NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0312

MARLA B. WHITTINGTON

VERSUS

HOSPICE CARE SERVICES OF LOUISIANA, L.L.C.

AND

NO. 2013 CW 1690

MARLA B. WHITTINGTON

VERSUS

HOSPICE CARE SERVICES OF LOUISIANA, L.L.C. AND LIFE HOSPICE, LLC

Judgment rendered NOV 12 2014

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C559169
Honorable R. Michael Caldwell, Judge

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Kuhn J. concurs and assigns additional Reasons

Welch concurs in part and dissents in part.

PETTIGREW, J.

This matter was initiated by a petition for damages based on a whistleblower claim filed in September 2007, and is now before us on appeal and a supervisory writ application that challenge several trial court rulings that ultimately decided, in a judgment dated September 17, 2013, that the plaintiff cannot collect on a money judgment, rendered in her favor and against her employer, from the employer's successor entities.

Specifically, this appeal is by the plaintiff, Marla B. Whittington, of a judgment rendered in open court on September 3, 2013, and signed on September 17, 2013, that granted the motion for summary judgment filed by defendants Randall A. Gomez, Dynafab USA, LLC, and Life Hospice, LLC, and dismissed Ms. Whittington's claims attempting to enforce her money judgment against them, at her costs. Also before us is a writ application by Ms. Whittington, as relator, challenging the trial court's denial of her motion for summary judgment on the issue of *in solido*/successor liability, and of her "motion for entry of final judgment." After a thorough review of the record and the arguments presented on appeal and in the writ application, we affirm the trial court's judgment.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Ms. Whittington initiated this whistleblower action in September 2007 after she was fired by her employer, defendant Hospice Care Services of Louisiana, LLC (Hospice Care). In her petition, Ms. Whittington alleged that she was fired from her job as Hospice Care's administrator because she had exposed Hospice Care's violations of the Department of Health and Hospitals (DHH) regulations to DHH.[1]

The trial court initially rendered summary judgment in favor of Hospice Care, dismissing Ms. Whittington's claim under the Whistleblower Statute,[2] but this court

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[1] Specifically, Ms. Whittington asserted that Hospice Care had violated DHH regulations by hiring a director of nursing who was unqualified because she lacked one year of full-time experience in providing direct patient care in a hospice, home health, or oncology setting, and because she was simultaneously employed on a PRN (as needed) basis by another licensed health care agency.

[2] The Whistleblower Statute, La. R.S. 23:967, provides protection to employees against reprisal from employers for reporting or refusing to participate in illegal workplace practices.

reversed that judgment on September 10, 2010, and remanded the case to the trial court for further proceedings. **Whittington v. Hospice Care Services of Louisiana, L.L.C.**, 2010-0206 (La. App. 1 Cir. 9/10/10) (unpublished).

On December 31, 2009, during the pendency of that appeal, Hospice Care's only members, Richard and Linda Mahoney, executed an "Assignment of LLC Membership Right" that transferred 100 percent of their membership interest in Hospice Care to Dynafab, USA, LLC (Dynafab). Dynafab consisted of a sole member and manager, Randall A. Gomez. Mr. Gomez was also the managing member of Life Hospice, LLC (Life Hospice), which he co-owned with Mr. David E. Roberts.

On June 1 2010, Mr. Gomez executed an "Asset Sale Agreement with Assumption of Certain Liabilities," wherein Hospice Care, through Mr. Gomez, as its managing member, transferred to Life Hospice, through Mr. Gomez, as its managing member, the following:

1. Hospice Care's DHH License;
2. All furniture, fixtures, equipment, inventory, and supplies located at Hospice Care;
3. All of Hospice Care's patient records, software, and records for billing; and
4. Hospice Care's right to receive all outstanding payments due from Medicare.

The sale agreement further stated that "*[Life Hospice] shall not be deemed to have assumed any obligation or liability of [Hospice Care]* other than the Medicare Overpayment described above." (Emphasis added.) As a result of the assignment and subsequent sale, Hospice Care remained a limited liability company in good standing, but without any assets.

Upon learning of the assignment and asset sale, Ms. Whittington supplemented and amended her petition to add Dynafab, Life Hospice, and Mr. Gomez as additional defendants in her suit, alleging they had conspired to defraud her. Life Hospice filed an exception raising the objection of no right of action, and Dynafab and Mr. Gomez filed exceptions raising the objections of no right of action, no cause of action, and

vagueness. The hearing on the defendants' exceptions and the trial on the merits were held the same day.

Prior to the trial, the court sustained the exceptions of no right of action raised by Dynafab, Mr. Gomez, and Life Hospice and denied the exceptions of no cause of action and vagueness. Since the trial court sustained the exceptions of no right of action raised by the three newly-added defendants, the trial on the merits proceeded by Ms. Whittington solely against Hospice Care, which was not represented by counsel at trial.

At the conclusion of the trial, the trial court rendered judgment in favor of Ms. Whittington on the merits of her whistleblower (wrongful termination) claim and awarded her damages in the amount of $151,265.00 against Hospice Care. That judgment was signed on July 26, 2011, and neither Ms. Whittington nor Hospice Care appealed. Thus, it is now a final judgment.

Ms. Whittington, however, did appeal the trial court's judgment sustaining the newly-added defendants' exceptions of no right of action. On appeal, this court reversed the trial court, denied the exceptions of no right of action, and remanded the case to the trial court, thereby reinstating Hospice Life, Dynafab, and Mr. Gomez as defendants in this action. **Whittington v. Hospice Care Services of Louisiana, L.L.C.**, 2012-0540 (La. App. 1 Cir. 2/25/13) (unpublished). In so doing, this court stated, "[a]s a person wrongfully terminated, there is no question that [Ms. Whittington] belongs to the class that has a legal interest in the subject matter of the litigation (*i.e.,* to pursue a judgment for damages she herself sustained.)"

On remand, Ms. Whittington filed a "Motion for Summary Judgment on the Issue of In Solido/Successor Liability" and a "Motion for Entry of Final Judgment," the denials of which are at issue before us now. The motions sought a judgment finding Dynafab, Mr. Gomez, and Life Hospice solidarily liable for the judgment issued against Hospice Care on the bases of several allegations: (1) that Dynafab was not made a member of Hospice Care and therefore Dynafab lacked the power or authority to transfer assets of Hospice Care to Life Hospice; (2) that the continuation doctrine should apply in this

case, thereby transferring all liabilities of Hospice Care to Life Hospice; and (3) that Life Hospice should be held liable as a successor in interest.[3]

Dynafab, Mr. Gomez, and Life Hospice filed their own motion for summary judgment asserting that the assignment of interest by the Mahoneys to Dynafab effectively transferred all membership in Hospice Care to Dynafab; that Ms. Whittington could not prove that Life Hospice assumed liability for the judgment in this case; that Ms. Whittington could not prove that Mr. Gomez or Dynafab intended to commit any fraud; that Ms. Whittington could not pierce the veil of Hospice Care or Dynafab; and that Life Hospice and Dynafab were not liable to Ms. Whittington under the theory of successor liability, the continuation doctrine, or as a successor in interest. (Dynafab, Mr. Gomez, and Life Hospice made these same arguments in their opposition to the plaintiff's motions.)

ACTION BY THE TRIAL COURT

The trial court, after hearing arguments and accepting evidence (which consisted of Mr. Gomez's deposition and attached exhibits, and a jointly submitted affidavit by Mr. Gomez), very succinctly stated the purpose of Ms. Whittington's motions, *i.e.,* that she was "trying to obtain judgment against Dynafab and Mr. Gomez on the theory that Life Hospice Services is a successor of limited liability corporation to Hospice Services of Louisiana, and, therefore, the judgment rendered by this court against Hospice Care Services is enforceable against Life Hospice, Dynafab, and Mr. Gomez individually." The trial court also noted that Mr. Gomez's affidavit established, without contradiction, that he had no knowledge, from the Mahoneys or otherwise, of the suit against Hospice Care by Ms. Whittington (which by then, had been dismissed and was

[3] In the unique pleading styled "Motion for Entry of Final Judgment," Ms. Whittington argued that this court's prior opinion (that reversed the grant of the exception raising the objection of no right of action) warranted the rendering of a judgment declaring Hospice Care, Dynafab, Mr. Gomez, and Life Hospice liable *in solido* to the plaintiff for violating the whistleblower statute and for causing damages to the plaintiff as a result of this violation. We disagree, because Ms. Whittington mischaracterizes this court's prior opinion, which as stated earlier, simply ruled that Ms. Whittington, as a person wrongfully terminated from her job, was among the class with a legal right to pursue a claim for damages she sustained as a result thereof. That opinion in no way addressed or decided the merits of that claim, particularly, Ms. Whittington's attempts to execute her money judgment on the current named defendants.

on appeal) until the case was remanded after appeal and Mr. Gomez, Dynafab, and Life Hospice were added as defendants. Based on the evidence and arguments presented, the trial court denied Ms. Whittington's motions and granted the defendants' motion for summary judgment.

DISCUSSION

Our *de novo* review of the summary judgment granted in this matter in favor of the defendants, which is a final judgment, and our supervisory review for manifest error on the trial court's interlocutory rulings on Ms. Whittington's motions, leads us to the conclusion that the trial court was correct in all of its rulings. We also find that the oral reasons given by the trial court when rendering judgment adequately address the assignments of error presented by Ms. Whittington in her appeal and the issues raised in her supervisory writ application. Moreover, the trial court's reasons are thorough, succinct, and as well put as we could do if we were to draft our own. Therefore, we hereby repeat and adopt the reasons given by the trial court as our own:

> It is the argument of the plaintiff that since Mr. Gomez was the sole member or the managing member of Dynafab, LLC and became the managing member or one of the managing members and owners of Life Hospice that this was all being done and manipulated by Mr. Gomez. Limited liability corporations are established for a reason. They are established and are required to follow corporate procedures. The law is very clear that there is no individual liability on members of a limited liability corporation except in very limited circumstances which would include fraud. ... [T]here has been no evidence of fraud in this case. There were business transactions that were done wherein the Mahoneys transferred their membership in Hospice Care Services to Dynafab USA, LLC. Later, Hospice Care Services of Louisiana transferred its assets to Life Hospice in consideration for Life Hospice agreeing to pay a [M]edicare overpayment owed by Hospice Care. The document transferring the assets specifically limited the liability assumed by Life Hospice to the [M]edicare overpayment. Plaintiff tries to categorize this as merely a name change. There is no evidence that that's what was done. [Plaintiff] [t]ries to characterize this as an attempt to defraud Ms. Whittington. There is no evidence that that was done. Rather, the evidence is that the Mahoneys did not disclose to Mr. Gomez, to Dynafab USA, or to Life Hospice that there was a pending lawsuit. As indicated in argument, when this matter came up for hearing, I denied the exception of no cause of action and sustained the exception of no right of action. Those defendants, that is, Life Hospice, Mr. Gomez,

and Dynafab and their representatives left the courtroom. Ms. Whittington proceeded with her case against Hospice Care Services of Louisiana in the manner of a default because there was no one present. I rendered judgment in her favor against Hospice Care Services of Louisiana. There can be no entry of a judgment against those defendants without them having been present and joined at the trial and participating in the trial. So the motion for entry of judgment against them is denied. With regard to the motion for summary judgment, there has been no evidence introduced to show that this was done in any way to defraud Ms. Whittington. There has been no evidence that these parties were merely affecting a name change or that somehow Life Hospice continued on the business of Hospice Care. They took over the assets, which did include the client list and so forth, but that does not mean that they continued to operate that business as such. There has been no evidence to support the plaintiff's motion for summary judgment, and that motion is denied.

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What the plaintiff has alleged against these defendants is that they are somehow successors to Hospice Services of Louisiana, LLC and that they have somehow committed fraud upon Ms. Whittington by merely affecting a name change ... and the sole purpose of the transfer was to defraud Ms. Whittington out of her claim. ... It's also the argument of the plaintiff that since Hospice Services was defending the appeal of the original granting of summary judgment that that somehow imputes knowledge of that appeal to Dynafab and thus to Mr. Gomez and thus to Life Hospice. ... There is no evidence that [Hospice Services' original attorney] communicated whatsoever with Mr. Gomez or Dynafab or Life Hospice Services. Her knowledge could be imputed to Hospice Services of Louisiana. ... But I don't think her knowledge can be imputed beyond that. And even though Dynafab may have been the owner of and managing partner of that LLC [Hospice Services of Louisiana], there is no evidence that there was any actual knowledge on the part of Dynafab or Mr. Gomez of that appeal and of its pendency at the time of the transfer. Rather, the affidavit of Mr. Gomez refutes that point. So again, plaintiff has come forward with no evidence to show that this was a fraudulent transaction, that this was done to deprive Ms. Whittington of available assets or recovery on her case. These were business transactions conducted by various LLC's. There has been no showing that there was anything underhanded or fraudulent about what was done. There is, therefore, no basis for liability on the part of Life Hospice Services, Inc., Dynafab USA, LLC, or Mr. Gomez individually.

CONCLUSION

For all the foregoing reasons, the rulings by the trial court denying Ms. Whittington's motion for summary judgment and motion for entry of a final judgment are affirmed and the writ application challenging those rulings is denied. The judgment of the trial court granting summary judgment in favor of Randall A. Gomez, Dynafab USA, LLC, and Life Hospice, LLC, and dismissing Ms. Whittington's claims against them is also affirmed. Costs of this appeal are assessed to plaintiff, Marla B. Whittington.

AFFIRMED. WRIT DENIED.

MARLA B. WHITTINGTON

VERSUS

HOSPICE CARE SERVICES OF LOUISIANA, LLC

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2014 CA 0312

KUHN, J., concurring.

I concur for the purpose of assigning additional reasons emphasizing the proper burden of proof on motion for summary judgment.

In support of their motion for summary judgment, defendants, who would not bear the burden of proof at trial, pointed out that plaintiff cannot meet her burden of proving at trial any basis for imposing liability on them. In particular, the affidavit of Randall A. Gomez, a member and manager of Dynafab, was filed as a **joint** exhibit at the hearing on the parties' cross motions for summary judgment. In his affidavit, Mr. Gomez stated that he had no knowledge that the lawsuit filed by plaintiff against her former employer, Hospice Care, was still pending on appeal at the time of the transactions in question. He further attested to the fact that the Mahoneys represented to Dynafab that the lawsuit filed by plaintiff had been dismissed.

At that point, the burden shifted to plaintiff to come forward with evidence to establish that she would be able to satisfy her evidentiary burden at trial that defendants entered into the transactions in question in order to escape liability from her claim against her former employer, Hospice Care, and had knowledge of the pending claim. La. C.C.P. art. 966(C)(2). "J1," an exhibit filed jointly by plaintiff and defendants, was the affidavit of Mr. Gomez. As stated above, it established that: (1) Mr. Gomez had no knowledge that the lawsuit filed against plaintiff's former employer, Hospice Care, was still pending; and (2) the Mahoneys represented to Dynafab that the lawsuit had been dismissed. Consequently, plaintiff's own filings support the defendants' position on the motion for summary

judgment. Accordingly, because plaintiff failed to present evidence demonstrating that she could meet her evidentiary burden at trial, no genuine issue of material fact existed, and the defendants were entitled to summary judgment in their favor. La. C.C.P. art. 966(C)(2); ***Souza v. St. Tammany Parish***, 11-2198 (La. App. 1st Cir. 6/8/12), 93 So.3d 745, 747.

MARLA B. WHITTINGTON

VERSUS

HOSPICE CARE SERVICES OF LOUISIANA, LLC

NO. 2014 CA 0312

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WELCH, J., dissents in part.

FEW I agree that the trial court properly denied Ms. Whittington's motion for summary judgment; however, I find that the trial court erred in granting defendants' motion for summary judgment. Accordingly, I respectfully dissent in part.

Plaintiff asserts that defendants are liable to her for a judgment obtained against Hospice Care on a theory of successor liability. The basic principle of successor liability, developed in the context of corporations, is that when a corporation sells all of its assets to another, the successor is not liable for the seller's debts or liabilities, except where: (1) the purchase expressly or impliedly agrees to assume the obligation; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. **Pichon v. Asbestos Defendants**, 2010-0570 (La. App. 4th Cir. 11/17/10), 52 So.3d 240, 243, writ denied, 2010-2771 (La. 2/4/11), 57 So.3d 317.

I believe that there is a genuine issue of fact as to whether the transactions in question were entered into in order to escape liability to Ms. Whittington in the event she obtained a judgment against Hospice Care. Mr. Gomez knew that Ms. Whittington had filed a lawsuit against Hospice Care before his company, Dynafab, purchased 100% of the Mahoney's interest in Hospice Care. He claims he did not know her suit was still pending at the time of the purchase or at the time that he, acting as the managing member of both Hospice Care and Dynafab, transferred Hospice Care's assets, including its right to receive all outstanding

payments due from Medicare, to his newly formed LLC, Life Hospice. According to Mr. Gomez, because he did not know of the pendency of the lawsuit, he could not have entered into the transactions in order to escape liability to Ms. Whittington. The issue of whether Mr. Gomez knew or should have known that Ms. Whittington was a potential creditor of Hospice Care at the time of the transfers is a question of fact that can only be determined by assessing Mr. Gomez's credibility and by determining whether his claim of lack of knowledge is reasonable under the circumstances of this case. However, a court may not make credibility decisions on a motion for summary judgment. Furthermore, summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge, or malice, and should only be granted on such subjective issues when no genuine issue of material fact exists concerning that issue. **Monterrey Center, LLC v. Ed.ucation Partners, Inc.**, 2008-0734 (La. App. 1st Cir. 12/23/08, 5 So.3d 225, 232.

In this case, the circumstances surrounding the transactions themselves can provide a factual basis to support Ms. Whittington's claim that the transactions were perfected to escape liability to her, including: (1) Dynafab's purchase of 100% of the Mahoney's membership interest in Hospice Care for $5,000.00, where for a ten month period ending October 31, 2009, Hospice Care had gross revenues in the amount of $474,612.40; and (2) the timing of the formation of Mr. Gomez's LLCs, the acquisitions, and transfers, all of which occurred during the pendency of the lawsuit, including the following: Mr. Gomez registered Dynafab as an LLC on March 16, 2009; on December 31, 2009, Dynafab acquired 100% of the Mahoney's interest in Hospice Care; Life Hospice was registered as an LLC on March 12, 2010, and on June 1, 2010, Hospice Care and Dynafab, through Mr. Gomez as both entities' managing member, transferred its assets to Mr. Gomez's

newly formed LLC, Life Hospice. Whether these transactions were part of a strategy to deprive Ms. Whittington of any recovery in the event that a judgment was rendered against Hospice Care on her whistleblower claim is a question of fact that may not be decided on summary judgment. Therefore, I would reverse the summary judgment rendered in favor of defendants and remand the case to the trial court for further proceedings.