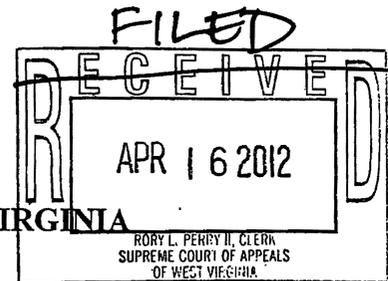


12-0507



IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

JOSEPH KUBICAN,

Plaintiff,

v.

Civil Action No.: 11-C-231-2
THOMAS A. BEDELL, Judge

THE TAVERN, LLC d/b/a
BUBBA'S BAR AND GRILL,
and HARRY WISEMAN,

Defendants.

ORDER AND CERTIFICATION

Before this Court is the "Plaintiff's Motion for Leave to Amend Complaint," which was tendered to the Court on February 22, 2012. Defendant "The Tavern, LLC" ("Defendant Tavern") responded to that motion on March 8, 2012. Finally, the Plaintiff filed a reply to that response on March 15, 2012.

With his current motion, the Plaintiff attempts to amend the complaint herein for the purposes of "piercing the corporate veil and to include the two owners of The Tavern." See Motion for Leave to Amend Complaint, p. 4. If allowed to amend, he will seek damages from the two owners stemming from an assault that took place at Bubba's Bar and Grill, an establishment owned and operated by Defendant Tavern.

However, Defendant Tavern was incorporated as a limited liability company. It opposes the proposed amendment to the complaint based around the statutory protection afforded to its owners under W. Va. Code §31B-3-303 [1996].

Undisputed Substantive and Procedural Histories

1. This action concerns an assault that allegedly took place at Bubba's Bar and Grill in Bridgeport, WV, on February 7, 2011.

2. Bubba's Bar and Grill is a fictitious name used for business purposes by Defendant Tavern, a now-defunct limited liability company ("LLC").
3. In that assault, Mr. Harry Wiseman, acting unarmed, beat the Plaintiff and inflicted multiple lasting injuries.
4. Mr. Wiseman has since pled guilty to the beating in a criminal action. See: 11-M-12-3, Harrison County, WV.
5. At a deposition taking place on February 7, 2011, one of the owners of Defendant Tavern, Mr. Lawson Mangum, testified for Defendant Tavern. The other owner of Defendant Tavern, Mr. James Paugh, was not present.
6. As a result of that deposition, the Plaintiff now believes Defendant Tavern to be unable to satisfy any judgment rendered against it. It seeks to hold Lawson Mangum and James Paugh "personally liable for the actions of the former Tavern, LLC." See Motion for Leave to Amend Complaint, p. 3.

**The Law on Certification and this Court's Analysis
As to the Suitability of this Question for Certification**

West Virginia Code §58-5-2 provides, in pertinent part, that "[a]ny question of law [...] may , in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back." Furthermore, certification requires a "sufficiently precise and undisputed factual record on which the legal issues can be determined [and that] such legal issues [...] substantially control the case." *Zelenka v. City of Weirton*, 208 W. Va. 243, 245; 539 S.E.2d 750, 752 (2000), quoting Syllabus Point 5, in part, of *Bass v. Coltelli*, 192 W. Va. 516, 453 S.E.2d 350 (1994). Finally, the West Virginia Supreme Court of Appeals "will not consider a

question not necessary to the decision of a case.” *Zelenka* at 245, 752, quoting *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 280 S.E.2d 183 (1989).

Regarding the question being certified, an undisputed factual record exists. The question before the Court is purely a question of law relating to the statutory protections afforded to members of a limited liability corporation under W. Va. Code §31B-3-303. Furthermore, although other states have visited this question, it presents an issue of first impression before the West Virginia Supreme Court of Appeals. The answer to the question being posed will dictate which parties may be involved in this lawsuit, and it will most likely have a substantial impact on the damages that the Plaintiff will ultimately collect if he emerges victorious.

Certified Question, this Court’s Answer, and Accompanying Analysis

Pursuant to W. Va. Code §58-5-2 [1998] and Rule 17 of the West Virginia Rules of Appellate Procedure [2010], this Court hereby **CERTIFIES** the following question for the Supreme Court’s consideration:

Does West Virginia’s version of the Uniform Limited Liability Company Act, codified at W. Va. Code §31B *et seq.*, afford complete protection to members of a limited liability company against a plaintiff seeking to pierce the corporate veil?

ANSWER: YES

With its pending motion, the Plaintiff seeks to “pierce the corporate veil” of Defendant Tavern and assert liability against Defendant Tavern’s two owners, Mr.

Lawson Mangum and Mr. James Paugh. However, Defendant Tavern uses W. Va. Code §31B-3-303 to shield its two owners. That statute, in pertinent part, provides as follows:

[...] the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the company. A member or manager is not personally liable for a debt, obligation or liability of the company solely by reason of being or acting as a member or manager. [...] The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.

W. Va. Code §31B-3-303 [1996].

Upon plain reading of this statute, it appears that the owners and members of a limited liability company are completely protected from liability stemming from the operation of their company. If it were forced to rule on this matter without guidance from the West Virginia Supreme Court of Appeals, this Court would employ a plain reading analysis and rule accordingly.

However, this Court certifies the pending question today because it seeks a determination of whether the West Virginia Legislature truly intended members and managers of limited liability companies to be effectively invulnerable for the actions of their businesses, even when it may be possible for the Plaintiff to pierce the corporate veil. In his pending motion, the Plaintiff represents to this Court that Defendant Tavern was undercapitalized, that funds were co-mingled between the members and the business, and that Mr. Mangum used company assets to conduct personal business. Although, at the moment, this Court chooses not to decide whether the Tavern's corporate veil should

be pierced, it does recognize that the Plaintiff is alleging classic elements that might later allow him to do so.

Order

It is, therefore, hereby **ORDERED** that further proceedings in this matter, excluding discovery, be stayed until such questions have been decided by the West Virginia Supreme Court of Appeals and the decision thereof certified back to this Court. Accordingly, the timeframes for such matters, excluding discovery, as previously established in the “Scheduling Order” herein, are suspended. The parties are permitted and encouraged to continue discovery throughout the certification process.

Both parties are **DIRECTED** to prepare a joint appendix of the record sufficient to permit review of the certified question alongside a number of copies required by Rule 38 of the West Virginia Rules of Appellate Procedure. The joint appendix must comply with the format, page numbering, and general requirements in Rule 7 of the West Virginia Rules of Appellate Procedure. It must be filed at the same time the Petitioner’s brief is filed, unless otherwise provided.

The Clerk of this Court is **DIRECTED** to transmit this Order and a list of the docket entries in the case to the Clerk of the West Virginia Supreme Court of Appeals.

The Clerk of this Court shall provide certified copies of this Order to:

Gregory H. Schillace
Schillace Law Offices
P.O. Box 1526
Clarksburg, WV 26302

David E. Goddard
Goddard Law
333 East Main St.
Clarksburg, WV 26301

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P.O. Box 63
Gans, PA 15439

The Honorable Rory L. Perry II
Clerk of the West Virginia Supreme Court of Appeals
State Capitol Room E-317
Charleston, WV 25305

ENTER: April 12, 2012


THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 12 day of April, 2012.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 13 day of April, 2012.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia