No. 124753

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS ex rel ILLINOIS DEPARTMENT OF HUMAN RIGHTS,

Plaintiff-Appellee,

v.

OAKRIDGE HEALTHCARE CENTER, LLC,

Defendant-Appellant,

and **OAKRIDGE NURSING & REHAB CENTER, LLC, a/k/a OAKRIDGE REHABILITATION CENTER**,

Defendant.

On leave to appeal from the Appellate Court of Illinois, First Judicial District. There heard on appeal from the Circuit Court of Cook County, Illinois

Circuit Court No. 15 CH 13917
Appellate Court No. 1-17-0806

Honorable
Franklin U. Valderrama
Judge, Presiding

BRIEF FOR DEFENDANT-APPELLANT OAKRIDGE HEALTHCARE CENTER, LLC

RICHARD LEE STAVINS
DIANA H. PSARRAS
Attorneys for Defendant-Appellant, Oakridge Healthcare Center, LLC

ROBBINS, SALOMON & PATT, LTD.
Of Counsel
180 N. LaSalle Street, Suite 3300
Chicago, IL 60601
rstavins@rsplaw.com
dpsarras@rsplaw.com
(312) 782-9000

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THE PEOPLE OF THE STATE OF ILLINOIS ex rel ILLINOIS DEPARTMENT OF HUMAN RIGHTS, *Plaintiff-Appellee,* v. **OAKRIDGE HEALTHCARE CENTER, LLC**, *Defendant-Appellant,* and **OAKRIDGE NURSING & REHAB CENTER, LLC, a/k/a OAKRIDGE REHABILITATION CENTER**, *Defendant.*	On leave to appeal from the Appellate Court of Illinois, First Judicial District. There heard on appeal from the Circuit Court of Cook County, Illinois Honorable **Franklin U. Valderrama** Judge, Presiding

BRIEF FOR DEFENDANT-APPELLANT
OAKRIDGE HEALTHCARE CENTER, LLC

POINTS AND AUTHORITIES

A.

INTRODUCTION

This action was brought by the State of Illinois for entry of judgments against two defendants: appellant Oakridge Healthcare Center, LLC and non-appellant Oakridge Nursing & Rehab Center, LLC. The basis of the request for judgment against non-appellant Oakridge Nursing & Rehab Center was that an administrative award had been entered against that entity. The basis for the request for judgment against appellant Oakridge Healthcare Center was that it allegedly was the successor to the liabilities of non-appellant Oakridge Nursing & Rehab Center, although it was not a party to the administrative proceeding. The circuit court entered a money judgment for the state and against Oakridge Nursing & Rehab Center, the entity against whom the administrative award had been entered. On the other hand, the circuit court entered summary judgment *against* the state and for appellant Oakridge Healthcare Center, the entity against whom no administrative award had been entered. From that summary judgment order, the state appealed. The appellate court reversed, and this Court granted leave to appeal. No questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

Whether defendant-appellant Oakridge Healthcare Center was the legal successor to the liabilities of defendant Oakridge Nursing & Rehab Center. That issue depends substantially on whether Illinois should adopt a fifth exception to the successor corporate non-liability rule.

STATEMENT OF FACTS

This case was brought by the state against two defendants which are separate and unrelated legal entities: appellant Oak Ridge Healthcare Center and Oakridge Nursing & Rehab Center, not a party to this appeal.

Oakridge Nursing & Rehab Center, the defendant which is not involved in this appeal, was a party to an administrative proceeding instituted in 2011 by Jane Holloway before the Illinois Department of Human Rights. More than two years later, in 2014, a $30,088 monetary award was entered by the Human Rights Commission against that entity, Oakridge Nursing & Rehab Center. The state then filed this action in the circuit court, seeking entry of judgment on that award in count I of the complaint. (C3, C6)

The state also sued the instant defendant-appellant, Oakridge Healthcare Center, in count II of the complaint. That entity, Oakridge Healthcare Center, was not a party to the administrative proceeding and no award was ever entered against that entity. In count II, the state sought entry of a judgment against Oakridge Healthcare Center, solely on a successorship liability theory. (C8) The state recognized the rule of successor corporate non-liability, but it pleaded that one of the four exceptions to that rule purportedly applied in this case: that Oakridge Healthcare Center allegedly was a mere continuation of Oakridge Nursing & Rehab Center. (C8-C9)

There are actually three similarly named limited liability companies who are referenced in the record in this case. They each used the generic name Oakridge. Those three LLC's are Oakridge Nursing & Rehab Center, Oakridge Nursing & Rehab Properties and Oakridge Healthcare Center.

<u>Oakridge Nursing & Rehab Center, LLC</u>

The first of the three limited liability companies involved in the facts in this case, Oakridge Nursing & Rehab Center, was established by the State of Illinois on May 1, 2008, and was involuntarily dissolved on November 14, 2014. (C60, ¶ 4) Before the dissolution, its two members were Helen Lacek and John Lacek. (C60, ¶ 5) The Laceks are husband and wife. (C60, ¶ 2) In addition to being a member of the Oakridge Nursing & Rehab

Center, Helen Lacek was also that entity's manager. (C60, ¶ 6) Oakridge Nursing & Rehab Center was in the business of operating a nursing home named Oakridge Nursing & Rehab Center, also known as Oakridge Rehabilitation Center, located at 323 Oakridge Avenue in Hillside, Illinois. (C61, ¶ 7)

Oakridge Nursing & Rehab Properties, LLC

Oakridge Nursing & Rehab Center did not own the real estate at 323 Oakridge Avenue where it operated the nursing home. (C55, ¶ 6, C61, ¶ 8) Rather, the real estate was owned by the second of the three limited liability companies referenced in this case, Oakridge Nursing & Rehab Properties. (C55, ¶ 6, C61, ¶ 8) That entity was established as a limited liability company on May 1, 2008. (C55, ¶ 5) It is still active and still owns the real estate. (C55, ¶¶ 5, 6)

The members of this second entity, Oakridge Nursing & Rehab Properties, were Joel Atkin, Donna Atkin and Jay Orlinsky. (C56, ¶ 7) Joel and Donna are brother-in-law and sister-in-law. (C56, ¶ 7) Jay Orlinsky is also Joel's brother-in-law. (C56, ¶ 7) The managers of Oakridge Nursing & Rehab Properties were Joel Atkin, Elisha Atkin and Donna Atkin. (C56, ¶ 8) Joel and Elisha are brothers. (C56, ¶ 8) Elisha is also known as Eli. (C55, ¶ 2) Eli and Donna are husband and wife. (C55, ¶ 3) That entity that owned the real estate, Oakridge Nursing & Rehab Properties, was not a party to this litigation. (C3)

On June 1, 2008, the owner of the real estate, Oakridge Nursing & Rehab Properties, as lessor, leased the premises at 323 Oakridge Avenue to defendant Oakridge Nursing & Rehab Center, as lessee, for 20 years. (C56, ¶ 9, C61, ¶ 9, C66) The rent was $35,000 per month. (C90, ¶ 4.1)

Lessee Oakridge Nursing & Rehab Center operated the nursing home in 2008, 2009, 2010 and 2011. (C61, ¶ 10) In 2011, lessee Oakridge Nursing & Rehab Center experienced major financial problems, caused substantially by nonpayment of bills by the State of Illinois, and as a result lessee/non-appellant Oakridge Nursing & Rehab Center, was unable to pay its rent to its landlord, non-party Oakridge Nursing & Rehab Properties the owner of the real estate. (C56, ¶ 10, C61, ¶ 10)

On January 1, 2012, under threat of eviction by landlord Oakridge Nursing & Rehab Properties for non-payment of rent, lessee Oakridge Nursing & Rehab Center entered into a lease termination agreement with the landlord, Oakridge Nursing & Rehab Properties. (C56, ¶ 12, C61, ¶ 11)

That lease termination instrument (C114) provided that as of January 1, 2012, the lease dated June 1, 2008 was terminated and that lessee Oakridge Nursing & Rehab Center thereby returned possession of the demised premises to lessor Oakridge Nursing & Rehab Properties. (C146-C147, ¶ 2)

<u>Oakridge Healthcare Center, LLC</u>

Simultaneously, on January 1, 2012, Oakridge Nursing & Rehab Center sold nearly all its assets to the third of the three limited liability companies, Oakridge Healthcare Center, the instant appellant before his Court. (C56, ¶ 13, C61, ¶ 12) Oakridge Healthcare Center is an ongoing and active limited liability company. (C56, ¶ 14)

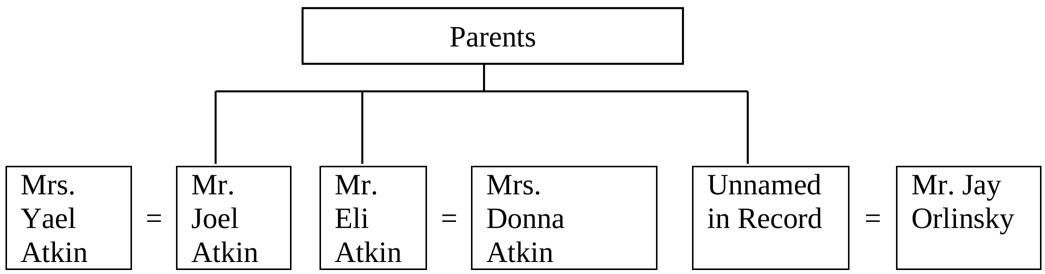
The members of Oakridge Healthcare Center are Elisha (Eli) Atkin and Yael Atkin. (C56, ¶ 15) They are brother-in-law and sister-in-law. Joel Atkin and Yael Atkin are husband and wife. (C56, ¶ 15) The manager of Oakridge Healthcare Center is Elisha Atkin a/k/a Eli Atkin. (C56, ¶ 16) Oakridge Healthcare Center was established as a limited liability company on December 5, 2011 and is still in business. (C57, ¶ 17)

Summary of the Relationships

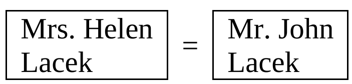
In summary, here are the family relationships of the natural persons involved in the three limited liability company entities, and the roles of the three limited liability company entities in this litigation:

1. The Two Family Trees

A. **Atkin Family**



B. **Lacek Family**



C. **Relationships** by either consanguinity or affinity between the Atkin family tree and the Lacek family tree: None. (C55, ¶ 4, C60, ¶ 3)

2. The Three LCC Entities

A. **Oakridge Nursing & Rehab Properties, LLC**

Members: Mr. Joel Atkin, Mrs. Donna Atkin, Mr. Jay Orlinsky

Managers: Mr. Joel Atkin, Mr. Eli Atkin, Mr. Jay Orlinsky

Role: Owner of the real estate, lessor

B. **Oakridge Nursing & Rehab Center, LLC**

Members: Mrs. Helen Lacek, Mr. John Lacek

Manager: Mrs. Helen Lacek

Role: Transferor of the nursing home assets, original lessee, defendant, non-appellant

C. **Oakridge Healthcare Center, LLC**

Members: Mr. Eli Atkin, Mrs. Yael Atkin

Manager: Mr. Eli Atkin

Role: Transferee of the nursing home assets, subsequent lessee, defendant, appellant

<u>Transfer of assets</u>

The January 1, 2012 transfer agreement between Oakridge Nursing & Rehab Center, the transferor, and appellant Oakridge Healthcare Center, the transferee, is named "Operations Transfer Agreement." (C57, ¶ 18, C62, ¶ 13, C168) By the terms of the transfer agreement, the following assets were transferred from transferor Oakridge Nursing & Rehab Center to transferee Oakridge Healthcare Center:

- All property. (C189, ¶ 7.A.(x)) Property is defined as the facility and the real property. (C181, ¶ 1) The facility is defined as the licensed skilled and intermediate and long term care facility at 323 Oakridge Avenue, Hillside, Illinois, and the furniture, fixtures and equipment. (C178, ¶ 1) Although the document purported to transfer the real property at 323 Oakridge Avenue from Oakridge Nursing & Rehab Center to Oakridge Healthcare Center, it could not, and did not do so. The real estate was not owned by transferor Oakridge Nursing & Rehab Center; it was owned by Oakridge Nursing & Rehab Properties. (C55, ¶ 6) Obviously, Oakridge Nursing & Rehab Center could not transfer what it did not own. It did, however, own the business of the nursing home and the personal property, and those things it could, and did transfer.

- All contracts. (C188, ¶ 7.A.(viii), C192, ¶ 11.A)
- All supplies. (C190, ¶ 9)
- All licenses. (C189, ¶ 7.A.(ix))
- All patient records. (C189, ¶ 7.A.(ix))
- All patient trust funds. (C191, ¶ 10.B.)

Thus, just about every asset of transferor Oakridge Nursing & Rehab Center was transferred to transferee Oakridge Healthcare Center. Essentially, the only asset not transferred was the transferor's accounts receivable (C195, ¶ 14.A, C57, ¶ 20, C62, ¶ 15), most of which were owed by the state.

The operations transfer agreement also stated, in all capital letters, that transferee Oakridge Healthcare Center:

- Was not a successor to the transferor;
- Was not a successor-in-interest to the transferor;
- Was not liable for the obligations of the transferor; and
- Could not have a judgment entered against it for the obligations of the transferor. (C197-C198, ¶ 16, C57-C58, ¶ 21, C62, ¶ 16)

After the assets transfer on January 1, 2012 from Oakridge Nursing & Rehab Center to Oakridge Healthcare Center, transferee Oakridge Healthcare Center continued to operate a nursing home business at the same location, although under a new name, Oakridge Healthcare Center, rather than under the old name, Oakridge Nursing & Rehab Center. (C58, ¶ 22)

There was no continuity of the members and managers between the transferor and the transferee. (C58, ¶ 23) The members of the transferor entity were Helen Lacek and

John Lacek (C60, ¶ 5), whereas the members of the transferee entity were Eli Atkin and Yael Atkin. (C58, ¶ 23) The manager of the transferor was Helen Lacek (C60, ¶6), whereas the manager of the transferee was Eli Atkin. (C58, ¶ 23)

While the two Laceks are related to each other and the three Atkins are related to each other, the Laceks and the Atkins are not related by blood or marriage. (C55, ¶ 4, C58, ¶ 24, C63, ¶ 17)

Thus, there are close family relations among the principals of the transferor entity, and there are close family relations among the principals of the transferee entity; but, there are absolutely no family relations between the principals of the transferor and the principals of the transferee, i.e. there is no family relationship whatsoever between spouses Helen Lacek and John Lacek (the members of transferor Oakridge Nursing & Rehab Center), on the one hand, and sister-in-law and brother-in-law Yael Atkin and Elisha Atkin (the members of Oakridge Healthcare Center), on the other hand. (C55, ¶¶ 3, 4, C56, ¶¶ 7, 8, 15, C58, ¶ 24, C60, ¶¶ 2, 5, C63, ¶ 17)

Litigation

Jane Holloway was an employee of transferor Oakridge Nursing & Rehab Center. (C13) She was not an employee of transferee Oakridge Healthcare Center and there is no allegation that she ever was. On February 7, 2011, Ms. Holloway filed a *pro se* administrative charge in the Illinois Department of Human Rights based on alleged discrimination by her employer, Oakridge Nursing & Rehab Center. (C13, ¶ One)

Eventually, on April 3, 2014, the Illinois Human Rights Commission adopted the Administrative Law Judge's recommendation to enter a monetary award against the employer, Oakridge Nursing & Rehab, LLC, only. (C32) The amount of the award was $30,880. (C30) The Human Rights Commission did not enter any award against transferee

Oakridge Healthcare Center, which was not even a party to the proceeding before either the Department of Human Rights or the Human Rights Commission when the award was entered. (C32)

The state then brought this action in the circuit court pursuant to 775 ILCS 5/8-111(C)(1), seeking entry of judgment against both the employer-transferor, Oakridge Nursing & Rehab Center, and the non-employer-transferee, Oakridge Healthcare Center. (C3)

Transferee Oakridge Healthcare Center moved for summary judgment on count II (C221), which the trial court granted. (A-3) An agreed money judgment was then entered against the other defendant, transferor Oakridge Nursing & Rehab Center on count I. (A-8) The State timely filed a notice of appeal (A-8), and this appeal ensued. The appellate court reversed, 2019 IL App (1st) 170806, (A-11), with one justice dissenting (A-39), and this Court granted leave to appeal.

The record on appeal in this matter was prepared by the clerk of the circuit court prior to electronic filing and it is a paper record consisting entirely of the common law record. Notwithstanding that this appeal involves a paper record, in citations to the record we have not used the old system (R. C___), but rather have used the new system (C___).

STANDARD OF REVIEW

The standard of review in this appeal is not disputed. This appeal was taken from an order of the circuit court granting summary judgment and involves a question of law on undisputed facts. Accordingly, the standard of review is *de novo*. *Murneigh v. Gainer*, 177 Ill.2d 287, 298 (1997); *Outbound Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill.2d 90, 102 (1992); *Murphy-Hylton v. Lieberman Mgmt. Servs., Inc.*, 2016 IL 120394, ¶ 16; *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill.2d 127, 160 (1990).

ARGUMENT

I.

WHERE THE ASSETS OF A BUSINESS ARE TRANSFERRED, THE TRANSFEREE DOES NOT ACQUIRE ANY LIABILITIES OF THE TRANSFEROR, SUBJECT TO FOUR LONG-STANDING AND WELL-RECOGNIZED EXCEPTIONS.

Successor liability in Illinois is based upon corporate law, not tort law. *Myers v. Putzmeister, Inc.*, 232 Ill.App.3d 419, 422 (1st Dist. 1992). In actions in both tort and contract, this Court and the appellate court have long subscribed to the principle of corporate law referred to as the rule of successor corporate non-liability. Under that rule, where the transferee of a business acquires the transferor's assets -- as distinguished from acquiring the transferor's shares of stock -- the transferee is *not* liable for the debts, liabilities or obligations of the transferor. This Court made that absolutely clear in *Vernon v. Schuster*, 179 Ill.2d 338, 344-45 (1997). The appellate court made that clear in a litany of cases, including *Groves of Palatine Condo. Ass'n v. Walsh Constr. Co.*, 2017 IL App (1st) 161036, ¶ 57; *Dearborn Maple Venture, LLC v. SCI Illinois Servs., Inc.*, 2012 IL App (1st) 103513, ¶ 37; *Diguilio v. Goss Int'l Corp.*, 389 Ill.App.3d 1052, 1059-60 (1st Dist. 2009); *Charles Austin, Ltd. v. A-1 Food Servs., Inc.*, 2014 IL App (1st) 132384, ¶ 29; *Villaverde v. IP Acquisition VIII, LLC,* 2015 IL App (1st) 143187, ¶¶ 41, 57.

This general rule has long been subject to four well established exceptions, stated by this Court in *Vernon v. Schuster*. The transferee of the assets will be liable for the debts and obligations of the transferor if either (1) there was an express or implied agreement of assumption of liability; (2) the transaction amounts to a merger or 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. *Vernon*, 179 Ill.2d at 345.

The appellate court has likewise often stated the same four exceptions. *Kaleta v. Whittaker Corp.*, 221 Ill.App.3d 705, 708-09 (1st Dist. 1991); *Groves of Palatine*, 2017 IL App (1st) 161036, ¶ 57; *Myers*, 232 Ill.App.3d at 756; *Dearborn Maple Venture*, 2012 IL App (1st) 103513, ¶ 37; *Charles Austin*, 2014 IL App (1st) 1232384, ¶ 29; *Villaverde*, 2015 IL App (1st) 143187, ¶ 44; *Nilsson v. Cont'l Mach. Mfg. Co.,* 251 Ill.App.3d 415, 417-18 (2d Dist. 1993); *Advocate Fin. Grp., LLC v. 5434 N. Winthrop, LLC*, 2015 IL App (2d) 150144, ¶ 26; *Park v. Townson & Alexander, Inc.*, 287 Ill.App.3d 772, 774 (3d Dist. 1997); *Clayton v. Planet Travel Holdings, Inc.*, 2013 IL App (4th) 120717, ¶ 38; *Flanders v. California Coastal Cmtys., Inc.*, 356 Ill.App.3d 1113, 1118 (5th Dist. 2005).

This principle of law is known as the "the rule of successor corporate non-liability." *Vernon*, 179 Ill.2d at 345; *Villaverde*, 2015 IL App (3d) 143187, ¶ 41; *Groves of Palatine*, 2017 IL App (1st) 161036, ¶¶ 57, 58; *Diguilio*, 389 Ill.App.3d at 1010. The rule of successor corporate non-liability applies to all forms of asset transfers, not just sales. *Alexander v. State Savings Bank & Trust Co.*, 281 Ill.App. 88, 96 (1st Dist. 1935).

In the case *sub judice*, it is undisputed that transferee-appellant-Oakridge Healthcare Center acquired the assets, but not the liabilities, of transferor-non-appellant-Oakridge Nursing & Rehab Center. (C56, ¶ 13, C61, ¶ 12, C181, ¶ 1, C188, ¶ 7.A.(viii), C189, ¶ 7.A.(ix), C190, ¶ 9, C191, ¶ 10.B)

The state never argued the first of the four exceptions (agreement) or the second of the four exceptions (merger) in either the circuit court or in the appellate court. Therefore, we shall not address the first two exceptions, and shall address only the third and fourth exceptions, and we shall address the fifth exception which the appellate court created.

A.

The mere continuation exception.

The third exception – that the transferee is a mere continuation of the transferor -- was argued by the state in the circuit court, but not in the appellate court. This exception will apply only where there was a continuation of the corporate entity of the transferor, not where there was a continuation of the transferor's business. *Vernon v. Schuster,* 179 Ill.2d 338, 346 (1997); *Groves of Palatine Condo. Ass'n v. Walsh Const. Co.*, 2017 IL App (1st) 161036, ¶ 69; *Advocate Financial Grp., LLC v. 5434 North Winthrop,* LLC, 2014 IL App (2d) 130998, ¶¶ 23, 26; *Dearborn Maple Venture, LLC v. SCI Illinois Servs., Inc.*, 2012 IL App (1st) 103513, ¶ 38; *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187, ¶¶ 55, 56.

The test is not whether the seller's business operation continues in the purchaser, but whether the seller's corporate entity continues in the purchaser. The key consideration is whether there is identity of ownership, based on identity of officers, directors and stockholders, as between the transferor and the transferee. *Vernon,* 179 Ill.2d at 346-47; *Advocate Fin. Grp.*, 2015 IL App (2d) 130998, ¶ 26; *Groves of Palatine,* 2017 IL App (1st) 161036, ¶ 70; *Dearborn Maple Venture,* 2012 IL App (1st) 103513, ¶ 38; *Clayton v. Planet Travel Holdings, Inc.*, 2013 IL App (4th) 120717, ¶ 40.

Common identity of ownership is not merely one factor among many; it is the essential factor. *Vernon*, 179 Ill.2d at 346-47. This is a crucial distinction. It means that successor corporate liability will be imposed upon the transferee under the continuation exception if, and only if, the transferee maintains the same or similar ownership and management. *Vernon,* 179 Ill.2d at 346; *Dearborn Maple Venture*, 2012 IL App (1st) 103513, ¶ 38; *Advocate Fin. Grp.,* 2014 IL App (2d) 130998, ¶ 26; *Groves of Palatine,* 2017 IL App (1st) 161036, ¶¶ 69-70.

"A common identity of officers, directors and stock[holders] between the selling [transferor] and purchasing [transferee] corporation [is] the key element of what constitutes a continuation." *Vernon*, 179 Ill.2d at 347; *Dearborn Maple Venture*, 2012 IL App (1st) 103513, ¶ 38. Identity of ownership between the transferor corporation and the transferee corporation is *required* before imposing successor liability under the continuation exception. *Vernon*, 179 Ill.2d at 347. "[T]he court must focus upon and determine whether there is a common identity of officers, directors, and stock[holders] between the selling and purchasing corporation." *Ashley v. IM Steel, Inc.*, 406 Ill.App.3d 222, 239 (3d Dist. 2010). There must be an identity of officers, directors, and stockholders. *Advocate Fin. Grp.*, 2014 IL App (2d) 130998, ¶ 26.

Decades ago, California adopted the so-called product-line approach to successor liability. *Ray v. Alad Corp.*, 19 Cal.3d 22 (1977). Creditors and tort victims in Illinois immediately tried to induce Illinois courts to adopt the California product-line approach, but the appellate court consistently rejected those efforts. *Hernandez v. Johnson Press Corp.*, 70 Ill.App.3d 664, 668-70 (1st Dist. 1979); *Gonzalez v. Rock Wool Eng'g & Equip. Co., Inc.*, 117 Ill.App.3d 435, 440 (1st Dist. 1983); *Diguilio v. Goss Int'l Corp.*, 389 Ill.App.3d 1052, 1063-64 (1st Dist. 2009); *Myers v. Putzmeister, Inc.*, 232 Ill.App.3d 419, 426 (1st Dist. 1992); *Nguyen v. Johnson Mach. Press Corp.*, 104 Ill.App.3d 1141, 1145-47 (1st Dist. 1992); *Domine v. Fulton Iron Works*, 76 Ill.App.3d 253, 256-58 (1st Dist. 1979); *Barron v. Kane & Roach, Inc.*, 79 Ill.App.3d 44, 49 (1st Dist. 1979).

The public policy behind Illinois' rejection of the California product-line approach was well stated by the appellate court in *Hernandez:* "In recent years, for a variety of reasons, many have thought it necessary to turn to the courts in search of solutions to social problems. Courts are ill-equipped, however, to balance equities among future plaintiffs and defendants. Such forays can result in wide-ranging ramifications on society, the contemplation of which is precluded by the exigencies of deciding a particular case presented on a limited record developed by present parties." Such "public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate." 70 Ill.App.3d at 670.

Accordingly, the fact that the transferor and the transferee in an assets transfer in Illinois may both be in the same business, produce the same product, do business with the same customers, use the same telephone numbers, have the same name, operate on the same land, and maintain the same inventory and supplies are all irrelevant to the continuation exception in Illinois. *Diguilio*, 389 Ill.App.3d at 1063-64; *Green v. Firestone Tire & Rubber Co., Inc.*, 122 Ill.App.3d 204, 210 (2d Dist. 1984).

Those things go only to the question of whether the transferor's business operation continued in the transferee. While that is highly probative in a product line jurisdiction like California, it is irrelevant in Illinois. The only thing that is relevant here is "whether there is identity of ownership, based on identity of officers, directors, and stockholders." *Advocate Fin. Grp.*, 2014 IL App (2d) 130998, ¶ 26. The fact that the two entities operate out of the same location and that they involve similar activities does *not* establish the continuation exception, absent identity of ownership. *Groves of Palatine*, 2017 IL App (1st) 161036, ¶¶ 69-70.

The mere continuation exception to the rule of successor corporate non-liability has sometimes been said by the appellate court of Illinois to mean that the business "wears different clothes" or "put on new clothes" or "put on a new coat" or "changed hats." *Groves of Palatine*, 2017 IL App (1st) 161036, ¶ 58; *Advocate Fin. Grp.*, 2014 IL App (2d) 130998, ¶ 26; *Villaverde*, 2015 IL App (1st) 143187, ¶ 55. Use of those phrases does *not* mean that there is a product line exception to successor non-liability in Illinois. On the contrary, in determining whether the transferee is wearing a new coat or new clothing for the transferor, the mandatory critical factor is still continuity of ownership. *Groves of Palatine*, 2017 IL App (1st) 161036, ¶¶ 69-70; *Park v. Townson & Alexander, Inc.*, 287 Ill.App.3d 772, 774 (3d Dist. 1997); *Nilsson v. Cont'l Mach. Mfg. Co.*, 251 Ill.App.3d 415, 418 (2d Dist. 1993).

The principles of case law discussed above developed in Illinois in the context of entities chartered as corporations under the Business Corporation Act. 805 ILCS 5. Those principles would apply equally to entities that were chartered not as corporations, but as limited liability companies under the newer Limited Liability Company Act. 805 ILCS 180. In a case in 2015 involving the issue of successor liability where one limited liability company transferred its assets to another limited liability company, the appellate court analyzed the rights and liabilities of the limited liability companies that were there involved under the familiar rules applicable to corporations. *Villaverde*, 2015 IL App (1st) 143187, ¶¶ 1, 2, 40.

In the case at bar, the State did not argue in the appellate court that the mere continuation exception allegedly should apply in this case. Where a point raised by an appellant in the lower court is not argued by the appellant in its opening brief in the appellate court, the point is deemed forfeited. S.Ct. Rule 341(h)(7); *Palm v. 2800 Lake*

Shore Drive Condo. Ass'n, 2013 IL 110505, ¶ 65; *BAC Home Loan Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23; *Vancura v. Katris*, 238 Ill.2d 352, 369-70 (2010).

Arguendo, if this Court opts to consider the state's argument made in the lower court notwithstanding the forfeiture on appeal, defendant respectfully submits this response:

Nature of the transaction: This was a transfer of assets only. In 2011 Oakridge Nursing & Rehab Center, failed financially as a business. (C56, ¶ 10, C61, ¶¶ 10-11) As a consequence, it transferred its assets on January 1, 2012 to Oakridge Healthcare Center. The Operations Transfer Agreement (C168) is replete with language that this was an assets transfer, not a stock transfer: the transfer was of all property, of all contracts, of all licenses, of all patient records, of all patient trust funds, and of all supplies. (C56, ¶ 12, C61, ¶ 13, C181, ¶ 1, C188, ¶ 7.A.(viii), C189, ¶ 7.A.(ix), C190, ¶ 9, C191, ¶ 10.B.) No reference is made to transfer of shares of stock or memberships.

Continuity of ownership: There was no continuity of ownership. The transferor and the transferee are each duly constituted limited liability companies, separately chartered several years apart. (C57, ¶ 17, C60, ¶ 4) The members of a limited liability company are its owners, akin to a corporation's shareholders. The members of transferor Oakridge Nursing & Rehab Center were Helen Lacek and John Lacek. (C60, ¶5) The members of transferee Oakridge Healthcare Center were Elisha (Eli) Atkin and Yael Atkin. (C56, ¶ 15) There is no common ownership and no family relationship between the transferor's members and the transferee's members. (C55, ¶ 4, C60, ¶3)

The majority of the appellate court drew a sinister inference from the fact that Helen Lacek, Oakridge Nursing & Rehab Center's member/manager, knew Eli Atkin, one of the members of Oakridge Nursing & Rehab Properties and a partner with Helen Lacek in another nursing home. The majority also thought it suspicious that Eli Atkin formed Oakridge Healthcare Center to buy the nursing home's assets and did not conduct any valuation of those assets before agreeing to take them. The majority also characterized the sale as being without consideration.

Helen Lacek has no interest in transferee Oakridge Healthcare Center. (C56) The fact that she knew Eli Atkin and had been involved in another nursing home venture with him is irrelevant. As the member/manager of Oakridge Nursing & Rehab Center's landlord, Atkin would have been familiar with the difficulties the nursing home was facing, as it was not paying its rent (C56, C61), and the only assets transferor Oakridge Nursing & Rehab Center possessed were the stream of income from its residents and its expectation of payments from the state. A valuation of transferor Oakridge Nursing & Rehab Center's assets would have added noting to this scenario. The majority also held that, according to the transaction documents, transferor Oakridge Nursing & Rehab Center retained its accounts receivable, including past due sums from the state. Thus, Oakridge Nursing & Rehab Center retained the right to collect its accounts receivable, and therefore it cannot be said -- as the majority contended -- that the sale of its assets was without consideration. The fact that the amount of consideration is not specified in the record is no reason to conclude the transfer was improper, but that is what the majority of the appellate court did.

<u>Continuity of management</u>: There was no continuity of management. A limited liability company is run by its managers. 805 ILCS 180/15-1. They are akin to the directors and officers of a corporation. The manager of transferor Oakridge Nursing & Rehab Center was Helen Lacek. (C56, ¶ 16) The manager of transferee Oakridge Healthcare Center was

Elisha Atkin. (C60, ¶ 6) They are unrelated. (C55, ¶ 4, C60, ¶ 3) There is no continuity of management between the entities.

Express or implied agreement to assume the liabilities of the transferor: There was no assumption of liabilities. Indeed, the agreement specifically states the opposite: that the liabilities are *not* assumed. (C197-C198)

Continuity of business: This is irrelevant. Each entity admittedly was in the same business, operating the same nursing home, at the same address, on the same land, and with the same operating staff and supplies, but that is all irrelevant under Illinois law in determining successorship liability. See discussion, *supra.*

Admittedly, both entities also use the word Oakridge in their name, but that too is irrelevant. Over 45 corporations and limited liability companies in Illinois presently are authorized to use the word Oakridge as the first word in their name. That fact is capable of accurate and ready determination by resort to the Illinois Secretary of State website at www.cbyerdriveillinois.com/departments.business_services/home.html. That is a source for such information whose accuracy cannot reasonably be questioned, and as such may be judicially noticed. ILL. R. Ev. 201(b)(2).

Contractual limit on successor liability: The instant asset transfer agreement stated in all capital letters and bold face type that Oakridge Healthcare Center is not the successor or successor-in-interest to Oakridge Nursing & Rehab Center and that it shall not be responsible for any of Oakridge Nursing & Rehab Center's liabilities of any nature whatsoever, including litigation which was pending or which arises later. (C197-C198) Such a provision is lawful and enforceable to bar successor liability against the transferee of the assets for the liabilities of the transferor. *Kaleta v. Whittaker Corp.*, 221 Ill.App.3d

705, 711 (1st Dist. 1991); *Myers*, 232 Ill.App.3d at 424; *Climatrol Indus., Inc. v. Fedders Corp.*, 149 Ill.App.3d 533, 537 (1st Dist. 1986).

B.

The fraudulent purpose exception.

This brings us to the fourth exception, the fraudulent purpose exception. To establish fraud, a plaintiff must prove (1) a false statement of material fact; (2) knowledge that the statement was false; (3) intent that the statement induce another to act; (4) reliance upon the truth of the statement; (5) damages resulting from reliance on the statement. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 496 (1996).

Each element of fraud must be pleaded with particularity, specificity and certainty. *Ault v. C.C. Servs., Inc.*, 232 Ill.App.3d 269, 271 (3d Dist. 1992). The facts pleaded by the plaintiff must be those from which fraud is the necessary or probable inference. *Board of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill.2d 428, 457 (1989). The defendant's fraud then must be proven by clear and convincing evidence. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100,191 (2005); *Regenold v. Baby Fold, Inc.*, 68 Ill.2d 419, 431 (1997); *Garrett v. Garrett*, 343 Ill. 577, 580 (1931). Clear and convincing means proof greater than the mere preponderance usually required in civil litigation. *Bazydlo Volant*, 164 Ill.2d 207, 213 (1995).

The state forfeited the fraudulent purpose argument by failing to assert it in the circuit court. *Shaw v. Lorenz*, 42 Ill.2d 246, 248 (1969); *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill.2d 461, 470 (2006). The state's position in the circuit court in opposition to defendant's motion for summary judgment was asserted in the state's response to that motion. (C507-C655) Searching that document, cover to cover, one finds no contention by the state that the transfer allegedly was for the fraudulent purpose of avoiding liability. Accordingly, the argument was forfeited.

Not only did the state never raise its fraudulent purpose theory in opposition to defendant's motion for summary judgment, the state never raised that theory of recovery in its complaint (C8-C10) or at any stage of the proceedings in the circuit court. That created yet another forfeiture. *Trapani Const. Co., Inc. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶ 55.

The state contended in the appellate court that a reviewing court may affirm or reverse on any ground appearing in the record. The state cited two cases, neither of which stands for that proposition. The first, *Westfield Ins. Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 11, says: "[W]e may affirm on any basis in the record regardless of whether the trial court relied on that basis or its reasoning was correct." The second, *Barney v. Unity Paving, Inc.*, 266 Ill.App.3d 13, 18 (1st Dist. 1994), does not state that a court may reverse on any ground appearing in the record. *Barney* stands for the proposition that on appeal from a summary judgment order, a reviewing court is not bound by the trial court's reasoning and may independently address issues briefed by the parties in the trial court, but not addressed in the lower court's ruling. *Id*.

The state also cited a case to the appellate court containing the statement, "we may affirm or reverse on any basis found in the record." *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16. *Huang* did not reverse on a ground not argued by the appellant in the trial court. In fact, it affirmed the trial court's ruling. Further, as authority for the proposition that "we may affirm or reverse on any basis," *Huang* cited this Court's decision in *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 261 (2004), that "this court can affirm the appellate court on any basis present in the record." However, *Raintree Homes* did not approve *reversing* on grounds not raised in the trial court, merely affirming. Therefore, *Huang* did not support the state's argument.

No rule of law allows a litigant to proceed on one argument in the circuit court, lose that argument, and then raise new arguments on appeal. The law is precisely the opposite. The theory upon which a case is tried in the lower court cannot be changed on review and an issue not presented to or considered by the trial court cannot be raised for the first time on review. *Daniels v. Anderson*, 162 Ill.2d 47, 58 (1994); *Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 147 (1975); *Richardson v. Economy Fire & Cas. Co.*, 109 Ill.2d 41, 47 (1985).

As the dissenting justice stated, in Oakridge Healthcare Center's summary judgment motion, Oakridge Healthcare Center anticipated that the state might raise the issue and therefore specifically addressed all four exceptions to the general rule of corporate successor non-liability, including the fraudulent purpose exception, and articulated why the evidence did not support application of any of those theories. (A-41) In response, the state expressly limited its argument to the assertion that the only exception to the rule against non-liability for successor entities that applied was the mere continuation exception. (A-41)

Nowhere in the state's response to Oakridge Healthcare Center's motion for summary judgment did it cite the Uniform Fraudulent Transfer Act or argue a fraudulent purpose theory. Disavowing even the common law exception recognized in Illinois for successors that are merely a continuation of the seller, the focus of the state's arguments in the trial court was its contention, based exclusively on federal law, that [i]n the context of employment discrimination, successor liability may be imposed even if it does not fall within any of the [four] exceptions recognized in Illinois. (See point II, *infra*) As the dissenting justice stated, the state labeled Oakridge Healthcare Center's discussion of the four exceptions to successor non-liability under Illinois common law as purportedly irrelevant because the state had raised "a genuine issue of material fact under [sic] whether the court should find Oakridge Center liable under the federal common law doctrine of successor liability for employment discrimination cases." (A-42)

The phrase "badges of fraud" and Illinois authorities discussing the uniquely factual analysis necessary to support successor liability on the fraudulent purpose theory were absent from the state's briefs filed in the trial court and from the report of proceedings of the argument on the motion for summary judgment. *People v. Hughes*, 2015 IL 117242, ¶ 38. Accordingly, the state did not just forfeit this argument by failing to raise it; the state affirmatively waived this argument. *Id*. ¶ 37.

Despite the state's unequivocal disavowal of any argument in the trial court that the subject asset sale was for a fraudulent purpose, that became the argument of the state in the appellate court.

The appellate court majority rationalized its decision to address this forfeited and waived argument on three grounds. First, the majority concluded that the state's complaint in the trial court stated a claim for fraudulent transfer, based on two allegations in the state's complaint. Even if the two paragraphs contained in the state's complaint could be deemed sufficient to state a fraudulent transfer claim, it is well-settled that a party opposing summary judgment may not rely on the allegations of its pleading to create a genuine issue of material fact. *Land v. Board of Educ. of the City of Chicago*, 202 Ill.2d 414, 432 (2002); *Deutsche Bank Nat'l Trust Co. v. Gilbert*, 2012 IL App (2d) 120164, ¶ 21; *Triple R. Dev.*, *LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 12. In its response to Oakridge Healthcare Center's motion for summary judgment, the state failed to even mention any facts supporting a fraudulent purpose exception to the corporate successor non-liability doctrine under Illinois law.

Second, the majority of the appellate court said in its decision that transferee Oakridge Healthcare Center allegedly raised the issue in the trial court by addressing it in its summary judgment motion and so should not be surprised by the decision to consider it. But the state never responded to Oakridge Healthcare Center's analysis of the non-applicability of the fraudulent purpose exception and so must be deemed to have conceded the merits of that argument. *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 25.

Third, the majority said that addressing arguments affirmatively waived by the state is purportedly necessary to achieve a just result. While the majority quoted a decision of this Court that a court of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent (quoting *Jackson v. Board of Election Com'rs of City of Chicago*, 2012 IL 111928, ¶ 33) *Jackson* does not support a freewheeling invocation of a just result to overlook issues that have been affirmatively waived. This Court's comments in *Jackson* militate against the majority's approach: "[W]hile our case law is permeated with the proposition that waiver and forfeiture are limitations on the parties and not on the court, that principle is not and should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeited issues at will." *Jackson*, *Id*.

Allowing the state to raise new issues on appeal was decidedly unfair to transferee Oakridge Healthcare Center. First, Oakridge Healthcare Center negotiated the purchase of transferor Oakridge Nursing & Rehab Center's assets, which specifically excluded an assumption of the transferor's liabilities. The evidence does not support a finding that the transfer was undertaken for a fraudulent purpose. Ergo, the appellate court decision frustrates the clearly expressed intent of the contracting parties. *Kaleta v. Whittaker Corp.*, 221 Ill.App.3d 708, 711 (1st Dist. 1991). Even though the state failed to contest Oakridge Healthcare Center's fraudulent purpose arguments in the trial court, Oakridge Healthcare Center now has the issue resolved against it, as the appellate court majority concluded that there are sufficient badges of fraud to preclude summary judgment. That is fundamentally unfair to Oakridge Healthcare Center and to the trial judge, who was never asked to determine, and thus never had the opportunity to analyze whether the fraudulent purpose exception to successor non-liability should apply.

Arguendo, if this Court might choose to consider the state's forfeited and waived argument regarding the fraudulent purpose exception, Oakridge Healthcare Center respectfully submits that there was no fraud in the instant transfer:

Illinois divides fraud into two types: fraud in fact and fraud in law. Fraud in fact requires proof of an actual intent to hinder creditors and fraud in law requires, among other things, proof of an existing indebtedness to the creditor. *Casey Nat. Bank v. Roan*, 282 Ill.App.3d 55, 59 (4th Dist. 1996). In the case at bar, there is no evidence of either of these essential elements. There is no evidence that anyone involved in the transfer on January 1, 2012 had given any thought whatsoever to Jane Holloway's *pro se* administrative charge that was pending before the Department of Human Rights, let alone that the transfer was done with an intent to hinder Ms. Holloway's charge. Further, when the transfer was made, there was no existing indebtedness to Jane Holloway. That indebtedness did not arise until

April 3, 2014, 27 months later, when an award was entered in favor of Jane Holloway by the Human Rights Commission. (C32)

The reason for the transfer of assets in January 2012 had nothing whatsoever to do with Jane Holloway's charge or with the $30,880 later awarded to Ms. Holloway in 2014. (C30) On the contrary, it had everything to do with the fact that the nursing home facility owned by transferor Oakridge Nursing & Rehab Center was in major financial trouble in 2011. (C61, ¶ 10) Because of those financial problems, Oakridge Nursing & Rehab Center was unable to fulfill its contractual obligations to pay rent. (C61, ¶ 11) Failure to fulfill contractual obligations is not fraud. *Avery*, 216 Ill.2d at 169. The irony of the case *sub judice* is that the transferor's financial trouble was caused by the fact that the State of Illinois -- the plaintiff in this case which accuses others of wrongdoing -- was itself wrongfully not paying bills which it unquestionably owed to the transferor, and as a consequence, the transferor became unable to pay its rent. (C61, ¶¶ 10, 11)

The state's fraud argument was meritless. The state claimed that the transfer of the nursing home assets from Oakridge Nursing & Rehab Center to Oakridge Healthcare Center allegedly was for the purpose of enabling Oakridge Nursing & Rehab Center to fraudulently avoid liability to Jane Holloway on an award that she received on April 3, 2014, long *after* the transfer of the assets on January 1, 2012. Common sense dictates that no person involved in the transfer had the divine ability to foretell the future, and that therefore when the assets transfer was made in 2012 no one could know that Jane Holloway would receive an award in 2014.

Transferor Oakridge Nursing & Rehab Center failed financially, but failure does not equal fraud. Broken promises and unfulfilled obligations are not fraud. *Kanfer v. Busey*

Trust Co., 2013 IL App (4th) 121144, ¶ 8. Defendant's affidavits on file establish that transferor Oakridge Nursing & Rehab Center failed financially; that it was unable to pay its rent to the landlord; and that as a consequence, it surrendered possession of the demised premises to the landlord. (C61, ¶¶ 10, 11) There is no counter-affidavit. The effect of that is to admit the facts as presented in defendant's affidavits. *Hernandez v. Johnson Press Corp.*, 70 Ill.App.3d 664, 670 (1st Dist. 1979). The landlord did what any reasonable landlord would strive to do when its lessee stops paying rent: rent to a new tenant. That new tenant was transferee Oakridge Healthcare Center.

There is absolutely no evidence -- nor was there even an allegation in the circuit court -- that returning possession of the property to the landlord, or the landlord's leasing the property to a new tenant, was part of a scheme to get rid of any liability. Likewise, there is no evidence that the transfer of assets from transferor Oakridge Nursing & Rehab Center to transferee Oakridge Healthcare Center was part of any such scheme. The transfer was the consequence of economic failure by the transferor, ironically caused by non-payment of bills by the appellee State of Illinois. Rather than shut down the business and lay off the employees, the business was sold in a *bona fide* sale to a new owner. The state's theory that the transfer of all of the assets of this very substantial nursing home business was done just so that Oakridge Nursing & Rehab Center could avoid what was then a relatively small *pro se* administrative agency claim borders on being ludicrous.

The things that the state contended create a genuine issue of material fact are speculation and conjecture, devoid of material facts. Furthermore, *arguendo*, if the State's speculation and conjecture somehow were to be construed as fact-based, it does not constitute evidence of fraud. The state tried to spin fraud out of the fact that the owners of the transferor and owners of the transferee know each other and did business together. A small business like a single, free-standing nursing home that is failing financially is not readily sold on the open market. Often, the only possibility of a sale under such circumstances is to someone known to the seller, who is familiar with that particular business, and thinks he can acquire it at so-called fire sale prices and then turn it around. That is not fraud. It is the way capitalism works. The only alternative may be to lay off the employees, stiff the creditors, and file bankruptcy.

The instant transfer of assets was purposefully structured to avoid successorship liability by the transferee for the debts of the transferor. That is both ethical and lawful. Anyone may so arrange his affairs so that his liability shall be as low as possible. A transferee is not bound to choose the pattern which will best pay creditors of the transferor out of the transferee's pocket, whether the creditors are private entities or public entities. In that regard, we cite the oft-quoted statement of Justice Learned Hand in *Helvering v. Gregory*, 69 F.2d 809, 810-811 (2d Cir. 1934), and echoed in *Matter of Estate of Murphey*, 130 Ill.App.3d 870, 873 (4th Dist. 1985): "Any one may so arrange his affairs that his taxes shall be low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes…." Likewise, there is no legal, moral or patriotic duty to increase one's liabilities.

In *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187, ¶¶ 43-51, the appellate court affirmed summary judgment for the transferee and rejected the plaintiff's contention that there was a fraudulent purpose to the transfer, despite all of the following facts: While plaintiff's case was pending, and before the transfer, representatives of the transferor and transferee expressed concern that plaintiff would receive a judgment.

Transferee's representative stated that he did not want a judgment entered. The transferee acquired all of the transferor's assets. After the transfer, the transferor's owner filed personal bankruptcy. The owners of the transferor and transferee had been friends for 30 years. No other entity attempted to buy the assets.

In the case at bar, the state adduced no evidence that the financial difficulties faced by transferor Oakridge Nursing & Rehab Center in the fall of 2011 were contrived. The nursing home was $244,000 in arrears on its rent to its landlord because of the state's failure to timely process Medicaid applications for the facility's residents and Medicaid reimbursements. At that point, Oakridge Nursing & Rehab Center faced the choice of failing to make rent payments or failing to meet its payroll. Choosing the latter option would have resulted in the shutdown of the nursing home and the loss of its staff and its patients. As a consequence, Oakridge Nursing & Rehab Center's only viable choice was to conduct a fire sale of its assets, which it did. There is no badge of fraud in this scenario.

The majority of the appellate court believed that Jane Holloway's filing of her discrimination charge in February 2011 allegedly "put Oakridge Center on notice of a threatened lawsuit and the real possibility of judgment." The majority never articulated how the mere filing of a charge of discrimination rendered any subsequent transfer of assets suspect. Ms. Holloway did not obtain her judgment for more than 27 months following the assets transfer. Hence, the causal relationship between Ms. Holloway's claim and the asset transfer is speculative, at best.

As the dissenting justice stated, it is not apparent why a business would be liquidated to avoid a potential liability of indeterminate amount, which, as it turns out, was roughly the equivalent of one month's rent. (C30, C90) This is particularly true since Helen

Lacek, the person the appellate court majority assumed orchestrated the fraud to avoid the discrimination claim, got nothing out of the transaction. Although Oakridge Nursing & Rehab Center retained the ability to collect its accounts receivable, any amounts collected were earmarked under the transaction documents to satisfy the $244,000 in back rent and the early termination fee of $210,000 which was owed by Oakridge Nursing & Rehab Center and guaranteed by Helen Lacek to the lessor. (A-52 - A-53)

In February 2017, an agreed judgment was entered in this case against transferor Oakridge Nursing & Rehab Center. Nothing prevented the state from thereupon pursuing collection of that judgment. A citation to discover assets served by the state on itself, which would have permitted the state to satisfy Ms. Holloway's judgment from payments made by the state to Oakridge Nursing & Rehab Center on its accounts receivable. Ms. Holloway's judgment lien would have been entitled to priority, as neither Oakridge Nursing & Rehab Center's liability for past due rent under the lease nor Helen Lacek's liability under the guarantee had been reduced to judgment. 735 ILCS 5/2-1402(m). Thus, the judgment creditor's ability to collect the judgment from the transferor weighs heavily against a finding of fraud in the transfer.

II.

ILLINOIS SHOULD NOT ADOPT THE FEDERAL EXCEPTION FOR EMPLOYMENT DISCRIMINATION CASES.

We shall now discuss the appellate court's adoption of a fifth exception to the rule of successor corporate non-liability used in federal courts in the federal seventh circuit: employment discrimination cases.

In its decision 22 years ago in *Vernon v. Schuster*, this Court unequivocally held: "There are four exceptions to the general rule of successor corporate non-liability," and that "[t]hese exceptions are equally recognized in most American jurisdictions." 179 Ill.2d 338, 345 (1997). In the instant opinion, the appellate court itself unequivocally reiterated: "There are four exceptions to the general rule of successor corporate non-liability." 2019 IL App (1st) 170806, ¶¶ 32, 51. (A-21, A-30)

Notwithstanding these repeated and explicit pronouncements that there are only four exceptions to the non-liability rule, the appellate court majority in the case at bar created a new fifth exception. Under the appellate court decision there has now been created a fifth exception to the rule of non-liability, even though the transfer does not fall under any of the four long-standing exceptions recognized by this Court in *Vernon v. Schuster*. The new fifth exception is that there is successor liability if the claim is for employment discrimination under the Illinois Human Rights Act. 2019 IL App (1st) 170806, ¶ 65.

In creating this fifth exception, the appellate court adopted the local federal rule and overruled -- or profoundly modified -- this Court's decision in *Vernon v. Schuster,* by creating in Illinois an entirely new exception to the non-liability rule. That was in direct violation of this Court's repeated admonishment that the appellate court may not overrule, change or modify what this Court has said. *Blumenthal v Brewer,* 2016 IL 118781, ¶ 28; *Rickey v. Chicago Transit Authority*, 98 Ill.2d 546, 551 (1983); *People v. Artis*, 232 Ill.2d 156, 164 (2009).

Respectfully, this Court unequivocally held in *Vernon v. Schuster* that there are four -- and only four -- exceptions, and the appellate court's addition of a fifth exception in the case at bar improperly created a substantial modification of what this Court said, and which this Court should now reject. 179 Ill.2d at 345.

A.

The appellate court's decision profoundly changed more than 80 years of Illinois law.

An unbroken chain of appellate court cases going back to 1935 -- the year the appellate court of Illinois first became a court of record -- have held, just as did this Court in *Vernon v. Schuster*, 179 Ill.2d 338, 345 (1997), that there are four and only four exceptions to the rule of successor corporate non-liability. The 1935 case is *Alexander v. State Savings Bank & Trust Co.*, 281 Ill.App. 88, 96 (1st Dist. 1935).

Some, but by no means all of the appellate court cases thereafter are *Groves of Palatine Condominium Ass'n v. Walsh Construction Co.*, 2017 IL App (1st) 161036, ¶ 59; *Diguilio v. Goss Int'l Corp.*, 389 Ill.App.3d 1052, 1059 (1st Dist. 2009); *Workforce Sols. v. Urban Servs. of Am., Inc.*, 2012 IL App (1st) 111410, ¶86; *Hernandez v. Johnson Press Corp.*, 70 Ill.App.3d 664, 666 (1st Dist. 1979); *Johnson v. Marshall & Huschart Machinery Co.*, 66 Ill.App.3d 766, 768 (1st Dist. 1978); *Kramer v. Weedhopper of Utah, Inc.*, 204 Ill.App.3d 469, 474 (1st Dist. 1990); *Nguyen v. Johnson Mach. & Press Corp.*, 104 Ill.App.3d 1141, 1143 (1st Dist. 1982); *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 37; *Charles Austin, Ltd. v. A-1 Food Servs., Inc.*, 2014 IL App (1st) 132384, ¶ 29; *Gonzalez v. Rock Wool Eng'g and Equip. Co., Inc.* 117 Ill.App.3d 435, 440 (1st Dist. 1983); *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187, ¶¶ 41, 57; *Nilsson v. Cont'l Mach. Mfg. Co.*, 251 Ill.App.3d 415, 417-18 (2d Dist. 1993); *Advocate Fin. Grp., LLC v. 5434 N. Winthrop, LLC*, 2015 IL App (2d) 150144, ¶ 26; *Park v. Townson & Alexander, Inc.*, 287 Ill.App.3d 772, 774 (3d Dist. 1997); *Clayton v. Planet Travel Holdings, Inc.*, 2013 IL App (4th) 120717, ¶ 38; *Flanders v. California Coastal Cmtys., Inc.*, 356 Ill.App.3d 1113, 1118 (5th Dist. 2005).

Under the principle of *stare decisis,* this Court should not overrule or modify this long and well-established line of cases. The doctrine of *stare decisis* expresses the policy of the courts to stand by precedents and not to disturb settled points. *People v. Caballes*, 221 Ill.2d 282, 313 (2006). A question once deliberately examined and decided should be considered as settled and closed to further argument. *Wakulich v. Mraz,* 203 Ill.2d 223, 230 (2003). The law should not change erratically, but rather should develop in a principled intelligible fashion. *Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 161 Ill.2d 502, 510 (1994); *People v. Mitchell,* 189 Ill.2d 312, 338 (2000).

"Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Caballes*, *Id.* A court should not depart from precedent merely because it might have decided otherwise if the question were a new one. *People v. Lopez,* 207 Ill.2d 449, 459 (2003). Any departure from the doctrine of *stare decisis* demands special justification. *Chicago Bar Ass'n*, *Id.* As in the *Chicago Bar Association* case, there is no special justification for departure from precedent in the case *sub judice*. A settled rule of law that does not contravene a statute or a constitutional principle should be followed unless serious detriment is likely to arise which would be prejudicial to public interests. *Maki v. Frelk*, 40 Ill.2d 193, 196 (1968).

The legislature has chosen not to abolish or modify the long-established successor corporate non-liability rule and its four exceptions. This non-action by the legislature is of substantial significance. The General Assembly is presumed to act with full knowledge of the prevailing case law, and legislative silence on an issue in the face of existing decisions indicates the legislature's acquiescence in those decisions. *In re Marriage of Heroy*, 2017

IL 120205 ¶ 15; *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25. Under the *stare decisis* doctrine, "decisions that have been established for a long period of years should, in the orderly administration of justice, be deemed controlling unless and until the General Assembly provides otherwise." *Charles v. Seigfried*, 165 Ill.2d 482, 492 (1995); *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.*, 15 Ill.2d 182, 188 (1958).

In *Kinsey Distilling*, this Court stated that a decision it was being asked to overrule had been decided 22 years previously and that therefore the prior decision should be deemed controlling unless and until the General Assembly provided otherwise. 15 Ill.2d at 188. In the case at bar, the rule of successor corporate non-liability goes back far more than a mere 22 years. More than 80 years ago, in 1935, the appellate court said that the doctrine of successor corporate non-liability was then already well settled. *Alexander*, 281 Ill.App. at 96, citing the then current edition of Fletcher on Corporations, Vol. 15, § 7122.

Interestingly, *Alexander* was decided at the June 1935 term of the appellate court. We note that was just six months after the appellate court of Illinois became a court of record, on January 1, 1935. Before that, appellate court decisions lacked precedential authority, had no binding authority on lower courts, and were not entitled to any *stare decisis* effect. *Bryson v. News Am. Publications, Inc.*, 174 Ill.2d 77, 95 (1996); *Young v. Bryco Arms*, 213 Ill.2d 433, 451 (2004); *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 32, fn. 4.

Ergo, this Court should look to long-standing Illinois law to resolve this case. If this Court chooses to consider federal law, it should be guided by two very recent cases on *stare decisis* decided by the United States Supreme Court. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2418, 2422-23 (2019); *Gamble v. United States*, 139 S.Ct. 1960, 1969-78 (2019).

In *Kisor*, the U.S. Supreme Court refused to overrule precedents from 1945 and 1997 and said: "*Stare decisis* [is the] special care we take to preserve our precedents….Overruling precedents is never a small matter. Adherence to precedent is a foundation stone of the rule of law. It promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial process. To be sure, *stare decisis* is not an inexorable command. But any departures from the doctrine demands special justification -- something more than an argument that the precedent was wrongly decided…[E]ven if we are wrong…Congress ([1]) remains free to alter what we have done…[W]hen that is so, considerations of *stare decisis* have special force…And so far, at least, Congress has chosen acceptance." *Kisor* 139 S.Ct. at 2418 (citations omitted)

In *Gamble*, the U.S. Supreme Court said: "*Stare decisis* promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process…a departure from precedent demands special justification…[S]omething more than ambiguous historical evidence is required before we will flatly overrule a number of major decisions of this Court…And the strength of the case for adhering to such decisions grows in proportion to their antiquity." *Gamble*, 139 S. Ct. at 1969.

The firmly established Illinois rule of non-liability of the transferee of assets may seem harsh. However, the rule is necessary to make marginal and failing companies marketable which otherwise would likely go out of business. As this Court has explained, "the traditional rule of successor corporate non-liability 'developed as a response to the

[1] In Illinois, we substitute the phrase "General Assembly" for the word "Congress."

need to protect *bona fide* purchasers from unassumed liability' and was 'designed to maximize the fluidity of corporate assets'." *Vernon*, 179 Ill.2d at 346.

Any possible harshness of the non-liability rule is ameliorated by its four recognized exceptions: express or implied agreement to assume the liabilities, consolidation or merger of the two entities, mere continuation, and fraudulent purpose. Essentially, the long-standing doctrine of successor corporate non-liability protects *bona fide* purchasers, while the four well-established exceptions to the doctrine protect corporate creditors. *Clayton*, 2013 IL App (4th) 120717, ¶ 38. This system strikes a reasonable balance between the needs of buyers of corporate assets and the needs of creditors of the seller corporation.

Furthermore, although an employee claiming discrimination by his or her employer might have an emotionally appealing argument that a fifth exception should be created for that kind of case, that same emotional appeal could be made for a myriad of damaged plaintiffs in a myriad of civil case. For example, envision a hypothetical employee who was not paid his wages, who obtained a judgment against his former employer on a wage claim action, and then was left without an entity from which to collect the wage judgment when the employer sold its assets to another entity and went out of business. The appellate court was confronted with that precise scenario in 2015 and had no problem rejecting the employee's efforts to collect from the transferee a $166,000 judgment for wages owed and not paid by the transferor. *Villaverde*, 2015 IL App (1st) 143187, ¶¶ 40-57, 65. A wage case brought by an employee presents an equally compelling argument for successor liability as does a discrimination case brought by the same employee.

Another category of victim with a similarly appealing emotional argument is the plaintiff who sustained severe bodily injury from a defective product, obtained a judgment against the self-insured manufacturer of the product, and then was left without an entity from which to collect the judgment because the manufacturer legitimately sold its assets to another entity. Again, the appellate court has had no problem in consistently rejecting such an injured victim's efforts to collect the judgment from the transferee. *Diguilio,* 389 Ill.App.3d 1052; *Kaleta v. Whittaker Corp.*, 221 Ill.App.3d 705 (1st Dist. 1991); *Myers v. Putzmeister, Inc.*, 232 Ill.App.3d 491 (1st Dist. 1992); *Kramer*, 204 Ill.App.3d 271; *Nguyen*, 104 Ill.App.3d 1141.

In *Nguyen*, plaintiff's hands were both completely severed by a defective punch press manufactured by the transferor entity. Summary judgment was entered in favor of the transferee and against the catastrophically injured plaintiff, based on the successor corporate non-liability doctrine. On review, the case emotionally cried out for an exception to the rule, so that the lower court could be reversed. Nevertheless, the appellate court affirmed. 104 Ill.App.3d at 1141.

If the exception created by the majority of the appellate court in the case *sub judice* for employment discrimination cases were to become the supreme law of the land in Illinois, why not another exception for wage claimants, and another exception for bodily injury claimants, and another for wrongful death claimants, and another for vendors of goods and services who were not paid by the transferor, and eventually an exception for every worthy plaintiff? What plaintiff does not believe his or her case to be profoundly worthy?

If the instant decision of the appellate court is affirmed, the dam will be broken, and Illinois law will be on the slippery slope of creating exception after exception to the successor corporate non-liability rule. Fairly soon, the corporate law rule of successor non-liability will be upended, as the exceptions will grow and eventually swallow the rule, something which this Court repeatedly has cautioned against. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 34; *Jackson v. Nestle-Beich, Inc.*, 147 Ill.2d 408, 417 (1992); *Epstein v. Chicago Bd of Educ.*, 178 Ill.2d 370, 378 (1997); *Opyt's Amoco, Inc. v. Village of South Holland*, 149 Ill.2d 265, 275 (1992).

The federal exception in employment discrimination cases is based on mere continuation of the predecessor. However, it requires proof of elements profoundly different from, and in conflict with those required to invoke the mere continuation exception under Illinois law. (See point I.A., *supra.*) *Vernon v. Schuster* emphasized that under the law of Illinois (as well as that of a majority of jurisdictions), the issue in a case involving the mere continuation exception is whether there is a continuation "of the corporate entity of the seller - not whether there is a continuation of the seller's business operations." *Vernon*, 179 Ill.2d at 346. Essential to the exception is proof of identity of ownership between the predecessor and successor entities. *Id*. at 347. Without identify of ownership, the fact that the successor carries on the business of the predecessor, keeps the predecessor's name, and hires the predecessor's personnel is not enough to impose liability under the mere continuation exception in Illinois. As stated above under point I.A., Illinois courts have consistently required identify of ownership before imposing successor liability under the mere continuation exception.

In contrast, under the federal court's approach, the elements of successor liability in employment discrimination cases are (1) whether the successor had notice of the pending lawsuit, (2) whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale, (3) whether the predecessor is able to provide relief following the sale, (4) whether the successor is able to provide the relief sought in the lawsuit, and (5) whether there is a continuity of operations and workforce between the predecessor and successor entities. *E.E.O.C. v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 902 (7th Cir. 2015). This is essentially the California product-line approach. Accordingly, while continuity of the operation and the workforce, without continuity of ownership, is insufficient as a matter of law in Illinois to defeat the general rule of successor corporate non-liability, it can readily support the imposition of successor liability under the federal law. This is an irreconcilable conflict between the Illinois rule and the federal rule.

In adopting the federal rule, the majority of the appellate court contradicted an unbroken line of Illinois cases limiting the mere continuation exception as required by this Court in *Vernon v. Schuster*. Far from maintaining a sound and uniform body of precedent, the majority's adoption of the federal common law standard throws well-settled law into flux and reignites arguments that have been consistently rejected by the appellate court and that were rejected by this Court in *Vernon*.

We also note that the federal body of law which the majority of the appellate court embraced has never been considered by the United States Supreme Court. If and when the issue comes before the Supreme Court sometime in the future, the Supreme Court might well reject this exception created in the seventh circuit.

We recognize that if this Court reverses the decision of the majority of the appellate court in the case *sub judice*, that will mean that -- at least until the U.S. Supreme Court passes on the issue for federal courts -- there will be four exceptions to the successor corporate non-liability rule in Illinois state courts and five exceptions in the local federal courts. However, a dichotomy like that is not at all improper or unusual; it is simply a natural consequence of America's federal system of government.

B.

Illinois courts are not bound by a federal court's decision.

Illinois state courts are not bound by the decisions of any federal court, including the U.S. court of appeals -- other than decisions of the United States Supreme Court in appropriate cases. *Travelers Ins. Co. v. Eljer Mfg. Co.*, 197 Ill.2d 278, 302 (2001) (rejecting a decision of the U.S. court of appeals for the seventh circuit because it was inconsistent with Illinois law); *City of Chicago v. Groffman*, 68 Ill.2d 112, 118 (1977); *Johnston v. Weil*, 241 Ill.2d 169, 185, fn. 3 (2011); *Weiland v. Teletronics Pacing Sys., Inc.*, 188 Ill.2d 415, 422-23 (1999).

It is only where a result is mandated by the U.S. Constitution that a state court is bound to follow federal court precedent, and then only if the precedent is that of the Supreme Court of the United States. *People v. Gillespie*, 136 Ill.2d 496, 502 (1990); *People v. Hope*, 184 Ill.2d 39, 44 (1998); *Harris v. Rivera*, 454 U.S. 339, 344-45 (1981). "Federal judges have no general supervisory power over state trial judges; they may not require the observance of any special procedures except when necessary to assure compliance with the dictates of the Federal Constitution." *Harris*, 454 U.S. at 344-45.

In questions of general law, state courts are not bound by the authority of federal courts, particularly where it would be necessary to overrule previous state court decisions to conform to the views of the federal court. *Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 256 Ill. 196, 206-07 (1912). Lower federal courts -- such as the United States court of appeals for the seventh circuit -- exercise no appellate jurisdiction over state courts. *People v. Dale*, 189 Ill.App.3d 704, 729 (1st Dist. 1989). The U.S. court of appeals itself has acknowledged that state courts are not bound by federal courts' interpretation of law, including state law. *Diginet, Inc. v. Western Union ATS, Inc.*,, 958 F.2d 1388, 1395 (7th Cir. 1992).

In the case *sub judice*, no federal decision on point cited by the majority of the appellate court is from the United States Supreme Court or has a federal constitutional basis. On the contrary, the cited cases represent a California product-line type of successor liability rule, utilized in federal question cases in the federal courts located in the seventh circuit. That is totally inconsistent with the Illinois successor corporate non-liability rule that consistently has been followed by Illinois reviewing courts for over 80 years.

The local federal rule of successor non-liability has the effect of creating an exception in employment discrimination cases in certain federal courts where violation of a federal right is at issue. *Feinberg v. RM Acquisition, LLC*, 629 F.3d 671, 674 (7th Cir. 2011). In the case at bar, there is no allegation of a violation of a federal right, only of a state right.

It is true that under the limited lockstep doctrine (not cited by the state or the majority opinion in the case *sub judice*), Illinois courts do follow the lead of federal courts. However, that doctrine has no application in the case at bar. The limited lockstep doctrine applies only when federal and Illinois *constitutional* provisions are nearly identical, and only when there is a U.S. Supreme Court case construing the nearly identical provision.

Hampton v. Metropolitan Water Reclamation Dist. of Greater Chicago, 2016 IL 119861, ¶ 10; *People v. Holmes*, 2017 IL 120407, ¶ 24; *City of Chicago v. Alexander*, 2017 IL 120350, ¶ 31; *People v. Caballes*, 221 Ill.2d 282, 297 (2006).

Under this doctrine, when the language of the provisions in both the Illinois and federal constitutions is nearly identical, departure from the United States Supreme Court's construction of the provision in the federal constitution will generally be warranted by an Illinois court only if there is something in the language of the Illinois constitution, or in the debates and committee reports of the 1969-70 Illinois constitutional convention, which indicates that the provisions of the state constitution are intended to be construed differently than similar provisions in the federal constitution. *City of Chicago*, 2017 IL 120350, ¶ 3.

There is nothing like that in the case at bar. Here, there is no federal or state constitutional provision involved and no United States Supreme Court decision on point. Therefore, the limited lockstep doctrine has no application to the instant case.

Liability of successor entities for judgments entered against their predecessors is not a subject on which we need to look to federal authority; it is a matter of Illinois law that is well established, and which the appellate court improperly changed.

CONCLUSION

For the foregoing reasons, defendant-appellant Oakridge Healthcare Center, LLC most respectfully prays this Honorable Court reverse the appellate court decision and affirm the circuit court order granting summary judgment to defendant-appellant.

Respectfully submitted,

RICHARD LEE STAVINS
DIANA H. PSARRAS
Attorneys for Defendant-Appellant,
Oakridge Healthcare Center, LLC

ROBBINS, SALOMON & PATT, LTD.
Of Counsel
180 N. LaSalle Street, Suite 3300
Chicago, IL 60601
(312) 782-9000
rstavins@rsplaw.com
dpsarras@rsplaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and 341(b). The length of this brief, excluding the pages containing 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 matters to be appended to the brief under Rule 342(a), is 42 pages.

/s/ Richard Lee Stavins
RICHARD LEE STAVINS
Attorney for Defendant-Appellant

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS ex rel ILLINOIS DEPARTMENT OF HUMAN RIGHTS,

Plaintiff-Appellee,

v.

OAKRIDGE HEALTHCARE CENTER, LLC,

Defendant-Appellant,

and **OAKRIDGE NURSING & REHAB CENTER, LLC, a/k/a OAKRIDGE REHABILITATION CENTER**,

Defendant.

On leave to appeal from the Appellate Court of Illinois, First Judicial District. There heard on appeal from the Circuit Court of Cook County, Illinois

Honorable
Franklin U. Valderrama
Judge, Presiding

APPENDIX

TABLE OF CONTENTS TO APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

PEOPLE OF THE STATE OF ILLINOIS, EX REL. ILLINOIS HUMAN RIGHTS COMMISSION, Plaintiff, v. OAKRIDGE NURSING & REHAB CENTER, LLC AND OAKRIDGE, HEALTHCARE CENTER, LLC, Defendants.	Case No. 2015 CH 13917 Calendar 03 Honorable Franklin U. Valderrama

ORDER

This matter comes to be heard on Defendant, Oakridge Healthcare Center LLC's motion for summary judgment on Count II of Plaintiff's Complaint, due notice having been given, and the Court being fully advised in the premises, the Court finds as follows:

1. On February 7, 2011, Jane Holloway ("Holloway"), *pro se*, filed an action with the Illinois *Department of Human Rights (the "Department") alleging that while employed by* Oakridge Nursing & Rehab Center, LLC ("Oakridge Rehab"), she was suspended and fired because of her age and physical disabilities. Thereafter, the Department filed a Complaint of Civil Rights Violations on behalf of Holloway against Oakridge Rehab alleging that Oakridge Rehab had unlawfully suspended and terminated Holloway because of her age and disabilities.

2. A hearing was held on December 4, 2012 before Administrative Law Judge Michael J. Evans, who entered judgment in favor of Holloway and ordered Oakridge Rehab (1) to pay Holloway $30,000 of back-pay; (2) to pay Holloway prejudgment interest; (3) to clear from Holloway's records all references of the filing of the underlying discrimination charge and subsequent disposition and (4) cease and desist from further acts of discrimination. The Commission adopted Judge Evan's Recommended Order and Decision.

3. Defendant, Oakridge Rehab, leased property from an entity to operate the nursing home at *which Holloway was employed. On January 1, 2012,* due to the non-payment of rent, Oakridge Rehab terminated its lease with that entity. On the same date, Oakridge Rehab sold almost all of its assets to Defendant, Oakridge Healthcare Center, LLC ("Oakridge Healthcare").

4. On September 22, 2015, Plaintiff, the People of the State of Illinois on behalf of the Department, filed a two-count Verified Complaint for Judicial Enforcement (the "*Complaint*"). *The Complaint alleges Oakridge Rehab's failure to comply with the*

Commission's Order, Count I; and successor liability, Count II. Count II specifically seeks to enforce the Commission's decision against Oakridge Healthcare on the theory that Oakridge Healthcare is a successor in liability to Oakridge Rehab.

5. On November 16, 2016, Defendant Oakridge Healthcare filed a motion for summary judgment on Count II of Plaintiffs Complaint. This fully-briefed motion is presently before the Court.

6. Summary judgment should be granted when "the pleadings, depositions, and admissions on *file, together with the affidavits, if any, show that there is no genuine issue as to any* material fact" and the "moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012); Safeway Ins. Co. v. Hister, 304 Ill. App. 3d 687, 691 (1st Dist. 1999). That is, summary judgment is appropriate when there is no dispute as to any material fact but only as to the legal effect of the facts. Dockery ex rel. Dockery v. Ortiz, 185 Ill. App. 3d 296, 304 (2d Dist. 1989). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. Id. A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact. Williams v. Covenant Med. Ctr., 316 Ill. App. 3d 682, 689 (4th Dist. 2000). The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant. Medow v. Flavin, 336 Ill. App. 3d 20, 28 (1st Dist. 2002). While the non-moving party is not required to prove his or her case in response to a motion for summary judgment, he or she must present a factual basis that would arguably entitle him or her to judgment under the applicable law. Pielet v. Pielet, 407 Ill. App. 3d 474, 490 (2d Dist. 2010). In ruling on a motion for summary judgment, the court is required to strictly construe all evidentiary material submitted in support of the motion for summary judgment and liberally construe all evidentiary material submitted in opposition. Kolakowski v. Voris, 83 Ill. 2d 388 (1980). When a party is confronted with a motion for summary judgment it may not rest on its pleadings to show that there is an issue of *material fact. Land v. Board of Educ. Of City of Chicago, 202 Ill. 2d 414, 232 (2002).* Instead, the non-movant must set forth facts which show that there is a genuine issue of material fact precluding summary judgment. Addison v. Whittenberg, 124 Ill. 2d 287, 294 (1988).

7. As a general rule under Illinois law, "a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation." Charles Austin, Ltd. V. A-1 Foods Servs., Inc., 2014 IL App (1st) 1323854, ¶ 29. The purpose of this rule is to protect *bona fide* purchasers from liabilities which they did not assume. Id. There are four exceptions to this general rule: (1) the existence of an express or implied agreement of assumption; (2) if the transaction constitutes a merger or consolidation of the purchaser of the seller; (3) where the purchaser is only a continuation of the seller; or (4) "where the transaction was made for the fraudulent purpose of escaping liability for the seller's obligations." Vernon v. Schuster, 179 Ill. 2d 338 (1997). Although the aforementioned theory of successor liability is applied to corporations this framework has also been applied when analyzing an LLC's potential successor liability. Villaverde v. IP Acquisition VIII, LLC, 2015 IL App (1st) 143187. Therefore, the Court sees no reason to disregard the application of Illinois successor liability law to limited liability companies.

8. Oakridge Healthcare asserts that Oakridge Rehab transferred its assets to Oakridge Healthcare pursuant to an Operations Transfer Agreement ("Agreement") including: (1) all property; (2) all contracts; (3) all supplies; (4) all licenses; (5) all patient records and (6) all patient trust funds. The only asset excluded from the purchase were Oakridge Rehab's accounts receivable. As such, Oakridge Healthcare asserts, it is not a successor to Oakridge Rehab's liabilities. Furthermore, Oakridge Healthcare argues that the Agreement explicitly stated that Oakridge Healthcare was not a successor, a successor in interest, or liable for the obligations of Oakridge Rehab and that Oakridge Healthcare could not have a judgment entered against it for the obligations of the Oakridge Rehab.

9. Additionally, Oakridge Healthcare contends that none of the exceptions to the general Illinois rule that purchase of assets alone does not make an entity liable for the liabilities of the transferor are present in this case. As such, Oakridge Healthcare concludes that there is no issue of material fact that it is not a successor liable for the judgment entered against Oakridge Rehab.

10. Plaintiff, on the other hand, counters it has raised a genuine issue of material that fact Oakridge Healthcare is liable under the federal common law doctrine of successor liability. Plaintiff argues that there is an existence of continuity between Oakridge Healthcare and Oakridge Rehab because the transaction between the parties was not at arm's length, and because there are business relationships between the parties involved with both entities. Plaintiff further asserts that Oakridge Healthcare is unable to claim lack of notice of the judgement entered against Oakridge Rehab due to its own failure to investigate. The crux of Plaintiff's argument, however, is that the federal common law doctrine of successor liability for employment discrimination and labor matters—which is more lenient than Illinois law—applies in the present case. In support of this proposition, Plaintiff cites multiple federal cases, including, Musikiwamba v. ESSI, Inc., 760 F.2d 740, 746 (7th Cir. 1986) and Teed v. Thomas, 711 F3d 763, 766 (7th Cir. 2013); EEOC v. G-K-G, Inc., 39 F.3d 740 (7th Cir. 1994); and Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1237 (7th Cir. 1986).

11. Oakridge Healthcare replies that Plaintiff cites no Illinois authority and makes no attempt to bring its case within one of the Illinois exceptions which may make an entity subject to the doctrine of successor liability. Oakridge Healthcare further asserts that Plaintiff's implicit argument is that the Court should overrule extensive precedent by the Illinois Supreme and Appellate Court, which is something that the Court may not do.

12. Oakridge Healthcare, as the movant, bears the burden of establishing that there is no issue of material fact that it is not liable for the liabilities of Oakridge Rehab. In support of its motion, Oakridge submits, *inter alia*, the affidavits of Eli Atkin and Helen Lacek, and the Agreement.

13. Lacek's affidavit states that Oakridge Healthcare only purchased the assets of Oakridge Rehab, and that the purchase of assets only excluded Oakridge Rehab's accounts receivable. Furthermore, Lacek asserts that the Agreement explicitly states that Oakridge

Healthcare did not assume Oakridge Rehab's liabilities and that Oakridge Healthcare was not a successor to Oakridge Rehab. Lacek further attests that she has no degree of family relationship to Eli Atkin, Dona Atkin, Joel Atkin, Yael Atkin or Jay Orlinsky. Finally, Lacek attests that there is no family relationship between her husband John Lacek and Yael Atkin, Joel Atkin, Jay Orlinski and Elisha Atkin.

14. Eli Atkin's affidavit attests that he is married to Donna Atkin and that he is the brother of Joel Atkin. Eli Atkin further attests that Jay Orlinski is his, and Dona Atkin's brother in law, and that Yael is Joel Atkins's wife. Eli Atkin further asserts that there was no continuity of management between the two entities after the asset transfer occurred. Eli Atkin also states that the Agreement between Oakridge Healthcare and Oakridge Rehab transferred only the assets and not the liabilities between the two entities.

15. The Court finds that Oakridge Healthcare has met its initial burden that there is no issue of material fact, as the affidavits establish that Oakridge Healthcare did not purchase the liabilities of Oakridge Rehab, as explicitly stated in the Agreement. The affidavits further show that there was no continuity between the two entities. As such, the burden shifts to Plaintiff to establish the existence of a genuine issue of material fact.

16. Plaintiff asserts that there is an issue of material fact that Oakridge Healthcare assumed Oakridge Rehab's liabilities. Plaintiff contends that (1) there are significant business relationships between the principals of Oakridge Healthcare and Oakridge Rehab and (2) that Oakridge Healthcare is liable due to its failure to investigate whether Oakridge Rehab had any liabilities.

17. Plaintiff submits the depositions of Eli Atkin and Helen Lacek in support of its response. According to Plaintiff, the affidavits show that Helen Lacek and Elisha Atkin, Joel Atkin, Eli Atkin and Dona Atkin have business relationships. The affidavits show, *inter alia*, that (1) Helen Lacek was the manager of Oakridge Rehab, that (2) Eli Atkin, Joel Atkin and Dona Atkin managed the property rented by Oakridge Rehab and that (3) Eli Atkin is the manager of Oakridge Healthcare. As such, posits Plaintiff, there are significant business relationships between Oakridge Healthcare and Oakridge Rehab. Therefore, Plaintiff asserts there is an issue of material fact as to whether Oakridge Healthcare assumed the liabilities of Oakridge Rehab because, under federal authority, there is a question of fact as to whether there was a continuity of operations between the two entities.

18. The Court finds that Plaintiff has not met its burden to show that there is an issue of material fact precluding summary judgment. The depositions of Helen Lacek and Eli Atkin do not raise a genuine issue of material fact that Oakridge Healthcare acquired the liabilities of Oakridge Rehab. They also do not establish that Oakridge Healthcare was merely a continuation of Oakridge Rehab, or that the transaction was made for the fraudulent purpose of escaping liability. In fact, Plaintiff acknowledges that Oakridge Healthcare was not aware of Oakridge Rehab's liability to Holloway.

19. The Court agrees with Oakridge Healthcare that, under the rule of stare decisis, a circuit court *must* follow the precedent of the appellate court of its district if such precedent exists.

Schramer v. Tiger Athletic Ass'n., 351 Ill. App. 3d 1016 (2d Dist. 2004) (emphasis added). As noted above, the law of successor liability is well-settled in Illinois. Vernon, 179 Ill. 2d 338 (1997). As such, the Court is bound to follow Illinois precedent and is not free to follow federal authority.

20. In addition to not being binding on this Court, the federal authority cited by Plaintiffs does not illustrate the issues in the present case. For example, in Betts the Seventh Circuit Appellate Court states that, when a federal statute related to labor or employment is implicated, the federal law standard of successor liability, which is more favorable to plaintiffs, applies. Betts, 711 F.3d at 764-765. Additionally, as Plaintiffs themselves state in the response, "Federal law has expanded the doctrine of successor liability *when federal labor and employment statutes are involved.*" Pl. Resp., Pg. 8. Therefore, under Plaintiff's own theory, where as in this case, state law applies to the underlying claim—namely Holloway's claim of violation of the *Illinois* Human Rights Act—the court would apply the state law of successor liability. See Betts, 711 F.3d at 764.

21. As such, the Court, bound to follow Illinois authority, finds that Oakridge Healthcare has met its burden to show that there is no issue of material fact that Oakridge Healthcare is not a successor in liability to Oakridge Rehab. Therefore, for the aforementioned reasons, the Court grants Oakridge Healthcare's motion for summary judgment as to Count II of Plaintiff's Complaint.

SO ORDERED.

ENTERED:

ENTERED
JUDGE FRANKLIN ULYSSES VALDERRAMA-1968

DEC 19 2016

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Franklin U. Valderrama
Judge Presiding

DATED: December 19, 2016

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* ILLINOIS DEPARTMENT OF HUMAN RIGHTS,	)	
Plaintiff,	)	
v.	)	Case No. 15 CH 13917
OAKRIDGE NURSING & REHAB CENTER, LLC a/k/a OAK RIDGE REHABILITATION CENTER and OAKRIDGE HEALTHCARE CENTER, LLC,	)	
Defendants.	)	

AGREED JUDGMENT

THIS CAUSE coming on to be heard on stipulation of the parties; and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that (1) judgment be and the same is hereby entered in favor of plaintiff People of the State of Illinois on behalf of complainant Jane Holloway and against defendant Oakridge Nursing & Rehab Center LLC, in the amount of $51,418.26 in accordance with the April 3, 2014 Order and Decision of the Illinois Human Rights Commission; (2) no personal liability may be imposed upon any individual who is an agent, servant, successor or assign of either defendant; (3) plaintiff does not waive its claims against defendant Oakridge Healthcare Center LLC; (4) plaintiff does not waive its right to appeal the summary judgment order entered on December 19, 2016; (5) this order disposes of all rights, claims and liabilities of all parties.

ENTERED
JUDGE FRANKLIN ULYSSES VALDERRAMA-1968
14
FEB - 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Date: February 14, 2017

ENTER:

JUDGE

Shareese Pryor
Attorney for plaintiff, People of the State of Illinois Office of the Illinois Attorney General
James R. Thompson Center
100 West Randolph Street, 11th Floor
Chicago, Illinois 60601
312-814-3400
Attorney No. 99000
spryor@atg.state.il.us

Richard Lee Stavins
Attorney for defendants Oakridge Nursing & Rehab Center, LLC and Oakridge Healthcare Center, LLC
180 N. LaSalle Street, Suite 3300
Chicago, Illinois 60601
312-782-9000
Attorney No. 80919
rstavins@rsplaw.com

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. ILLINOIS DEPARTMENT OF HUMAN RIGHTS,	)	
Plaintiff-Appellant,	)	
v.	)	
OAKRIDGE HEALTHCARE CENTER, LLC,	)	No. 15 CH 13917
Defendant-Appellee,	)	
and	)	
OAKRIDGE NURSING & REHAB CENTER, LLC, a/k/a, OAK RIDGE REHABILITATION CENTER,	)	The Honorable FRANKLIN U. VALDERRAMA,
Defendant.	)	Judge Presiding.

FILED CH
MAR 22 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

NOTICE OF APPEAL

Plaintiff-Appellant People of the State of Illinois ex rel. Illinois Department of Human Rights, by its attorney, Lisa Madigan, Attorney General of the State of Illinois, hereby appeals to the Appellate Court of Illinois, First Judicial District, from the agreed judgment entered on February 14, 2017, in which the State preserved its right to appeal the order entered by the Circuit Court of Cook County, Illinois, on December 19, 2016, that granted summary judgment in favor of Defendant-Appellee Oakridge Healthcare Center, LLC, on Count II of the State's complaint. A copy of the agreed judgment is attached hereto as Exhibit A and a copy of the circuit court's order from December 19, 2016, is attached as Exhibit B.

By this appeal, the State requests that the appellate court reverse the order from December 19, 2016, and grant any other relief deemed appropriate.

Respectfully submitted,

LISA MADIGAN
Attorney General
State of Illinois

BY: ______________________
FRANK H. BIESZCZAT #99000
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
312-814-2234
Primary: CivilAppeals@atg.state.il.us
Secondary: Fbieszczat@atg.state.il.us

2019 IL App (1st) 170806
No. 1-17-0806
March 11, 2019

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* THE DEPARTMENT OF HUMAN RIGHTS, Plaintiff-Appellant, v. OAKRIDGE NURSING & REHAB CENTER, a/k/a OAKRIDGE REHABILITATION CENTER, and OAKRIDGE HEALTHCARE CENTER, LLC, Defendants (Oakridge Healthcare Center, LLC, Defendant-Appellee).	Appeal from the Circuit Court Of Cook County. No. 15 CH 13917 The Honorable Franklin Valderrama, Judge Presiding.

JUSTICE WALKER delivered the judgment of the court, with opinion.
Justice Pucinski concurred in the judgment and opinion.
Justice Mason dissented, with opinion.

OPINION

¶ 1 On February 7, 2011, Jane Holloway, an employee of Oakridge Convalescent Home (Convalescent), filed a charge of discrimination in violation of the Illinois Human Rights Act

(Act) (775 ILCS 5/1-101 *et seq.* (West 2010)) against Oakridge Nursing & Rehab Center, LLC (Oakridge Center), her employer and the managing company of Convalescent. Oakridge Center received notice of the charge in the spring of 2011 and thereafter transferred substantially all of its assets for no consideration to Oakridge Healthcare Center, LLC (Oakridge Healthcare). Oakridge Healthcare became the new manager of Convalescent. Holloway obtained an administrative judgment of $30,880. When Oakridge Center failed to satisfy the judgment, the State filed a complaint against Oakridge Healthcare, as the successor of Oakridge Center, to enforce compliance with Holloway's judgment. Oakridge Healthcare filed a motion for summary judgment, which the circuit court granted. The State appeals and argues that it presented sufficient evidence to create a material issue of fact that Oakridge Center transferred its assets for the fraudulent purpose of escaping Holloway's judgment. Furthermore, the State urges this court to look to federal common law, where successor liability is recognized as the default rule in employment discrimination cases. The State maintains that recognition of successor liability in employment discrimination cases aids victims to enforce judgments against employers involved in discriminatory practices who might otherwise escape liability.

¶ 2 I. BACKGROUND

¶ 3 A. Helen Lacek and Elisha Atkin Business Relationship

¶ 4 Ms. Helen Lacek (Helen), managing member of Oakridge Center, met Mr. Elisha Atkin (Elisha), managing member of Oakridge Healthcare, while working at a nursing home in 1991. In 1993, Helen met Joel Atkin, Elisha's brother. In 1999, Helen and Elisha worked as managers for a different nursing home. In 2001, Helen became a member and the director of operations for another nursing home where she met Donna Atkin, Elisha's wife, and Jay Orlinsky, Elisha's brother-in-law. Thereafter, Helen and Elisha worked for a nursing home management company as director of operations and CEO respectively. In December of 2007, Helen, Donna, and Jay formed McAllister Nursing and Rehab, LLC (McAllister), a nursing home management company that operated a nursing home in a building that was owned by McAllister Nursing & Rehab Properties, LLC (McAllister Properties), comprised of members Joel and Donna and an insurance company. Elisha stated in his deposition that he was also a member of McAllister.

¶ 5 On May 1, 2008, Helen, and her husband, John Lacek, formed Oakridge Center and were the company's only members; Helen was the company's only managing member. On the same day, Elisha, Donna, Joel, and Jay formed Oakridge Nursing & Rehab Properties, LLC (Oakridge Properties), and Elisha, Donna, and Joel were the company's managing members.

¶ 6 B. Convalescent Nursing Home

¶ 7 On June 1, 2008, both Oakridge Center and Oakridge Properties executed separate agreements with Accera-Oakridge (Accera), a nursing home management company, for the management of Convalescent. Oakridge Center's agreement provided that Accera would transfer Convalescent's personal property to Oakridge Center, and Oakridge Center would become Convalescent's new management company. Oakridge Properties agreed to acquire the land and building where Convalescent was operated at 323 Oak Ridge Avenue, Hillside, Illinois. Oakridge Center and Oakridge Properties executed a lease for the continued operation of Convalescent by Oakridge Center at the same location. Oakridge Center employed 85 workers at Convalescent.

¶ 8 C. Human Rights Complaint

¶ 9 On February 7, 2011, Holloway, who was an employee at Convalescent, filed the charge of discrimination against Oakridge Center with the Department of Human Rights (Department) and alleged that Oakridge Center suspended her because of her age, 50, and terminated her because of her physical disabilities, in violation of section 2-102(A) of the Act. 775 ILCS 5/2-102(A) (West 2010). Helen stated in her deposition that she became aware of the charge "in spring 2011." On September 26, 2012, the Department filed a civil rights violation complaint on behalf of Holloway with the Illinois Human Rights Commission (Commission). When Oakridge Center failed to file an appearance with the Commission, a default order was entered against it on February 5, 2013. On September 17, 2013, the chief administrative law judge of the Commission recommended a judgment of $30,880 for lost back pay with prejudgment interest to be awarded to Holloway. On April 3, 2014, the Commission entered the administrative law judge's September 17, 2013, recommendation as its order. On July 16, 2014, the Commission ordered the Department to "commence an action in the name of the People of the State of Illinois praying for an issuance of an order directing the Respondent, [Oakridge Center], its agents, servants, successors and assigns" to comply with the Commission's April 3, 2014, judgment.

¶ 10 D. Oakridge Center's Financial Troubles

¶ 11 Helen stated in her deposition that in June 2011, Oakridge Center began to experience financial trouble because the state of Illinois stopped making its payments to Oakridge Center. Helen further stated that due to Oakridge Center's financial trouble, the company was no longer able to pay its rent to Oakridge Properties. Therefore, it provided Oakridge

Properties with notice to terminate its lease. The lease required Oakridge Center to pay an early termination fee of $210,000, personally guaranteed by Helen, but Helen stated she could not answer whether the termination fee was paid because her husband "handled a lot of the financial stuff."

¶ 12 E. Oakridge Healthcare's Formation and Oakridge Center's Termination

¶ 13 On December 5, 2011, Elisha formed Oakridge Healthcare with Yael Atkin, Elisha's sister-in-law and Joel's wife, as the company's only members, with Elisha as the sole managing member.

¶ 14 On January 1, 2012, Oakridge Center, Oakridge Properties, and Oakridge Healthcare entered into a "lease and option termination, cancellation and indemnity agreement" (termination agreement). The termination agreement concluded the lease between Oakridge Center and Oakridge Properties and assigned the lease to be between Oakridge Properties and Oakridge Healthcare. On the same day, the parties also executed an "operations transfer agreement" (transfer agreement) to transfer to Oakridge Healthcare all of Oakridge Center's (i) property, (ii) contracts, (iii) licenses, (iv) patient records, (v) patient trust funds, and (vi) supplies. Oakridge Center however retained all of its accounts receivable. In her deposition, Helen stated that Oakridge Center transferred "beds, the license, three days worth of perishable foods, seven days of frozen [food], stock meds, medical supplies, maybe a couple reams of paper." She further stated that Oakridge Center never appraised the transferred assets for value, and it never received any payment for them.

¶ 15 The transfer agreement also included a "no assumption of liabilities" section, which provided that Oakridge Healthcare (i) "is not, and shall not under any circumstances, be deemed or interpreted to be, a parent, subsidiary and/or and affiliate of Oakridge Center" and (ii) "is not assuming or purchasing and shall not be responsible or liable for any of [Oakridge Center's] liabilities."

¶ 16 Helen stated in her deposition that Oakridge Center's last day of operating Convalescent was January 1, 2012, which was the same day Oakridge Center transferred it assets to Oakridge Healthcare. At the time Oakridge Center was dissolved, it had zero assets. After shutting down the operation of Convalescent, Helen then worked for a hospice facility from January 2012 to February 2013. In August 2013, she returned to work as administrator at McAllister.

¶ 17 F. Circuit Court Proceedings

¶ 18 On September 22, 2015, the State filed a two count complaint and named as defendants, Oakridge Center and Oakridge Healthcare and requested that the court enter an order against the two companies and its "agents, servants, successors, and assigns" to comply with the Commission's April 3, 2014, judgment. Count I sought to enforce the judgment against Oakridge Center. Count II, titled "successor liability," sought similar relief, but it was asserted against Oakridge Healthcare. Under count II, the State asserted, in part, that (i) "[o]n information and belief, when [Oakridge Healthcare] began operating [Convalescent] it was aware of [c]omplainant's charge of employment discrimination with the Department," and (ii) "[b]ased on these facts, on information and belief, [Oakridge Healthcare] is a successor limited liability company of [d]efendant [Oakridge Center], and is therefore responsible for the liabilities of [Oakridge Center]."

¶ 19 On November 16, 2015, Oakridge Healthcare filed a motion for summary judgment on count II of the State's complaint predicated on section 2-1005(b) of the Code of Civil Procedure (Code). 735 ILCS 5/2-1005(b) (West 2014). Oakridge Healthcare argued that it was entitled to judgment as a matter of law because, under Illinois law regarding successor liability, a successor company is not liable for its predecessor's liabilities. Oakridge Healthcare also specifically addressed all four exceptions to the general rule of successor corporate nonliability, including the fraudulent purpose exception, and argued that there was not sufficient evidence to support application of any of the exceptions.

¶ 20 On August 3, 2016, the State filed a response to Oakridge Healthcare's motion for summary judgment. The State argued that because Holloway's judgment stemmed from a charge of employment discrimination in violation of the Act, the court should look to the federal doctrine of successor liability because Illinois courts look to standards applied to federal claims brought under federal employment discrimination laws in analyzing discrimination claims brought pursuant to the Act.

¶ 21 On December 19, 2016, the circuit court found that (i) there was no issue of material fact that Oakridge Healthcare was not a successor in liability to Oakridge Center, (ii) the State did not establish that Oakridge Healthcare was merely a continuation of Oakridge Center, or that the transaction was made for the fraudulent purpose of escaping liability, and (iii) the court stated that pursuant to the rule of *stare decisis*, it was bound to follow Illinois law regarding successor nonliability and, therefore, the court was not free to follow federal authority. Accordingly, the court entered an order granting Oakridge Healthcare's motion for summary judgment and on February 14, 2017, entered a judgment against Oakridge Center for

$51,418.26, but did not impose personal liability "upon any individual who is an agent, servant, successor or assign of either [Oakridge Center or Oakridge Healthcare]."

¶ 22 On March 22, 2017, the State filed its notice of appeal, seeking a reversal of the December 19, 2016, order granting Oakridge Healthcare's motion for summary judgment.

¶ 23 II. ANALYSIS

¶ 24 A. Standard of Review

¶ 25 The State contends that the circuit court erred when it granted Oakridge Healthcare's motion for summary judgment predicated on section 2-1005(b) of the Code. 735 ILCS 5/2-1005(b) (West 2016). Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* § 2-1005(c). Summary judgment orders are reviewed *de novo*. *Lake County Grading Co. v. Village of Antioch*, 2014 IL 115805, ¶ 18.

¶ 26 B. Forfeiture of Fraudulent Transfer Argument

¶ 27 The State contends it presented sufficient evidence for a reasonable jury to find that the asset transfer was for the fraudulent purpose of escaping Holloway's judgment. Oakridge Healthcare argues, and the dissent agrees, that the State never raised the fraudulent transfer argument at any stage of the proceedings in the trial court, only raising it for the first time on appeal, and therefore the State forfeited the argument. Furthermore, Oakridge Healthcare argues that the transfer was not done with intent to defraud Holloway because at the time of the transfer (i) "no one had given any thought whatsoever to [Holloway's] *pro se* administrative charge," (ii) "there was no existing indebtedness to Holloway," and (iii) "no person involved in the transfer had the divine ability to foretell the future, and that therefore when the asset transfer was made in 2012 no one could know that [Holloway] would receive an award in 2014." We disagree.

¶ 28 Section 2-603 of the Code provides that "[a]ll pleadings shall contain a plain and concise statement of the pleader's cause of action" and "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." 735 ILCS 2-603(a), (c) (West 2016). Our supreme court has held that a "plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368 (2004); see also *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981) (The court held that in order to pass muster a complaint "must be legally sufficient; it must set forth a legally recognized claim as its avenue of recovery" and "must be factually sufficient; it must plead facts which bring the claim within the legally recognized cause of action alleged.").

¶ 29 Here, the State alleged in count II of its complaint, titled "successor liability," that (i) "[o]n information and belief, when [Oakridge Healthcare] began operating [Convalescent] it was aware of [c]omplainant's charge of employment discrimination with the Department" and (ii) "[b]ased on these facts, on information and belief, [Oakridge Healthcare] is a successor limited liability company of [d]efendant [Oakridge Center], and is therefore responsible for the liabilities of [Oakridge Center]." We find the aforementioned facts were sufficient to set forth a cause of action pursuant to the fraudulent transfer exception to the general rule of successor corporate nonliability. See *Beretta U.S.A. Corp.*, 213 Ill. 2d at 368; *Carriage Way West, Inc.*, 88 Ill. 2d at 308. We are further convinced that these alleged facts were sufficient to set forth a cause of action because as the record indicates, and as the dissent notes, Oakridge Healthcare, in its response to the motion for summary judgment, specifically addressed all four exceptions to the general rule of successor corporate nonliability, including the fraudulent purpose exception. We find it implausible for Oakridge Healthcare to now argue that the State never raised the fraudulent transfer exception in the trial court when Oakridge Healthcare specifically addressed the exception based on the facts the State provided in the complaint. Therefore, because we find that these facts were sufficient to set forth a cause of action pursuant to the fraudulent transfer exception to the general rule of successor corporate nonliability, and that Oakridge Healthcare specifically addressed the fraudulent transfer exception, we hold that this argument was not raised for the first time on appeal and the State did not forfeit the argument.

¶ 30 Furthermore, in *Jackson v. Board of Election Commissioners*, 2012 IL 111928, our supreme court held that "waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent." *Id.* ¶ 33. We note that the supreme court in *Jackson* cautioned that while the proposition that waiver and forfeiture are limitations on the parties and not on the court, that principle does not confer upon reviewing courts unfettered authority to consider forfeited issues at will. *Id.* Based upon this caution, the dissent opposes consideration of the State's argument because it does not provide a just result nor does it maintain a uniform body of precedent. The dissent contends that the trial court's holding was properly founded on well-settled Illinois authority and that our holding consequently contradicts "a sound and uniform body of precedent." *Infra* ¶ 77. For reasons provided below, we respectfully disagree because this is a case of first impression and our consideration of the State's arguments will achieve a just result for the parties involved. Therefore, in the interest of achieving a just result, we shall address the State's contention that it presented sufficient evidence to create a material issue of fact that Oakridge Healthcare would be liable for Holloway's judgment as a successor to Oakridge Center.

¶ 31 C. Successor Liability

¶ 32 In *Vernon v. Schuster,* 179 Ill. 2d 338 (1997), our supreme court held that a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation. *Id.* at 344-45. The rule of successor corporate nonliability has the purpose of protecting *bona fide* purchasers from unassumed liability. *Id.* at 345. It was created to improve the fluidity of corporate assets. *Id.* There are four exceptions to the general rule of successor corporate nonliability: (1) where there is an express or implied agreement of assumption, (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation, (3) where the purchaser is merely a continuation of the seller, or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *Id.* Here, there is evidence the transfer may have been made for the fraudulent purpose of escaping Oakridge Center's obligation to Holloway.

¶ 33 1. Fraud in Fact

¶ 34 Illinois recognizes two categories of fraudulent transfers: "fraud in law" and "fraud in fact." *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 87. Under fraud in fact, a party must prove that the transfer was made with actual intent to hinder, delay, or defraud the creditors. *Id.*; *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 22. A creditor can prove fraud in fact based on the existence of certain factors or " 'badges of fraud' " set forth in section 5(b) of the Uniform Fraudulent Transfer Act (UFTA) (740 ILCS 160/5(a)(1), (b) (West 2016)). *Bank of America*, 2015 IL App (1st) 132551, ¶ 88; see *Sharif*, 2014 IL App (1st) 133008, ¶ 22. The factors to consider are:

> "(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;
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> (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." 740 ILCS 160/5(b) (West 2016).

The factors are merely considerations and a court need not consider all 11 factors. *Bank of America*, 2015 IL App (1st) 132551, ¶ 89; *Sharif*, 2014 IL App (1st) 133008, ¶ 23. When the factors are present in sufficient numbers, they may give rise to an inference or presumption of fraud. *Bank of America*, 2015 IL App (1st) 132551, ¶ 89; *Sharif*, 2014 IL App (1st) 133008, ¶ 23. It is possible that the presence of only one factor could entitle a party to relief. *Bank of America*, 2015 IL App (1st) 132551, ¶ 89. Under the UFTA, " '[a] donor may make a conveyance with the most upright intentions, and yet, if the transfer hinders, delays, or defrauds his creditors, it may be set aside as fraudulent.' " *Sharif*, 2014 IL App (1st) 133008, ¶ 17 (quoting *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 193-94 (2010)).

¶ 35 Here, Holloway filed her charge of discrimination on February 7, 2011, and Helen became aware of the charge "in spring 2011." On January 1, 2012, Oakridge Center transferred its assets to Oakridge Healthcare, and Holloway's filing of her charge of discrimination put Oakridge Center on notice of a threatened lawsuit and the real possibility of judgment against Oakridge Center. Thus, Oakridge Center had the obligation not to dissipate assets. See *A.G. Cullen Construction Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶ 33 (holding that a transfer of assets by defendant after plaintiff filed a demand of arbitration put defendant "on notice of a threatened lawsuit and the real possibility of judgment against [the defendant]" and thus defendant "had the obligation not to dissipate the company's assets"); *Kennedy v. Four Boys Labor Services, Inc.*, 279 Ill. App. 3d 361, 369 (1996) (holding that a transfer of assets during the pendency of a lawsuit against a corporation supported the finding that the transfer of assets constituted a fraudulent conveyance).

¶ 36 Oakridge Center transferred to Oakridge Healthcare all of its (i) property, (ii) contracts, (iii) licenses, (iv) patient records, (v) patient trust funds, and (vi) supplies. Helen stated in her deposition that Oakridge Center transferred "beds, the license, three days worth of perishable foods, seven days of frozen [food], stock meds, medical supplies, maybe a couple reams of paper." The fifth "badge of fraud" is met because the transfer was for substantially all of Oakridge Center's assets. See *Apollo Real Estate Investment Fund,* 403 Ill. App. 3d at 194; 740 ILCS 160/5(b)(5) (West 2016).

¶ 37 In addition, because Oakridge Center never had the transferred assets appraised for value and that it never received any payment from Oakridge Healthcare for the assets, we hold that Oakridge Center did not receive reasonably equivalent consideration for the value of the transferred assets, and therefore hold that the eighth badge of fraud is met. See *Burnham*, 2015 IL App (1st) 122538, ¶ 35; 740 ILCS 160/5(b)(8) (West 2016).

¶ 38 Finally, with respect to the ninth "badge of fraud," we find that Helen stated in her deposition that in June 2011, Oakridge Center began to experience financial trouble and was no longer able to pay its rent to Oakridge Properties, which resulted in the company's termination of its lease with Oakridge Properties. We therefore hold that Helen's assertions establish that there is evidence that Oakridge Center was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

¶ 39 Based on the aforementioned findings, there is evidence to support an inference or presumption of fraud. See *Bank of America*, 2015 IL App (1st) 132551, ¶ 89; *Sharif*, 2014 IL App (1st) 133008, ¶ 23.

¶ 40 2. Fraud in Law

¶ 41 We note that a "fraud in law" transfer is set forth in sections 5(a)(2) and 6(a) of the UFTA. 740 ILCS 160/5(a)(2), 6(a) (West 2016); see also *Bank of America*, 2015 IL App (1st) 132551, ¶ 87; *Sharif*, 2014 IL App (1st) 133008, ¶ 18; *Burnham*, 2015 IL App (1st) 122538, ¶ 25. A fraud in law transfer occurs where the " 'transfer is made for no or inadequate consideration, [and] the fraud is presumed.' " *Bank of America*, 2015 IL App (1st) 132551, ¶ 87; *Sharif*, 2014 IL App (1st) 133008, ¶ 18; *Burnham*, 2015 IL App (1st) 122538, ¶ 25. Because we found that Oakridge Center did not receive reasonably equivalent value in exchange for the transferred assets, we hold that the transfer was made for no or inadequate consideration. Therefore, the transfer was made for the fraudulent purpose of avoiding Holloway's judgment because there was no consideration and evidence of the unreasonably small amount of assets. See 740 ILCS 160/5(a)(2)(A) (West 2016); *Bank of America*, 2015 IL App (1st) 132551, ¶ 87; *Sharif*, 2014 IL App (1st) 133008, ¶ 18; *Burnham*, 2015 IL App (1st) 122538, ¶¶ 25, 35.

¶ 42 Based on our findings that after Holloway filed her charge of discrimination and Oakridge Center became aware of the charge, Oakridge Center transferred to Oakridge Healthcare substantially all of its assets for no consideration, thereby possibly leaving Oakridge Center insolvent, we hold that the State presented sufficient evidence for a reasonable trier of fact to find that the asset transfer was for the fraudulent purpose of escaping Holloway's judgment. See 740 ILCS 160/6(a) (West 2016); *Bank of America*, 2015 IL App (1st) 132551, ¶ 87; *Sharif*, 2014 IL App (1st) 133008, ¶ 18; *Burnham*, 2015 IL App (1st) 122538, ¶¶ 25, 35.

¶ 43 The dissent contends that our consideration of the fraudulent purpose exception to achieve a just result only frames the question from Holloway's perspective, and it is "decidedly unfair" to Oakridge Healthcare. The dissent also states that it is unfair to Oakridge Healthcare because Oakridge Healthcare "negotiated a purchase of [Oakridge Center's] assets, which specifically excluded an assumption of the latter's liabilities." Therefore, it is unfair for us to impose Holloway's liability upon Oakridge Healthcare. The dissent goes on to state that because Oakridge Center was facing financial difficulties and "faced the choice of failing to make payments to its landlord or failing to meet its payroll," and choosing the latter option would have led to the immediate shutdown of Convalescent, Oakridge Center's "only viable choice was to conduct a 'fire sale' of its assets" and, therefore, there is no badge of fraud in this scenario. *Infra* ¶ 85. However, Oakridge Healthcare did not negotiate a purchase of Oakridge Center's assets. The record does not indicate that there were any negotiations between the parties, and more importantly, as we found, there was no purchase price because Oakridge Healthcare never paid any consideration for the assets. The dissent mistakenly believes that because Oakridge Center "retained the right to collect its accounts receivable, it cannot be said that the sale of its assets was without consideration." *Infra* ¶ 89. We firmly disagree with this reasoning because Oakridge Center cannot claim that the accounts receivables, which Oakridge Center already owned, were retained by Oakridge Center as consideration for transferring Oakridge Center's assets to Oakridge Healthcare.

¶ 44 With respect to the accounts receivable, it can be presumed that Helen and Oakridge Center retained them in order to satisfy past rent due as well as the early termination fee of the lease to Oakridge Properties. However the record does not indicate whether the past rent or the early termination fee were paid to Oakridge Properties. In her deposition, Helen could not answer whether the termination fee was paid because her husband "handled a lot of the financial stuff." Here, the record establishes the only outcome from the transfer of assets to Oakridge Healthcare was that Oakridge Center managed to escape Holloway's judgment. Without further discovery to determine if Oakridge Healthcare used the money from the accounts receivables to satisfy past rent or the early termination fee, it is impossible to conclude that the transfer of the assets without consideration was not performed only to avoid Holloway's judgment. Accordingly, the court's granting of Oakridge Healthcare's motion for summary judgment was premature.

¶ 45 Furthermore, even if there were negotiations between the parties, employees such as Holloway are often never a consideration in such negotiations and are often left without a remedy. In this instance, Oakridge Center even admits that during its plans to cease operations of Convalescent and transfer the assets to Oakridge Healthcare, "no one had given any thought whatsoever to [Holloway's] *pro se* administrative charge." Instances such as this where corporations never even consider its employees when transferring their assets are part of the reason federal courts and some states have adopted successor liability in employment discrimination cases so they can protect discriminatee employees. Therefore, in the interest of fairness, we find that imposing liability on Oakridge Healthcare as a successor of Oakridge Center is a just result.

¶ 46 We commend the trial court's thoughtful consideration of the issues, but we conclude the trial court was not bound by any Illinois authority that required the grant of summary judgment. Nothing is this decision is meant to criticize the trial judge. The dissent mistakenly contends that our "approach is also patently unfair to the trial judge who was never asked to determine and thus never had the opportunity to analyze whether the fraudulent purpose exception to successor nonliability should apply." *Infra* ¶ 78. In the trial court's December 19, 2016, written order, the court found that the State did not establish that Oakridge Healthcare "was merely a continuation of Oakridge [Center], *or that the transaction was made for the fraudulent purpose of escaping liability*." (Emphasis _____.) Therefore, the trial judge did consider the fraudulent purpose exception, which also further supports our finding that this argument was raised in the trial court.

¶ 47 We note that the dissent contends that we offer no rationale "why a profitable venture would be liquidated to avoid a potential liability of indeterminate amount, which, as it turns out, was roughly the equivalent of one month's rent." *Infra* ¶ 87. First, we disagree with the description of this transfer of assets as a liquidation because, as we have repeatedly noted, Oakridge Center never received any consideration for its transfer of assets. Second, the good intentions of Oakridge Center for transferring its assets is not the issue because as we previously noted, under the UFTA, " '[a] donor may make a conveyance with the most upright intentions, and yet, if the transfer hinders, delays, or defrauds his creditors, it may be set aside as fraudulent.' " *Sharif*, 2014 IL App (1st) 133008, ¶ 17. We find the transfer hindered Holloway's recovery of the judgment she recovered against Oakridge Center for discriminating against her based on her age.

¶ 48 We also note that the dissent states that "Oakridge Healthcare did not discriminate against Holloway; Oakridge Center did. So the result reached here is nothing more than placing the financial burden of the predecessor's conduct on the successor corporation because the successor can afford to pay." *Infra* ¶ 79. The majority is well aware that Oakridge Healthcare did not discriminate against Holloway, but Oakridge Healthcare clearly acquired the assets of Oakridge Center for no consideration. As we discuss below, the successor who has taken over control of the business is generally in the best position to remedy such practices most effectively.

¶ 49 D. Illinois Courts Shall Recognize Successor Liability for Violations of the Illinois Human Rights Act

¶ 50 Next, the State urges this court to look to federal common law where successor liability is recognized as the default rule in employment discrimination cases. The State maintains that recognition of successor liability in employment discrimination cases aids victims such as Holloway to enforce judgments against employers involved in discriminatory practices who might otherwise escape liability. Oakridge Healthcare maintains that recognizing successor liability in the employment discrimination context departs from well-settled Illinois law, which is a violation of the doctrine of *stare decisis*. The dissent also contends that creating an entirely new exception to the general rule against corporate successor liability is beyond this court's power as an intermediate court of review. The dissent cites *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28, which states that " ' "[w]here the Supreme Court has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." ' " (Emphasis in original.) See *infra* ¶ 80. We are not overruling or modifying Illinois Supreme Court precedent.

¶ 51 As previously stated, Illinois recognizes four exceptions to the rule of corporate successor nonliability. *Vernon*, 179 Ill. 2d at 345. This general rule and its exceptions, however, only focus on transactions involving corporations and the transfer of their assets. See *id.* They do not consider discriminated employees such as Holloway, who have no control over these transactions and are left without a remedy when corporations transfer their assets. Our research establishes, and the dissent agrees, that our supreme court has not specifically addressed a successor corporation's liability for employment discrimination. Furthermore, neither Oakridge Healthcare nor the dissent cites a case in which our supreme court has addressed a successor corporation's liability in the employment discrimination context. Additionally, we are aware of *Blumenthal*. As we previously stated, we commend the trial judge for thoughtful care to the issues. However, because our supreme court has not specifically addressed a successor corporation's liability for employment discrimination, we are not overruling or modifying declared law. Therefore, we find that our holding in this case does not depart from Illinois law, but it is one of first impression.

¶ 52 While Illinois has not yet addressed a successor corporation's liability in the employment discrimination context, federal courts, by contrast, have considered the issue and have enunciated a standard for determining successor liability in cases involving employment discrimination. The Sixth Circuit first imposed liability on successor employers in *Equal*

Employment Opportunity Comm'n v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). In *MacMillan*, the Equal Employment Opportunity Commission (EEOC) filed a complaint on behalf of an employee, alleging race and sex discrimination by her employer in violation of Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e *et seq.* (1964)). *MacMillan*, 503 F.2d at 1088. Sometime after the complaint was filed, a different corporation took over the operations of the employer. *Id.* The EEOC filed a complaint against the successor corporation and argued that it should be liable as the successor employer to remedy the discrimination suit. *Id.* at 1089.

¶ 53 In imposing successor liability in employment discrimination cases, the court looked to considerations that governed liability for successor employers under the National Labor Relations Act (Labor Act) (29 U.S.C. § 151 *et seq.* (1964)). See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964); *National Labor Relations Board v. Burns International Security Services, Inc.*, 406 U.S. 272, 281-91 (1972); *Golden State Bottling Co. v. National Labor Relations Board*, 414 U.S. 168, 171-74 (1973). The court found that the considerations governing successor liability under the Labor Act were equally applicable to remedy unfair employment practices in violation of Title VII. *MacMillan*, 503 F.2d at 1090. The court reached this conclusion by noting that Title VII was molded largely after the Labor Act and that the relief provisions of Title VII were also derived from the Labor Act. *Id.* at 1091. Therefore, because both acts placed an emphasis on extending protection to and providing relief for victims of prohibited practices, the court found it sufficient to impose liability on a corporate successor for Title VII violations of the predecessor company. *Id.*

¶ 54 Under the Labor Act, the court implemented successor liability because it found that when there is a change in corporate ownership, employees ordinarily do not take part in negotiations between entities, and those negotiations are ordinarily not concerned with the well-being of the employees. *Id.* at 1089. Accordingly, the court found that "the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers" needed to be "balanced by some protection to the employees from a sudden change in the employment relationship." (Internal quotation marks omitted.) *Id.* The court noted imposing successor liability would achieve this balance because it found that the successor who has taken over control of the business is generally in the best position to remedy such unfair labor practices most effectively. *Id.* at 1090. The court also found that a successor's "potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices." (Internal quotation marks omitted.) *Id.*

¶ 55 In addition to the aforementioned considerations, the court imposed successor liability for employment discrimination stating that,

> "[f]ailure to hold a successor employer liable for the discriminatory practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without a remedy or with an incomplete remedy. In the case where the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate

transfers of ownership. Similarly, where relief involved seniority, reinstatement or hiring, only a successor could provide it." *Id.* at 1091-92.

¶ 56 The court however cautioned that liability of successor employers is not automatic and must be determined on a case-by-case basis with the primary goal of providing the discriminatee with full relief. *Id.* at 1091. The court provided nine factors a court may consider in imposing liability on a successor corporation as follows: (1) whether the successor company had notice of the charge, (2) whether the predecessor was able 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 he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production, and (9) whether he produces the same product. *Id.* at 1094. Some courts have condensed these factors by focusing on the first three factors and subsuming the remaining factors into the continuity of business operations factor.

¶ 57 The Seventh Circuit, which also imposes successor liability in employment discrimination cases, further articulated the *MacMillan* factors in *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750-53 (7th Cir. 1985). The court first found that the first two factors—(1) whether the successor company had notice of the charge and (2) whether the predecessor was able to provide relief—are critical to the imposition of successor liability. *Id.* at 750. First, notice is required so that "the successor has some time to negotiate a change in the purchase agreement to reflect the potential liability of a lawsuit." *Id.* at 752. However, plaintiff does not have the burden of providing notice to the successor, rather, the burden is on the successor to find out from the predecessor all outstanding potential and actual liabilities. *Id.* Second, the ability of the predecessor to provide relief is also critical because it would be grossly unfair to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing relief. *Id.* at 750. With respect to the third factor, continuity in operations, which as noted subsumes the remaining factors, the court found "the amount of 'continuity' required between the predecessor and the successor will vary depending upon the number of employees adversely affected by the predecessor's action and the remedy requested by the injured employee(s)." *Id.* at 751. Less continuity is required where plaintiff is not seeking reinstatement, retroactive seniority, or placement on a preferential hiring list. However, greater continuity would be required if the plaintiff were seeking more than monetary relief. *Id.*

¶ 58 Here, Oakridge Center's transfer of assets to Oakridge Healthcare meets the *MacMillan* factors. First, as previously noted, Oakridge Center had notice of Holloway's discrimination charge because Holloway filed it on February 7, 2011, and Helen became aware of the charge "in spring 2011," prior to the transfer on January 1, 2012. As for the second factor, Oakridge Center did not have the ability to provide Holloway relief because it admittedly began to experience financial trouble in June 2011 and was unable to pay its rent, establishing that it was insolvent or became insolvent shortly after the transfer was made, thus unable to provide Holloway relief. Finally, the third factor, which subsumes the remaining factors into the continuity of operations factor, is also met because Oakridge Healthcare continued to operate Convalescent as a nursing home, using the same workforce and at the same location. All of Convalescent's operations remained the same. Therefore, we find the transfer meets the *MacMillan* factors, and Holloway's judgment may be imposed on Oakridge Healthcare as Oakridge Center's successor.

¶ 59 The dissent contends that "the federal common law exception in employment discrimination cases, based on 'mere continuation' of the predecessor, requires proof of elements different from and *** in conflict with those required to invoke the exception under Illinois law" because the federal law exception does not require proof of an identity of ownership as is required in Illinois. (Emphasis omitted.) *Infra* ¶ 81. As we noted, successor liability in employment discrimination is not only based on the mere continuation factor but, rather, on the first three of nine factors necessary to impose liability. *MacMillan*, 503 F.2d at 1094. Furthermore, the federal law exception purposely makes the mere continuation factor much more liberal by not requiring an identity of ownership because "the general common law rule of nonliability on the part of successors is too harsh to employees for application in the context of discrimination in employment, and that the traditional common law exceptions to the nonliability rule insufficiently ease the harshness." *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1237 (7th Cir. 1986). Therefore, the federal common law exception is not in conflict with Illinois law, it is just more liberal to make it easier for employees who have been injured from discriminatory practices of corporations to be made whole.

¶ 60 Several states have followed the *MacMillan* standard for determining successor liability for employment discrimination in violation of the states' Human Rights Acts. See *First Judicial District Department of Correctional Services v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 89 (Iowa 1982); *Stevens v. McLouth Steel Products Corp.*, 446 N.W.2d 95, 98-

99 (Mich. 1989); *MTA Trading, Inc. v. Kirkland*, 922 N.Y.S.2d 488, 490-91 (App. Div. 2011). In *Kirkland*, a successor liability case where the underlying claim arose out of a violation of the New York State Human Rights Law, a New York appellate court held that using the *MacMillan* standard to determine successor corporation liability was proper because " '[t]he standards for recovery under the New York State Human Rights Law [citation] are the same as the federal standards under [Title VII]." *Kirkland*, 922 N.Y.S.2d at 491.

¶ 61 Similarly in Illinois, the standards for recovery under the Illinois Act are the same as the federal standards under Title VII. *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989); see also *Sangamon County Sheriff's Department v. Illinois Human Rights Comm'n*, 233 Ill. 2d 125, 138 (2009). Therefore, for similar reasons outlined by the Sixth Circuit in *MacMillan*, we hold that in an action where the underlying claim stems from a charge of employment discrimination in violation of the Act, Illinois courts may rely on the federal doctrine of successor corporate liability. See *MacMillan*, 503 F.2d at 1092.

¶ 62 We note that the dissent mischaracterizes our decision to follow federal law as being simply because "Illinois courts sometimes look to federal authorities regarding employment discrimination." *Infra* ¶ 84. We want to be clear that our decision to follow federal law successor liability in employment discrimination cases is not only because Illinois courts sometimes look to federal authorities regarding employment discrimination, but it is because in Illinois, the standards for recovery under the Act are the same as the federal standards under Title VII. *Zaderaka*, 131 Ill. 2d at 178; *Sangamon County Sheriff's Department*, 233 Ill. 2d at 138. Therefore, we find that using the *MacMillan* standard, specifically used to determine successor corporation liability in employment discrimination under Title VII, is proper to determine successor corporation liability in employment discrimination under the Act because the standards for recovery under the Illinois Act are the same as the federal standards under Title VII.

¶ 63 Finally, the dissent contends it is unfair to implement an additional exception to the general rule of successor nonliability only for victims of employment discrimination when Illinois has not made similar exceptions for "injured tort claimants, employees who have not been paid their earned wages, and vendors left without compensation for goods and services provided to the defunct entity." *Infra* ¶ 79; see *Villaverde v. IP Acquisition VIII, LLC*, 2015 IL App (1st) 143187; *Nguyen v. Johnson Machine & Press Corp.*, 104 Ill. App. 3d 1141, 1143 (1982); *Diguilio v. Goss International Corp.*, 389 Ill. App. 3d 1052 (2009). The claimants in all three cases failed to recover from the successor corporation, and thus the dissent believes that Holloway's hardship is not "qualitatively more compelling" to justify an exception than these claimants. *Infra* ¶ 79. These categories of claimants however are easily distinguishable from Holloway. In all three cases, the claimants sought to recover damages under the four traditional exceptions, but failed to satisfy the elements necessary to recover. In *Villaverde*, claimant argued the fraudulent transfer exception, but the court found that there were not sufficient badges of fraud. *Villaverde*, 2015 IL App 143187, ¶ 48. Claimant also argued the continuation exception, but the court also found that claimant failed to satisfy this exception because there was no identity of ownership (*id.* ¶ 57), which is the most important factor to meet this exception, between the predecessor and successor corporation. Similarly in *Nguyen*, claimant failed to satisfy the continuation exception because there was no identity of ownership. *Nguyen*, 104 Ill. App. 3d at 1143. Finally in *Diguilio*, the court analyzed all four traditional exceptions and found that claimant failed to meet the elements required for any of the exceptions. *Diguilio*, 389 Ill. App. 3d at 1062-64. Here, contrary to these three claimants, we have found that there is evidence that the transfer may have been made for the fraudulent purpose of escaping Oakridge Center's obligation to Holloway. Furthermore, the State, on behalf of Holloway, specifically urged this court to adopt the federal doctrine of successor liability because Holloway's injury was caused by Oakridge Center's discriminatory practice. Therefore, we find that Holloway's case is different from the three claimants and because her injury was in the employment discrimination context, imposing an additional exception that furthers the eradication of discrimination in the work place is proper.

¶ 64 III. CONCLUSION

¶ 65 We find that forfeiture rules are an admonition on parties and not a limitation upon this court and that we can override considerations of forfeiture to achieve a just result. Therefore, in the interest of achieving a just result in an employment discrimination case, we have addressed the State's argument. We also find that the State presented evidence that (i) Holloway filed her charge of discrimination, (ii) after Oakridge Center became aware of the charge, Oakridge Center transferred substantially all of its assets to Oakridge Healthcare, (iii) Oakridge Center transferred its assets for no consideration, (iv) Oakridge Center transferred its assets without informing Holloway, and (v) the transfer resulted in the possible insolvency of Oakridge Center. We further find that the aforementioned evidence is sufficient to create a material issue of fact that the asset transfer was for the fraudulent purpose of escaping Holloway's judgment and, therefore, summary judgment was improperly granted. Finally, we hold that Illinois courts, including the circuit court in this case, shall rely on the federal doctrine of successor corporate liability in successor liability actions where the underlying claim stems from a charge of employment discrimination in violation of the Illinois Human Rights Act.

¶ 66 Reversed and Remanded.

¶ 67 JUSTICE MASON, dissenting:

¶ 68 I respectfully dissent from the majority's decision to consider an argument deliberately waived by the State and to use that argument, never raised in the trial court, as the reason to reverse. Further, the majority's decision to adopt a federal standard of corporate successor liability in employment discrimination cases—whether or not warranted from a public policy standpoint—is nevertheless inconsistent with decades of controlling Illinois decisions. To the extent the majority determines that a departure is warranted from those authorities, that is a change that can only be effected by our supreme court. Because the trial court's decision was properly founded on well-settled Illinois authority, I would affirm.

¶ 69 The State has taken the position here that a reviewing court may affirm *or reverse* on any ground appearing in the record. In its opening brief, in support of that contention, the State cited two cases, neither of which stands for that proposition. The first, *Westfield Insurance Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 11, states: "[W]e may *affirm* on any basis in the record regardless of whether the trial court relied on that basis or its reasoning was correct" (emphasis added). The second, *Barney v. Unity Paving, Inc.*, 266 Ill. App. 3d 13, 18 (1994), does not state that a court may reverse on any ground appearing in the record. Rather, *Barney* stands for the proposition that on appeal from a summary judgment order, a reviewing court is not bound by the trial court's reasoning and may independently address issues briefed by the parties in the trial court, but not addressed in the court's ruling. *Id.* The State's reply brief does cite a case containing the broad statement "we may affirm or reverse on any basis found in the record" (*Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 16), but *Huang* did not reverse on a ground not argued by the appellant in the trial court. In fact, it affirmed the trial court's ruling. Further, as authority for the proposition that "we may affirm or reverse on any basis," *Huang* cited *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004), in which our supreme court stated "this court can *affirm* the appellate court on any basis present in the record" (emphasis added). As *Raintree Homes* did not approve reversing on grounds not raised in the trial court, *Huang* does not support the State's argument.

¶ 70 There is no general rule that allows litigants to try on one argument for size in the trial court, lose that argument, and raise new issues on appeal. In fact, the law is precisely the opposite. " '[T]he theory upon which a case is tried in the lower court cannot be changed on review[ ] and *** an issue not presented to or considered by the trial court cannot be raised for the first time on review.' " *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994) (quoting *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 147 (1975)); see also *Richardson v. Economy Fire & Casualty Co.*, 109 Ill. 2d 41, 47 (1985) ("[A]n appellant who fails to prevail on one theory in the court below is not at liberty to argue a different theory on appeal."); *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill. 2d 507, 514-15 (1994) ("our responsibilities as a court of review do not extend to protecting a party from its own failed trial strategy"); *Trapani Construction Co.*

v. The Elliot Group, Inc., 2016 IL App (1st) 143734, ¶ 55 ("Generally, an unsuccessful party cannot raise a new theory of recovery for the first time on appeal. [Citation.] If the issue was not raised in the trial court, the party has not properly preserved the issue, which results in forfeiture of that issue on appeal." (Internal quotation marks omitted.)).

¶ 71 Illinois courts have long recognized that allowing a party to forego litigating issues in the trial court only to raise them for the first time on appeal is antithetical to the fundamental concept that a reviewing court considers issues actually raised in the trial court, not those that could have been but were not raised. Permitting a change of theory on appeal not only prejudices the opposing party, but also "weaken[s] the adversarial process and our system of appellate jurisdiction." *Daniels*, 162 Ill. 2d at 59.

¶ 72 This is not a case in which a party inadvertently failed to raise an argument in the trial court. In its motion for summary judgment, Oakridge Healthcare, anticipating that the State might raise the issue, specifically addressed all four theories supporting exceptions to the general rule of corporate successor nonliability, including fraudulent purpose, and articulated why the evidence did not support application of any of those theories. In response, the State expressly limited its argument to the assertion that the only exception to the rule against nonliability for successor entities that applied was the "mere continuation" exception.

> "THE COURT: I presume ... you're asking for the continuation exception, right?
>
> MS. PRYOR [COUNSEL FOR THE STATE]: Correct."

Nowhere in the State's response to Healthcare's motion for summary judgment did it cite UFTA or any of the authorities it now relies on to support its new fraudulent purpose theory. And disavowing even the common law exception recognized in Illinois for successors that are merely a continuation of the seller, the focus of the State's arguments in the trial court was its contention, *based exclusively on federal law*, that "[i]n the context of employment discrimination, successor liability may be imposed even if it does not fall within any of the [four] exceptions" recognized in Illinois. The State went so far as to label Oakridge Healthcare's discussion of the four exceptions to successor nonliability under Illinois common law "irrelevant" because the State had raised "a genuine issue of material fact under [sic] whether the court should find Oakridge Healthcare center liable under *the federal common law doctrine of successor liability for employment discrimination cases*." (Emphasis added.) Counsel for the State reaffirmed at oral argument that (i) it never argued the fraudulent purpose exception in the trial court, (ii) it was not invoking on appeal the Illinois common law exception for successor entities that are a "mere continuation" of the seller, and (iii) its contention that Oakridge Healthcare was a "mere continuation" of Oakridge Center and should therefore be liable for Holloway's award is premised entirely on federal common law.

¶ 73 The phrase "badges of fraud" and Illinois authorities discussing the uniquely factual analysis necessary to support successor liability on the fraudulent purpose theory are absent from both the State's briefs filed in the trial court and the transcript of the argument on the motion for summary judgment. See *People v. Hughes*, 2015 IL 117242, ¶ 38 (noting that new factual theories on appeal "deprive the formerly prevailing party of the opportunity to present evidence on that point"). Accordingly, the State did not just forfeit this argument by failing to raise it; the State affirmatively waived this argument. See *id.* ¶ 37 (noting that although forfeiture and waiver have been used interchangeably, they are actually distinct doctrines, waiver being the "voluntary relinquishment of a known right," while forfeiture is the "failure to timely comply with procedural requirements." (Internal quotation marks omitted.)). Given Oakridge Healthcare's summary judgment motion, which specifically addressed and argued the inapplicability of the fraudulent purpose exception, the State's decision to refrain from responding to this argument amounts to a voluntary relinquishment of a known right.

¶ 74 And yet, despite the State's unequivocal disavowal of any argument in the trial court that the asset sale was effected for a fraudulent purpose, that is now the argument the State advances on appeal (having abandoned its argument that the mere continuation exception under Illinois common law applies) and that is the basis upon which my colleagues elect to reverse. I cannot agree that we should relieve the State of the consequences of its strategic decision not to litigate this issue in the trial court.

¶ 75 The majority rationalizes its decision to address this new argument on three grounds. First, the majority concludes that the State's complaint in the trial court stated a claim for fraudulent transfer (*supra* ¶ 29) (the majority is quoting the State's allegations that Oakridge Healthcare was " 'aware of' " Holloway's claim and for that reason it is a " 'successor' " to Oakridge Center and responsible for its liabilities). While I do not agree with that analysis (see *Green v. Rogers*, 234 Ill. 2d 478, 494 (2009) (requiring fraud to be pled with " 'specificity, particularity and certainty' "); *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 39), that is beside the point. Even if the two paragraphs contained in the State's complaint could be deemed sufficient to state a fraudulent transfer claim, it is well-settled that a party opposing summary judgment may not rely on the allegations of its pleading to create a genuine issue of material fact. See *Land v. Board of Education of the*

City of Chicago, 202 Ill. 2d 414, 432 (2002) ("'If the party moving for summary judgment supplies facts that, if not contradicted, would warrant judgment in its favor as a matter of law, the opponent cannot rest on his pleadings to create a genuine issue of material fact.'" (quoting *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470 (2001)). In its response to Oakridge Healthcare's motion for summary judgment, the State failed to even mention, much less argue, facts supporting a fraudulent purpose exception to the corporate successor nonliability doctrine under Illinois common law. This should be the end of the analysis.

¶ 76 Second, my colleagues reason that Oakridge Healthcare "raised" the issue in the trial court by addressing it in its summary judgment motion and so should not be surprised by this court's decision to consider it (*supra* ¶ 29). But, as noted, the State never responded to Oakridge Healthcare's analysis of the nonapplicability of the fraudulent purpose exception and so must be deemed to have conceded the merits of that argument. *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 25 (former client forfeited appellate review of his claim that *res judicata* did not bar his malpractice claim against law firm that represented him in an underlying divorce proceeding on ground that the elements of *res judicata* were not met, where client did not contest that elements were met before the trial court, but only argued that an exception to *res judicata* applied). Allowing the State to raise this argument for the first time on appeal encourages a party to (i) refrain from responding to an opponent's arguments in the trial court and later, on appeal, (ii) contend that the prevailing party "raised" the issue, so there is no unfairness in allowing the issue to be raised on appeal by and resolved in favor of the losing party. We should not condone or encourage such tactics.

¶ 77 Finally, the majority reasons that addressing arguments affirmatively waived by the State is necessary to achieve a "just result" (*supra* ¶ 30). While the majority quotes from our supreme court's decision in *Jackson* (" 'courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent' " (*supra* ¶ 30) (quoting *Jackson*, 2012 IL 111928, ¶ 33)), *Jackson* does not support a freewheeling invocation of a "just result" to overlook issues that have been affirmatively waived. In fact, when read in context, the supreme court's comments counsel against the majority's approach. In precluding a litigant from advocating a different result than she had argued in her petition for leave to appeal and her brief, our supreme court stated: "[W]hile our case law is permeated with the proposition that waiver and forfeiture are limitations on the parties and not on the court, that principle is not and should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeited issues at will." *Jackson*, 2012 IL 111928, ¶ 33. And, as I discuss below, the majority's creation of a new exception to successor nonliability flatly contradicts "a sound and uniform body of precedent," precisely the opposite effect of the justification for considering waived issues in the first place.

¶ 78 The majority's conclusion that consideration of the fraudulent purpose issue is "just," frames the question from only one point of view. If we are defining a "just result" solely from the perspective of the employee attempting to collect an employment discrimination award, I understand the majority's point. But there are other fairness concerns implicated in the analysis. Allowing the State to raise new issues on appeal is decidedly unfair to Oakridge Healthcare. First, Oakridge Healthcare negotiated a purchase of Oakridge Center's assets, which specifically excluded an assumption of the latter's liabilities. Because, as I discuss below, the evidence does not support a finding that the transfer was effected for a fraudulent purpose, the result reached by the majority frustrates the clearly expressed intent of the contracting parties. See *Kaleta v. Whittaker Corp.*, 221 Ill. App. 3d 705, 711 (1991). Second, even though the State failed to contest Oakridge Healthcare's fraudulent purpose arguments in the trial court, Oakridge Healthcare now has the issue resolved against it as the majority concludes that there are sufficient "badges of fraud" to preclude summary judgment. In a judicial system where we rely on advocates to control the issues presented for resolution at the trial level, such a result is fundamentally unfair. Finally, the majority's approach is also patently unfair to the trial judge, who was never asked to determine and thus never had the opportunity to analyze whether the fraudulent purpose exception to successor nonliability should apply.

¶ 79 My colleagues reason, pointing to the federal common law exception, that without the ability to recover from the successor entity, victims of employment discrimination will be left without redress, unable to collect their damage awards (*supra* ¶ 45). While this is undoubtedly true, the same can be said of injured tort claimants, employees who have not been paid their earned wages, and vendors left without compensation for goods and services provided to the defunct entity. But in all of the latter contexts, we have for decades consistently held that, absent proof of an applicable common law exception, the hardship caused by the general rule of corporate successor non-liability does not justify the imposition of liability on the purchaser of assets. See *Villaverde*, 2015 IL App (1st) 143187, ¶¶ 1, 48, 57 (rejecting employee's effort to collect $166,000 judgment for wages against successor LLC);

Diguilio v. Goss International Corp., 389 Ill. App. 3d 1052, 1063-64 (2009) (tort plaintiff who sustained severe personal injury from predecessor's defective product not entitled to pursue collection of judgment against successor, rejecting minority "product line" approach to successor liability); *Nguyen*, 104 Ill. App. 3d at 1149-51 (plaintiff whose hands were amputated by defective machine manufactured by predecessor entity not entitled to collect judgment against successor). All of these categories of claimants are left without a remedy against the successor entity, and I do not agree that Ms. Holloway's hardship is qualitatively more compelling so as to justify a heretofore unrecognized additional exception to the general rule. Oakridge Healthcare did not discriminate against Holloway; Oakridge Center did. So the result reached here is nothing more than placing the financial burden of the predecessor's conduct on the successor corporation because the successor can afford to pay.

¶ 80 The general rule of corporate successor nonliability, as formulated in Illinois, was articulated in *Vernon v. Schuster*, 179 Ill. 2d 338, 344-45 (1997), in which our supreme court recognized four—and only four—exceptions that warrant imposing successor liability on the purchasing entity. No supreme court decision in the past two decades has recognized additional exceptions in the name of a "just result" and, as noted, decisions from our court have uniformly declined to expand the categories of exceptions to the general rule of successor nonliability. Expressly, the majority modifies *Vernon* by creating a new exception to be applied in employment discrimination cases. See *supra* ¶ 49 ("Illinois Courts Shall Recognize Successor Liability for Violations of the Illinois Human Rights Act"). Fundamentally, the majority's decision to create an entirely new exception to the general rule against corporate successor liability based on federal common law, when the only exceptions to the rule have been fixed for decades, is beyond our power as an intermediate court of review. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28 (" ' "Where the Supreme Court has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." ' " (Emphasis in original.)), ¶ 61 ("Under the doctrine of *stare decisis*, when this court 'has declared the law on any point, *it alone can overrule and modify its previous opinion*.' " (Emphasis in original.)); *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 551 (1983) (" 'It is fundamental that appellate courts are without authority to overrule the supreme court or to modify its decisions.' ").

¶ 81 And to complicate matters further, the federal common law exception in employment discrimination cases, based on "mere continuation" of the predecessor, requires proof of elements different from and, more importantly, *in conflict with* those required to invoke the exception under Illinois law. *Vernon* emphasized that, under Illinois law (as well as that of a majority of jurisdictions), the issue in a case involving the mere continuation exception is whether there is a continuation "of the *corporate entity of the seller*—not whether there is a continuation of the *seller's business operation*." (Emphases in original.) *Vernon*, 179 Ill. 2d at 346. Essential to the exception is proof of *identity of ownership* between the predecessor and successor entities. *Id.* at 347. Without identity of ownership, the fact that the successor carries on the business of the predecessor, keeps the predecessor's name, and hires the predecessor's managers and employees is not enough to impose liability under the mere continuation exception. See *Groves of Palatine Condominium Ass'n v. Walsh Construction Co.*, 2017 IL App (1st) 161036, ¶ 69 ("Plaintiff also points to the fact that the LLC operates

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out of the same locations and referred to the [predecessor] corporation's activities on its website as evidence that the LLC is merely the continuation of the corporation. However, as noted, our courts have ' "consistently required identity of ownership before imposing successor liability under [the continuation exception]." ' " (quoting *Vernon*, 179 Ill. 2d at 347)); *Advocate Financial Group, LLC v. 5434 North Winthrop, LLC*, 2014 IL App (2d) 130998, ¶ 26 ("The test is not whether the seller's business operation continues in the purchaser, but whether the seller's corporate entity continues in the purchaser. [Citation.] The key consideration is whether there is identity of ownership, based on identity of officers, directors, and stockholders."). In contrast, under federal law, the elements of successor liability in employment discrimination cases are (1) whether the successor had notice of the pending lawsuit, (2) whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale, (3) whether the predecessor is able to provide relief following the sale, (4) whether the successor is able to provide the relief sought in the lawsuit, and (5) whether there is a *continuity of operations and work force* between the predecessor and successor entities. *Equal Employment Opportunity Comm'n v. Northern Star Hospitality, Inc.*, 777 F.3d 898, 902 (7th Cir. 2015). Accordingly, while continuity of operations and workforce without continuity of ownership is insufficient, as a matter of law, in Illinois to defeat the general rule of successor nonliability, it can support the imposition of successor liability under federal common law. This is an irreconcilable conflict.

¶ 82 In adopting the federal common law rule, the majority flatly contradicts an unbroken line of cases from our court limiting the mere continuation exception as required under *Vernon*. Far from "maintaining a sound and uniform body of precedent" (*Jackson*, 2012 IL 111928,

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¶ 33), the majority's adoption of the federal common law standard throws well-settled law into flux and reignites arguments that have been consistently rejected by our court.

¶ 83 The uncertainty flowing from the majority's decision is easily illustrated. Assume, for example, that at the time a predecessor's assets are sold and the successor, a different entity, carries on the predecessor's operations, there are three complaints on file in state court: a personal injury action, a claim under the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2016)), and a discrimination lawsuit. Under the majority's rationale, all other things being equal, the discrimination claimant could potentially recover against the successor under the new federal common law exception adopted by the majority, while the other two plaintiffs, given the change in the corporate entity, could not recover under Illinois law. And if, as here, the transfer agreement contains an express nonassumption of liabilities by the successor, those words would be given effect in one context, but not the other.

¶ 84 I do not agree that the fact that Illinois courts sometimes look to federal authorities regarding employment discrimination supports a departure from settled Illinois law regarding the enforcement of judgments. Holloway's award was based on a violation of the Illinois Human Rights Act, not federal law. In the area of employment discrimination, federal law can provide guidance in the context of, for example, what quantum of proof is required to show discrimination on the basis of race or how, once a *prima facie* case of discrimination is established, the employer can rebut that showing. See *Sola v. Human Rights Comm'n*, 316 Ill. App. 3d 528 (2000); *Lalvani v. Human Rights Comm'n*, 324 Ill. App. 3d 774 (2001). But the liability of successor entities for judgments entered against their predecessors is not a subject on which we need to look to federal authority; it is a matter of Illinois law that is well-established.

¶ 85 As a final matter, even if I agreed that we should reach the merits of the State's fraudulent purpose argument, I respectfully disagree with the majority's analysis. The State adduced no evidence that the financial difficulties faced by Oakridge Center in the fall of 2011 were contrived. The nursing home was $244,000 in arrears on its rent to Oakridge Properties due to the State's failure to timely process Medicaid applications for the facility's residents and Medicaid reimbursements.[1] At that point, Oakridge Center faced the choice of failing to make payments to its landlord or failing to meet its payroll. Choosing the latter option would, of course, have resulted in the immediate shutdown of the nursing home and the loss of its patients, so Oakridge Center's only viable choice was to conduct a "fire sale" of its assets, which it did. I find no "badge of fraud" in this scenario.

¶ 86 In discussing fraud in fact, the majority finds that Holloway's filing of her discrimination charge in February 2011 "put Oakridge Center on notice of a threatened lawsuit and the *real possibility of judgment* against [them]" (emphasis added) (*supra* ¶ 35). But the majority does not articulate how the mere filing of a charge of discrimination renders any transfer of assets

[1]In this situation, Oakridge Center was not alone. See Tom Kacich, *Kacich: Letter to governor hints at nursing home peril*, The News-Gazette (Oct. 12, 2016) http://news-gazette.com/news/local/2016-10-12/kacich-letter-governor-hints-nursing-home-peril.html (last visited Feb. 13, 2019) [https://perma.cc/VN7J-6L64] (referring to county-owned nursing home "owed $1.5 million by the state in late Medicaid payments" and the delay in processing Medicaid applications " 'costing the home $180,000 a month' "); *Illinois Medicaid legislation too late for nursing home*, The Southern Illinoisan (Aug. 13, 2018), https://thesouthern.com/news/local/state-and-regional/illinois-medicaid-legislation-too-late-for-nursing-home/article_e3022b70-b3d1-533c-94d7-a55365861dda.html (last visited Feb. 13, 2019) [https://perma.cc/JK33-4TXG] (reporting closure of Macoupin County nursing home with a backlog of $2.3 million in Medicaid payments). As Oakridge Healthcare notes, there is no small irony in the fact that Oakridge Center was forced to sell its assets due to the State's delay in Medicaid payments while the State now attacks that same sale in an effort to impose liability on Oakridge Healthcare.

effected thereafter *per se* suspect. Holloway did not obtain her judgment for more than 27 months following the transfer and so the causal relationship between Holloway's claim and the asset transfer is speculative, at best. Further, the authorities my colleagues cite are readily distinguishable. In both *Burnham* and *Kennedy*, the assets distributed by the corporate debtors were disbursed to insiders of the respective entities. *Burnham*, 2015 IL App (1st) 122538, ¶¶ 1, 8 (noting that after payment of a secured construction loan, the debtor LLC's remaining cash was distributed to another LLC controlled by an individual who also received, with his wife, substantial payments; essentially all of the LLC's cash ended up in the hands of the person who controlled the judgment debtor); *Kennedy*, 279 Ill. App. 3d at 364 (sole director of judgment debtor transferred the corporation's assets to her husband's probate estate; assets later transferred from the estate to the director, who then sold the assets to her four sons who, after forming a new corporation, continued to use the judgment debtor's trade name). Here, Oakridge Center's assets were transferred to Oakridge Healthcare, in which Helen has no interest.

¶ 87 It is not apparent (and the majority offers no rationale) why a profitable venture would be liquidated to avoid a potential liability of an indeterminate amount, which, as it turns out, was roughly the equivalent of one month's rent. This is particularly true since Helen, the party the majority assumes orchestrated the fraud to avoid the discrimination claim, got nothing out of the deal. Although Oakridge Center retained the ability to collect its accounts receivable, any amounts collected were earmarked under the transaction documents to satisfy the $244,000 in back rent and the early termination fee of $210,000 owed by Oakridge Center (and guaranteed by Helen) to Oakridge Properties. The record does not disclose the amount of payments from the state that Oakridge Center expected to or did, in fact, receive.

¶ 88 And apropos of the State's ability to collect Holloway's judgment from Oakridge Center, nothing has prevented the State, following entry of the agreed judgment against Oakridge Center in February 2017, from pursuing a citation to discover assets. A citation would have permitted the State to recover Holloway's judgment from payments made (by the state, ironically) to Oakridge Center on its accounts receivable, and Holloway's judgment lien would be entitled to priority as neither Oakridge Center's liability for past due rent under the lease nor Helen's liability under the guarantee had been reduced to judgment. See 735 ILCS 5/2-1402(m) (West 2014) (lien of judgment creditor created by service of citation "binds nonexempt personal property, including money, choses in action, and effects of the judgment debtor"); *TM Ryan Co. v. 5350 South Shore, L.L.C.*, 361 Ill. App. 3d 352, 356 (2005) (lien that it is first in time has priority). Certainly, the judgment creditor's ability to collect the judgment from the transferor weighs heavily against a finding of fraud.

¶ 89 The majority draws a sinister inference from the fact that Helen, Oakridge Center's member/manager, knew Eli Atkins, one of the members of Oakridge Properties and a partner with Helen in another nursing home. The majority also finds it suspicious that Atkins formed Oakridge Healthcare to buy the nursing home's assets and did not conduct any valuation of those assets before agreeing to take them. Finally, the majority characterizes the sale as "without consideration." Apart from the fact that the State did not advance any of these arguments in the trial court, I do not agree with these observations. It is undisputed that Helen has no interest in Oakridge Healthcare; the fact that she knew Atkins and had been (and might still be) in another nursing home venture with him is true, but irrelevant. As the member/manager of Oakridge Center's landlord, Atkins was undoubtedly familiar with the financial difficulties the nursing home was facing since it was not paying its rent and the only "assets" Oakridge Center possessed were the stream of income from its residents and its expectation of payments from the state. What a "valuation" of Oakridge Center's assets would have added to this scenario is unclear. The majority also overlooks that, as noted above, according to the transaction documents, Oakridge Center retained its accounts receivable, including past due sums from the state. Accordingly, because Oakridge Center retained the right to collect its accounts receivable, it cannot be said that the sale of its assets was without consideration. The fact that we cannot discern the amount of consideration from the record[2] is no reason to presume the transfer was fraudulent.

¶ 90 All of this highlights the intensely factual nature of the fraudulent purpose argument the State raises for the first time on appeal. Had the State believed more discovery was necessary before it could respond to Oakridge Healthcare's motion for summary judgment, it was incumbent on the State to file an affidavit outlining that discovery pursuant to Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013). The State's failure to do so precludes us from using inferences and assumptions to create issues of material fact where no such facts appear in the record.

[2]Of course the State could easily have ascertained the value of the accounts receivable retained by Oakridge Center as they were due and owing from a state agency. Even if it had raised this argument in the trial court, it was the State, not Oakridge Healthcare, who bore the burden of establishing the lack of consideration. Thus, the majority's finding that summary judgment was "premature" because this information was not provided by the State is misplaced.

¶ 91 I would affirm the judgment in favor of Oakridge Healthcare because (i) the State has waived its argument that the transfer from Oakridge Center to Oakridge Healthcare was fraudulent in law or in fact and (ii) there is no genuine issue of material fact that the long-established Illinois common law exceptions to the corporate successor nonliability do not apply and any expansion of those exceptions must be accomplished not by us, but by our supreme court.

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CERTIFICATE OF SERVICE

I the undersigned, an attorney at law, hereby certify that on October 29, 2019, the foregoing instrument was filed with the clerk of the Supreme Court using the electronic filing tylerhost Odyssey e-FileIL system, and was served upon all parties entitled to notice in this appeal by email transmission on said date to counsel for the appellee at the email addresses which follow:

Hon. Kwame Raoul
Attorney General
State of Illinois
Attn: Aaron T. Dozeman
Assistant Attorney General
Civil Appeals Division
Office of the Illinois Attorney General
adozeman@atg.state.il.us
CivilAppeals@atg.state.il.us

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Richard Lee Stavins
RICHARD LEE STAVINS
Attorney for Defendant-Appellant