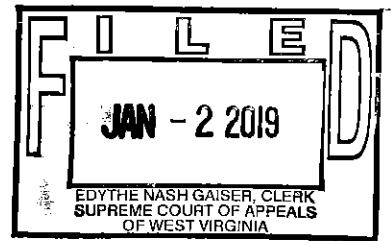


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MICHAEL A. LORMAND, Executor of
the Estate of Charles P. Winker, Jr.,
Deceased**

Plaintiff

Kanawha County Circuit Court

v.

Civil Action No. 14-C-1774

**KIMBERLY W. WINKLER, an
Individual and Kanawha County resident,
and Premiere Liquor Warehouse, LLC, a
West Virginia limited liability company,**

Defendants.

PLAINTIFF'S MOTION TO REFER CASE TO THE BUSINESS COURT DIVISION

Pursuant to Rule 29.06 of the West Virginia Trial Court Rules, the Plaintiff, Michael A. Lomand, Executor of the Estate of Charles P. Winker, Jr., Deceased, by counsel, Gordon C. Lane, Sr., and Charles R. Bailey and Jeffrey M. Carder of the law firm of Bailey & Wyant, PLLC, respectfully request the above-styled case be referred to the Business Court Division.

In regard to additional related actions:

- ☒ There are no known related actions.
- ☐ The following related actions could be the subject of consolidation, and are
- ☐ now pending
- or
- ☐ may be filed in the future. (Please list case style, number, and Court if any)

This action involves: (Please check all that apply):

- | | |
|--|---|
| <input checked="" type="checkbox"/> Breach of contract; | <input type="checkbox"/> Sale or Purchase of Commercial Products Covered by the Uniform Commercial Code; |
| <input checked="" type="checkbox"/> Sale or Purchase of Commercial Entity; | |
| <input type="checkbox"/> Sale or Purchase of Commercial Real Estate; | <input type="checkbox"/> Terms of a Commercial Lease; |
| <input type="checkbox"/> Commercial Non -consumer debts; | <input checked="" type="checkbox"/> Injunctive and Declaratory Relief Between Commercial Entities; |
| <input checked="" type="checkbox"/> Internal Affairs of Commercial Entity | |
| <input type="checkbox"/> Trade Secrets and Trademark Infringement; | <input checked="" type="checkbox"/> Liability of Shareholders, Directors, Officers, Partners, etc.; |
| <input type="checkbox"/> Non-compete Agreements; | <input checked="" type="checkbox"/> Mergers, Consolidations, Sales of Assets, Issuance of Debt, Equity and Like Interest; |
| <input type="checkbox"/> Intellectual Property, Securities, Technology Disputes; | <input checked="" type="checkbox"/> Shareholders Derivative Claims - LLC; |
| <input type="checkbox"/> Commercial Torts; | <input type="checkbox"/> Commercial Bank Transactions; |
| <input type="checkbox"/> Insurance Coverage Disputes in Commercial Insurance Policies; | <input type="checkbox"/> Franchisees/Franchisors; |
| <input type="checkbox"/> Professional Liability Claims in Connection with the Rendering of Professional Services to a Commercial Entity; | <input type="checkbox"/> Internet, Electronic Commerce and Biotechnology |
| <input type="checkbox"/> Anti-trust Actions between Commercial Entities; | <input type="checkbox"/> Disputes involving Commercial Entities; or |
| | <input checked="" type="checkbox"/> Other (Describe) Determining who can exercise control over LLC operations |

In support of this motion, this matter contains issues significant to businesses, and presents novel and/or complex commercial or technological issues for which specialized treatment will be helpful as more fully described here:

1. Charles P. Winkler, Jr. ("Dr. Winkler") died on April 7, 2010.
2. Defendant, Kimberly W. Winkler was Dr. Winkler's estranged wife. Dr. Winkler had filed for

divorce from Kimberly Winkler but died before the divorce was final.

3. As divorce proceedings had been instituted with the intent to sever the bonds of matrimony with Kimberly Winkler, Dr. Winkler made no provision in his Last Will and Testament for the distribution of any part of his estate to Kimberly Winkler.
4. Under the Will of Dr. Winkler, Michael Lormand is named Executor of his estate.
5. Dr. Winkler's Will provides that all his assets are to be distributed to the "Charles P. Winkler, Jr. Testamentary Trust" ("the Trust") and his two (2) children are to be the beneficiaries of the Trust. Michael Lormand is Trustee of the Trust.
6. On the date of his death, Dr. Winkler owned 60% of Premiere Liquor Warehouse, LLC ("Premiere Liquor") and Defendant Kimberly Winkler owned 40%.
7. Shortly after Dr. Winkler's death, Dr. Winkler's Executor and attorneys for the Executor made many requests for financial information regarding Premiere Liquor, all of which were wrongfully denied.
8. After Dr. Winkler's death, extremely contentious litigation ensued between Dr. Winkler's Estate and his estranged wife.
9. A Settlement Agreement was executed on August 23, 2011, which resolved all litigation. Provision 3B of the Settlement Agreement provided Defendant Kimberly Winkler an option to purchase the 60% interest in Premiere Liquor from Dr. Winkler's Estate at market value.
10. Under the terms of the Option, both Kimberly Winkler and the Estate were to retain a certified valuation analyst ("CVA") to appraise the market value of the 60% interest in Premiere Liquor owned by the Estate. If the CVAs could agree on the market value, that would then become the price to be paid by Kimberly Winkler if she wanted to exercise her

option to purchase the Estate's 60% interest. If the CVAs could not agree on a value, they would then select a third CVA, whose appraisal would be final and set the Option price.

11. Kimberly Winkler obtained an appraisal in which 60% Interest in the business was valued at \$34,980.00.
12. The Estate believes that 60% Interest in the business is worth several times more than the \$34,980.00.
13. The Estate retained a CVA to conduct an appraisal of 60% Interest in the business.
14. The Estate's CVA requested financial information from Kimberly Winkler to conduct an appraisal of the business.
15. Kimberly Winkler refused to provide any of the information requested by the Estate's CVA.
16. The Executor of the Estate demanded that Kimberly Winkler provide the requested information to the Estate's CVA.
17. Kimberly Winkler again refused to provide any of the information requested by the Estate's CVA and refused to allow the CVA to review the books.
18. Kimberly Winkler's refusal to provide financial information and review of book and records pertaining to the financial status of Premiere Liquor made it impossible for the Estate to complete an appraisal of the 60% Interest in the business.
19. Because the Estate's CVA was prevented from appraising the value of 60% Interest in the business, the Option price for 60% Interest was never determined, and therefore Kimberly Winkler never exercised the Option to purchase the Estate's Interest.
20. Kimberly Winkler admits that the Estate continues to be the owner of 60% of Premiere Liquor and that she has not purchased the remaining 60% Interest from the Estate.

Nonetheless, Kimberly Winkler continues to deny the Estate any and all rights relating to its 60% interest in Premier Liquor, such as its rights to receive financial and tax information, its right to 60% of profits, and other rights.

21. By Motion dated April 26, 2017, Plaintiff moved to refer this case to the Business Court Division on the basis that this litigation involves very complex business issues and disputes.
22. By Administrative Order dated May 31, 2017, Chief Justice Loughry denied the Plaintiff's Motion to refer the case to the Business Court Division on the basis that he did not feel the matter required specialized treatment to reach a fair and equitable resolution.
23. Following the denial, the Estate issued a subpoena ordering Kimberly Winkler to produce all documents, which in any way relate to the books and accounting records of Premiere Liquor, LLC.
24. Kimberly Winkler in violation of the subpoena failed to produce financial records.
25. A status/scheduling conference was held on December 4, 2017 before Judge Bailey where it was agreed that the parties would brief their positions in writing regarding whether the Estate is entitled to the business's financial information, whether the Settlement Agreement's Option had lapsed, and the date of valuation of 60% Interest in the business.
26. On December 6, 2017, Defendant's Counsel submitted a Report on behalf of Kimberly Winkler arguing that the Settlement Agreement Option was still valid and that the proper date of valuation of the business is the date of Dr. Winkler's death on July 23, 2010. Defendant moved to quash the Estate's subpoena for financial information arguing that the Estate is not entitled to that information because the Estate is not entitled to profits beyond the date of Dr. Winkler's death in 2010.

27. On January 19, 2018, the Estate submitted a Memorandum arguing that it was legally entitled to review book and records and receive all requested financial information, as well as receive distributions of its 60% share of profits since the date of Dr. Winkler's death on April 7, 2010, and that Kimberly Winkler has unlawfully denied the Estate access to financial records and has failed to pay the Estate its share of business distributions. In its Memorandum, the Estate also argues that the Option Agreement has lapsed, in part due to illegal and bad faith conduct on the part of Kimberly Winkler, and because the Option was not exercised within a reasonable amount of time. The Estate requested that a special receiver be appointed to sell the business of Premiere Liquor and distribute 60% of the proceeds to the Estate and 40% of the proceeds to Kimberly Winkler.
28. On February 15, 2018, Counsel for Kimberly Winkler filed a Motion for Summary Judgment on the date of valuation requesting that the Court set the date of valuation of the Estate's interest in the company on the date of Dr. Winkler's death on April 7, 2010.

The present litigation involves very complex business issues and disputes including but not limited to breach of duty, minority owner rights, forced liquidation, sale of business as resolution, and most recently the selection of a date of valuation for the entity. When first reviewed by former Chief Justice Loughry in May 2017, Justice Loughry believed this to simply be an inheritance dispute for which no specialized review is required. However, recent developments have compounded the complexity of these issues requiring specialized knowledge of West Virginia's Uniform Limited Liability Act and business acumen. Some of the legal claims and issues that must be addressed in the instant litigation are as follows:

- (1.) Breach of Contract. Plaintiff asserts that Defendant has breached the terms of the Settlement Agreement in her refusal to provide financial documents to the Plaintiff necessary to complete the valuation of the business. Plaintiff also asserts breach of the Operating Agreement in that the Defendant has wrongfully taken control of the business and failed to distribute profits to the Estate.
- (2.) Sale of the entity. The relief sought by the Plaintiff is for a receiver to be appointed to the business, provide full information to both parties, then sell the entire entity or assets of the LLC. A Business Court is much better equipped to oversee the business operations of an appointed receiver, ensure that the sale of the business is consummated in line with industry standards, ensure that the trust receives a fair value for the business, and that the business is operated in an appropriate manner until it is sold.
- (3.) Internal affairs of the business. As holder of 60% Interest, the Estate asserts that it retains voting control to name a manager as well as control over all operations of the LLC. Moreover, from the limited number of financial records that the Estate has been permitted to review, it is demonstrated that Kimberly Winkler has wrongfully taken LLC funds to pay various personal expenses. Plaintiff believes that an independent CPA will need to be appointed to prepare a forensic report before the LLC can be valued with any degree of accuracy.
- (4.) Liability of Shareholders, Directors, Officers, Partners, Etc. Plaintiff asserts that Defendant wrongfully assumed control of the LLC and has breached fiduciary duty owed to other shareholders.
- (5.) Shareholder derivative action. Plaintiff asserts claims for amounts wrongfully taken

from the LLC, failure to provide accountings, concealment of records and breach of duty as an officer of the LLC.

(6.) Injunctive Action. Plaintiff seeks injunctive relief to appoint a Special Commissioner to control the LLC's business operations and to enjoin Plaintiff and Defendant from interfering with its duties.

(7.) Determine Date of Valuation of the LLC. Defendant argues that the date of the valuation for the LLC is the date of Dr. Winkler's death on July 23, 2010. However, Plaintiff maintains that the date of valuation is whatever date that the assessment is completed.

The Business Court Division is designed to relieve our very busy circuit court judges from this very kind of complicated business matters requiring specific expertise. In between adjudicating abuse and neglect cases and various other criminal matters, our circuit court judges simply do not have the time and/or resources to familiarize themselves with the particularities of the state Uniform Limited Liability Act, as well as the other facets of business law. As noted in the foregoing, the present litigation involves very complex business issues appropriate for the Business Court Division. Failure to remove this matter to the Business Court Division will merely place an unnecessary burden on our circuit court judges and result in unnecessary delay.

In further support of this Motion, please find attached hereto an accurate copy of the operative complaint(s), the operative answer(s), the docket sheet, and the following other documents: Motion for Referral to Business Court Division dated April 26, 2017 and Exhibits, Administrative Order dated May 31, 2017, Report of the Defendants Kimberly W. Winkler and Premier Liquor Warehouse, LLC; Plaintiff's Memorandum Addressing Certain Legal Issues containing Exhibits A -

C; Defendants' Motion for Summary Judgment on Date of Valuation; Defendants' Memorandum in Support of the Motion for Summary Judgment on Date of Valuation containing Exhibits A - F; Motion for Order Substituting Counsel for the Defendants; and Order Substituting Counsel for Defendants Kimberly Winkler and Premiere Liquor Warehouse.

In regard to expedited review, the Movant:

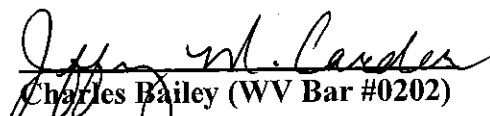
X DOES NOT request an expedited review under W. Va. Trial Court Rule 29.06(a)(4), and gives notice that all affected parties may file a memorandum stating their position, in accordance with W. Va. Trial Court Rule 29.

☐ hereby REQUESTS that the Chief Justice grant this Motion to Refer without responses, pursuant to W. Va. Trial court Rule 29.06(a)(4), and contends tha the following constitutes good cause to do so:

WHEREFORE, the undersigned hereby MOVES, pursuant to W. Va. Trial Court Rule 29, the Chief Justice of the West Virginia Supreme Court of Appeals to refer this case to the Business Court Division.

Respectfully submitted, this 2ng day of January, 2019,

Michael Lormand,
By Counsel,


Charles Bailey (WV Bar #0202)
Jeffrey M. Carder (WV Bar #12527)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600

Post Office Box 3710
Charleston, West Virginia 25337-3710
T: 304.345.4222
F: 304.343.3133
cbailey@baileywyant.com
jcarder@baileywyant.com

**KIMBERLY W. WINKLER, an
individual; CHARLES P. WINKLER, III,
by Kimberly W. Winkler, his next-of-
friend; and JENNIFER W. WINKLER,**

Petitioners,

v.

**Civil Action No.
Honorable**

**MICHAEL A. LORMAND; and
CHARLES P. WINKLER, SR.,**

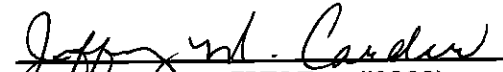
Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "PLAINTIFF'S MOTION
TO REFER CASE TO THE BUSINESS COURT DIVISION" was served upon the following parties
on this day, Wednesday, January 2nd, 2019:

Robert J. Frank
The Law Firm of Robert J Frank & Assoc LLC
205 W. Washington Street, Suite 1
Lewisburg, WV 24901
Email Address: rob@rjflaw.com
Attorney For: Kimberly W. Winkler, Premier Liquor Warehouse, LLC

Gordon C. Lane, Sr., Esquire
Lane & Young
1538 Kanawha Boulevard, East
Charleston, WV 23511
Email: glane@laneyyounglaw.com


Charles Bailey (WV Bar #0202)

Jeffrey M. Carder (WV Bar #12527)

BAILEY & WYANT, PLLC

500 Virginia Street, East, Suite 600

Post Office Box 3710

Charleston, West Virginia 25337-3710

T: 304.345.4222

F: 304.343.3133

cbailey@baileywyant.com

jcarder@baileywyant.com