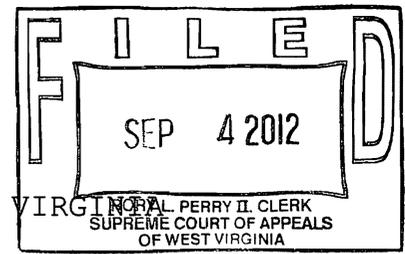


NO. 12-0507



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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JOSEPH KUBICAN,

Plaintiff

v.

Civil Action No. 11-C-231-2  
Judge Thomas A. Bedell

THE TAVERN, LLC D/B/A  
BUBBA'S BAR AND GRILL,  
JAMES PAUGH, LAWSON MANGUM,  
SHAFFER AMUSEMENT COMPANY, LLC,  
and HARRY WISEMAN,

Defendants.

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FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
HONORABLE THOMAS A. BEDELL, JUDGE

---

**BRIEF OF THE APPELLEE, THE TAVERN, LLC**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**TABLE OF CONTENTS**

TABLE OF CITATIONS . . . . . ii

STATEMENT OF THE KIND OF PROCEEDING AND  
NATURE OF THE RULING BELOW . . . . . 1

STATEMENT OF FACTS . . . . . 4

SUMMARY OF ARGUMENT . . . . . 5

STATEMENT REGARDING ORAL ARGUMENT . . . . . 5

POINTS AND AUTHORITIES . . . . . 6

DISCUSSION . . . . . 8

    A. Standard of Review . . . . . 8

    B. The Circuit Court Correctly Refused to Allow  
the Amendment of the Complaint as the Claims  
in the Amendment Against the Members of The  
Tavern, LLC, Would not have Permitted the  
Presentation of the Merits of the Action . . . . . 8

    C. West Virginia Code § 31B-3-303 Provides That  
Members or Managers of West Virginia Limited  
Liability Companies Are Not Personally Liable  
for Any Liability of the Limited Liability  
Company. . . . . . 10

CONCLUSION . . . . . 21

**TABLE OF CITATIONS**

**Federal Cases**

Netjets Aviation, Inc. v. LHC Commun., LLC,  
537 F.3rd 168 (2<sup>nd</sup> Circuit 2008) . . . . . 6, 17

**State Cases**

Advanced Telephone Systems, Inc. v. Comnet  
Professional Mobile Radio, LLC, 2004 Pa.Super.  
100, 846 A.2d 1264 (2004) . . . . . 6, 17

Allen v. Pinnacle Healthcare Systems, LLC, 394 S.C.  
268, 715 S.E.2d 362 (2001) . . . . . 6, 13

Cemen Tech, Inc. v. 3D Industries, LLC, 753 N.W.2d1  
(Iowa 2008) . . . . . 6, 15, 16

Dumas v. Infosave Corp., 320 S.C. 188, 463 S.E.2d  
641 (Ct. App. 1995) . . . . . 6, 14

Equity Trust Company v. Cole, 766 N.W.2d 334  
(Minn.App. 2009) . . . . . 6, 19

Gasstop Two, LLC v. Seatwo, LLC, 225 P.3d 1072  
(Wyo. 2010) . . . . . 6, 16

Haddix v. Suburban Lanes, Inc., 176 W.Va. 744, 349  
S.E.2d 910 (1986) . . . . . 6, 9

Hamby v. Profile Products, LLC, 361 N.C. 630, 652  
S.E.2d 231 (2007) . . . . . 6, 12

Jack v. Fritts, 193 W.Va. 494, 457 S.E.2d 431 (1995) . . . 6, 10

Lloyd's, Inc. v. Lloyd, 225 W.Va. 377, 693 S.E.2d  
451 (2010) . . . . . 6, 8

Miller v. Whitworth, 193 W.Va. 262, 455 S.E.2d  
821 (1994) . . . . . 6, 9

Mott v. Krby, 225 W.Va. 788, 696 S.E.2d  
304 (2010) . . . . . 6, 20

Sheffield Service Company v. Trowbridge, 211 P.3d  
714 (Colo.App. 2009) . . . . . 6, 19

State ex rel. Vedder v. Zakaib, 217 W.Va. 528,  
618 S.E.2d 537 (2005) . . . . . 6, 8

Thomas & Thomas Court Reporters, LLC v. Switzer,  
2012 WL 104481 (Sup.Ct.Neb. 2012) . . . . . 6, 14, 15

Traders Bank v. Dils, 228 W.Va. 691, 704 S.E.2d  
692 (2010) . . . . . 7, 8

Vasudevan v. Pragosa, 40 Conn. L. Rptr. 617  
2006 WL 328367 (Conn. Super. Ct. 2006) . . . . . 7, 12

Westmeyer v. Flynn, 889 N.E.2d 671 (Ill.App. 2008) . . . . . 7, 19

Wright Therapy Equipment, LLC v. Blue Cross and  
Blue Shield of Alabama, 991 So.2d 701  
(Ala. 2008) . . . . . 7, 13

**Statutes and Regulations**

Colorado Revised Statute § 7-80-107(1) . . . . . 7, 19

Illinois Compiled Statute 805 ILCS 180/10-10(a) . . . . . 7, 19

Iowa Code Annotated § 490A.603 . . . . . 7, 16

Minnesota Statute § 322B.303[2] . . . . . 7, 18

Washington Revised Code § 25.15.060 . . . . . 7, 18

West Virginia Code § 31-1-89 . . . . . 7, 20

West Virginia Code § 31B *et seq.* . . . . . 3, 7

West Virginia Code § 31B-3-303 . . . . . *passim*

West Virginia Code § 31B-3-303(a) . . . . . 7, 11

West Virginia Code § 31B-3-303(b) . . . . . 7, 11

Wyoming Statute § 17-15-113 . . . . . 7, 16

**Rules of Civil Procedure**

West Virginia Rules of Civil Procedure Rule 15(a) . . . . . 7, 8

**Rules of Appellate Procedure**

West Virginia Rules of Appellate Procedure Rule 19(a) . . . . . 5, 7

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FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
HONORABLE THOMAS A. BEDELL, JUDGE

---

**BRIEF OF THE APPELLEE, THE TAVERN, LLC**

---

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**I. Statement of the Kind of Proceeding  
and Nature of the Ruling Below**

The appellant, Joseph Kubican, instituted this civil action against Bubba's Bar and Grill and Harry Wiseman on May 27, 2011. Record at 278. The essence of the civil action involves injuries allegedly received by the appellant in an altercation with Mr. Wiseman occurring on the afternoon of February 7, 2011.

Initially, the appellant named Bubba's Bar and Grill as a defendant, however, Bubba's Bar and Grill is the name under which the appellee, The Tavern, LLC, operated. On July 28, 2011 the appellee, The Tavern, LLC, was substituted in place of the fictitious name of Bubba's Bar and Grill. Record at 278.

On or about February 22, 2012, the appellant filed a motion for leave to amend his complaint to include James Paugh and Lawson Mangum as additional defendants. Record at 065. The only involvement of James Paugh and Lawson Mangum with respect to this matter is that they are the members of the appellee, The Tavern, LLC. Record at 080.

On or about February 27, 2012, the plaintiff filed a second motion to amend his complaint to add Shaffer Amusement Company, LLC as an additional defendant. Record at 279. The amendment to add Shaffer Amusement Company, LLC as a defendant was based upon the theory that the leasing by Shaffer Amusement Company, LLC of West Virginia limited video lottery machines to The Tavern, LLC created a joint venture between the two entities. This second motion to amend was permitted by the circuit court on April 24, 2012. Record at 278.

The appellee, The Tavern, LLC, filed a response objecting to the first motion to amend the complaint to add the members and/or managers of The Tavern, LLC as defendants in this action. Record at 185. Recognizing that West Virginia Code § 31B-3-303 provides that members or managers of a West Virginia limited liability

company are not personally liable for any debt, obligation or liability of the company, the circuit court answered the following question in the affirmative:

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?

The circuit court in its April 12, 2012 order recognized that this Court has not had the opportunity to address West Virginia Code § 31B-3-303 in this context, therefore, the circuit court certified this question to this Court. The circuit court did recognize however, that the plain reading of West Virginia Code § 31B-3-303 provides that owners and members of a limited liability company are completely protected from liability stemming from the operation of the limited liability company. The circuit court stated that this was a plain reading of this legislative enactment.<sup>1</sup>

## **II. Certified Question**

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*<sup>2</sup>

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<sup>1</sup> The April 12, 2012 Order and certification of the circuit court is not contained in the appendix, therefore, it is attached hereto.

<sup>2</sup> This is the answer of the circuit court.

### **III. Statement of Facts**

1. The appellee, The Tavern, LLC, operated a private club in accordance with West Virginia law in the City of Bridgeport, Harrison County, West Virginia with its permit being issued by the Office of West Virginia Alcohol Beverage Control Commission.

2. On the afternoon of February 7, 2011 at approximately 3:00 p.m. the appellant, Joseph Kubican, and the defendant, Harry Wiseman, became involved in an altercation resulting in alleged injuries to the appellant, Joseph Kubican. Record at 50.

3. The defendant, Harry Wiseman, plead guilty with respect to his involvement in the altercation in the criminal action against him in the Magistrate Court of Harrison County, West Virginia. See, April 12, 2012 Order and Certification attached hereto.

4. The employee of the appellee, The Tavern, LLC, who was present at the time of the altercation and the defendant, Harry Wiseman, have maintained that the appellant instigated the altercation. Record at 16. Further, neither the appellant nor the defendant, Harry Wiseman, are alleged to have been intoxicated at the time of the altercation.

5. The appellee, The Tavern, LLC, has two (2) members, James Paugh and Lawson Mangum, whom the appellant attempted to name as defendants in this action with the first motion to amend the complaint. Record at 65.

6. The appellee, The Tavern, LLC, was formed as a West Virginia limited liability company pursuant to Article 31B of the West Virginia Code. At all times relevant hereto including, but not limited to, February 7, 2011, the appellee, The Tavern, LLC, was in good standing as a West Virginia limited liability company with the West Virginia Secretary of State.

#### **IV. Summary of Argument**

The Circuit Court correctly refused the amendment of the complaint to add the members of The Tavern, LLC as defendants in this action. The Circuit Court correctly determined that West Virginia Code § 31B-3-303 provides that members or managers of limited liability companies are not personally liable for any debt, obligation or liability of the company.

#### **V. Statement Regarding Oral Argument**

Pursuant to Rule 19(a), the appellee, The Tavern, LLC, believes that oral argument should be held in this case as it involves an unsettled question regarding the application of West Virginia Code § 31B-3-303. Further, oral argument pursuant to Rule 19(a) is warranted, as this case involves a fairly narrow issue of law regarding the ability to pierce the veil of a West Virginia limited liability company.

## **VI. Points and Authorities**

### **Federal Cases**

Netjets Aviation, Inc. v. LHC Commun., LLC,  
537 F.3rd 168 (2<sup>nd</sup> Circuit 2008)

### **State Cases**

Advanced Telephone Systems, Inc. v. Comnet Professional  
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715 S.E.2d 362 (2001)

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Dumas v. Infosave Corp., 320 S.C. 188, 463 S.E.2d  
641 (Ct. App. 1995)

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Haddix v. Suburban Lanes, Inc., 176 W.Va. 744, 349  
S.E.2d 910 (1986)

Hamby v. Profile Products, LLC, 361 N.C. 630, 652  
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Jack v. Fritts, 193 W.Va. 494, 457 S.E.2d 431 (1995)

Lloyd's, Inc. v. Lloyd, 225 W.Va. 377, 693 S.E.2d 451 (2010)

Miller v. Whitworth, 193 W.Va. 262, 455 S.E.2d 821 (1994)

Mott v. Krby, 225 W.Va. 788, 696 S.E.2d 304 (2010)

Sheffield Service Company v. Trowbridge, 211 P.3d 714  
(Colo.App. 2009)

State ex rel. Vedder v. Zakaib, 217 W.Va. 528,  
618 S.E.2d 537 (2005)

Thomas & Thomas Court Reporters, LLC v. Switzer, 2012 WL 104481  
(Sup.Ct.Neb. 2012)

Traders Bank v. Dils, 228 W.Va. 691, 704 S.E.2d  
692 (2010)

Vasudevan v. Pragosa, 40 Conn. L. Rptr. 617 2006 WL 328367  
(Conn. Super. Ct. 2006)

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Blue Shield of Alabama, 991 So.2d 701 (Ala. 2008)

### **Statutes and Regulations**

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Minnesota Statute § 322B.303[2]

Washington Revised Code § 25.15.060

West Virginia Code § 31-1-89

West Virginia Code § 31B *et seq.*

West Virginia Code § 31B-3-303

West Virginia Code § 31B-3-303(a)

West Virginia Code § 31B-3-303(b)

Wyoming Statute § 17-15-113

### **Rules of Civil Procedure**

Rule 15(a) of the West Virginia Rules of Civil Procedure

### **Rules of Appellate Procedure**

West Virginia Rules of Appellate Procedure Rule 19(a)

## VII. Discussion

### A. Standard of Review

The appellee agrees with the assertion of the appellant that the standard of review is de novo. Traders Bank v. Dils, 228 W.Va. 692, 704 S.E.2d 691 (2010).

### B. The Circuit Court Correctly Refused to Allow the Amendment of the Complaint as the Claims in the Amendment Against the Members of The Tavern, LLC, Would not have Permitted the Presentation of the Merits of the Action.

This Court has held that a circuit court correctly denied a motion to amend a complaint because the claims asserted by the amendment would not have permitted the presentation of the merits of the action. Lloyds, Inc. v. Lloyd, 225 W.Va. 377, 693 S.E.2d 451 (2010). The amendment of the complaint to include Mr. Paugh and Mr. Mangum as defendants would not permit the presentation of the merits as they are expressly not liable for the debts, obligations and/or liabilities of the West Virginia limited liability company, The Tavern, LLC.

Although Rule 15(a) of the West Virginia Rules of Civil Procedure provides that the amendment of pleadings should be given freely when so required by justice, the circuit court was correct in not permitting the amendment in this action. Where the claims sought to be asserted in the amendment would not have permitted the presentation of the merits of the action a circuit court is correct in refusing the request to amend. State ex rel. Vedder v. Zakaib, 217 W.Va. 528, 618 S.E.2d 537 (2005). In this action, the

amendment to include Mr. Paugh and Mr. Mangum as defendants would not have permitted the presentation of the merits as these individuals are not responsible pursuant to West Virginia Code § 31B-3-303 for any liabilities of The Tavern, LLC.

In considering the motion to amend the complaint, the context of the cause of action asserted against the defendant, The Tavern, LLC d/b/a Bubba's Bar and Grill, and the proposed defendants who are being sued in their capacity as managers and/or members of The Tavern, LLC must be considered. The complaint and the proposed amended complaint seek to assert a claim against this defendant and the potential defendants based upon the criminal conduct of a third-party, the defendant, Harry Wiseman.<sup>3</sup>

The West Virginia Supreme Court of Appeals has held that a landlord has no duty to protect a tenant from the criminal activity of a third-party solely based upon the landlord/tenant relationship. Miller v. Whitworth, 193 W.Va. 262, 455 S.E.2d 821 (1994). The West Virginia Supreme Court of Appeals has also held that the owner or occupant of a premises used for business purposes is not the insurer of the safety of invited person present on such premises. Haddix v. Suburban Lanes, Inc., 176 W.Va. 744, 349 S.E.2d 910 (1986). In Haddix, an invitee of a bowling alley was injured in a shooting incident. This Court held that the owner of

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<sup>3</sup> Mr. Wiseman was charged criminally and entered a guilty plea with respect to the allegations against him.

the bowling alley was not liable as the third-party conduct was not foreseeable.

This issue was also addressed by the West Virginia Supreme Court of Appeals in Jack v. Fritts, 193 W.Va. 494, 457 S.E.2d 431 (1995). The Court held that a landlord owes no duty to a tenant's social guest to protect that guest from criminal conduct of third-parties.

Accordingly, considering the nonexistence of any duty owed by the defendant, The Tavern, LLC d/b/a Bubba's Bar and Grill, to the appellant, the circuit court was correct to refuse the amendment.

**C. West Virginia Code § 31B-3-303 Provides That Members or Managers of West Virginia Limited Liability Companies Are Not Personally Liable for Any Liability of the Limited Liability Company.**

West Virginia Code § 31B-3-303 provides that members or managers of limited liability companies are not personally liable for any debt, obligation or liability of the company solely by reason of being or acting as a member or manager. Accordingly, the circuit court correctly denied the motion to amend the complaint to add James Paugh and Lawson Mangum as defendants in an effort to pierce the veil of the limited liability company.

The proposed first amended complaint tendered by the appellant contained in Count 6 allegations entitled "Veil Piercing". Record at 080. Count 6 is the only count of the proposed amended complaint purporting to assert a claim against Lawson Mangum and James Paugh. Record at 074.

The claims asserted in Count 6 of the proposed amended complaint contain no allegation against Mr. Paugh and Mr. Mangum outside of their status as members and/or managers of the limited liability company. Record at 074. Accordingly, as West Virginia Code § 31B-3-303(a) provides that Mr. Paugh and Mr. Mangum are not personally liable for any debt, obligation or liability of the limited liability company, the amendment to assert a claim for which these proposed defendants are statutorily shielded was properly refused by the Circuit Court.

Count 6 of the proposed amended complaint alleges in its thirteen (13) paragraphs that Mr. Paugh and Mr. Mangum as members and/or managers of the limited liability company failed to observe the usual company formalities or requirements relating to the exercise of the powers or management of the limited liability company making them responsible for the liabilities of the limited liability company. Record at 080. However, such allegations are expressly stated by West Virginia Code § 31B-3-303(b) to not be "a ground for imposing personal liability on the members or managers for liabilities of the company."<sup>4</sup> Accordingly, the allegations of

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<sup>4</sup> West Virginia Code § 31B-3-303(b) provides as follows:

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.

Count 6 claiming the failure to observe usual company formalities or requirements, does not permit the presentation of the merits of this action.

Contrary to the assertion of the appellant, courts of other jurisdictions addressing personal liabilities of members and/or managers of limited liability companies have determined that a statutory provision specifically shielding members and/or managers from liability when acting as or on behalf of the limited liability company is valid and does protect members and/or managers from such liability. Hamby v. Profile Products, LLC, 361 N.C. 630, 652 S.E.2d 231 (2007); Vasudevan v. Pragosa, 40 Conn. L. Rptr. 617, 2006 WL 328367 (Conn. Super. Ct. 2006) (unreported opinion). This Court has not addressed the statutory shield provided by West Virginia Code § 31B-3-303 to members and/or managers of limited liability companies, however, as recognized by the circuit court a plain reading of the statute supports the position of the circuit court that piercing the veil of the limited liability company is not allowed.

The cases relied upon by the appellant allowing the piercing of the veil of the limited liability company are either not applicable to the situation at hand; not decided under similar statutory provisions; or, not accurately represented by the plaintiff. After review of these same authorities the circuit court concluded that the purpose of the statutory scheme allowing

limited liability companies was to limit the liabilities of the members.

The appellant cited to this Court the decision of the Alabama Supreme Court in Wright Therapy Equipment, LLC v. Blue Cross and Blue Shield of Alabama, 991 So.2d 701 (Ala. 2008). However, the decision in Wright Therapy, does not discuss the piercing of the veil of a limited liability company or personal liability of members/managers of limited liability companies in any respect.

The South Carolina Court of Appeals decision in Allen v. Pinnacle Healthcare Systems, LLC, 394 S.C. 268, 715 S.E.2d 362 (2001), was also identified to this Court for the proposition that it is appropriate to pierce the veil of a limited liability company. However, the South Carolina case involved the failure to pay wages pursuant to the South Carolina Payment of Wages Act.

In Allen, the South Carolina Court addressed the personal liability of the members of a health care group to a physician for unpaid wages under the Payment of Wages Act, which is the South Carolina version of the West Virginia Wage Payment and Collection Act. The South Carolina Payment of Wages Act provides for individual liability of agents or officers of a corporation who knowingly permit the corporation to violate the Payment of Wages Act. Accordingly, the South Carolina Court in Allen, did not allow the piercing of the veil of a limited liability company, but did uphold the personal liability of those members who knowingly permitted the failure to pay timely wages.

The Court of Appeals of South Carolina determined in Dumas v. Infosave Corp., 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995), another South Carolina Payment of Wages Act case, that the South Carolina legislature intended to impose individual liability on agents or officers of a corporation who knowingly permit their corporation to violate the Payment of Wages Act. The South Carolina Court stated that the fact that members of a limited liability company were personally held liable for the payment of wages had nothing to do with an effort to pierce the veil of a limited liability company but instead was based upon the Payment of Wages Act which provides individual liability for agents or officers of the corporation who knowingly permit their corporation to violate that act. Accordingly, the South Carolina cases relied upon by the appellant are not on point to this issue.

In Thomas & Thomas Court Reporters, LLC v. Switzer, 810 N.W.2d 677 (Neb. 2012), the Nebraska Court addressed the circumstances under which a court could consider disregarding a limited liability companies identity. The Nebraska Court held that this could occur:

Only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another

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a plaintiff seeking to impose liability on an individual member or manager has the burden of proving that the companies identity should be disregarded to prevent fraud or injustice to the plaintiff.

The Nebraska Court did not disregard the limited liability company's identity in the Switzer action. This decision does not apply to the instant action as there is no allegation contained in the proposed first amended complaint which alleges fraud on the part of the appellee, Mr. Paugh or Mr. Mangum.

The Supreme Court of Iowa decision in Cemen Tech, Inc. v. 3D Industries, LLC, 753 N.W.2d 1 (Iowa 2008), also provides no support for the proposition of the appellant. Without any discussion of the statutory provisions regarding the shielding of members and/or managers of limited liability companies from any company liability the Iowa Court upheld a grant of summary judgment for the limited liability company. The Iowa Court did state:

The burden is on the party seeking to pierce the **corporate** veil to show the exceptional circumstances required. The factors which would support such a finding include (1) the corporation is undercapitalized; (2) it lacks separate books; (3) its finances are not kept separate from individual finances or individual obligations are paid by the corporation; (4) the corporation is used to promote fraud or illegality; (5) corporate formalities are not followed; and (6) the corporation is a mere sham. (Emphasis added)

These were requirements discussed for the piercing of a **corporate** veil not the veil of a limited liability company.

However, at the time of the Iowa Court's decision in Cemen Tech, there existed in the Iowa Code Annotated the following subsection:

A member of a limited liability company is personally liable under a judgment or for any debt, obligation or liability of the limited liability company, whether that liability or obligation arises in contract, tort, or otherwise, under the same or similar circumstances and to the same extent as a shareholder of a corporation may be personally liable for any debt, obligation or liability of the corporation....

I.C.A. § 490A.603.

At the time of the Cemen Tech action, the legislative branch of the Iowa government determined to statutorily permit the piercing of the veil of the limited liability company. West Virginia has no such statutory provision. Accordingly, the Supreme Court of Iowa decision is likewise unhelpful to the appellant's cause.

The appellant also relies upon a 2010 decision of the Supreme Court of Wyoming in Gasstop Two, LLC v. Seatwo, LLC, 225 P.3d 1072 (Wyo. 2010). Gasstop, facially appears to provide support for the plaintiff's assertion that it is possible to ignore the statutory shield provided to limited liability companies under certain circumstances. However, the Gasstop decision was rendered relying upon Wyoming Statute § 17-15-113 which approximately four (4) months later was repealed.

The Wyoming Legislature replaced the statute relied upon in Gasstop, with a statute strikingly similar to West Virginia Code § 31B-3-303. The Wyoming statute presently provides as follows:

(a) The debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or

otherwise: (i) Are solely the debts, obligations or other liabilities of the company; and (ii) Do not become the debts, obligations or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager. (b) The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company.

Since the statutory change the Supreme Court of Wyoming has not readdressed this position.

In Advanced Telephone Systems, Inc. v. Comnet Professional Mobile Radio, LLC, 2004 Pa.Super. 100, 846 A.2d 1264 (2004). The Superior Court of Pennsylvania determined that evidence was sufficient to support the trial court's refusal to pierce the corporate veil of the limited liability company, however, the decision contains no analysis of the necessary initial inquiry of the propriety of piercing the veil of a limited liability company. As this decision did not address directly the issue at hand it should not be relied upon by this Court.

A significant disconnect between West Virginia law and the appellant's position is highlighted by the decision in Netjets Aviation, Inc. v. LHC Commun., LLC, 537 F.3rd 168 (2<sup>nd</sup> Circuit 2008). In Netjets, the Second Circuit addresses the substantial issue in this case which the appellant has avoided. In Netjets, the Court states as follows:

Every state that has enacted LLC piercing legislation has chosen to follow corporate law standards and not develop a separate LLC standard.

Id. at 176.

Unlike many states, West Virginia has not adopted LLC piercing legislation.

For example the State of Washington has the following statutory provision:

Members of a limited liability company shall be personally liable for any act, debt, obligation, or liability of the limited liability company to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances. In this regard, the court may consider the factors and policies set forth in established case law with regard to piercing the corporate veil except that the failure to hold meetings of the members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish that the members have personal liability ... if the certificate of formation and the limited liability company agreement do not expressly require the holding of meetings of members or managers.

Wash.Rev.Code § 25.15.060.

The State of Minnesota has adopted the following provision:

The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies.

Minn.Stat. § 322B.303[2].

The State of Colorado has adopted the following provision:

In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law.

Colo.Rev.Stat. § 7-80-107(1). Texas provides for the piercing of the veil of a limited liability company by having a catch all limited liability company provision making the Texas Business Corporation Act applicable to limited liability companies. The Illinois LLC Act protects members only to the same extent that shareholders of Illinois corporations are protected in analogous circumstances. 805 ILCS 180/10-10(a).

Accordingly, the citation of the appellants to the Minnesota Court of Appeals decision in Equity Trust Company v. Cole, 766 N.W.2d 334 (Minn.App. 2009), and the Colorado Court of Appeals decision in Sheffield Service Company v. Trowbridge, 211 P.3d 714 (Colo.App. 2009), and the Illinois Court of Appeals decision in Westmeyer v. Flynn, 889 N.E.2d 671 (Ill.App. 2008), must be disregarded. Each of these states have clearly adopted LLC piercing legislation which West Virginia has not.

As provided herein the appellee, The Tavern, LLC, is a West Virginia limited liability company organized under Chapter 31B of the West Virginia Code. The West Virginia Limited Liability

Company Act was enacted in 1996. This Court has previously held that a member of a limited liability company possess no ownership interest in the limited liability company but rather as a member is entitled to a distributional interest in the limited liability company. Mott v. Kirby, 225 W.Va. 788, 696 S.E.2d 304 (2010).

West Virginia limited liability companies organized under Chapter 31B of the West Virginia Code are separate and distinct from corporations created under the West Virginia Business Corporation Act contained in Chapter 31D of the West Virginia Code. One significant difference between a West Virginia corporation and a West Virginia limited liability company is the limited liability of members as provided in West Virginia Code § 31B-3-303.

There is no corresponding provision to West Virginia Code § 31B-3-303 for corporations created under the West Virginia Business Corporation Act. The limited liability of the members is the purpose for creating limited liability companies.

The appellant directs this Court to compare the provisions of West Virginia Code § 31-1-89 which purportedly state that there is no liability for shareholders or subscribers to a corporation and West Virginia Code § 31B-3-303 regarding the shield of liability for members or managers of West Virginia limited liability companies. However, West Virginia Code § 31-1-89 was repealed by the West Virginia Legislature in 2002. Accordingly, there is no appropriate comparison between these statutory provisions.

Clearly, the appellant requests that this Court legislate away the provisions of West Virginia Code § 31B-3-303 which, as found by the circuit court, plainly shields members or managers of limited liability companies from claims asserted such as asserted by the appellant. However, this Court is not a legislative body and cannot substitute its judgment for that of the Legislature in this regard.

**VIII. Conclusion**

Based upon the foregoing, the appellee, The Tavern, LLC, respectfully requests the decision of the Circuit Court of Harrison County, West Virginia in its Order and Certification of April 12, 2012 be affirmed.

Dated this 31<sup>st</sup> day of August, 2012.



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NO. 12-0507

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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JOSEPH KUBICAN,

Plaintiff

v.

Civil Action No. 11-C-231-2  
Judge Thomas A. Bedell

THE TAVERN, LLC D/B/A  
BUBBA'S BAR AND GRILL,  
JAMES PAUGH, LAWSON MANGUM,  
SHAFFER AMUSEMENT COMPANY, LLC,  
and HARRY WISEMAN,

Defendants.

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FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA  
HONORABLE THOMAS A. BEDELL, JUDGE

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of August, 2012, I served the foregoing **BRIEF OF THE APPELLEE, THE TAVERN, LLC** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

David E. Goddard, Esquire  
Goddard Law  
333 East Main Street  
Clarksburg, West Virginia 26301

  
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