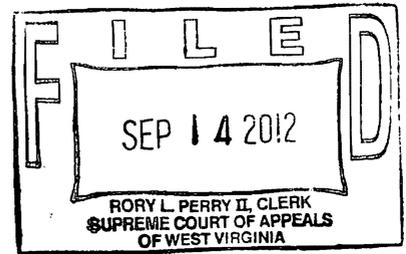


APPEAL NO. 12-0507



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UPON CERTIFIED QUESTIONS FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA, CIVIL ACTION NO. 11-C-231-2

JOSEPH KUBICAN,

Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY BRIEF

Counsel for Petitioner:

Edmund L. Wagoner (WVSB #10605)
David E. Goddard (WVSB #8090)
Goddard & Wagoner
333 East Main Street
Clarksburg, WV 26301
Phone: (304) 933-1411
Fax (855) 329-1411

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

TABLE OF EXHIBITS. iv

STATEMENT REGARDING ORAL ARGUMENT. 1

ARGUMENT. 1

 I. There is No Basis for Legal Distinction Between
 The Limitation from Liability of LLC Members and
 Corporate Shareholders 1

 II. Tavern, LLC’s Liability Is Irrelevant to the
 Certified Question 3

 III. The Authority Relied Upon By Respondent
 Does Not Preclude LLC Veil Piercing 4

CONCLUSION. 7

CERTIFICATE OF SERVICE. 8

TABLE OF AUTHORITIES

CASE LAW

<u>Connecticut Light & Power v. Westview Carlton Group, LLC</u> , 950 A.2d 522, (Conn. App. Ct. 2008)	5
<u>Haddix v. Suburban Lanes, Inc.</u> , 176 W. Va. 744, 349 S.E.2d 910 (1986)	3
<u>Hamby v. Profile Products, LLC</u> , 361 N.C. 630, 652 S.E.2d 231 (2007)	4
<u>Jack v. Fritts</u> , 193 W. Va. 494, 457 S.E.2d 431 (1995)	3
<u>Laya v. Erin Homes, Inc.</u> , 177 W. Va. 343, 352 S.E.2d 93 (1986).	1, 2
<u>Miller v. Whitworth</u> , 193 W. Va. 262, 455 S.E.2d 821 (1994)	3
<u>Netjets Aviation, Inc. v. LHC Commun., LLC</u> , 537 F.3d 168 (2d Cir. 2008).	5, 6
<u>Phillips v. Larry’s Drive-in Pharmacy, Inc.</u> , 220 W. Va. 484, 647 S.E.2d 920 (2007)	2
<u>Vasudevan v. Pragosa</u> , 40 Conn. L. Repr. 617, 2006 WL 328367, 2006 Conn. Super. LEXIS 207 (2007)	4, 5
<u>Wilton Corp. v. Ashland Castings Corp.</u> , 188 F.3d 670 (6 th Cir. 1999).	2

STATE STATUTES & OTHER AUTHORITIES

W. Va. Code § 31-1-89.	1, 2, 3
W. Va. Code § 31B-3-303.	1, 3
J. Leet, et al., <u>The Limited Liability Company</u> § 11:30	6
David H. Barber, <u>Piercing the Corporate Veil</u> 17 Willamette L. Rev. 371	1

TABLE OF EXHIBITS

Transcript from the Rule 30(b)(7) Deposition of The Tavern, LLC. 001

Original Complaint. 049

Original Answer. 056

Plaintiff’s Motion for Leave to Amend Complaint. 065

Response of the Defendant, The Tavern, LLC d/b/a Bubba’s Bar and Grill, To
Motion of the Plaintiff to Amend the Complaint.185

Plaintiff’s Reply in Support of His Motion for Leave to Amend Complaint. 195

Plaintiff’s Supplemental Reply in Support of His Motion for Leave to Amend Complaint. . . .244

Amended Complaint. 270

Certified Copy of Docket Sheet from Circuit Court of Harrison County. 278

STATEMENT REGARDING ORAL ARGUMENT

The issue presently before the Court has never been formally adjudicated in West Virginia and thus is novel. It also involves questions of fundamental public importance and oral argument is appropriate pursuant to R.A.P. 20(a).

ARGUMENT

I. THERE IS NO BASIS FOR A LEGAL DISTINCTION BETWEEN THE LIMITATION FROM LIABILITY OF LLC MEMBERS AND CORPORATE SHAREHOLDERS

In his Response, the Respondent correctly points out that W. Va. Code § 31-1-89, and indeed the entire corporations code, underwent a major overhaul in 2002. This point merely betrays Petitioner's counsel's failure to Shephardize a statute found in a graying set of Michie's Code and for this failure Petitioner's counsel apologizes to the Respondent and to the Court. This fact does not, however, signal a seismic change in the law of this state. Rather, the former W. Va. Code § 31-1-89, and the provision relied upon by the Respondent, W. Va. Code § 31B-3-303, are simply statements of the general rule that the liability of owners of a corporation or LLC is generally limited. At issue in this case is the exception to that general rule. The Respondent's position is that the technical form of an entity dictates whether the judiciary may apply that exception to prevent injustice to the public. The law of this state has never elevated such form above function and this Court must therefore answer the certified question in the negative.

Corporations are statutory creations, designed to promote commerce by limiting the liability of corporate owners or shareholders. See Laya v. Erin Homes, Inc., 177 W. Va. 343, 352 S.E.2d 93 (1986) (quoting David H. Barber, Piercing the Corporate Veil 17 Willamette L. Rev. 371, 373 (1981) "Given the purpose of promoting commerce by providing limited liability for shareholders in state corporation laws, courts have been reluctant to pierce the corporate veil .

. . .”). Veil piercing, on the other hand, “is an equitable remedy designed to avoid the injustice which results from abuse of the corporate form” Wilton Corp. v. Ashland Castings Corp., 188 F.3d 670 (6th Cir. 1999).

Logically, the doctrine of veil piercing must necessarily have followed the decision of the legislature to cloak certain business owners with limited liability. The seminal Laya case bears this point out. In the Laya case, this Court specifically addressed W. Va. Code § 31-1-89 and the legislative proclamation of limited liability contained therein stating, “a corporate shareholder’s liability is usually limited to his or her capital investment in the corporation, and the shareholder is normally not liable individually to a creditor in the organization.” Laya 177 W. Va. at 346, 352 S.E.2d at 97. Despite its clear recognition of this fact, this Court went on to delineate the factors relevant to a veil piercing analysis and remanded the case for further proceedings consistent with its opinion. Thus, the existence or non-existence of a statute specifically stating that owners are generally not liable is clearly not dispositive of whether the veil may be pierced. Such statutes merely state the general rule: that the owner’s liability is limited. They do not, however, preclude operation of the longstanding judicially created exception to that rule: equitable veil piercing.

Furthermore, adoption of the Respondent’s rationale would amount to blessing the implicit legislative repeal of a longstanding judicial doctrine, which is disfavored in West Virginia and elsewhere. As this Court has repeatedly held, statutes in derogation of the common law are strictly construed and such statutes “are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms.” Syl. Pt. 3-4, Phillips v. Larry’s Drive-in Pharmacy, Inc., 220 W. Va. 484, 647 S.E.2d 920 (2007). The legislature could have abolished the veil piercing doctrine

altogether or precluded its application to LLCs by clearly stating that intention in the statute. It did neither but adopted a uniform law which, as discussed more fully in the Petitioner's brief, has rather uniformly been determined to incorporate the equitable doctrine of veil piercing in some circumstances. This Court should not, therefore, repeal by implication the long standing doctrine of veil piercing.

In sum, the existence of W. Va. Code § 31B-3-303 or the non-existence of W. Va. Code § 31-1-89 have no bearing on whether this Court may apply the equitable doctrine of veil piercing to an LLC. The legislature has created no distinction in the sort of limited liability generally applicable to the owners of either type of entity and this court should not imply or create a distinction as to which exceptions to that limited liability apply. Accordingly, this Court must answer the certified question in the negative.

II. TAVERN, LLC'S LIABILITY IS IRRELEVANT TO THE CERTIFIED QUESTION

In section "B" of the Respondent's brief, the Respondent states that "considering the nonexistence of any duty owed by the defendant, The Tavern, LLC d/b/a Bubba's Bar and Grill (hereinafter referred to as "Tavern"), to the appellant, the circuit court was correct to refuse the amendment." (Resp.'s Brief at P. 10.) In support of its argument, the Respondent cites Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1994); Haddix v. Suburban Lanes, Inc., 176 W. Va. 744, 349 S.E.2d 910 (1986) and Jack v. Fritts, 193 W. Va. 494, 457 S.E.2d 431 (1995) for the proposition that the Tavern owes no duty to protect its customers from criminal conduct. (Resp.'s Brief at 9-10). While these cases may be helpful to establishing the duty owed by

Tavern to its customers, they have no relevance to the narrow issue before this Court. Accordingly, this argument has no bearing on the Court's resolution of this question.

III. THE AUTHORITY RELIED UPON BY RESPONDENT DOES NOT PRECLUDE LLC VEIL PIERCING

In its brief, the Respondent cites two cases as supporting its position that West Virginia's Limited Liability Company Act is an absolute bar to application of the veil piercing doctrine to LLCs: Hamby v. Profile Products, LLC, 361 N.C. 630, 652 S.E.2d 231 (2007) and Vasudevan v. Pragosa, 40 Conn. L. Repr. 617, 2006 WL 328367, 2006 Conn. Super. LEXIS 207 (2007). Neither case supports the position advanced by the Respondent and therefore neither is persuasive on the point before the Court.

Indeed, the Hamby case actually favors the Petitioner's argument:

The decisive question then, whether Profile was conducting the business of Terra-Mulch, requires us to consider the nature of a limited liability company ("LLC") as a business entity and the role of its member-manager. An LLC is a "statutory form of business organization . . . that combines characteristics of business corporations and partnerships." Russell M. Robinson, II, Robinson on North Carolina Corporate Law § 34.01, at 34-2 (rev. 7th ed. 2006) [hereinafter Robinson]. Similar to statutes enacted in other states, the North Carolina Limited Liability Company Act provides for the formation of a business entity combining the limited liability of a corporation and the more simplified taxation model of a partnership. *Id.* § 34.01, at 34-2 to -3. These state laws provide default rules, most of which can be varied by the parties forming an LLC. *Id.* As such, the "LLC is primarily a creature of contract," allowing for great flexibility in its organization. *Id.* § 34.01, at 34-3. **However, as its name implies, limited liability of the entity's owners, often referred to as "members," is a crucial characteristic of the LLC form, giving members the same limited liability as corporate shareholders.** *Id.* § 34.03[3], at 34-15.

Hamby, 652 S.E.2d at 236 (emphasis added). Thus, the owners of an LLC would have the same “limited liability” as the owners of a corporation. Because corporate shareholders can be subject to personal liability when the elements of veil piercing exist, the *same* veil piercing analysis should apply to members of an LLC.

Similarly, the Vasudevan case does not preclude piercing in all circumstances. Instead, it merely states the following:

In paragraph 6 of counts 1, 2 and 3, the plaintiffs also allege that Saucier is liable as the “sole owner” of “the limited liability company known as T.J.Z ...” Connecticut General Statutes § 34-133 provides that no member or manager of a Limited Liability Company shall be liable, *solely* by reason of being a member or manager of such limited liability company, for any liability of the limited liability company, or any acts or omissions of any other member or manager of the limited liability company. Further, Connecticut General Statutes § 34-134 provides that a member of a limited liability company is not a proper party to an action against a limited liability company *solely* by being a manager or member of such limited liability company.

Vasudevan, 2006 Conn. Super. LEXIS 207 at 13 (emphasis added). Petitioner does not disagree with the proposition set forth therein: that simply being a member or manager of an LLC (or a corporation for that matter) does not render one liable for the acts of the LLC. However, this opinion does not stand for the proposition that an LLC cannot ever be pierced.

Moreover, Respondent cannot possibly claim that the State of Connecticut (the jurisdiction of the Vasudevan Court) has adopted its position. In Conn. Light & Power Co. v. Westview Carlton Group, LLC, 950 A.2d 522 (Conn. App. Ct. 2008), Westview Carlton Group, LLC and its sole owner appealed from the trial court’s order finding them both liable to the plaintiff. The LLC Defendant claimed, among other things, that the court improperly pierced the corporate veil as to its sole owner. Id. at 524. The Court succinctly stated: “The defendants first claim that the court improperly concluded that Sousa was personally liable for Westview Carlton

Group LLC's breach of contract. We disagree.” Id. at 526. The Court went on to do a veil piercing analysis for the LLC defendant.

As the basis for his position that an LLC veil may not be pierced in the absences of a statute specifically allowing such piercing, the Respondent cites Netjets Aviation, Inc. v. LHC Commun., LLC, 537 F.3d 168 (2nd Cir. 2008). This reliance is also misplaced. While the Second Circuit quoted J. Leet, et al., The Limited Liability Company § 11:130 at 11-9 for the proposition that “Every State that has enacted LLC piercing legislation has chosen to follow corporate law standards and not develop a separate LLC standard”, that point had no bearing on the Court’s decision. Netjets, 537 F.3d at 176. In fact, the Court also quoted the same treatise for the proposition that “Emerging caselaw illustrates’ that ‘situations that result in a piercing of the limited liability veil are similar to those [that warrant] piercing the corporate veil.’” Id. Furthermore, the Court in Netjets decided that Delaware common law principles regarding piercing the veil “are generally applicable as well where one of the entities in question is an LLC rather than a corporation.” Id. at 178. Ultimately, the Netjets Court concluded that the issue of whether veil piercing was warranted against the LLC in that case was an issue for the jury. Id. at 184.

In sum, the Respondent has cited this Court to no authority for the arbitrary distinction between the limited liability afforded a corporate shareholder and that afforded an LLC manager. In fact, the cases upon which the Respondent relies simply reinforce the Petitioner’s assertion that the liability is identical and where necessary and appropriate, the Courts of this state are empowered to disregard to corporate (or company) fiction and hold those owners responsible liable for the entity’s debts. This Court should therefore answer the certified question in the negative.

CONCLUSION

For the foregoing reason, Petitioner Joseph Kubican respectfully requests that this Court, in answering the questions certified to it by the Circuit Court of Harrison County, enter an Opinion finding that W. Va. Code § 31B-3-301 *et seq.* is not an absolute bar to the liability of the members of a limited liability company and that equitable veil piercing is available to prevent fraud and injustice.

Respectfully Submitted,



Edmund L. Wagoner (WVSB #10605)

David E. Goddard (WVSB #8090)

Goddard & Wagoner

333 East Main Street

Clarksburg, WV 26301

Phone: (304) 933-1411

Fax (855) 329-1411

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2012, I served the foregoing "Petitioner's Brief" upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Gregory H. Schillace, Esquire
Schillace Law Office
P.O. Box 1526
Clarksburg WV 26302-1526

Thomas W. Kupec, Esquire
Kupec & Associates, PLLC
228 Court Street
Clarksburg WV 26301



Edmund L. Wagoner (WVSB #10605)
David E. Goddard (WVSB #8090)
Goddard & Wagoner
333 East Main Street
Clarksburg, WV 26301
Phone: (304) 933-1411
Fax (855) 329-1411
Counsel for Petitioner