

IN THE SUPREME COURT OF IOWA

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SUPREME COURT NO. 20-0268

POLK COUNTY NO. EQCE085101

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LIQUOR BIKE, LLC,

Plaintiff-Appellant,

vs.

IOWA DISTRICT COURT IN AND FOR POLK COUNTY,

Defendant,

VIVONE, LLC,

Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY, IOWA  
HONORABLE JEANIE VAUDT, DISTRICT COURT JUDGE

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. THE DISTRICT COURT ERRED IN ORDERING THE DISQUALIFICATION OF COUNSEL FOR DEFENDANT.**

*Concordia Partners, LLC v. Ward*, No. 2:12-CV-138, 2012 WL 3229300, at \*6 (D. Me. Aug. 6, 2012)

*Conn. Limousine, LLC v. Industrial Roofing and Paving*, 2005 WL 648140 (Conn. Supr. Ct. Feb. 17, 2005)

Iowa R. Prof'l Conduct 32:1.13

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN ORDERING THE DISQUALIFICATION OF COUNSEL FOR DEFENDANT.**

Vivone's argument is the epitome of the simultaneous use of the corporate structure as "a sword and a shield" warned of in *Concordia Partners, LLC v. Ward*, No. 2:12-CV-138, 2012 WL 3229300, at \*6 (D. Me. Aug. 6, 2012). Vivone is a limited liability company that provides liability protection to its owners. *See Briggs Transp. Co., Inc. v. Starr Sales Co., Inc.*, 262 N.W.2d 805, 809 (Iowa 1978) ("Central to corporate law is the concept a corporation is an entity separate from its owners. The separate corporate personality ordinarily enables corporate stockholders to limit their personal liability to the extent of their investment."). As such, Dr. Cherny is insulated from personal liability for Vivone, unless a party bears the burden and proves that exceptional circumstances exist which warrant piercing the corporate veil. *C. Mac Chambers Co., Inc. v. Iowa Tae Kwon Do Academy, Inc.*, 412 N.W.2d 593, 598 (Iowa 1987). Interestingly, despite having this protective shield for Dr. Cherny, Vivone is in essence arguing for the Court to pierce the corporate veils of Vivone, Heartland, and JSV, and focus solely on Dr. Cherny for the conflicts of interest analysis. This selective use of the corporate form is not appropriate. *See Concordia Partners*, 2012 WL 3229300, at \*6.

The undisputed facts are that "Brick Gentry represents Heartland." *See* Def's Brief p. 15. While Dr. Cherny is the "individual behind Heartland," *see* Def's Brief

p. 14-15, he is not Brick Gentry's client. The "entity concept" embraced by the Iowa Rules of Professional Conduct make clear that a "lawyer employed or retained by an organization represents the organization through its duly authorized constituents." See Iowa R. of Prof'l Conduct 32:1.13(a). Because Brick Gentry's client is Heartland, the "directly adverse" conflict argued by Vivone is off-base.

In its briefing, Vivone cites to a Connecticut district court case as support for disqualification. See *Conn. Limousine, LLC v. Industrial Roofing and Paving*, 2005 WL 648140 (Conn. Supr. Ct. Feb. 17, 2005). This unpublished district court ruling is not even binding in Connecticut. See Conn. Gen. Stat. § 51-216a. This unpublished district court ruling also completely lacks any supportive authority or analysis. Like Vivone's brief, the unpublished district court ruling does not cite to or even attempt to address the "entity concept" embraced by Connecticut Rule of Professional Conduct 1.13.

Not waiving the foregoing, even if considered as persuasive authority, the unpublished Connecticut district court case is distinguishable from the present matter. In *Conn. Limousine*, the district court put emphasis on the fact the law firm sought to be disqualified had a "longstanding relationship" that was "close, substantial and extensive" and that the owner would be a "key witness" in the case. *Id.* at \*2, fn. 3. Specifically, the relationship had been ongoing for about five years with enough time being spent to result in legal fees between \$300,000-\$500,00. *Id.*

No similar facts are present in the current matter. Heartland retained Brick Gentry for a single, specific purpose: to assist on “an application for an Iowa Certificate of Need for an Ambulatory Surgery Center.” APP051, APP119. Thus, the present case does not involve a close, substantial, extensive, and longstanding relationship, and there was no evidence to show substantial legal fees. Likewise, the present case involves allegations of encroachment, boundary by acquiescence, and adverse possession. APP006-APP008, APP010-APP018. In these types of cases, the relevant time frame is whether there has been acquiescence or continuous possession for a ten-year period. *See* Iowa Code § 650.14; *Louisa County Conservation Bd. v. Malone*, 778 N.W.2d 204, 207 (Iowa Ct. App. 2009). However, as Dr. Cherny testified, Vivone only acquired the property in 2014, and he had no personal knowledge of the properties at issue prior to Vivone’s purchase. APP056-APP058. Therefore, Dr. Cherny has no knowledge during the key time frame for the key issues in this case. APP058. Thus, Dr. Cherny is not a “key witness” in this case.

Vivone can only carry its burden to show a conflict of interest by ignoring the corporate structures Dr. Cherny and his co-owners have put in place. The “entity concept” prevents this result legally, and there is a failure of proof to show these entities should set aside factually. Therefore, the District Court’s Order Granting Motion to Disqualify Counsel was in error. Accordingly, the writ should be

sustained, and this matter should be remanded allowing Liquor Bike's chosen counsel to remain as counsel in the case.

#### IV. CONCLUSION

For the reasons set forth above, the Court should find that the District Court erred in ordering the disqualification of Billy Mallory and Brick Gentry, P.C. in the present case. This Court should sustain the writ of certiorari, and remand this matter with direction that allows Liquor Bike's chosen counsel to remain as counsel of record in the case.

Respectfully submitted,

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**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that I have filed the attached Defendant-Appellant's Reply Brief with the Clerk of the Iowa Supreme Court through the electronic document management system on the 9<sup>th</sup> day of June 2020.

/s/ Billy J. Mallory  
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Attorney for Defendant-Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of June 2020, I served the attached Defendant-Appellant's Reply Brief through the electronic document management system upon the following attorneys:

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**CERTIFICATE OF COMPLIANCE**

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 863 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2016 edition of Microsoft Word in 14-point font plain style.

/s/ Billy J. Mallory  
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**CERTIFICATE OF ATTORNEY’S COSTS**

I hereby certify that the cost of printing the foregoing Defendant-Appellant’s Reply Brief was \$0.00 (exclusive of sales tax, postage and delivery).

/s/ Billy J. Mallory  
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