen recalled several potential buyers coming to assess the facility, C584. There were no negotiations before entering into the transfer agreement. C627.

Oakridge Healthcare payed nothing for Oakridge Nursing's assets. C570. The assets transferred were beds, the license to operate the facility, three days' worth of perishable food, seven days' worth of frozen food, stock medication, medical supplies, and paper. C570, C628. Helen did not know what the value of the items was — she never had them appraised, nor did Eli request a valuation. C570–71, C576–77, C628. The only assets that Helen kept were a computer and chair, C571, and the accounts receivable, C57, C62.

Oakridge Nursing did not make documents available to Oakridge Healthcare before the transfer agreement was entered, and Oakridge Healthcare did not ask. C577, C628.

The transfer agreement contained a "No Assumption of Liabilities" provision that disclaimed any assumption of Oakridge Nursing's liabilities. C197–98, C438–39. It also stated that Oakridge Healthcare was in no way a parent, subsidiary, or affiliate of Oakridge Nursing. C197, C438. Both Helen and Eli understood that Oakridge Healthcare did not assume Oakridge Nursing's liabilities in the asset transfer. C568, C628. Because Oakridge Healthcare disclaimed any liabilities, it conducted no due diligence into Oakridge Nursing's liabilities; Eli did not believe that doing so would have been pertinent. C628.

The transfer agreement also contained an indemnification provision, providing that Oakridge Nursing indemnified Oakridge Healthcare for any claims arising from Oakridge Nursing's operation of the nursing home. C198, C439.

Helen informed Oakridge Nursing employees of the transfer at the company Christmas party. C591. Oakridge Nursing gave notice to vendors and residents' families that Oakridge Healthcare was taking over operations on December 28, 2011. C572. The last day of Oakridge Nursing's operations was December 31, 2011. C575.

When Oakridge Healthcare took over operations, Eli gave the "standard speech" that he gives every time that he takes over the operations of a facility. C631. The current staff initially stayed on, but most were replaced over time. *Id.* According to "[u]sual normal standard operation," a letter was sent by Oakridge Healthcare to families who had relatives at the facility informing them of the transfer of operators. C632. The agreement between the residents and the facility operators changed, but the nature of the business remained the same. C573–74, C633.

Oakridge Nursing dissolved sometime in 2014. C538. At dissolution, Helen believed that the company owed $60,000–$80,000 in outstanding liabilities and had no assets. *Id.*

F. Helen and Eli continued to work together in the nursing home industry.

After Oakridge Nursing ceased operating at the end of 2011, Helen worked at Oak Park Health Center and Homebound Hospice and Home Health, C544, and then returned to McAllister Nursing & Rehab as a member and an administrator, where Eli also was a member, C541, C602, C604. Helen also was a member of McAllister Nursing & Rehab Properties, the company that owned the property that McAllister Nursing & Rehab rented; Eli was a manager of McAllister Nursing & Rehab Properties. C605, C622.

In addition to being a manager of Oakridge Properties and McAllister Nursing & Rehab Properties, and a member of Oakridge Healthcare and McAllister Nursing & Rehab, Eli had been a member of at least seven other companies in the nursing home industry: Big River Nursing & Rehab LLC, Oakwood Nursing & Rehab LLC, Windsor Estates of St. Charles LLC, Royal Oak Nursing & Rehab LLC, Abbington Nursing & Rehab LLC, Innovative Management Associates, and Innovative Healthcare Associates. C602–03, C605, C612.

Several of these companies shared the same members, many of whom were members of Eli's family. C55, C607, C609–10. Inter-company loans were common among these companies. C620–25, C638. Eli did not "keep track of every check or loan," C623, and there were no documents evidencing the loan terms, although some were noted in a general ledger, C637. As for terms of the loans, the general sense was to "pay it back as soon as you can." *Id.*

Of the companies of which Eli was a member or manager, Helen provided consulting services for three of them (Oakwood Nursing and Rehab, Innovative Management Associates, and "Lasik Management Associates"), C608, C611, C613, was a member of another company (McAllister Nursing & Rehab Properties), C605, and was a member and the administrator of another (McAllister Nursing & Rehab), C541, C604.

IV. The circuit court determined that Oakridge Healthcare was entitled to judgment as a matter of law.

After taking the depositions of Helen and Eli, the State responded to Oakridge Healthcare's motion for summary judgment. C507. Relying on the successor liability doctrine recognized under federal law for violations of federal labor and employment statutes, the State argued that summary judgment for Oakridge Healthcare was not proper because liability could be imposed under that doctrine on Oakridge Healthcare for violations of the Act. C513–15. The State explained that liability is generally imposed under the federal successor liability doctrine where the successor had notice of the employee's claim before the sale, the predecessor could not provide relief before the sale, and there is a continuity of workforce and business operations between the successor and predecessor. C515. Under that standard, the State argued that questions of fact existed as to whether Oakridge Healthcare had notice of the claim, and the record demonstrated that Oakridge Nursing could not provide relief before the asset transfer and that there was continuity between Oakridge Nursing and Oakridge Healthcare's operations and business. C516–21.

The State also argued that genuine issues of material fact existed as to whether Oakridge Healthcare was liable as successor to Oakridge Nursing under the mere-continuation exception to successor non-liability under the traditional common law doctrine. C515–21; R16–17.

The circuit court granted summary judgment for Oakridge Healthcare. C681–85. It declined to adopt the federal successor liability doctrine and also found no disputed issue of material fact as to liability under the common law doctrine of successor liability. C683–85. In particular, the court determined that no reasonable fact finder could find that "Oakridge Healthcare was merely a continuation of Oakridge [Nursing], or that the transaction was made for the fraudulent purpose of escaping liability." C684. The circuit court also entered a judgment against Oakridge Nursing, but that judgment did not impose personal liability on any "an agent, servant, successor or assign of either defendant." C688. The State appealed. C691–99.

V. The appellate court reversed summary judgment for Oakridge Healthcare.

In a split decision, the appellate court reversed the entry of summary judgment for Oakridge Healthcare. *People ex rel. Dep't of Human Rights v. Oakridge Nursing*, 2019 IL App (1st) 170806, ¶¶ 65–66.

The majority first concluded that Oakridge Healthcare was not entitled to judgment as a matter of law under Illinois's existing doctrine of corporate successor non-liability. *Id.* ¶¶ 39, 42. The State had argued on appeal that summary judgment was improperly granted to Oakridge Healthcare because a reasonable fact finder could have determined, based on the record developed on summary judgment, that the asset transfer was done for the fraudulent purpose of avoiding Oakridge Nursing's liabilities. *Id.* ¶ 27. Oakridge Healthcare asserted, however, that the State had forfeited this argument by not addressing it in its response to Oakridge Healthcare's motion for summary judgment. *Id.*

The appellate court disagreed, holding that the argument for the fraudulent-purpose exception had not been raised for the first time on appeal and the State did not forfeit the argument. *Id.* ¶ 29. First, the court noted, the State's complaint included allegations sufficient to set forth a cause of action pursuant to the fraudulent-purpose exception. *Id.* Second, the court explained that Oakridge Healthcare, in its motion for summary judgment, argued that it was not liable as successor because the asset transfer was not fraudulently undertaken to escape liabilities. *Id.* And the appellate court stated that the circuit court had based its decision, in part, on a determination "'that the transaction was [not] made for the fraudulent purpose of escaping liability.'" *Id.* ¶ 46. Alternatively, because waiver and forfeiture are limitations on parties, not courts, the court stated that, even if waived or forfeited, it would address the fraudulent-purpose exception in the interest of achieving a just result. *Id.* ¶ 30.

On the merits of the fraudulent-purpose exception, the court held that a reasonable fact finder could determine that Oakridge Nursing transferred its assets to Oakridge Healthcare to avoid its liabilities, which included Holloway's pending discrimination charge. *Id.* ¶¶ 39, 42. Several factors supported a reasonable inference of fraud: Holloway filed her charge and Oakridge Nursing became aware of it months before the asset transfer, Oakridge Nursing transferred substantially all of its assets to Oakridge Healthcare, Oakridge Nursing never appraised its assets and received no payment for them from Oakridge Healthcare, and Oakridge Nursing became insolvent before or shortly after the asset transfer. *Id.* ¶¶ 35–38.

The court also concluded that, as a matter of first impression, it would recognize the availability of the federal successor liability doctrine for violations of the Act. *Id.* ¶ 61. It noted that Holloway's discrimination charge was filed before the asset transfer, Oakridge Nursing did not have the ability to provide Holloway relief due to its financial troubles, which led to insolvency, and there was continuity in workforce and business between Oakridge Healthcare and Oakridge Nursing. *Id.* ¶ 58

In dissent, Justice Mason disagreed with the majority's analysis. First, Justice Mason maintained that the *de novo* standard of review applicable to an award of summary judgment did not permit the reviewing court to reverse the judgment on any basis in the record. *Id.* ¶ 69. Justice Mason acknowledged the appellate court's decision in *Huang v. Brenson* stating that it "'may affirm or reverse on any basis found in the record,'" but stated that she could find decisions only in which the appellate court affirmed, not reversed, on a different basis than the circuit court. *Id.* (quoting 2014 IL App (1st) 123231, ¶ 16)). Justice Mason also believed that the circumstances here, which included the State not responding to Oakridge Healthcare's discussion of the fraudulent-purpose exception in its motion for summary judgment, did not warrant overlooking any forfeiture. *Id.* ¶¶ 71–77. Justice Mason then stated that reaching the exemption was unfair to Oakridge Healthcare. *Id.* ¶ 78.

Justice Mason also would have held that that adopting the federal successor liability doctrine for violations of the Act was "beyond [the appellate court's] power as an intermediate court of review." *Id.* ¶ 80. And, in any event, the existing state-law exception to corporate successor non-liability based on the successor being a "'mere continuation' of the predecessor [corporation]" was in "irreconcilable conflict" with the federal successor liability doctrine. *Id.* ¶ 81. Specifically, while the mere-continuation exception applies only where there is proof of identity of ownership between the predecessor and successor entities, the federal successor liability doctrine does not require such identity of ownership, but instead turns on whether there is continuity of operations and work force. *Id.*

This Court allowed Oakridge Healthcare's petition for leave to appeal.

ARGUMENT

This appeal presents an issue of first impression: whether Illinois courts should adopt the federal successor liability doctrine for determining whether victims of discrimination can seek recovery from a corporation that acquires the assets of a corporation that had violated the Act. This doctrine assesses successor liability on a case-by-case basis by balancing the victim's interests, the successor company's interests, and anti-discrimination policies furthered by the Act. The existing common law exceptions to successor non-liability do not make room for these considerations. This Court should adopt the federal doctrine to ensure that this State's interests in deterring and remedying employment discrimination, as embodied in the Act, are served. And, after recognizing the federal doctrine, this Court should remand to the circuit court to allow the State to seek to establish that it is satisfied here.

Also on review is the appellate court's determination that Oakridge Healthcare was not entitled to judgment as a matter of law because a reasonable fact finder could have determined that Oakridge Nursing transferred its assets to Oakridge Healthcare for the fraudulent purpose of avoiding its liabilities, including Holloway's pending discrimination charge. The transfer was concededly not an arm's length transaction, it lacked any consideration or negotiations, and the outcome left Holloway with no viable way to recover the damages awarded to her against Oakridge Nursing.

The appellate court, in agreeing with the State on these two bases, recognized the posture of the case on summary judgment and the equitable principles that guide the determination of whether discrimination victims should be allowed to recover from successor companies. This Court should affirm.

I. This Court should adopt the federal successor liability doctrine for violations of the Act.

The Act has broad reach to impose liability for acts of employment discrimination. It allows the Department "to commence an action in the name of the People of the State of Illinois" against any "person, his or her or its officers, agents, servants, successors and assigns" to enforce Commission orders. 775 ILCS 5/8-111(C)(1) (2018). Here, the State commenced this action to enforce a Commission order finding that Oakridge Nursing violated the Act, and it sought to hold liable both Oakridge Nursing and the successor company that acquired its assets, Oakridge Healthcare.

Oakridge Healthcare, for its part, argued that the traditional common law doctrine of successor liability insulated it from liability for Oakridge Nursing's discriminatory employment practices. But the State argued that Illinois should adopt the successor liability doctrine followed by federal courts in cases involving violations of federal labor and employment statutes, including Title VII of the Civil Rights Act of 1963, and by a number of States applying their own anti-discrimination statutes that are akin to the Act. The key feature of this doctrine is that it furthers anti-discrimination policies, including the anti-discrimination policies embodied in the Act. *See* 775 ILCS 5/1-102 (2018). This Court should affirm the appellate court's adoption of the federal successor liability doctrine, putting the Act on par with its federal analog, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

At common law, Illinois and the majority of American state and federal jurisdictions follow the general rule that a corporation that buys the assets of another corporation is not liable for the liabilities of the seller corporation. *See Vernon v. Schuster*, 179 Ill. 2d 338, 344–45 (1997) (citing *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977); 15 W. Fletcher, Private Corporations § 7122 (1990)). On one hand, this rule seems reasonable because it facilitates the transfer of corporate assets to buyers who will put the assets to valuable use while protecting them from unassumed liability. *Id.* at 345 (citing *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1325 (7th Cir. 1990); *Tucker v. Paxson Mach. Co.*, 645 F.2d 620, 623 (8th Cir. 1981)). On the other hand, the consequences of the rule's application are harsh, potentially leaving creditors with no recourse against debtors. *Id.* Accordingly, under the common law, there are four narrow exceptions to the general rule, imposing successor liability where: (1) there is an express or implied agreement that the buyer corporation would assume the seller corporation's liabilities; (2) the transaction amounts to a merger or consolidation of the buyer and seller corporation; (3) the buyer is a mere continuation of the seller; or (4) the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Id.*

More recently, federal courts, including the United States Supreme Court, have developed a separate successor liability doctrine for violations of specific statutes, first beginning in the federal labor law context. In *John Wiley & Sons, Inc. v. Livingston*, the Supreme Court held that, following a corporate merger, the successor company could be bound by the predecessor company's labor contracts, which were enforceable under the Labor Management Relations Act. 376 U.S. 543, 546, 550–51 (1964). "[I]n appropriate circumstances," the Court concluded, the successor company may be required to honor a bargain reached with the predecessor company, *id.* at 548, because a labor contract is "not an ordinary contract" and "impressive [national labor] policy considerations" are at stake, *id.* at 550. In *National Labor Relations Board v. Burns International Security Services, Inc.*, the Court reaffirmed this approach, recognizing that the federal labor policy behind the National Labor Relations Act (NLRA) would be undermined if a successor were not required to assume a predecessor's labor contract, even though such successor liability might inhibit the free transfer of capital and restrict the successor's business interests. 406 U.S. 272, 281–91 (1972).

The Supreme Court further developed the successor liability doctrine in the labor law context in *Golden State Bottling Co., Inc. v. National Labor Relations Board*, 414 U.S. 168 (1973). There, it held that a successor company that bought and continued another company's business, with notice of the predecessor company's violations of the NLRA, was required to implement the terms of labor board orders to rectify those violations. *Id.* at 170–72. The Court explained that the successor company's "potential liability for remedying the unfair labor practices is a matter which can be reflected in the price [it] pays for the business, or [it] may secure an indemnity clause in the sales contract" to protect it from liability in the event that it is held liable for a predecessor's unfair labor practices. *Id.* at 185 (internal quotations omitted).

After the United States Supreme Court recognized that successor liability may attach to ensure compliance with federal labor laws, federal appellate courts expanded the doctrine to include employment discrimination claims brought under Title VII. The first case to do so was *Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974). There, the Sixth Circuit held that the Supreme Court's rationale for recognizing successor liability to remedy unfair labor practices applied "equally to remedy unfair employment practices." *Id.* at 1090. As the court explained, "Title VII was molded, to a large degree, after the [NLRA]" and, specifically, Title VII's relief provisions derived from those under the NLRA. *Id.* at 1091. The court further noted that Title VII and the NLRA coextensively prohibited certain employer conduct, thus warranting application of the federal doctrine to Title VII. *Id.*

The Sixth Circuit also emphasized, however, that successor liability was not automatic, but rather should be determined on a case-by-case basis because "there is, and can be, no single definition of 'successor' which is applicable in every legal context." *Id.* And it explained that a multi-factor, equitable approach to successor liability permitted courts to further Title VII's goal of eliminating employment discrimination, both by remedying past wrongs and deterring future ones. *Id.* The court noted that the alternative — not allowing successor liability for past discrimination — "could emasculate" Title VII's relief provisions by leaving victims without a complete remedy. *Id.* "Such a result could encourage evasion in the guise of corporate transfers of ownership." *Id.* at 1092.

The Sixth Circuit then identified nine factors to aid in the inquiry:

> (1) whether the successor company had notice of the charge,
>
> (2) the ability of the predecessor to provide relief,
>
> (3) whether there has been a substantial continuity of business operations,
>
> (4) whether the new employer uses the same plant,
>
> (5) whether the new employer uses the same or substantially the same work force,
>
> (6) whether the new employer uses the same or substantially the same supervisory personnel,
>
> (7) whether the same jobs exist under substantially the same working conditions,
>
> (8) whether the new employer uses the same machinery, equipment and methods of production, and

(9) whether the new employer produces the same product.

See id. at 1094. In later cases, the Seventh Circuit refined the analysis to focus on whether (1) the successor had actual or constructive notice of the pending lawsuit, (2) the predecessor could have provided the relief sought before the sale, (3) the predecessor could have provided relief after the sale, (4) the successor can provide the relief sought, and (5) there is continuity between the operations and work force of the predecessor and successor. *See, e.g., Equal Emp't Opportunity Comm'n v. N. Star Hosp., Inc.*, 777 F.3d 898, 902 (7th Cir. 2015); *Teed v. Thomas & Betts Power Sols., L.L.C.*, 711 F.3d 763, 765–66 (7th Cir. 2013); *Artistic Furniture*, 920 F.2d at 1326–27 (cited with approval in *Vernon*, 179 Ill. 2d at 345); *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236 & n.7 (7th Cir. 1986); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750–51 (7th Cir. 1985).

Moreover, since the Sixth Circuit decided *MacMillan Bloedel Containers*, the federal courts of appeal have further expanded the federal doctrine to include federal employment and labor statutes other than the Labor Management Relations Act, NLRA, and Title VII, *see Teed*, 711 F.3d at 764–65 (noting doctrine extends to seven federal statutes, and adopting it for Fair Labor Standards Act), while courts in several States have adopted it when applying their own anti-discrimination statutes (which are analogous to the Act), *see, e.g., MTA Trading, Inc. v. Kirkland*, 922 N.Y.S.2d 488, 491–92 (N.Y. App. Div. 2011) (N.Y. State Human Rights Law); *Stevens v. McLouth Steel*

Prods. Corp., 446 N.W.2d 95, 100 (Mich. 1989) (Mich. Elliott–Larsen Civil Rights Act); *First Jud. Dist. Dep't of Corr. Servs. v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 89–92 (Iowa 1982) (Iowa Civil Rights Act); *see also Superior Care Facilities v. Workers' Comp. Appeals Bd.*, 32 Cal. Rptr. 2d 918, 924–25 & n.1 (Cal. Ct. App. 1994) (applying federal doctrine to Cal. Workers Compensation Act claim, but noting Cal. Fair Employment and Housing Act contains similar remedies).

In doing so, these courts have balanced the equitable considerations in play, and, in particular, have sought to protect the ability of employment discrimination victims to obtain relief, prevent wrongdoers from escaping liability, allow corporate assets to find their most valuable use, and further the public interest in combating illegal employment practices. *See Ind. Elec. Workers Pension Benefit Fund v. ManWeb Servs., Inc.*, 884 F.3d 770, 776–77 (7th Cir. 2018) (successor liability determinations "require an equitable balancing of the national policies at stake and the interests of the affected parties"); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006) ("ultimate inquiry" is whether imposing liability "would be equitable and in keeping with federal policy"); *Equal Emp't Opportunity Comm'n v. Vucitech*, 842 F.2d 936, 944–45 (7th Cir. 1988) (successor liability proper if it "strike[s] a proper balance between . . . preventing wrongdoers from escaping liability and . . . facilitating the transfer of corporate assets to their most valuable uses").

To be sure, imposing liability may have a "significant fiscal impact" on buyers. *Artistic Furniture*, 920 F.2d at 1327. But that is "not a strong argument" for rejecting the federal successor liability doctrine because a buyer can protect itself by factoring any liabilities into the purchase price, *Teed*, 711 F.3d at 766–67, or seeking indemnity from the seller, *see Golden State Bottling Co., Inc.*, 414 U.S. at 185. In any event, any burden of liability on a successor, who often can "provide relief at minimal cost," may be outweighed by the burden on the victim who is helpless to protect her rights when there is a change in corporate ownership or the public interest in enforcing prohibitions against discriminatory employment practices. *Musikiwamba*, 760 F.2d at 746.

In addition, declining to recognize the federal successor liability doctrine for violations of the Act would lead to incongruous treatment of state and federal claims arising out of the same conduct, depending on whether these claims are brought in state or federal court. Yet the framers of the Act and Title VII contemplated that these statutes would be overlapping and complimentary, both in their administration and substance. When Title VII was enacted, it was anticipated that the federal and state governments would "cooperate" to remedy employment discrimination. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 & n.4 (1980). In fact, "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48–49 (1974). The Act, passed after Title VII, also contemplated cooperation with the federal government. For example, the Department and the United States Equal Employment Opportunity Commission "have a work sharing arrangement providing that a charge filed with one is deemed cross-filed with the other," *McQueen v. City of Chi.*, 803 F. Supp. 2d 892, 902–03 (N.D. Ill. 2011), which is explained in the Act, *see* 775 ILCS 5/7A-102 (2018).

There also is overlap between state and federal courts in adjudicating state and federal employment discrimination claims. State courts have concurrent jurisdiction over Title VII claims, *see Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990), while a federal court may exercise supplemental jurisdiction to adjudicate a claim under the Act, *see* 28 U.S.C. § 1367(a); *e.g.*, *Frey v. Coleman*, 903 F.3d 671, 675 (7th Cir. 2018). Thus, Title VII claims and claims under the Act can be heard together in either state or federal court. In addition, both Title VII and the Act apply the "analytical framework set forth in United States Supreme Court decisions" to determine whether there is a substantive violation. *Zaderaka v. Ill. Human Rights Comm'n*, 131 Ill. 2d 172, 178–79 (1989) (adopting three-part analysis from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to apply the Act). But if different successor liability doctrines attach to state and federal claims, that will create divergent outcomes even though the claims are substantively similar. As illustrated by Holloway's case, a discrimination victim's decision to pursue claims under the Act through the state administrative process, as opposed to Title VII in court, limits her remedies if there is a change in corporate ownership after she files her claim.

Moreover, the record here contains sufficient evidence to impose liability on Oakridge Healthcare under the federal successor liability doctrine. While Oakridge Healthcare was not provided notice of Holloway's charge by Oakridge Nursing, nor did it ask Oakridge Nursing about pending liabilities, C580–82, C628–30, Oakridge Healthcare had constructive notice of the charge because it was filed before the asset transfer, *see Vucitech*, 842 F.2d at 945. Further, Oakridge Nursing could not provide Holloway relief because it was insolvent shortly after she filed her charge. C532, C566–67. Finally, there was substantial continuity between the nursing home operations and business between Oakridge Nursing and Oakridge Healthcare. C573–74, C633. Significantly, indemnification provisions are included in both the termination agreement, C151–52, C393–94, and transfer agreement, C198, C439, which Oakridge Healthcare could invoke in the event a court imposes liability.

Before this Court, Oakridge Healthcare provides no persuasive reason not to adopt the federal successor liability doctrine. It first argues that adopting the federal doctrine would violate the doctrine of *stare decisis*. AT Br. 39. But *stare decisis* is not implicated here because this case presents an issue of first impression. *See Coleman v. E. Joliet Fire Prot. Dist.*, 2016 IL 117952, ¶ 53 (the doctrine of *stare decisis* involves settled points of law); *Brunton v. Kruger*, 2015 IL 117663, ¶ 28 ("because this question has not been answered by this court or our appellate court, the doctrine of *stare decisis* plays no role in our analysis"). Adopting the federal successor liability doctrine thus would not render any precedent invalid.

Even if *stare decisis* were applicable, it "is not an inexorable command" and precedent may be modified for good cause or compelling reasons. *See Coleman*, 2016 IL 117952, ¶ 53. And *stare decisis* considerations hold less weight where common law is at issue, as opposed to questions of statutory interpretation. *See People v. Espinoza*, 2015 IL 118218, ¶ 29. Here, the reasoning of the United States Supreme Court, federal appellate courts, and numerous state courts provide good cause and compelling reason to "abandon outmoded theories of liability and . . . bring the law into focus with modern social mores and humanitarian values." *Walton v. Norphlett*, 56 Ill. App. 3d 4, 10 (1st Dist. 1977) (Lin, J. concurring). "In the final analysis, the law, to remain an instrument of justice, must be functional and responsive to societal needs," *id.*, which include ensuring that acts of employment discrimination are deterred and redressed.

Relatedly, Oakridge Healthcare argues that because the General Assembly has not abolished or modified the traditional common law doctrine of successor liability, the legislature's "silence" indicates acquiescence to the common law as it stands. AT Br. 39. But if "the General Assembly acts with full knowledge of previous judicial decisions" and "its silence on an issue in the face of those decisions indicates its acquiescence to them," *People v. Way*, 2017

IL 120023, ¶ 27, it cannot have acquiesced to a judicial decision on whether to adopt the federal successor liability doctrine because until the decision below no Illinois court had addressed successor liability in the employment discrimination context one way or the other. If anything, the General Assembly indicated its intent that victims of employment discrimination be able to collect on judgments they have been awarded when it authorized actions against any "person, his or her or its officers, agents, servants, *successors* and assigns" to enforce Commission orders. 775 ILCS 5/8-111(C)(1) (2018) (emphasis added). Moreover, the overlapping and complementary nature of the Act and Title VII indicate reliance on federal law, not rejection of it. *See supra* pp. 25–27.

Next, Oakridge Healthcare contends that the common law doctrine and its four narrow exceptions "strike[ ] a reasonable balance between the needs of buyers of corporate assets and the needs of creditors of the seller corporation." AT Br. 42. But the traditional system cannot strike an appropriate balance in the discrimination context because it lacks any consideration of anti-discrimination policies. When violations of the Act are involved, the exceptions to successor non-liability for corporate creditors, *e.g.*, *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187, ¶¶ 47–52, 56–57 (no successor liability where employee pursued unpaid wages against successor company that acquired company at foreclosure sale), or tort victims, *e.g.*, *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill. App. 3d 1141, 1144 (1st Dist. 1982) (no successor liability for individual who brought bodily injury claim against successor company), are a high bar for imposing liability and do not contemplate the state interests in combating employment discrimination.

Oakridge Healthcare proceeds to warn that adopting the federal doctrine will create a “slippery slope” and “swallow the rule” against successor non-liability. AT Br. 44. To the contrary, adopting the doctrine would merely bring harmony to state and federal law. If the Court is wary of a “dam” of liability breaking, *id.*, it only need look to the absence of such a disaster in the nearly 60 years that the federal successor liability doctrine has been applied. Moreover, it is an equitable doctrine and outcomes are determined on a case-by-case basis. *See MacMillan*, 503 F.2d at 1091. Merely *adopting* the doctrine cannot, by itself, lead to *imposition* of liability in every case.

Oakridge Healthcare also asserts that the federal successor liability doctrine (which considers, in part, whether the predecessor’s business continued, irrespective of ownership) is in “irreconcilable conflict” with the mere-continuation exception to the common law rule (which requires an identity of ownership between the successor and predecessor companies). AT Br. 44–45. There is no conflict. The mere-continuation exception is simply narrower than the federal successor liability doctrine. The only consequence of applying the federal successor liability doctrine is that courts will not be required to cut off liability for employment discrimination claims if a business continued under different owners.

Last, Oakridge Healthcare notes that Illinois courts typically are not bound by decisions of federal courts. AT Br. 46. While true, the reasoning in federal decisions can nevertheless be persuasive. In *Vernon*, for example, this Court looked to decisions from federal appellate courts and other States' courts when deciding questions of successor liability. *See* 179 Ill. 2d at 344–49 (citing decisions of the United States Courts of Appeal for the Seventh, Eighth, and Eleventh Circuits, and the courts of California, Maryland, Nebraska, and Ohio). In fact, the Court cited with approval the Seventh Circuit's decision in *Artistic Furniture*, where that court had recognized and applied the federal successor liability doctrine. 920 F.2d at 1325–27.

At most, adoption of the federal successor liability doctrine for violations of the Act will require buyers to conduct due diligence before purchasing the assets of another company. This should come as no surprise to prudent businesspersons, who are already subject to Title VII, the NLRA, and other labor and employment laws to which the federal successor liability doctrine has been applied for decades. This Court should adopt the federal successor liability doctrine for violations of the Act and remand to allow the State to pursue liability against Oakridge Healthcare under that doctrine.

II. The appellate court correctly held that a reasonable fact finder could determine that Oakridge Nursing transferred its assets to Oakridge Healthcare for the fraudulent purpose of avoiding liabilities.

Federal successor liability doctrine aside, this Court should affirm the appellate court's decision that summary judgment was improperly granted to

Oakridge Healthcare because a reasonable fact finder could determine that the asset transfer between Oakridge Nursing and Oakridge Healthcare was for the fraudulent purpose of avoiding Oakridge Nursing's liabilities.

A. The fraudulent-purpose exception was not raised for the first time on appeal, and even if it were, the appellate court did not abuse its discretion in reaching the issue.

Oakridge Healthcare first argues that the State forfeited reliance on the fraudulent-purpose exception by not responding to the argument regarding the exception in Oakridge Healthcare's motion for summary judgment. AT Br. 26–27. Oakridge Healthcare is incorrect.

As the appellate court correctly determined, the fraudulent-purpose exception was not raised for the first time on appeal, and thus was not forfeited. *See Oakridge Nursing*, 2019 IL App (1st) 170806, ¶ 29. In its complaint, the State pleaded sufficient facts that Oakridge Healthcare was the successor of Oakridge Nursing, *see* C8 (Count II titled "Successor Liability"), and was not required to plead the legal theories for imposing liability on the successor, *see Oakridge Nursing*, 2019 IL App (1st) 170806, ¶ 29 (citing *City of Chi. v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004); *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981)). Further, Oakridge Healthcare did not dispute that it was the successor to Oakridge Nursing, but instead "specifically addressed . . . the fraudulent purpose exception" in its motion for summary judgment. *Id.* And because Oakridge Healthcare addressed the fraudulent-purpose exception in its summary judgment motion, and the circuit court likewise addressed it in its decision, Oakridge Healthcare cannot show that it was prejudiced by the appellate court's decision to address the exception. *See Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (1st Dist. 2007) ("key purpose of the waiver doctrine is to prevent unfair prejudice to an opposing party").

And, in any event, even if the State had forfeited reliance on the fraudulent-purpose exemption, the appellate court's decision to overlook that forfeiture would not have been an abuse of discretion. *See Kovera v. Envirite of Ill., Inc.*, 2015 IL App (1st) 133049, ¶ 47 (decision to overlook forfeiture or waiver generally reviewed for abuse of discretion). "An abuse of discretion occurs only where the . . . court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the . . . court." *Id.*

Indeed, in this Court, Oakridge Healthcare forfeited any argument that the appellate court abused its discretion because it included no argument under that standard of review in its opening brief. *See* Ill. S. Ct. 341(h)(7). Regardless, there was no abuse of discretion. As explained, Oakridge Healthcare raised the fraudulent-purpose exception in its motion for summary judgment, and the circuit court based its decision in part on the conclusion that the fraudulent-purpose exception was not met as a matter of law. *Accord Moriarty v. Svec*, 164 F.3d 323, 328 (7th Cir. 1998) ("appellant can always challenge the legal theory upon which the district court relied in its decision");

United States v. City of Chi., 869 F.2d 1033, 1036 (7th Cir. 1989) ("[i]t is folly . . . to assert that an appeals court on review of a district court judgment cannot consider the merits of each and every theory the district judge relied upon in deciding the case"). Further, the merits of the exception were adequately briefed in the appellate court and Oakridge Healthcare cannot have been surprised or prejudiced by the State's decision to pursue reversal on that basis. Therefore, the appellate court did not exceed its discretion by addressing the fraudulent-purpose exception.

B. The appellate court correctly concluded that a reasonable fact finder could determine that the asset transfer was done for the fraudulent purpose of avoiding liabilities.

On the merits, the appellate court correctly determined that summary judgment for Oakridge Healthcare on the fraudulent-purposes exception was improper. Viewing the record in a light most favorable to the State, the non-movant, the facts reasonably support the conclusion that the asset transfer was not the type that should insulate Oakridge Healthcare from liability.

1. Summary judgment is for disposing claims before trial where the outcome is free and clear from doubt.

This Court reviews *de novo* the entry of summary judgment. *See Seymour v. Collins*, 2015 IL 118432, ¶ 42. "The standard for summary judgment is a formidable one," *Pielet v. Pielet*, 2012 IL 112064, ¶ 54, appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, *Seymour*, 2015 IL

118432, ¶ 42. It "is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Id.*

On summary judgment, the court must construe the record strictly against the movant (here, Oakridge Healthcare) and liberally in favor of the non-movant (here, the State). *See id.* And "summary judgment is not appropriate: (1) if there is a dispute as to a material fact . . . (2) if reasonable persons could draw divergent inferences from the undisputed material facts . . . ; or (3) if reasonable persons could differ on the weight to be given the relevant factors of a legal standard[.]" *Id.* (internal citations and quotations omitted).

At the outset, Oakridge Healthcare suggests that the appellate court or this Court lacks the power to *reverse* summary judgment on any basis appearing in the record. AT Br. 27. But *de novo* review contains no such limitation; it means that the court reviews the judgment "anew," Black's Law Dictionary 548 (11th ed. 2019), conducting the same analysis as the circuit court, *see HBLC, Inc. v. Egan*, 2016 IL App (1st) 143922, ¶ 25; *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16 (the court "may affirm or reverse on any basis"). Under *de novo* review, correctly applied, Oakridge Healthcare's right to judgment was not free and clear from doubt.

2. Establishing fraud under Illinois law

Illinois law acknowledges two separate yet related methods by which fraud can be established for purposes of the fraudulent-purposes exception to successor non-liability, contained in sections 5 and 6 of the Uniform Fraudulent Transfer Act (UFTA), 740 ILCS 160/5, 6 (2018), and known as "fraud in law" and "fraud in fact," *Bank of Am. v. WS Mgmt., Inc.*, 2015 IL App (1st) 132551, ¶ 87.

First, under section 5(a)(2) of the UFTA, a transfer is fraudulent "in law" if it was made "without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor . . . was engaged or was about to engage in a . . . transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction" or the debtor "intended to incur . . . debts beyond his ability to pay as they became due." *Id.* § 5(a)(2). Similarly, section 6(a) of the UFTA states that a transfer is fraudulent "as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." *Id.* § 6(a). In short, "fraud in law" is presumed in transactions lacking consideration that dispose of substantially all of the debtor's assets. *Northwestern Mem'l Hosp. v. Sharif*, 2014 IL App (1st) 133008, ¶ 18. When a transfer constitutes fraud in law, the court need not consider in the alternative whether the transfer constitutes fraud under section 5(a)(1) of the UFTA, referred to as "fraud in fact." *First Sec. Bank of Glendale Heights v. Bawoll*, 120 Ill. App. 3d 787, 792–93 (1st Dist. 1983).

Second, under section 5(a)(1) of the UFTA, the fraud in fact method, a transfer is fraudulent if made "with actual intent to hinder, delay, or defraud any creditor of the debtor." 740 ILCS 160/5(a)(1) (2018). To aid courts in that determination, the UFTA sets forth eleven non-exhaustive factors to consider:

> (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of the property transferred after the transfer;
>
> (3) the transfer or obligation was disclosed or concealed;
>
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) the transfer was of substantially all the debtor's assets;
>
> (6) the debtor absconded;
>
> (7) the debtor removed or concealed assets;
>
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. § 5(b). Courts need not consider all of these so-called "badges of fraud," *Bank of Am.*, 2015 IL App (1st) 132551, ¶ 89, but each badge that applies strengthens the inference of fraud in fact, *see A.G. Cullen Constr., Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶ 29.

3. A reasonable fact finder could determine that Oakridge Nursing transferred its assets to Oakridge Healthcare for the fraudulent purpose of avoiding its liabilities.

A reasonable fact finder could determine that the asset transfer between Oakridge Nursing and Oakridge Healthcare was either fraudulent in law or fraudulent in fact. First, the asset transfer typifies fraud in law. After Holloway filed her charge, C13, C578, Oakridge Nursing transferred essentially all of its assets to Oakridge Healthcare without negotiations or consideration, C570, C627. Oakridge Healthcare even conceded that its transaction with Oakridge Nursing was not "a totally arm's length transaction."[2] These facts alone should have defeated summary judgment.

The record also supports successor liability under the fraudulent-purpose exception pursuant to a fraud in fact theory. Helen and Eli, along with other members of Eli's family, had been close business associates for more than two decades. C55, C543, C550–52, C604, C614. In 2008, Oakridge Nursing acquired the assets to operate the Oakridge Nursing facility, and Oakridge Properties acquired the property; both were acquired from the same predecessor. C552–53, C564, C558–59. Without negotiations, Oakridge Nursing and Oakridge Properties entered into a lease agreement pursuant to which Oakridge Nursing leased the property. C560.

---

[2] Oral Argument at 21:11–13, *Oakridge Nursing*, 2019 IL App (1st) 170806, https://multimedia.illinois.gov/court/AppellateCourt/Audio/2018/1st/100218_1-17-0806.mp3.

A few months after Holloway filed her charge of discrimination with the Department and gave notice to Oakridge Nursing of its filing, Oakridge Nursing experienced financial troubles and Helen made the decision to pay its payroll, rather than rent, and gave notice to Oakridge Properties that it was breaking its lease. C532, C565–66. Based on these facts, a reasonable fact finder could determine that Helen attempted to absolve Oakridge Nursing and herself of any potential liability through an asset transfer to Oakridge Healthcare.

Oakridge Healthcare was created to acquire Oakridge Nursing's assets. C56–57, C606–07. Without an asset valuation, negotiations, or exchange of value, C570–71, C577, C627–28, Oakridge Healthcare acquired Oakridge Nursing's assets through the transfer agreement, C57, C61, C169, C410. Despite Oakridge Nursing owing Oakridge Properties a $210,000 early lease termination penalty and $244,262.15 in back rent, debts Helen had personally guaranteed, she testified that she did not know whether those debts were paid. C565. Nor does it appear that Oakridge Properties ever pursued those debts debt against Helen personally.

Helen and Eli's post-transfer business relationship further suggests that the asset transfer was for the fraudulent purpose of avoiding liabilities. After the transfer, Helen consulted for three companies Eli was affiliated with, C608, C611, C613–14, they were both members of another company, and

Helen was a member and an administrator of another nursing home facility where Eli was a manager, C541, C602, C604–05.

Based on this evidence, a reasonable fact finder could determine that the transfer met several "badges" of fraud. The transfer occurred after Holloway filed her discrimination charge (badge 4). *See* C13, C578; *Oakridge Nursing*, 2019 IL App (1st) 170806, ¶ 35 (Oakridge Nursing "had the obligation not to dissipate assets" after Holloway filed her discrimination charge). Nearly all of Oakridge Nursing's assets were transferred to Oakridge Healthcare (badge 5). C56–57, C61–62, C570–71, C628. The consideration Oakridge Nursing received from Oakridge Healthcare was not equivalent to the value of the assets transferred because the assets were not valueless (badge 8), and even if they were, no valuation occurred so neither company could have known that. C570–71, C577, C628–29. And Oakridge Nursing was insolvent before the asset transfer was made (badge 9). C566. Based on this record, and the reasonable inferences to be drawn from it, summary judgment should not have been granted for Oakridge Healthcare.

On appeal, Oakridge Healthcare contends in conclusory fashion that the asset transfer "had nothing whatsoever to do with . . . Holloway's charge[.]" AT Br. 32. Rather, it claims, the asset transfer was the result of Oakridge Nursing's financial failure. *Id.* at 32–33. But it supplies no credible argument that is grounded in record evidence and phrased in the summary judgment posture of the case. Oakridge Healthcare does not even cite to the deposition testimony of Helen or Eli, and many of its factual contentions lack citations to the record. *See* Ill. S. Ct. R. 341(h)(7); *see, e.g.*, AT Br. 32–36. Nor does it identify how the inference of a fraudulent purpose to the transaction is unreasonable, let alone show how judgment for it was free and clear from doubt.

Although Oakridge Healthcare notes that "[b]roken promises and unfulfilled obligations are not fraud," and it had no "legal, moral or patriotic duty to increase [its] liabilities," *Id.* at 34, that is irrelevant to the particulars of this case. The law is clear: liabilities will follow a successor if the asset transfer was conducted to avoid paying a creditor. And where, as here, the facts show that the transfer lacked consideration and significant liabilities were avoided, a reasonable fact finder could conclude that the transfer was undertaken for fraudulent purposes.

CONCLUSION

For these reasons, this Court should affirm the judgment of the appellate court.

February 26, 2020

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellee

/s/ Aaron T. Dozeman
AARON T. DOZEMAN
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 793-1473
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
adozeman@atg.state.il.us

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 42 pages.

/s/ Aaron T. Dozeman
AARON T. DOZEMAN
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 793-1473
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
adozeman@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I certify that on February 26, 2020, I electronically filed the foregoing Brief of Plaintiff-Appellee with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the participants in this appeal, named below, are not registered Odyssey eFileIL service contacts, and thus were served on February 26, 2020, by transmitting a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants.

Richard Lee Stavins
rstavins@rsplaw.com

Dianna Psarras
dpsarras@rsplaw.com

Under penalties as provided by law under section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Aaron T. Dozeman
AARON T. DOZEMAN
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 793-1473
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
adozeman@atg.state.il.us