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

REPLY BRIEF FOR DEFENDANT-APPELLANT OAKRIDGE HEALTHCARE CENTER, LLC

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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

REPLY BRIEF FOR DEFENDANT-APPELLANT OAKRIDGE HEALTHCARE CENTER, LLC

ARGUMENT

In accordance with the mandate of Rule 341(j), appellant respectfully confines this reply brief strictly to replying to arguments presented in appellee's brief. At each bullet point we state a short summary of the state's argument, with page references to pages of the state's brief, and then we set forth our reply to the state's argument.

- Page 18: that the transferor allegedly is liable for the transferee's liabilities, because 775 ILCS 5/8-111(C)(1) authorizes the state to bring an action against "officers, agents, servants, successors," and transferee Oakridge Healthcare is a "successor."

On the contrary, the use of the word "successors" in the statute does not abrogate the Illinois corporate successor non-liability rule and the rule's four exceptions. If the mere use of the word "successors" in the statute authorizing the state to file suit to enforce the judgment were to be read as abrogating the common law corporate successor non-liability rule, then logically this Court would have to read the use of the word "officers" as abrogating the common law rule against officers being liable for the torts and contracts of the corporation, and would have to read the use of the word "servants" as abrogating the common law rule that servants, i.e. employees, of a corporation are not liable for the torts and contracts of the corporation. Obviously, the legislature never intended such a sweeping change in Illinois law.

To interpret the word "successors" as abrogating the common law rule of non-liability would require a very liberal reading of the statutory language, one that is not supported by legislative history or intent. "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning… each word, clause, and sentence… must be given a reasonable meaning." *People v. Gutman*, 355 Ill.2d 621, 624 (2011). In doing so, a court may consider the reason for the law, problems sought to be remedied, purposes to be achieved, and consequences of construing the statute one way or another. *Id.*

A "successor corporation" is defined as "a corporation that, through amalgamation, consolidation, or other assumption of interest, is vested with the rights and duties of an earlier corporation." *Successor*, Black's Law Dictionary (8th ed. 2004). This implies a merger or consolidation of two corporations where the interest, rights, and duties continue in the remaining entity. Here, there was no merger or consolidation. In fact, the operations

transfer agreement expressly states that transferee Oakridge Healthcare Center is not a successor, is not a successor-in-interest, is not liable for nor could have a judgment entered against it for the obligations of Oakridge Nursing & Rehab Center. (C197-C198, ¶ 16, C57-C58, ¶ 21, C62, ¶ 16). These express terms illustrate the parties' manifest intent that the instant transferee not assume the liabilities of the transferor.

- Pages 20 to 23: that the judicially created exception to the successor non-liability rule in federal labor/employment cases allegedly should control in this case.

On the contrary, "[t]here is no federal general common law." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 83 (1994). Matters that are not addressed in a comprehensive and detailed federal statutory scheme should be subject to the disposition provided by state law. *Id.* at 85; *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 79 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981). While some federal courts have developed "common law" in certain circumstances involving the rights and obligations of the federal government, those cases should not supplant Illinois common law.

The United States Supreme Court has established a three part test to determine whether so-called federal common law principles should displace state law: "(1) whether the federal program, by its very nature, required uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of uniform federal law would disrupt existing commercial relations predicated on state law." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979).

Regarding the first factor, there is no federal program or statute that specifically addresses corporate successor liability in employment discrimination cases. The federal

circuit cases cited by appellee have been determined on a cases-by-case basis, which by its very nature, does not require uniformity.

Regarding the second factor, the Court of Appeals and the U.S. Supreme Court have cautioned against the unwarranted displacement of state law:

> Emphasizing the second *Kimbell Foods* factor — a conflict with an identifiable federal interest — the Supreme Court in *O'Melveny* cautioned against the unwarranted displacement of state law, holding that state rules of decision generally fill interstitial gaps in federal statutes. 512 U.S. at 87. The displacement of state law is particularly disfavored in the area of corporate law, because business decisions typically proceed in reliance on the applicable state standards. *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 105 (1991). State corporation law generally should be integrated into the federal statutory regime, unless there exists "a significant conflict between some federal policy or interest and the use of state law." *O'Melveny,* 512 U.S. at 87; *see also Kamen,* 500 U.S. at 107; *Kimbell Foods,* 440 U.S. at 728; *see generally* Henry J. Friendly, *In Praise of Erie— And of the New Federal Common Law,* 39 N.Y.U. L.Rev. 383 (1964).

United States v. Gen. Battery Corp., Inc., 423 F.3d 294, 299 (3d Cir. 2005) (applying a "substantial continuity" standard for finding successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act).

Regarding the third factor, the application of this non-uniform federal "common law" would disrupt existing commercial relations of Illinois businesses that have relied on 85 years of common law recognizing only four exceptions to the general rule of successor non-liability.

This Court recently affirmed Illinois law and distinguished United States Supreme Court and Seventh Circuit Court of Appeals decisions, albeit for matters different than those there. *Joiner v. SVM Management, LLC*, 2020 IL 12467, distinguishing the United States Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), and the Seventh Circuit's decision in *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir.

2015). *Joiner* stands for this Court's independence from the federal courts and refusal to adopt a federal rule over Illinois law, merely because they are similar.

- Pages 23 and 31: that the Seventh Circuit case *Upholsterers' International Union vs. Artistic Furniture*, 920 F.2d 1323 (7th Cir. 1990), was cited with approval by this Court in *Vernon v. Schuster*, 179 Ill.2d 338 (1997).

On the contrary, while this Court did cite the *Artistic Furniture* case in *Vernon v. Schuster*, it did not cite the case for the proposition that the Seventh Circuit law is desirable or applicable. Rather, this Court cited *Artistic Furniture* solely for this proposition:

> The traditional rule of successor corporate nonliability "developed as a response to the need to protect bonafide purchasers from unassumed liability" (*Tucker v. Paxson Machine Co.*, 645 F.2d 620, 623 (8th Cir. 1981)) and was "designed to maximize the fluidity of corporate assets" (*Upholsterers' International Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1325 (7th Cir. 1990)). The rule is the "general rule in the majority of American jurisdictions." *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977); accord 15 W. Fletcher, Private Corporations § 7122 (rev. vol. 1990).

The key takeaway from the above citation is that the traditional rule was developed to protect from unassumed liability and designed to maximize fluidity of corporate assets. Adding a fifth exception would do neither of those things.

- Pages 23 to 24: that various states have adopted the federal successor doctrine in applying their own state discrimination statutes.

On the contrary, while a few states have imposed federal successor liability factors in state discrimination cases, that did not automatically result in successor liability being found. See case cited by the state: *MTA Trading, Inc. v. Kirkland*, 922 N.Y.S.2d 488, 492 (holding Commissioner's determination to impose successor liability on successor in interest was not supported by substantial evidence); *Stevens v. McLouth Steel Products*

Corp., 446 N.W.2d 95, 102 (concluding no successor liability under Michigan Civil Rights Act as successor corporation had no notice of the discrimination claim prior to the acquisition date); *First Judicial Dist. Dept. of Correctional Services v. Iowa Civil Rights Commission*, 315 N.W.2d 83, 92 (Iowa 1982) (holding the doctrine of successor liability was inapplicable as the federal factors failed to establish the necessary continuity between predecessor and successor entities); *Superior Care Facilities v. Workers' Comp. Appeals Bd.*, 32 Cal. Rptr. 2d 918, 927 (Cal. Ct. App. 1994) (holding there was insufficient evidence to hold current management company liable as merely an extension or successor to prior manager).

The Seventh Circuit has effectively adopted a product line rule of successor liability in employment cases. However, Illinois has never adopted the product line approach to corporate successor liability and only seven states have adopted that approach, all in strict liability in tort/product liability cases. California: *Ray v. Alad, Corp.* 19 Cal. 3d 22 (1977); Connecticut: *Kendall v. Amster*, 108 Conn. App 319 (2008); Mississippi: *Huff v. Shopsmith Inc.,* 786 So.2d 383 (2011); New Jersey: *Ramirez v. Amsted Indus. Inc.*, 86 N.J. 332 (1981); New Mexico: *Garcia v. Coe Mfg. Co.*, 123 N.M. 34 (1997); Pennsylvania: *Dawejko v. Jorgensen Steel Co.*, 290 Pa. Super 15 (1981); and Washington: *Martin v. Abbott Labs*, 102 Wash. 2d 581 (1984).

Only two states have held the purchaser of assets liable for the seller's debts where the buyer was merely in the same business as the seller, but again those were limited to product liability cases. Alaska: *Savage Arms. Inc. v. Western Auto Supply Co.*, 18 P.3d 49, 55-58 (Alaska 2001); and Michigan: *Turner v. Bituminous Cas. Co.*, 397 Mich. 406 (1976).

- Page 14: that a buyer allegedly can limit its exposure by factoring in the federal successor liability doctrine.

On the contrary, since 1935 Illinois has rejected this approach. Even if true, this would assume the transferee had knowledge of the liability. Here, the transferee did not have such knowledge; the award was entered by the commission after the transfer. (C32). Furthermore, the instant operations transfer agreement expressly stated that the transferee was not a successor, successor-in-interest, liable for, nor could have a judgment entered against it for the obligations of the transferor. (C197-C198, ¶ 16, C57-C58, ¶ 21, C62, ¶ 16).

- Pages 25 to 26: that the state and federal discrimination statutes allegedly complement and overlap.

On the contrary, even if the statues did complement and overlap as alleged, neither expressly creates a statutory exception to the four common law exceptions to the general rule of successor corporate non-liability.

- Page 27 to 28: that *stare decisis* allegedly does not apply because no Illinois case considered a fifth exception to the successor corporate non-liability rule.

On the contrary, for 85 years Illinois has had only four exceptions to the corporate successor non-liability rule, and transactional lawyers and businesses have long relied on that point of law in this state. That precedent should not be disturbed, absent legislation. Respectfully, if the General Assembly wanted to create another exception to successor corporate non-liability in the Illinois Human Rights Act, it would have done so -- but did not. Congress has done so under the Worker Adjustment and Retraining Notification (WARN) Act of 1988. 29 U.S.C.A. § 2101(b)(1). Illinois has not.

- Pages 28 to 29: that legislative non-action allegedly is not germane because until the instant case no Illinois case created a fifth exception to the non-liability rule.

On the contrary, the rule and its four exceptions have been enunciated over and over by the reviewing courts of this state for 85 years. If the legislature wanted to impose a California-type product-line rule or impose additional exceptions, it long had an opportunity to do so, but never did. Going back to 1935, Illinois reviewing courts have repeatedly held that there are four and only four exceptions to the corporate successor non-liability rule, and have repeatedly rejected efforts to create a fifth exception or re-write the non-liability rule in favor of seemingly worthy plaintiffs, but the legislature has never created a fifth exception or re-written the rule for anyone.

- Pages 29 to 30: that there is allegedly a high bar for tort and creditor claims.

To the contrary, there is not an alleged high bar for tort, creditor, or other successor liability claims. The bar is no higher than it is for any other plaintiff attempting to assert liability on a successor corporation. They must satisfy the evidentiary requirements and make a *prima facie* case that one of the four common law exceptions applies. Here, they simply do not apply.

- Page 29: that the "reasonable balance between the needs of corporate assets and the needs of creditors of the seller corporation" lacks consideration of anti-discrimination policies.

On the contrary, while the common law exceptions for successor corporate non-liability were originally recognized in Illinois before enactment of the Human Rights Act, that does not abrogate or change the four exceptions. As stated above, if the General

Assembly wanted to create a statutory exception in addition to the recognized four it readily could have done so, just as Congress did in the WARN Act.

- Page 30: that there allegedly is no possibility of a slippery slope.

On the contrary, as soon as there is a fifth exception or a re-writing of the non-liability rule in favor of the instant seemingly worthy plaintiff, then surely every worthy plaintiff will clamor for an exception. State courts, unlike federal courts, have to deal with a myriad of kinds of cases involving a myriad of worthy plaintiffs. The creation of additional exceptions to the rule will be difficult to resist. Eventually, they will swallow the rule.

A few of the many other worthy plaintiffs who will agitate for an exception to the non-liability rule are personal injury victims, wrongful death victims, employees not paid for their wages, tenants denied leases because of race, restaurant customers denied service, hospital patients denied an accommodation of their disability, etc.

- Page 38: that Oakridge Healthcare acknowledged in the appellate court that this was not a totally arm's length transaction.

On the contrary, while it is true that this was not a totally arm's length transaction, the only thing about this transaction that was not arm's length was the fact that the principals of the buyer and the principals of the seller were well acquainted with each other and did business with each other. Other than that, this was an arm's length transfer. (C55, ¶¶ 5-8, C56, ¶¶ 7-8, 10-16, C57, ¶ 17, C60, ¶ 2, 4-7)

- Pages 36 to 38: that there allegedly was fraud in law because there was no consideration.

On the contrary, the transfer of assets here to Oakridge Healthcare Center from Oakridge Nursing & Rehab Center was not without consideration. Consideration is the bargained for exchange of promises or performances and may consist of a promise, an act, or a forbearance. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 11304, ¶ 23. "Any act or promise which is of benefit to one party or disadvantage to the other is sufficient consideration to support a contact." *Id.* at ¶ 23.

Principles of contact law govern the successor corporate non-liability issue, and such principles do not require that the values exchanged be equivalent. *Id.* at ¶ 24. This Court has oft stated: "We will not inquire into the adequacy of the consideration to support a contract." *Id; Gallagher v. Lenart*, 226 Ill.2d 208, 243 (2007); *Ryan v. Hamilton*, 205 Ill 191, 197 (1903).

At the time of the January 1, 2012 asset transfer, transferor Oakridge Nursing & Rehab Center was experiencing major financial problems, including an inability to pay upwards of $450,000 in back rent and early lease termination penalties to its lessor. (C61, ¶ 10) The subject transaction resulted. Whether the value of the consideration bargained for in that exchange was sufficient is not for the judiciary to decide.

- Pages 38 to 41: that there allegedly was fraud in fact.

On the contrary, the asset transfer was not fraud in fact for the same reasons it is not fraud in law. The transferor was in serious financial trouble in 2012, and the transfer occurred, two years prior to the commission's award against the transferor. (C30, C61, ¶¶ 10, 11) The allegedly fraudulent transfer could not have been made in contemplation of avoiding a judgment creditor that did not exist at that point in time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this reply 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(c) certificate of compliance, the certificate of service, and matters to be appended to the brief under Rule 342(a), is 10 pages.

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

CERTIFICATE OF SERVICE

I the undersigned, an attorney at law, hereby certify that on March 10, 2020, the foregoing instrument was filed with the clerk of the Supreme Court using the electronic filing Odyssey e-FileIL service provider system at http//:Illinois.tylerhost.net; and that on that date the foregoing instrument was served upon all parties entitled to notice in this appeal by email transmission to counsel for the appellee at the email addresses which follow:

Hon. Kwame Raoul
Attorney General
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Attn: Aaron T. Dozeman
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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

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