

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MICHAEL A. LORMAND, Executor
of the Estate of Charles P. Winkler, Jr.,
deceased,**

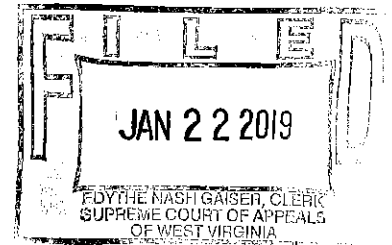
Plaintiff,

v.

**KIMBERLY W. WINKLER, an
individual and Kanawha County
resident, and PREMIERE LIQUOR
WAREHOUSE, LLC, a West
Virginia limited liability company,**

Defendants.

**Kanawha County
Civil Action No. 14-C-1774
Jennifer F. Bailey, Judge**



**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REFER CASE
TO THE BUSINESS COURT DIVISION**

COME NOW the Defendants, Kimberly W. Winkler and Premiere Liquor Warehouse, LLC, by Counsel, Robert J. Frank, The Law Firm of Robert J. Frank & Associates, PLLC, and hereby object to the Plaintiff's Motion for Referral to Business Court Division, and in support thereof, state as follows:

1. This is Plaintiff's second attempt to bring the above estate dispute into the business Court.¹ The initial attempt was reviewed by Chief Justice Allen H. Loughry, II and

¹ Plaintiff did not initially serve Defendants a copy of Plaintiff's Motion to Refer Case to Business Court Division. Defendants' notice of this filing came by way of a "courtesy notice of filing" sent by the Office of the Clerk of the West Virginia Supreme Court of Appeals on or about January 14, 2019. The actual Motion to Refer to Business Court Division was likewise received from the Office of the Clerk of the West Virginia Supreme Court of Appeals on or about January 14, 2019. Defendants did receive a mailing containing the motion and a disc containing exhibits on January 17, 2019 – three business days before response was due. It appears Plaintiff may have sent the pleading to the incorrect address. Counsel has confirmed that counsel's address on the firm's Motion to Substitute Counsel and all other pleadings filed in the Circuit Court in this matter is correct.

referral was denied on May 31, 2017. Justice Loughry stated in part “this case does not meet the criteria for referral under Rule 29.04(a)(2) of the West Virginia Trial Court Rules.” (*see* attached **Exhibit A**, May 31, 2017 Order denying referral to Business Court) Plaintiff’s present motion, while not so titled, appears to be a motion, a year and eight months later, to reconsider Justice Loughry’s Order. Nothing has materially changed in the intervening 20 months since Justice Loughry’s Order. The case remains an estate case, between the Executor of an estate, and an heir of the estate, over the disposition of a property interest owned by a decedent. It is not currently, and never has been, a case between two business entities. There is no basis on which to reconsider Justice Loughry’s May 31, 2017 Order.

2. This pending estate case does not constitute a “Business Litigation” that can be transferred to the Business Court Division.

3. This case is brought by the Plaintiff as the purported Executor of the Estate of Charles P. Winkler, Jr., the deceased husband of the Defendant, Kimberly W. Winkler, over the valuation of Premiere Liquor Warehouse, LLC, a liquor and wine store located near Patrick Street in Charleston, West Virginia.

4. The only real issue in this case is the Plaintiff’s request that the Court enforce a Settlement Agreement providing for the valuation and anticipated purchase by Kimberly W. Winkler of the membership interests in the LLC that were held by Charles P. Winkler, Jr., at his death. Ironically, the Plaintiff objected to Kimberly W. Winkler’s Motion to enforce the Settlement Agreement and value the LLC before Judge King of this Circuit Court, the Judge that presided over a Civil Action that was a subject of the Settlement Agreement.

5. Rule 29 of the W.Va. Trial Court Rules provides for the “establishment of a Business Court Division to handle a specialized court docket.” W.Va. Trial Ct. R. 29.01.

6. The Rule provides for the referral to the Business Court Division of “Business Litigation.” W.Va. Trial Ct. R. 29.06. Rule 29.04 provides for an inclusive three-part definition of “Business Litigation.” The first requirement is set forth in W.Va. Trial Ct. R. 29.04(a)(1), and requires that the “principal claim or claims involve matters of significance to the transactions, operations, or governance **between business entities.**” (emphasis added.)

7. The present action is not between business entities. The Plaintiff is not a business entity. Neither is the Defendant, Kimberly W. Winkler. Therefore, the dispute is not between business entities. The LLC is a named Defendant, but the Plaintiff’s Complaint does not assert any claim against the LLC. Therefore, the dispute does not even involve a non-business entity’s claim against a business entity. The dispute is between two non-business entities over the value of an asset that happens to be a limited liability company. This is not enough to satisfy the “Business Litigation” definition set forth in W.Va. Trial Ct. R. 29.04(a)(1). Attached as **Exhibit B** is a copy of an Order of the West Virginia Supreme Court denying the referral of a case to the Business Court Division because the “principal claims are not between business entities as required by Trial Court Rule 29.04(a)(1).” The fact that this case is not a case “between business entities” as required by Trial Court Rule 29.04(a)(1), has not changed since the May 31, 2017 Order and no basis exists to reconsider that order.

8. The second requirement is that the case “presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter” Trial Court Rule 29.04(a)(2) There is no “commercial and/or technology issue” present in this case for which “specialized treatment” is required for fair and reasonable resolution or for which “specialized knowledge or expertise” is needed by the Court. The

matters at issue, including valuation of an estate asset, the date of the valuation of an estate asset, the enforceability of settlement agreements, and the appropriateness of sanctions (if any) relating to discovery issues are heard by County Commissions sitting as probate courts, Family Courts, and Circuit Courts on a regular basis. While Defendants certainly disagree with Plaintiff's description of the case status and issues, those issues are well within the scope of issues regularly heard by trial courts at all levels and are well within the knowledge and experience of the Honorable Jennifer F. Baily, an experienced Circuit Court Judge. If Plaintiff's arguments prevail, nearly every estate case in which there was a dispute as to the value and disposition of a business on the death of a party would qualify for referral to Business Court. Indeed, but for the specific language of Trial Court Rule 29.04(a)(3), the Plaintiff's broad definition of cases suitable for Business Court Division referral would fit any Family Court case in which one of the parties operated a business. Such a broad reading of the scope of the Business Court Division would frustrate the very purpose of the Business Court Division as a forum for "efficiently managing and resolving litigation involving commercial issues and disputes **between businesses**" Trial Court Rule 29.01.


9. Additionally, there is nothing particularly new or different in this case that was not known in September of 2014, when the initial Motion for Referral to Business Court Division was filed. Virtually every allegation in the present Motion for Referral was either specifically referenced in the prior Motion for Referral or was reasonably inferable or anticipatable as an issue that may arise. There is no basis to reconsider Justice Loughry's specific finding that "this dispute does not require specialized treatment to improve the expectation of a fair and reasonable resolution..." of the case.

WHEREFORE, the Defendants, Kimberly W. Winkler and Premiere Liquor Warehouse, LLC, by Counsel, respectfully request that the Plaintiffs Motion for Referral to the Business Court Division be denied, and the Defendants respectfully request such other and further relief as this Court deems just and proper.

**KIMBERLY W. WINKLER, AND
PREMIERE LIQUOR WAREHOUSE,
LLC,**

By Counsel,

Dated: January 18, 2019



Robert J. Frank - WV State Bar #10654
The Law Firm of Robert J. Frank &
Associates, PLLC
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EXHIBIT A

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
2017 JUN -5 AM 8:50
GUYTON S. GILSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Michael A. Lormand, Executor of the
Estate of Charles P. Winkler Jr., deceased,
Plaintiff

vs. Civil Action No. 14-C-1774 (Kanawha County)

Kimberly W. Winkler, an individual and Kanawha
County resident, and Premiere Liquor Warehouse,
LLC, a West Virginia limited liability company,
Defendants

The Chief Justice of the Supreme Court of Appeals has been advised that Plaintiff Michael A. Lormand, Executor of the Estate of Charles P. Winkler Jr., deceased, by counsel, Gordon C. Lane Sr. and the law firm of Lane & Young, has filed a motion to refer the above-referenced case to the Business Court Division pursuant to Rule 29 of the West Virginia Trial Court Rules.

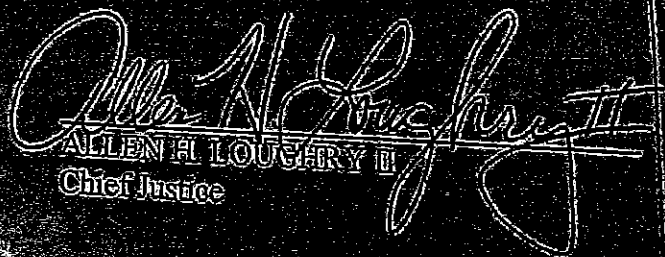
Although it appears that numerous pleadings were filed by the parties regarding referral to the Business Court Division between September 2014 and May 2016, none of those pleadings were previously transmitted to the Clerk of this Court pursuant to Rule 29. Nevertheless, all of those pleadings have now been reviewed.

Upon careful review and consideration of the motion and other pleadings, the Chief Justice has determined that this dispute does not require specialized treatment to improve the expectation of a fair and reasonable resolution, and, therefore, this case does not meet the criteria for referral under Rule 29.04(a)(2) of the West Virginia Trial Court Rules.

It is hereby ORDERED that the motion to refer the case to the Business Court Division is DENIED and that a copy of this order be transmitted to the Honorable Christopher C. Wilkes, Chair of the Business Court Division; to the Central Office of the Business Court Division; to the Honorable Jennifer F. Bailey, Chief Judge of the Thirteenth Judicial Circuit; and to the Clerk of the Circuit Court of Kanawha County, who is to provide copies of the same to all parties of record or their counsel.

ENTERED: MAY 31, 2017

6/5/17
Copies sent to:
Counsel of record
parties
Other (please indicate)
By: ☒ certified mail
☐ fax
☐ hand delivery
☐ internet
Other (please indicate)
Deputy Circuit Clerk


ALLEN H. LOUGHRY II
Chief Justice

SCANNED

EXHIBIT B

ADMISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Vandalia Capital II, LLC,
and United Bank, Inc.,
Plaintiffs**

v. No. 13-C-570 (Kanawha County)

**David P. Pray, Individually and as
Trustee of the David P. Pray Revocable
Trust, David P. Pray Revocable Trust,
and John/Jane Doe,
Defendants**

The Honorable Louis H. Bloom, Judge of the Thirteenth Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals that Vandalia Capital II and United Bank, Inc., by counsel Scott S. Segal and Mark R. Staun, and The Segal Law Firm, filed a motion to refer the above-referenced case to the Business Court Division pursuant to Rule 29 of the West Virginia Trial Court Rules ("TCR"). A response in opposition to the motion to refer was filed on behalf of David P. Pray, Individually and as Trustee of the David P. Pray Revocable Trust, by counsel Brian A. Glasser, Thanos Basdekis, and Rebecca Pomeroy, and Bailey & Glasser, LLP.

Upon careful review and consideration of the motion, the exhibits to the motion, and the reply memorandum, the Chief Justice has determined that the principal claims in the action are not between business entities as required by Trial Court Rule 29.04(a)(1), and the motion to refer should therefore be denied.

It is hereby ORDERED that the motion to refer this case to the Business Court Division is DENIED and that a copy of this order be transmitted to the Honorable Christopher C. Wilkes, Chair of the Business Court Division; to the Central Office of the Business Court Division; to the Honorable Louis H. Bloom; and to the Clerk of the Circuit Court of Kanawha County, who is to provide copies of the same to all parties of record or their counsel.

ENTERED: JUNE 25, 2013


BRENT D. BENJAMIN
Chief Justice

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**MICHAEL A. LORMAND, Executor
of the Estate of Charles P. Winkler, Jr.,
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Plaintiff,

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**Kanawha County
Civil Action No. 14-C-1774
Jennifer F. Bailey, Judge**

**KIMBERLY W. WINKLER, an
individual and Kanawha County
resident, and PREMIERE LIQUOR
WAREHOUSE, LLC, a West
Virginia limited liability company,**

Defendants.

CERTIFICATE OF SERVICE

I, Robert J. Frank, hereby certify that on the 18th day of January 2019, the foregoing
**DEFENDANTS REPLY TO PLAINTIFF'S MOTION TO REFER CASE TO BUSINESS
COURT DIVISION** was served by United States first class mail, postage prepaid, on the
following:

Gordon C. Lane, Sr., Esquire
LANE & YOUNG
1538 Kanawha Boulevard, East
Charleston, West Virginia 25311

Charles R. Bailey, Esquire
BAILEY & WYANT
Post Office Box 3710
Charleston, West Virginia 25537



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