

No. 33460

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

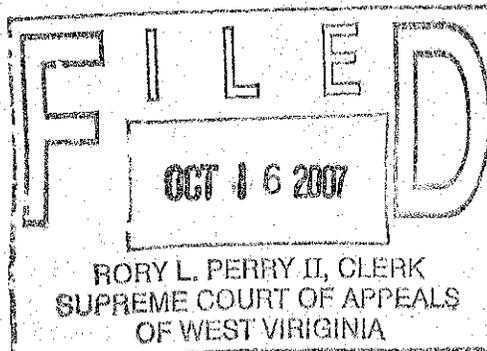
JOHNNIE HOOVER,

Appellant,
Plaintiff Below,

v.

PETER K. MORAN

Appellee,
Defendant Below.



Appeal from the Circuit Court of
Kanawha County, West Virginia
Case No. 02-C-1058

REPLY BRIEF ON BEHALF OF APPELLANT JOHNNIE HOOVER

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No. 33460

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNNIE HOOVER,

Appellant,
Plaintiff Below,

v.

Civil Action No. 02-C-1058
Irene C. Berger, Circuit Judge
Thirteenth Judicial Circuit

PETER K. MORAN,

Appellee,
Defendant Below.

REPLY BRIEF ON BEHALF OF APPELLANT JOHNNIE HOOVER

Now comes Plaintiff Below/Appellant Johnnie Hoover, by and through counsel, and respectfully submits his Reply Brief pursuant to Rules 10(c) and 10(f) of the West Virginia Rules of Appellate Procedure.

**A. THE "STATEMENTS OF FACTS" IN APPELLEE MORAN'S
REPLY BRIEF CONTAINS OMISSIONS AND
MISREPRESENTATIONS THAT ARE RELEVANT TO THIS
COURT'S ANALYSIS AND CONSIDERATION**

In its "Statements of Facts," Appellee Moran provides a factual narrative relating to dismissal and reinstatement of this case by the Circuit Court of Kanawha County in which Appellee omits relevant information contained in "Plaintiff's Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure." (See "Brief on Behalf of Appellee Peter K. Moran," pp. 4-5) Appellee Moran states as follows: "...Plaintiff/Appellant Hoover moved the Court to reinstate the civil action to the docket, alleging in a one-page motion that Plaintiff's counsel had not received notice of the impending dismissal and that motions were pending before the Court

at the time of the entry of the Order of dismissal.” The complete statement from Appellant Hoover’s “Motion to Reinstate Action” is as follows:

Comes now the plaintiff, Johnnie Hoover, by counsel, Stephen P. Meyer, and moves that this case be reinstated on the Court docket for the reason that plaintiff’s counsel of record did not receive proper notice that the matter was subject to the provisions of Rule 41(b) of the West Virginia Rules of Civil Procedure. **Said notice was sent to the plaintiff in care of William C. Garrett, Esq., who is deceased.**

The undersigned (Stephen P. Meyer) filed a notice of appearance on August 12, 2003. Further there were motions¹ pending before the Court awaiting ruling at the time this action was dismissed.

“Plaintiff’s Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure,” p. 1 (Emphasis added)

The fact that Appellant Hoover’s former attorney in this civil action, William C. Garrett, of Gassaway, West Virginia, died in March, 2003 is certainly relevant to this discussion. Indeed, Mr. Garrett prepared and filed Appellant Hoover’s Complaint as well as the document entitled “Plaintiff’s Response to and Memorandum in Opposition to Defendants’ Motion to Dismiss.” (Additional facts and argument will be provided later in this “Reply Brief” regarding reinstatement of this civil action in response to Appellee Moran’s cross-assignment of error.)

Furthermore, Appellee Moran attempts to obfuscate the gravamen of Appellant Hoover’s Complaint, stating “Plaintiff’s additional argument focused on the plural nature of many nouns in the Complaint, *Id.* at pp. 8-9, and Plaintiff’s new contention, inconsistent with the Complaint itself, that Moran had not promised to give Plaintiff a portion of the company, but a portion of Moran’s proceeds from the sale of the company. *Id.* at pp. 9-11.” (“Brief on Behalf of Appellee Peter K.

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Subsequently, “Plaintiff’s Response to Defendant, Peter K. Moran’s Reply to Plaintiff’s Motion to Reinstate Action,” contained the corrected assertion that “there was a motion pending before the court.”

Moran," p. 7). In fact, Appellant Hoover's claims regarding his interest in the coal company, are set forth in the Complaint as follows:

4. For several years, while plaintiff was in the employment of defendant, Princess Beverly Coal Company, Plaintiff's status with said defendant was more than just an employer – employee relationship. Through their course of dealings, plaintiffs and defendants maintained a business relationship wherein plaintiff made numerous loans to said defendant Coal Company so that said corporation could continue to operate, to-wit:
 - a) On or about February 5, 1985, plaintiff loaned \$20,000.00 to defendant Princess Beverly Coal Company at the request of defendant Peter Moran. This loan was evidenced by a check written by the plaintiff, and delivered to the defendants, (a copy of said check is attached hereto as Plaintiff's Exhibit No. 1), and by a promissory note executed by Princess Beverly Coal Company, on February 5, 1985, (copy of which is attached hereto and made a part hereof as Plaintiff's Exhibit No. 2). This note was to be paid within sixty (60) days from February 5, 1985.
 - b) A few days before said loan was due, defendant Peter Moran in his capacity as President of Princess Beverly Coal Company requested an extension of time which to repay the loan. **The consideration for this extension and late repayment was a promise made by Peter Moran that 10% of the profits would be given to the plaintiff if the company was ever sold.** This request for the said extension and the consideration were oral, and never reduced to writing, nor were they evidenced by any stock issued to the plaintiff in defendant Princess Beverly Coal Company. This loan was eventually repaid in full.
7. These loans and purchases made by the plaintiff for the benefit of the defendants were made by the plaintiff in material part **because of his reliance upon defendants' promise that he owned 10% interest in defendant Princess Beverly Coal Company, and if ever sold, he would receive 10% of its net sale proceeds.**
8. As a result of the various loans and financial support made by the plaintiff to the defendants, and the promise made by the defendants to the plaintiff, plaintiff had reason to believe, and **did in fact did believe, that he had a 10% equitable interest in Princess Beverly Coal Company, and in the event Princess Beverly Coal Company**

was ever sold, that he would be entitled to 10% of the profits of his² (sic) assets.

Complaint, ¶¶ 4,7-8 (Emphasis added)

Moreover, in his prayer for relief, Appellant Hoover sought “a judgment recognizing his 10% interest in Princess Beverly Coal Company ... judgment against the defendants in the amount of 10% of the net sale proceeds of said Princess Beverly Coal Company.”

B. CONTRARY TO APPELLEE MORAN’S ASSERTIONS, THE CIRCUIT COURT OF KANAWHA COUNTY COMMITTED REVERSIBLE ERROR IN SUMMARILY DISMISSING APPELLANT HOOVER’S COMPLAINT BASED ON A CLEARLY ERRONEOUS FINDING THAT THERE WERE “NO ALLEGATIONS IN THE COMPLAINT AGAINST PETER MORAN AS AN INDIVIDUAL”

In its Order granting Appellee Moran’s Motion to Dismiss, the Circuit Court of Kanawha County stated, as follows:

The Court has considered all written submissions and oral arguments of counsel and has conducted a thorough review of the Complaint assuming the allegations therein to be true. **After this review, the Court finds no allegations in the Complaint against Peter Moran as an individual, and therefore grants the Motion to Dismiss.**

Order, December 8, 2006, p. 1 (Emphasis added)

Appellant Hoover’s sole assignment of error in the case *sub judice* poses the question: Whether the Circuit Court of Kanawha County committed reversible error in summarily dismissing

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Current counsel for Appellant Hoover believes that former counsel, William C. Garrett, deceased, intended to use the word “its” instead of “his” when drafting this section of the Complaint, as the use of the term “his” is nonsensical, if not ungrammatical, in the context of the sentence. See “Brief on Behalf of Appellee Peter K. Moran,” p. 12, wherein Appellee Moran attempts to make a point of this drafting error.

Appellant Hoover's Complaint, based on a clearly erroneous finding of "no allegations in the Complaint against Peter Moran as an individual."

Thus, Argument A of the "Brief on Behalf of Appellee Peter K. Moran" is based on the faulty premise that "[t]he Circuit Court nonetheless properly dismissed the action against Defendant/Appellee for failure to state a cognizable claim for a breach of an oral contract, because no set of facts that could be proved consistent with the Plaintiff's allegations against Defendant/Appellant personally would allow relief to be granted the Plaintiff." *Id.* at p. 10. The Circuit Court's Order granting dismissal provides a single-sentence explanation: "After this review, the Court finds no allegations in the Complaint against Peter Moran as an individual, and therefore grants the Motion to Dismiss." Appellee Moran's Argument A 1 improperly attempts to "prop up" this simple, yet clearly erroneous, statement by the Circuit Court by engaging in convoluted discussion involving principles of agency and contract – none of which were provided by the Circuit Court as the basis of its decision. Certainly, the Circuit Court limited its ruling to a single point, and Appellee may not engage in judicial "mind-reading" at this juncture in order to articulate additional bases for the court's decision – where indeed there are none.

As Appellant Hoover argued in his Brief, "dismissal of the Complaint based on a finding that there were "no allegations in the Complaint against Peter Moran as an individual" is clearly erroneous and must be reversed on appeal. Immediately after the Circuit Court rendered its precipitous decision on December 8, 2006, Appellant Hoover filed a motion for reconsideration, directing the court's attention to "many allegations in the complaint against Peter K. Moran as an individual." See "Motion of Johnnie Hoover For Reconsideration of Order Granting Defendant, Peter K. Moran's Motion to Dismiss," p. 2. Rather than rectify its commission of clear error, the

Circuit Court denied the motion for reconsideration, without further explanation of its decision. *See* Order, January 2, 2007.

In his Argument A 1, Appellee Moran further “muddies the waters” by arguing that “[n]one of the relevant allegations in the Plaintiff/Appellant’s Complaint involve Peter Moran acting in his own behalf.” “Brief on Behalf of Appellee Peter K. Moran,” p. 11 Remember, the Circuit Court did not employ the terminology – “acting in his own behalf” – in its dismissal order. Moreover, Appellee Moran erroneously asserts that the Complaint “shows only the following averments only regarding Defendant Moran in his individual capacity:”

- In 1986, Defendant Moran personally borrowed \$2,000 from the Plaintiff, which was repaid (Complaint, p. 4, ¶ 6); and
- On February 13, 1997, Defendant Moran “in his own behalf and as President of Defendant Princess Beverly Coal Company, entered into negotiations with Plaintiff to satisfy him with his claim of his equitable interest in the Coal Company,” with no resolution being achieved (Complaint, p. 4, ¶ 9). (emphasis added)

“Brief on Behalf of Appellee Peter K. Moran,” p. 13

To the contrary, a simple reading of the Complaint reveals substantial allegations against Appellee Moran, as an individual, in that he was named as one of the “defendants” in the civil action, as illustrated below:

7. These loans and purchases made by the plaintiff for the benefit of the **defendants** were made by the plaintiff in material part because of his reliance upon **defendants’** promise that he owned 10% interest in defendant Princess Beverly Coal Company, and if ever sold, he would receive 10% of its net sale proceeds.

8. As a result of the various loans and financial support made by the plaintiff to the **defendants**, and the promise made by the **defendants** to the plaintiff, plaintiff had reason to believe, and did in fact believe, that he had a 10% equitable interest in Princess Beverly Coal Company ...
9. On February 13, 1997, **defendant Peter Moran, in his own behalf and as President of defendant Princess Beverly Coal Company**, entered into negotiations with plaintiff to satisfy him with his claim of his equitable interest in the Coal Company, which offer was never finalized or reduced to writing and signed by the parties.
11. **Defendants** breached **their** agreement with the plaintiff, made in 1985, as aforesaid, by failing to account to the plaintiff the terms of the sale of Princess Beverly Coal Company, and to render an accounting to him as to his share of the sale proceeds.
12. As a direct and proximate result of **defendants' breach of their agreement** to the plaintiff, plaintiff has been damaged in an unspecified amount, which breach occurred on or about February 18, 1999 and has continued thereafter.

Complaint, ¶¶ 7-9, 11-12 (Emphasis added)

Finally, in his prayer for relief, Appellant Hoover asked that “he be awarded judgment **against defendants jointly and severally . . .** that the Court order the **defendants to account to the plaintiff** the terms of the sale of the assets of Princess Beverly Coal Company to Addington Enterprises, Inc., . . . that he **have judgment against the defendants** in the amount of 10% of the net sale proceeds of said Princess Beverly Coal Company . . .” Thus, the Circuit Court’s finding that there were “no allegations in the Complaint against Peter Moran as an individual” was clearly in error. And Appellee Moran’s attempts to bolster the Circuit Court’s decision in this regard is wholly unavailing.

C. CONTRARY TO APPELLEE MORAN'S ASSERTIONS, THE STATUTE OF FRAUDS IS NOT APPLICABLE HEREIN, BUT EVEN IF THIS COURT FINDS THE STATUTE OF FRAUDS TO BE APPLICABLE, APPELLEE MORAN IS ESTOPPED FROM ASSERTING THE STATUTE AS A DEFENSE

Pursuant to **Argument A 2** of his Brief, Appellee Moran asserts that "Plaintiff (Appellant Hoover) wishes to be treated as a shareholder of Princess Beverly by virtue of an alleged oral agreement with Defendant Moran" and then proceeds to argue that "Plaintiff's claimed 10 percent interest in Princess Beverly Coal Company" is "just such a share or interest in an enterprise" as an "uncertificated security," pursuant to West Virginia Code § 46-8-102(b) (1985). See "Brief on Behalf of Appellee Peter K. Moran," p. 15. This argument is clearly without merit. The oral agreement at the heart of Appellant Hoover's Complaint did not concern an exchange of stock in Princess Beverly for Appellant Hoover's financial assistance. No transfer of stock is alleged in this action. Nor has Appellant Hoover asked or "wished" to be treated as stockholder, or sought formal stockholder status. Rather, the offer made by Appellee Moran was for an equitable interest in the company, i.e., 10 percent of the sale price when the company was sold, in exchange for Appellant Hoover's significant financial help. It is a specious stretch of securities law definitions to attempt to convert Appellant Hoover's claimed interest herein into an "uncertificated security" for the purpose of having his claim barred by the Statute of Frauds.

Then, Appellee Moran inexplicably asserts pursuant to **Argument A 3** of his Brief:

Plaintiff/Appellant now raises for the first time the argument that Appellee is estopped from raising the Statute of Frauds as a defense. This argument was not raised in any of the filings of record or in oral argument at Defendant/Appellee's motion to dismiss.

"Brief on Behalf of Appellee Peter K. Moran," p. 16.

Quite to the contrary, Appellant Hoover raised the estoppel issue clearly and legibly in “Plaintiff’s Response to and Memorandum in Opposition to Defendant’s Motion to Dismiss,” wherein Appellant Hoover argued as follows:

However, even if the Court finds that Statute of Frauds applies to the facts of this case, **Defendants are estopped by their own actions in raising the statute as a defense.** Recognizing that complete performance under an oral contract overcomes a defense of the Statute, the West Virginia Supreme Court observed that “[w]e have followed the general rule that where one party full (sic)³ performs on an agreement that would otherwise be barred by the Statute of Frauds, he is entitled to sue the other party for performance.” *Frasher v. Frasher*, - W. Va.-, 249 S.E.2d 513 (1978) (citations omitted). *See also Stump v. Harold*, 125 W. Va. 254, 23 S.E.2d 656, 659 (1942) (“We regard it as unnecessary to cite authority to sustain the broad statement that full performance on the part of the person offering to prove an understanding relieves that understanding from the effect of the statute of frauds . . . [O]ur cases indicat[e] that . . . complete performance of a bilateral contract by one party to an agreement otherwise within the provisions of the statute works an exception and permits the contract to be orally established.”)

Furthermore, in *Ross v. Midelberg*, 129 W. Va.-, 42 S.E.2d 185, (1947), the Court expounded at some length on the reasoning behind this well-settled exception to the Statute of Frauds: “It is a broad general rule that a court of equity will not permit a party to take shelter under the defense of the statute and by so doing commit a fraud on the other party . . . ‘The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. **In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm to be estopped from setting up the statute of frauds.**” *Ross*, 42 S.E.2d at 191-92

“Plaintiffs Response to and Memorandum in Opposition to Defendant’s Motion to Dismiss,” pp. 11-12. (Emphasis added)

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This passage from *Frasher* contains a typographical error, which should read “fully” rather than “full.”

D. THE FACTUAL STATEMENT CONTAINED IN APPELLANT HOOVER'S BRIEF, WHICH QUOTES APPELLANT HOOVER'S AFFIDAVIT, TRACKS THE LANGUAGE AND SUBSTANCE OF THE COMPLAINT AND MUST NOT BE EXCLUDED FROM CONSIDERATION BY THIS COURT, AS ASSERTED BY APPELLEE MORAN

The facts set forth in Appellant Johnnie Hoover's Affidavit, which was filed as an attachment to "Plaintiff's Response to and Memorandum in Opposition to Defendant's Motion to Dismiss," are substantially the same as the facts set forth in his Complaint. For purposes of this Appeal, the facts that form the basis of the Complaint, as well as the Affidavit, must not be excluded from consideration by this Court, as Appellee Moran demands pursuant to Argument A 4 of his Brief.

E. CONTRARY TO APPELLEE MORAN'S ASSERTIONS, THE PROPRIETY OF THE EQUITABLE REMEDY OF PIERCING THE CORPORATE VEIL SHOULD NOT BE FORECLOSED PURSUANT TO THE MOTION TO DISMISS

Appellant Hoover's Brief contains a lengthy discussion regarding the applicability of the equitable remedy of piercing the corporate veil to the case *sub judice*. Appellant Hoover asserts that this case presents the appropriate circumstances whereby "the corporate entity may be disregarded to remove the barrier to personal liability" of Appellee Moran – the shareholder "actively participating in the operation of the business," pursuant to *Laya v. Erin Homes, Inc.*, 352 S. E. 2d 93 (W. Va. 1986).

As discussed in Appellant's Brief, piercing the corporate veil disregards the formal and distinct existence of the corporate legal fiction to hold shareholders personally liable for corporate debts. Appellee asserts erroneously, pursuant to Argument A 5, that this Court is precluded from considering Appellant's arguments regarding this applicable equitable remedy because "[t]his argument . . . was never raised below, either in oral argument regarding the motion to dismiss or in

the written responses to the Defendant/Appellant's filings in relation to the motion to dismiss." See "Brief on Behalf of Appellee Peter K. Moran," p. 19. Of course, pursuant to his Complaint, Appellant Hoover seeks such relief as the Court deems "meet and just." This Court operates under a notice pleading system. It is well established that "complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *Whorton v. Malone*, 549 S.E. 2d 57, 63 (W. Va. 2001). Rule 8(a) provides as follows: "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks."

Moreover, as noted in Appellant's Brief, the argument that Appellant Hoover's remedy "is with Mr. Moran and the other shareholders who received the proceeds which Plaintiff claims are partially his" was affirmed in "Defendant, Princess Beverly Coal Company's Reply to Plaintiff's Response to Defendants' Motion to Dismiss," as follows:

Princess Beverly received none of the proceeds from the February 1999 stock sale challenged by the Plaintiff. Instead, the proceeds went to Mr. Moran and other shareholders and it is with them, if at all, that the Plaintiff's recourse lies. . . . Further, the Plaintiff's Complaint demonstrates that any purported oral agreement, whether relating to the transfer of stock, stock proceeds, or otherwise, was between the Plaintiff and Mr. Moran, not Princess Beverly. Princess Beverly received none of the proceeds from the sale of its outstanding stock. The proceeds were paid to Mr. Moran and the other shareholders. Thus, the Plaintiff's remedy is with *Mr. Moran* and the other shareholders who received the proceeds which Plaintiff claims are partially his. (Emphasis in Original)

"Defendant, Princess Beverly Coal Company's Reply to Plaintiff's Response to Defendants' Motion to Dismiss," p. 9

Appellee argues nonsensically, without citing to any authority, that piercing the corporate veil "is generally a tool used by plaintiffs at the end of a case, seeking recourse for damages, not a defense to a motion to dismiss." See "Brief on Behalf of Appellee Peter K. Moran," p. 22. Rather,

Appellant Hoover asserts that the equitable remedy of piercing the corporate veil is relevant to the Court's dismissal analysis herein. Syllabus Pt. 6 of *Laya* states: "The propriety of piercing the corporate veil should rarely be determined upon a motion for summary judgment. Instead, the propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of facts to determine upon all of the evidence." Certainly, then, issues involving the propriety of piercing the corporate veil should also not be foreclosed upon a motion to dismiss, given the "liberal standard" that a plaintiff must meet in order to overcome a Rule 12(b)(6) motion.

Appellee Moran further states in his Brief that "Plaintiff/Appellant cannot reasonably suggest to the Court that an unpled claim to pierce the corporate veil between Defendant/Appellee and Princess Beverly somehow indicates error on the part of the Circuit Court below." ("Brief on Behalf of Appellee Peter K. Moran, p. 21) See, however, the recent decision of *Dombroski v. Wellpoint, Inc.*, 2007 Ohio App. LEXIS 4440 (September 20, 2007) which stated:

A party seeking to pierce the corporate veil is not required to relate the specific intention in the complaint in order to proceed under the doctrine of piercing the corporate veil. (citation omitted) . . . "piercing the corporate veil is not a claim, it is a remedy encompassed within a claim. . . ." In other words, there is no requirement that one must state in their complaint that they are "piercing the corporate veil". (citation omitted) All that is required is that the complaint contain sufficient information to indicate a desire to proceed under a doctrine of piercing the corporate veil. (citation omitted)

Dombroski at p. 10

This Court stated in *John W. Lodge Distr. Co., Inc. v. Texaco, Inc.*, 245 S.E. 2d 157, 159 (W. Va. 1978) that "if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." Moreover, the Court stated in *Lodge* that "for the purposes of the motion to dismiss, the complaint is construed in the light most favorable to the

plaintiff, and its allegations are to be taken as true.” *Id.* at 158. As discussed in Appellant’s Brief, Johnnie Hoover’s legal theories and claims for relief sound in contract and are based on the following assertions: (a) that Appellee Moran induced Appellant Hoover to enter into an agreement in April, 1985, wherein Appellant Hoover used his own personal funds and credit to make loans to Appellee Moran and former Defendant Princess Beverly Coal Company and to purchase parts, materials, services and equipment for use in Princess Beverly’s business operations in exchange for Appellee Moran’s promise that Appellant Hoover would receive 10 percent of the sale price when the company was sold; (b) that this agreement constituted a valid oral contract between Appellant Hoover, Appellee Moran and Princess Beverly; (c) that Appellant Hoover fully performed his side of the agreement; (d) that Appellee Moran and Princess Beverly accepted the benefit of Appellant Hoover’s performance under the agreement for a period of approximately ten years; (e) that Appellee Moran and Princess Beverly are estopped by their own conduct from denying that a valid oral contract existed; and (f) that the agreement was breached when Princess Beverly was sold in February, 1999 and Appellee Moran and Princess Beverly failed and/or refused to pay Appellant Hoover 10 percent of the sale price.

Quite simply, it would work an injustice to Appellant Hoover to allow Appellee Moran’s egregious behavior to go unchecked. A *de novo* review of the allegations of the Complaint shall reveal sufficiently alleged facts to sustain Appellant Hoover’s claim past the motion to dismiss stage. Since piercing the corporate veil will depend, in part, upon facts that Appellant Hoover must obtain through further discovery, Appellee Moran’s motion to dismiss is premature. *See Bear Hollow, LLC v. Moberk, LLC*, 2006 U.S. Dist. LEXIS 36780 (June 2, 2006)

Accordingly, pursuant to this Court's *de novo* review, this Honorable Court must reverse the decision of the Circuit Court of Kanawha County which summarily dismissed Appellant Hoover's Complaint on the clearly erroneous finding of "no allegations in the Complaint against Peter Moran as an individual."

F. IN RESPONSE TO APPELLEE MORAN'S CROSS-ASSIGNMENT OF ERROR MADE PURSUANT TO RULE 10(F) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE, APPELLANT HOOVER ASSERTS THAT THE CIRCUIT COURT OF KANAWHA COUNTY DID NOT ABUSE ITS DISCRETION IN GRANTING HIS MOTION TO REINSTATE THE CIVIL ACTION

On August 4, 2006, the Circuit Court granted "Plaintiff's Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure." Pursuant to Rule 10(f) of the West Virginia Rules of Appellate Procedure, Appellee Moran has cross-assigned this ruling as prejudicial error. Appellant Hoover now responds to this cross-assignment of error with argument and authority confirming that the Circuit Court of Kanawha County did not abuse its discretion in granting Appellant Hoover's motion to reinstate this civil action.

The standard of review with regard to reinstatement after involuntary dismissal of a case is stated in *Dimon v. Mansy*, 479 S.E.2d 339 (W.Va. 1996), as follows:

Traditionally, our scope of review, even when reinstatement is timely sought, is limited. It is only where there is a clear showing of abuse of discretion that reversal is proper.

As previously set forth in the "Brief on Behalf of Appellant Johnnie Hoover," Appellant Hoover filed his Complaint on April 16, 2002, naming Princess Beverly Coal Company and Peter K. Moran as Defendants, to which they jointly filed a Motion to Dismiss, with accompanying memorandum of law, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on

July 30, 2002. Appellant Hoover filed his response to the Motion to Dismiss on September 4, 2002. Former Defendant Princess Beverly replied to Appellant Hoover's response to the Motion to Dismiss on November 13, 2002. On November 25, 2002 former Defendant Princess Beverly filed its notice of filing of bankruptcy, which triggered the automatic stay provisions of 11 U.S.C. § 362. During this initial stage of litigation, Appellant Hoover's attorney was William C. Garrett of Gassaway, West Virginia. Unfortunately, Mr. Garrett died in March, 2003. Appellant Hoover sought alternative counsel to take on this case; Appellant Hoover's present counsel filed his Notice of Appearance on August 13, 2003. The Circuit Court entered an Agreed Order on March 29, 2004, dismissing Princess Beverly from this civil action, with prejudice.

On July 1, 2005, the Circuit Court mailed notice pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. On July 15, 2005, the Circuit Court entered its Order dismissing the civil action for failure to prosecute. On May 22, 2006, Appellant Hoover filed his motion to reinstate the action, stating, in part, as follows:

Comes now the plaintiff, Johnnie Hoover, by counsel, Stephen P. Meyer, and moves that this case be reinstated on the Court docket for the reason that plaintiff's counsel of record did not receive proper notice that the matter was subject to the provisions of Rule 41(b) of the West Virginia Rules of Civil Procedure. Said notice was sent to the plaintiff in care of William C. Garrett, Esq., who is deceased.

"Plaintiff's Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure."

The Circuit Court held a hearing on the "Motion to Reinstate" on July 18, 2006, wherein the following explanation was provided by Appellant's counsel:

MR. MEYER: Your Honor, the motion by the plaintiff to reinstate is based upon the fact that we were not, that is plaintiff's counsel, was not given notice of the dismissal by the Court this past year because the notice was apparently sent to the plaintiff's

original attorney and was not forwarded to us, or else we would have been Johnny-on-the-spot and reacted to it.

We, we, we haven't been doing -- we have been doing things -- in fact, we dismissed one of the defendants in an agreed order of dismissal; and mistakenly, I guess, we were waiting for a ruling on a motion which had been briefed a couple years ago before we were to move. . . . [discussion with Circuit Court about setting of hearing on previously filed motion to dismiss] ⁴

. . . the attorney [William C. Garrett] died. The plaintiff looked for counsel, finally located us, and in the interim there was just a mix-up and I think a clerical error. We never got notice. And as a result we didn't find out about it until we made inquiry and realized that we didn't have the notice that the case had been dismissed.

So, we are actually coming with hat in hand and asking that it be able to go back on the docket and start our discovery, ask the court to review the motion for dismissal; and if we survive the motion for dismissal, we would like to go ahead and prepare the case.

Transcript of Hearing, July 18, 2006, pp. 2-4.

Under questioning by the Circuit Court, Appellant's counsel confirmed that Appellant Hoover did not receive from the late Mr. Garrett's office "either a copy of the notice or the dismissal order." *Id.* at 4.

Further, Appellant's counsel stated as follows:

MR. MEYER: Yes, your Honor. I understand there was a lot of time lag there. We -- part of the time that has caused the lag was we were definitely negotiating with the other defendant in the case, Princess Beverly Coal, regarding its status, and finally we agreed upon an order to dismiss them entirely. And also in the interim there was a bankruptcy and a, a notice that there was a bankruptcy, and on the next day -- that delayed it. So, we just really got off, off of a schedule because of the intervening matters of the bankruptcy and the change of counsel and the change of address.

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“ . . . [A] ‘proceeding’ has been ‘broadly construed to include any step or measure taken in either the prosecution or the defense of the action, except a continuance.’” *Meadows v. Hey*, 399 S.E.2d 657 (W. Va. 1990), citing Syllabus Pt. 1, *Millar v. Whittington*, 105 S. E. 907 (W. Va. 1921). See Rule 41(b) of the West Virginia Rule of Civil Procedure, which employs the term “proceeding.”

And so, we – certainly I guess we could be determined a bit dilatory in not scheduling and following up quicker, but we got off on a tangent with the dismissal of Beverly; and then after that they were, there was a stay, and that's the only, that's the only excuse, your Honor. We —

THE COURT: (Interposing) All right.

MR. MEYER: As soon as we found out about it, we moved. But we didn't have any notice that it was in fact dismissed. And we were under the assumption that there was a motion waiting to be heard.

Id., pp. 5-6

Appellant's counsel further argued in rebuttal at the reinstatement hearing, as follows:

MR. MEYER: . . . This is a serious case. It's been well-briefed, well-documented. And unfortunately, because of the change of counsel, Mr. Garrett having passed away, and there's been some period of time when Mr. Hoover finds another lawyer, then Princess Beverly going into bankruptcy, there has been a – jumps and a jerky type of situation here. And although we didn't get the notice, we would have followed up on it certainly.

. . . But this is a very serious case, and – Mr. Hoover, who is a Vietnam veteran and disabled because of injuries received in the war, really needs to have a chance to litigate this case. So, I think to dismiss this case because of our slowness and not reacting, even though we weren't on notice, though we had notified the clerk of the fact there was a change of counsel, I think that would be a severe sanction, and I would hope the Court would give us a chance to get back in the saddle in this case.

Id., pp. 12-13

Finally, the Circuit Court offered the following commentary regarding notice:

THE COURT: . . . [I]f you look at the *Dimon vs. Mansy* case and the *Covington* case and Rule 41, this whole process is triggered by a notice from the Court to give the plaintiff 15 days to respond with whether or not there is good cause for the delay.

Today it's been stated here that the plaintiff did not get notice. We know that his counsel of record did not get notice. From a review of the court file, we can ascertain that notice was sent to previous counsel and not to Mr. Meyer, even though Mr. Meyer had made an appearance as counsel of record. **Notice under the rule and the cases triggers this process. . . .** Transcript of Hearing, July 18, 2006, p. 13 (Emphasis added)

Subsequently, on August 4, 2006, the Circuit Court entered its Order granting the “Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure,” providing as follows: “After careful consideration the Court finds that neither the plaintiff or plaintiff’s counsel received notice of dismissal pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure and that notice is required.” *See* Order, August 4, 2006

This Court held in *Dimon v. Mansy*, 479 S.E.2d 339, 348 (W. Va. 1996) that “before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.” In *Dimon*, the Circuit Court of Jefferson County entered an order pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure without sending notice to the plaintiff. The two issues presented on appeal in *Dimon* were (a) whether the circuit court erred in failing to give pre-dismissal notice of its intent to dismiss a pending civil action with prejudice, and (b) whether the circuit court abused its discretion in declining to reinstate this case to its docket.

The case *sub judice* is clearly distinguishable from *Dimon* in that the Circuit Court of Jefferson County in *Dimon* failed to send **any** pre-dismissal notice **at all**; whereas in the instant matter, notice was sent, but to the **wrong individuals** – apparently due to an error by the Circuit Court of Kanawha County. As set forth above, the Circuit Court of Kanawha County expressed its concerns about pre-dismissal notice in the instant matter, as follows: “. . . this whole process is triggered by a notice from the Court to give the plaintiff 15 days to respond with whether or not there is good cause for the delay.” *See* Transcript of Hearing, July 19, 2006, p. 13. The Circuit Court further stated that both Appellant Hoover and his counsel of record “did not get notice.” *Id.* The Circuit Court further acknowledged that “notice was sent to previous counsel” (the late William C.

Garrett of Gassaway, West Virginia) but not to Stephen A. Meyer, Esquire, “even though Mr. Meyer had made an appearance as counsel of record.” The Circuit Court further emphasized: “Notice under the rule and the cases triggers this process.” *Id.*

Accordingly, the Circuit Court’s Order solely addressed the notice issue:

After careful consideration the Court finds that neither the plaintiff or plaintiff’s counsel received notice of dismissal pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure and that notice is required.

Order, August 4, 2006

Pursuant to the *Dimon* “guidelines,” the first requirement is as follows: “when a circuit court is contemplating dismissing an action under Rule 41(b), the court **must first send** a notice of its intent to do so to all counsel of record and to any parties who have appeared and do not have counsel of record.” As the Circuit Court stated at the reinstatement hearing, “[n]otice under the rule and the cases triggers this process.” Clearly, the lack of requisite notice voided the dismissal order previously entered by the Circuit Court on July 15, 2005. Therefore, Appellant Hoover asserts that it was not an abuse of discretion for the Circuit Court to rely solely on the “notice analysis” in its Order. In that the first *Dimon* guideline was not met, any further analysis by the Circuit Court would have been erroneous. Notice was not properly sent by the Court – neither Appellant Hoover nor his counsel of record received notice – and thus, the remainder of the *Dimon* guidelines were not “triggered.”

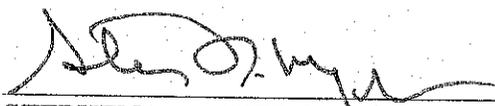
Finally, Appellant Hoover asks that the following principles be considered by this Court in considering Appellee’s cross-assignment of error:

“[A] court’s authority to issue dismissals as a sanction must be limited by the circumstances and necessity giving rise to its exercise. The sanction of dismissal with prejudice for the lack of

prosecution is most severe to the private litigant and could, if used excessively, disserve the dignitary purpose for which it is invoked. . . . (Citation omitted). . . . Because of the harshness of the sanction, a dismissal with prejudice should be considered appropriate only in flagrant cases. Indeed, we recognize that dismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit." *Dimon v. Mansy, supra*, pp. 344-345.

THEREFORE, for the reasons set forth above and in the original "Brief on Behalf of Appellant Johnnie Hoover," and for other reasons apparent and obvious from a review of the record, Appellant Johnnie Hoover respectfully requests that the Order of the Circuit Court of Kanawha County, rendered January 2, 2007, granting Appellee's Motion to Dismiss, be reversed by this Honorable Court. Furthermore, Appellant Hoover respectfully requests that Appellee's cross-assignment of error be denied.

Respectfully Submitted,
JOHNNIE HOOVER
Appellant, By Counsel.



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IN THE CIRCUIT OF KANAWHA COUNTY, WEST VIRGINIA

JOHNNIE HOOVER,

Plaintiff,

v.

Civil Action No. 02-C-1058
Judge Irene Berger

PRINCESS BEVERLY COAL
COMPANY, a West Virginia corporation,
and PETER K. MORAN,

Defendants.

CERTIFICATE OF SERVICE

I, STEPHEN P. MEYER, counsel for the plaintiff, does hereby certify that true and exact copies of the foregoing **REPLY BRIEF ON BEHALF OF APPELLANT JOHNNIE HOOVER**, was served upon the following by first class mail, postage prepaid, on October 15, 2007.

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