

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ELIZABETH CHICHESTER, as personal
representative of the Estate of George P. Cook;
ELIZABETH CHICHESTER, individually;
and KATHERINE LAMBSON,**
Counter-Plaintiffs Below,
Petitioners,

vs.

No. 13-0925

POSEY GENE COOK,
Plaintiff Below;
and **JAMES D. COOK, JERRY D. COOK,**
and **TONEY'S FORK LAND, LLC,**
Defendants Below,
Respondents.

PETITIONERS' BRIEF

From the Circuit Court of Wyoming County, West Virginia
Civil Action No.: 12-C-37

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting Summary Judgment on the issue of “scrivener’s error” and thus reforming the Deed.

2. The Circuit Court erred in holding that the Defendant’s Counterclaims of (1) Declaratory Judgment; (2) Breach of Fiduciary Duty; (3) Fraud; (4) Wrongful Interference with Testamentary Expectancy; and, (5) Demand for Accounting did not survive the grant of Summary Judgment on the issue of “scrivener’s error.”

3. The Court erred in finding “no breach of the fiduciary duty Plaintiff owed to GEORGE P. COOK as his attorney-in-fact.”

4. The Court erred in finding that “there is no evidence of fraud,” that would preclude a grant of summary judgment in Plaintiff’s favor.

5. The Court erred in granting Defendant TONY’S FORK LAND, LLC’S Motion to Quash Notice of Deposition and for Protective Order of a fact witness.

STATEMENT OF THE CASE

ELIZABETH CHICHESTER, as personal representative of the Estate of GEORGE P. COOK, filed suit against POSEY GENE COOK and TONY’S FORK LAND, LLC in Federal Court in the Middle District of Florida seeking a declaratory judgment to set aside, as null and void, the deed signed by a Power of

Attorney after the death of the Principal and also signed as “Executor of the Estate” when said person was not, in fact, the Executor of the Estate. (APP 52)

POSEY GENE COOK then filed suit in the Circuit Court of Wyoming County, West Virginia naming the Estate of GEORGE P. COOK and all four of his brothers and sisters as well as TONY’S FORK LAND, LLC as defendants. (APP 4 – 45)

By agreement of the Parties, the Federal suit was stayed pending the outcome of the West Virginia state action. (APP 52)

This matter was assigned to the Honorable Warren R. McGraw and a Scheduling Order was entered setting forth discovery cut off dates as well as dates for Pre-Trial Conference and Trial. (APP 112 – 113)

At a hearing scheduled on Defendants/Counter-Plaintiffs Motion in *Limine* and Defendant TONY’S FORK LAND, LLC’S Motion to Quash and for a Protective Order, the Honorable Warren R. McGraw recused himself from the case.

The Honorable Charles M Vickers was then assigned to the case. (APP 211)
A new Scheduling Order was entered and new dates set for Pre-Trial Conference and Trial. (APP 324 - 325)

Plaintiff then moved for Summary Judgment on the grounds that “The parties to the Deed dated August 28, 1997, made a mutual mistake of fact, based upon a mistake of the scrivener,” (APP 212 - 213)

A hearing was held on February 6, 2013 on all pending motions. *See* Transcript (APP 359 - 409).

On March 11, 2013, the Trial Court entered an Order Granting Motion for Summary Judgment, Granting Motion in *Limine* in Part, and Granting Motion to Quash Notice and for Protective Order. (APP 335 - 349).

Defendant/Counter-Plaintiffs then moved for Clarification of the Summary Judgment Order. (APP 350 - 353)

A hearing was held on August 1, 2013 (Transcript at APP 416 - 423) and the Court entered a Final Order on August 12, 2013. (APP 354 - 358).

Defendants/Counter-Plaintiffs filed a Notice of Appeal on August 28, 2013.

The facts and circumstances underlying and leading up to the above referenced history of the case are as follows:

GEORGE WASHINGTON COOK, the grandfather of all the individual parties to this lawsuit died on April 11, 1962. At the time of his death, he owned what now appears to be approximately 292 acres of land in Wyoming County, West Virginia. He was survived by five (5) children. His Will provided that each child receive specific small parcels of surface land and then all of them were to

receive the remainder in fee simple as well as the mineral rights to all the land, share and share alike. *See* Will of GEORGE W. COOK. (APP 69 - 72)

GEORGE P. COOK was one of said five children and the father of the five individuals who are parties to this lawsuit. GEORGE P. COOK died in Hernando County, Florida on March 20, 1999 and it is his inheritance which is the issue before this Court. *See* Will and Codicil of GEORGE P. COOK. (APP 69 – 72 and APP 77 - 79)

POSEY GENE COOK, the Plaintiff/Counter-Defendant in this case, obtained from his father, GEORGE P. COOK, an alleged Power of Attorney dated May 17, 1996. The Power of Attorney indicates that its purpose was “to handle any and all matters relative to any interest I own in real estate or oil, gas, mineral or other interests in any and all property owned by me or to which I am entitled to under the Estate of the late George Washington Cook, and throughout the State of West Virginia.” The alleged Power of Attorney also provided additional power and authority including “the right to transfer ownership of said property or rights thereto to himself personally, without limitation.” (APP 74 - 75) The authenticity of that provision of the Power of Attorney is contested in this case. *See* Deposition of ELIZABETH CHICHESTER (Transcript at APP 266 - 271) and Affidavit of ELIZABETH CHICHESTER, (APP 305 - 323).

On June 26, 1996, just twenty-six (26) days after the Power of Attorney was notarized, GEORGE P. COOK executed a First Codicil to his Last Will and Testament which states, “This Codicil is being executed specifically to clarify matters relative to my inheritance from my father, George Washington Cook. At this time, my son, Gene Cook, is protecting my inheritance and ensuring that my wife will benefit from any income in the event of my demise, and that my children will own everything equally that I have inherited or am entitled to inherit from my father.” *See* Codicil of GEORGE P. COOK. (APP 77 – 79)

By Deed dated August 28, 1997, POSEY GENE COOK used his alleged Power of Attorney in an attempt to deed certain property inherited by GEORGE P. COOK to himself. *See* Deed Book 392, Page 145. (APP 17 - 19) The description of Tract #1 in the above-referenced Deed, however, is not land or rights inherited by GEORGE P. COOK. By Deed of Correction dated June 6, 2008, POSEY GENE COOK attempted to correct the legal description of the 1997 Deed. (APP 21 – 22) Although, GEORGE P. COOK had been dead since March 20, 1999, the Deed of Correction recites POSEY GENE COOK, Durable Power of Attorney for GEORGE POSEY COOK. In addition, the Deed of Correction adds in written form, “Executor of the Estate of”, however, POSEY GENE COOK is not and has not ever been executor of the estate of GEORGE POSEY COOK.

On October 24, 2008, POSEY GENE COOK, his wife, and the heirs of GEORGE W. COOK, entered into a Coal Lease with TONEY'S FORK LAND, LLC and a Memorandum of Coal Lease was filed of record. In addition, POSEY GENE COOK and his wife, Margaret Hart Cook along with the heirs of GEORGE W. COOK, executed a Deed with a right of reversion at the end of the coal lease to TONEY'S FORK LAND, LLC. (APP 24 - 33)

POSEY GENE COOK now claims to own the one fifth undivided interests in the "property" which was the estate of GEORGE W. COOK and which was inherited by his father, GEORGE P. COOK.

In August or September of 2011 Defendants/Counter Plaintiffs, ELIZABETH CHICHESTER and KATHERINE LAMBSON discovered Plaintiff/Counter-Defendant, POSEY GENE COOK had attempted to deed himself their father's inheritance, and thus their own inheritance, by use of a Power of Attorney that allegedly authorized POSEY GENE COOK to deed himself the property in question and by a fraudulently created Deed of Correction. *See* Exhibit "B" attached to Response in Opposition to Plaintiff/Counter-Defendant, POSEY GENE COOK'S Motion for Summary Judgment. (APP 265 - 271) At that point ELIZABETH CHICHESTER opened a probate estate for her father, GEORGE P. COOK, and was appointed personal representative of the estate (APP 98) and filed the lawsuit referenced in the first paragraph of this statement of the case.

Defendant/Counter-Claimant, ELIZABETH CHICHESTER, as Personal Representative of the Estate of GEORGE P. COOK, claims beneficial ownership pursuant to the Will and Codicil of GEORGE P. COOK. ELIZABETH CHICHESTER and KATHERINE LAMBSON, individually, claim ownership as heirs of GEORGE P. COOK and in accordance with his Will and Codicil. *See* Counterclaim (APP 50 - 99)

SUMMARY OF ARGUMENT

There is a material issue of fact as to the authenticity of the Power of Attorney that Plaintiff used to deed himself his father's inheritance. That material issue of fact is set forth in the deposition testimony of ELIZABETH CHICHESTER attached to Response in Opposition to Plaintiff/Counter-Defendant, POSEY GENE COOK'S Motion for Summary Judgment (APP 265 - 271) and the Affidavit of ELIZABETH CHICHESTER filed in Opposition to Plaintiff/Counter-Defendant, POSEY GENE COOK'S Motion for Summary Judgment. (APP 309 - 323) Until that material issue is determined by a "finder of fact," it is improper to reform a deed, even if it contained a "scrivener's error." It is error for the Court to become that "finder of fact" at a Summary Judgment hearing

Counter-Plaintiffs have alleged that the Counter-Defendant, POSEY GENE COOK has committed fraud, interfered with their testamentary expectancy and breached his fiduciary duty to this father. *See* Counterclaim (APP 50 - 99) These

claims were not even before the Court on Summary Judgment. And these claims exist independent of and without regard to whether or not there was ever a “scrivener’s error.” The fact that Plaintiff chose to execute a Deed of Correction with an invalid Power of Attorney and falsely represent himself as Executor of his father’s estate creates a reasonable inference of fraud and breach of fiduciary duty that prevents the grant of summary judgment. If deeding himself his father’s inheritance was not fraud and a breach of his fiduciary duty, the proper course of action upon finding a “scrivener’s error” would have been to obtain a deed of correction from the Executor of his father’s estate, or have all the beneficiaries of his father’s estate sign a deed of correction or file a suit to quiet title giving all interested parties notice, rather than fraudulently executing a Deed of Correction by using a power of attorney that was no longer valid and claiming to be the executor of his father’s estate, which he was not.

It was improper for the Court to prohibit the taking of the deposition of a fact witness, Charles Dollison. Although, Mr. Dollison is an attorney, he is also a fact witness in this case, having prepared many of the documents involved in this matter. There is also an issue as to whether any of his testimony is protected by the attorney-client privilege since he was at one time, an officer of the Defendant, TONY’S FORK LAND, LLC. Certainly, any conversations and emails that he had with the Plaintiff/Counter-Defendant or any other third parties are not privileged.

Any privilege that might exist could have been easily protected at deposition and it was improper for the Court to prohibit the Defendant/Counter-Plaintiff from taking his deposition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument. The criteria set forth in Rule 18(a) that would preclude oral argument are not present. Petitioners submit that oral argument is warranted under Rule 19 of the Rules of Appellate Procedure because this case involves assignments of error in the application of settled law and under Rule 20 because this matter implicates issues of first impression – specifically, may a lay witness that otherwise qualifies under Rule 701 of the Rules of Evidence be permitted to testify to the signature initials of the deceased testator. Petitioners submit that the decisional process in this instance would significantly be aided by oral argument. Specifically, this case is appropriate for Rule 20 oral argument because it involves a question of first impression.

ARGUMENT

I. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. See *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2nd 755, (1994). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue of material fact, and

that it is entitled to judgment as a matter of law. *Id.* In Syllabus Point 1 of *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2nd 247 (1992), and Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963) this Court explained that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law.” A circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to conclude whether there is genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). Accordingly, courts must construe the facts in the light most favorable to the non-moving party. *Maisinter v. WEBCO Co.*, 164 W. Va. 241, 242, 262 S.E.2nd 433, 435 (1980). Because the Circuit Court did not adhere to these standards, the order of summary judgment should be reversed.

II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF “SCRIVENER’S ERROR” AND THUS REFORMING THE DEED.

A court of equity will not reform a deed because of alleged mutual mistake therein, unless it is shown by clear, convincing, and unequivocal evidence that a mutual mistake was made. *Donato v. Kimmins*, 104 W. Va. 200, 139 S.E. 714 (W.Va., 1927).

There are two reasons the Court erred in granting Summary Judgment and reforming the deed. First, there is an absence of evidence that a “scrivener’s error” occurred. In order to grant summary judgment, there must be a showing that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) W.Va. R. Civ. P. As argued in the memorandum in opposition to the Motion for Summary Judgment, there is absolutely no evidence before the Court upon which the Court could determine that the legal description to track No. 1 in the Deed dated August 28, 1997 is a “scrivener’s error” or a “mutual mistake.” There is no sworn testimony of the Plaintiff, POSEY GENE COOK before the Court. There is no sworn testimony of the person who prepared the Deed before the Court. Plaintiff attempted to cure the problem by filing a Reply to Defendant’s Response in Opposition to Plaintiff’s Motion for Summary Judgment two (2) days before the Summary Judgment Hearing. (APP 328 - 334) In Plaintiff’s Reply, Plaintiff recites the testimony of Joni Rundle, who prepared the Deed of Correction, but that testimony is not before the Court, her deposition having never been filed with the Court nor was it even attached to Plaintiff’s Reply. It is improper for the moving party to submit additional evidence for the Court’s

consideration two days before the summary judgment hearing. Rule 56, W. Va. R. Civ. P.

As stated in the Court's Order Granting Summary Judgment, "Summary Judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." Syl. Pt. 3. *Guthrie v. Northwestern Mut. Life Ins. Co.*, 158 W. Va. 1, 208 S.E. 2d 60 (1974). If Summary Judgment cannot be defeated by assertions in a brief, then certainly Summary Judgment cannot be supported by assertions in the brief. Yet, the Court quotes Joni Rundle's testimony which is nothing more than assertions in Plaintiff's Reply Brief and reiterated at oral argument on the Summary Judgment Hearing.

The sworn testimony before the Court in this case consists of the following:

(1) Pages 70 and 71 of the deposition of Elizabeth Chichester (Exhibit 7 attached to Plaintiff's Memorandum in Support of its Motion for Summary Judgment). (APP 247 - 249);

(2) Pages 78 - 81 of the deposition of Katherine Lambson. (Exhibit 8 attached to Plaintiff's Memorandum in Support of its Motion for Summary Judgment.) (APP 250 - 251);

(3) Pages 59 - 66 of the deposition of Elizabeth Chichester (Exhibit B attached to Defendant's Response in Opposition to Summary Judgment.) (APP 266 - 271);

(4) Affidavit of Elizabeth Chichester filed in Opposition to Plaintiff's Motion for Summary Judgment. (APP 305 - 323);

(5) Affidavit of James D. Cook, attached as Exhibit "H" to Defendants Motion in *Limine*. (APP 154 – 156);

(6) Affidavit of Jerry Lee Cook, attached as Exhibit "I" to Defendants Motion in *Limine*. (APP 158 - 160); and,

(7) Affidavit of P. Don Cook, attached as Exhibit "J" to Defendants Motion in *Limine*. (APP 162 - 164).

There is no other sworn testimony before the Court. It was error for the Court to consider any reference to Joni Rundle.

However, aside from the fact that there is no record testimony that there was a "scrivener's error" or "mutual mistake" there is a second and more fundamental reason the Court erred. There is a material issue of fact as to whether or not the Power of Attorney used by the plaintiff POSEY GENE COOK to deed himself the property in question is the actual one signed by the grantor of the Power of Attorney. There is sworn testimony before the Court that it is not. Ironically, there is no sworn testimony before the Court that it is, in fact, the same document which the father signed. The Court at summary judgment must make its decision based upon the record and as indicated, the above referenced items are the only sworn testimony before the Court. Accordingly, the only sworn testimony before the

Court is that page one (1) of the Power of Attorney is not the original page one (1) to that document and that the initials on the bottom of that page are not the grantor's of the Power of Attorney.

It was error for the Court to find that Defendant's argument relative to this issue to be incredible when the only testimony before the Court was that it was not an authentic copy of the original.

In an affidavit filed in opposition to Plaintiff's Motion for Summary Judgment, ELIZABETH CHICHESTER stated under oath that she prepared the Power of Attorney for her father to sign and notarized his signature using her previous name Elizabeth Fagan. (APP 313) In addition, ELIZABETH CHICHESTER states under oath that she has examined the Power of Attorney that is attached to POSEY GENE COOK'S Motion for Summary Judgment and page one (1) of that Power of Attorney is not the one she prepared and that her father signed. (APP 314) Lastly, she states under oath that she is personally familiar with her father's signature and his signature using initials only and the initials on page one (1) of the Power of Attorney are not her father's. (APP 315) Such specific testimony, under oath, is not merely a self serving declaration. It is specific, it is factual and it is a material issue in this case. It is testimony that is permitted pursuant to WV Evidence Rule 701.

The Court found “Defendants’ argument to be incredible” in reference to CHICHESTER’S sworn testimony relative to the authenticity of the Power of Attorney. (APP 356) The use of the term “incredible” shows on its face that the court was weighing the evidence and determining the credibility of a witness. That is the function of a jury and not the Judge at summary judgment. For the argument to be incredible, the testimony would also have to be incredible. For the testimony to be incredible there would have to be a weighing of the evidence and a determination of its truthfulness. Only when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law. Syl. Pt. 8, *State v. Smith*, 178 W.Va. 104, 358 S.E. 188 (1987). The trial court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Syl. pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

The authenticity of page one (1) of the Power of Attorney and the initials thereon, are certainly fact issues in this case. For the trial court to determine that the argument based upon sworn testimony of ELIZABETH CHICHESTER to be “incredible” is an impermissible determination of facts at a summary judgment hearing. It amounted to a non-jury trial without the benefit of the witness being before the Court so that a determination of the credibility and believability of the

witness based upon the demeanor of the witness and after subjecting the witness to a vigorous cross examination.

There are two aspects to ELIZABETH CHICHESTER'S testimony in connection with the authenticity of the Power of Attorney. First, is her testimony that she prepared and notarized the Power of Attorney and that it did not contain a provision for the Plaintiff to deed himself the property. That is nothing more than a fact witness testifying to facts that are within her personal knowledge.

The second aspect is her testimony that the initials on the bottom of page one (1) of the Power of Attorney are not her father's. That amounts to opinion testimony of a lay witness. Rule 701 of the West Virginia Rules of Evidence permits the opinions or inferences by lay witnesses. The requirements are (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue. Syllabus point 2, *State v. Nichols*, 208 W.Va.432, 541 S.E. 2d 310.

The testimony of ELIZABETH CHICHESTER meets the three prong test of Rule 701. Her testimony as set forth in her affidavit that she cared for and provided for her father for a number of years and was familiar with his signature

initials, provides both for her personal knowledge and a rational basis for her testimony that the initials on page one of the Power of Attorney are not her father's

In addition to West Virginia law providing for the admissibility of the above referenced testimony, Florida, the state in which the Power of Attorney was signed would permit the same testimony. *In re Brown*, 347 So. 2d 713 (Fla. 3d DCA 1977) is a similar case. Brown contends that the court erred in granting summary judgment because Hanger failed to carry the burden of establishing the absence of a genuine issue of material fact in that there was conflicting evidence concerning the validity of Dr. Brown's signature. The appellate court agreed and reversed the summary judgment on the authority of *Kline v. Pym's Suchman Real Estate Company*, 303 So.2d 401 (Fla. 3d DCA 1974); *DeMaggio v. Brasserie Restaurant*, 320 So.2d 49 (Fla. 3d DCA 1975). *See also*, 13 Fla.Jur., Evidence, Section 319, which cites with approval the admissibility of the non-expert opinion of the widow as to the authenticity of her deceased husband's signature.

The non-expert testimony of the daughter of the principal of the Power of Attorney as to the authenticity of her father's initials creates a genuine issue of a material fact, in addition to her testimony as a fact witness that she prepared the Power of Attorney and the provision for him to deed himself the property was not contained therein creates genuine issues of material facts which prevent the granting of summary judgment and the trial court erred in doing so.

III. THE CIRCUIT COURT ERRED IN HOLDING THAT THE DEFENDANT'S COUNTERCLAIMS OF (1) DECLARATORY JUDGMENT; (2) BREACH OF FIDUCIARY DUTY; (3) FRAUD; (4) WRONGFUL INTERFERENCE WITH TESTAMENTARY EXPECTANCY AND (5) DEMAND FOR ACCOUNTING DID NOT SURVIVE THE GRANT OF SUMMARY JUDGMENT ON THE ISSUE OF "SCRIVENER'S ERROR."

If we assume, for purposes of argument, that Plaintiff correctly described the property in question at the time he attempted to deed himself his father's inheritance, and that there was no need to reform the deed, these counter-claims would have still been filed upon learning of plaintiff's dastardly deed. The mere fact that Plaintiff or his attorney incorrectly described the real property he was stealing from his siblings and the Court has determined that it was a "scrivener's error" does not make it any less a larceny. The Counter-Claimants are entitled to their day in court as to the counterclaim issues.

In the Final Oder, the Court stated "the Order Granting Summary Judgment explicitly found no tortious or fraudulent conduct by Plaintiff; therefore, he was permitted to reform the deed to correct the scrivener's error. As Plaintiff lawfully transferred the subject property to himself, Defendants claim of wrongful interference with testamentary expectancy is no longer viable." (APP 357)

It was improper for the Court to make a determination of "no tortious or fraudulent conduct." It was not even an issue before the Court based upon the

Plaintiff's Motion for Summary Judgment. In addition, a circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but to conclude whether there is genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986), Syl. pt. 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

It was error for the Court to make factual determinations relative to the Counter-Plaintiff's claims and then dismiss them at a Summary Judgment Hearing.

IV. THE COURT ERRED IN FINDING "NO BREACH OF THE FIDUCIARY DUTY PLAINTIFF OWED TO GEORGE P. COOK AS HIS ATTORNEY-IN-FACT."

A power of attorney creates an agency and this establishes the fiduciary relationship which exists between a principal and agent. *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 253 S.E.2d 528 (1979). POSEY GENE COOK was therefore a fiduciary. The fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law[.]" *Black's Law Dictionary* 625 (6th ed. 1990); *Elmore v. State Farm Mut. Auto Ins. Co.* 202 W.Va. 430, 504 S.E. 893 (1998). In Syllabus Point 1 of *Sutherland v. Guthrie*, 86 W.Va. 208, 103 S.E. 298 (1920), the Court set forth the following standard of conduct for an agent:

"In the conduct of his principal's business an agent is held to the utmost good faith, and will not be allowed to use his principal's property for his own advantage, or to derive secret profits or

advantages to himself by reason of the relation of principal and agent existing between him and his principal.”

Then the Court went on to explain in *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 929, 253 S.E.2d 528 (1979);

“A corollary to the fiduciary principle is the rule that a presumption of fraud arises where the fiduciary is shown to have obtained any benefit from the fiduciary relationship, as stated in 37 Am.Jur.2d Fraud and Deceits §441:

“Thus, if in a transaction between parties who stand in a relationship of trust and confidence, the party in whom the confidence is reposed obtains an apparent advantage over the other, he is presumed to have obtained that advantage fraudulently; and if he seeks to support the transaction, he must assume the burden of proof that he has taken no advantage of his influence or knowledge and that the arrangement is fair and conscientious...

Accord, 37 C.J.S. Fraud §§ 2 and 95. A virtually identical rule was adopted in *Work v. Rogerson*, 152 W.Va. 169, 160 S.E. 2d 159 (1968).

Thus, a major genuine issue and one upon which Plaintiff has the burden, is not even mentioned in Plaintiff’s Motion for Summary Judgment nor addressed in the Order Granting Summary Judgment and Final Order. To say that the Court finds no breach of fiduciary duty because the Power of Attorney authorized the Plaintiff to transfer property to himself, without inquiring into the circumstance of the transfer and requiring the fiduciary to carry the burden of proof that he did not use his principal’s property for his own advantage, or to derive secret profits or advantages to himself by reason of the relation of principal and agent existing

between him and his principal simply avoids and ignores the Plaintiffs fiduciary duty to his father and the case law regarding a fiduciary. It also amounts to a determination of facts, not a finding that there is no dispute of a material issue of fact.

The Court's reliance upon *Rosier v. Rosier*, 227 W. Va. 88, 705 S.E.2d 595 (2012) is misplaced. In *Rosier* there was no issue as to the authenticity of the provision of the power of attorney that authorized the fiduciary to convey property and resources to himself. The authenticity of that provision in the power of attorney in this case is a major and material factual dispute which does not lend itself to a determination by summary judgment. In addition, in *Rosier*, there was undisputed testimony from the attorney that prepared the power of attorney as to the intent of the grantor. In this case, we have the testimony of the preparer of the power of attorney that such provision was not contained in the document, and in addition we have a Codicil prepared twenty six days after the power of attorney that clearly indicates there was absolutely no intention on the part of the grantor to permit the fiduciary to deed himself the property over which he was responsible as a fiduciary.

To fit this case within the holding of the *Rosier* case, the trial court appears to rely upon the affidavit of P. Don Cook that the grantor of the Power of Attorney wanted to transfer the property in West Virginia to one of his children. P. Don

Cook, is an interested party that the trial court held in other portions of the Order granting Summary Judgment to be inadmissible evidence. However, regardless of its admissibility, to accept his testimony and reject the Affidavit of Elizabeth Chichester as well as the contents of the Codicil is weighing the evidence and deciding the facts, not determining if there is a material issue of fact, which is the function of the Court at the summary judgment hearing.

In addition, it is respectfully submitted that the affidavit of P. Don Cook, an interested party, does not meet the high standard of corroboration required of a fiduciary to meet his burden of proof that the transaction was not fraudulent as presumed by the law. The Virginia case of *Nicholson v. Shockey* 64 S.E. 2d 813, 192 Va. 270 (1951) is instructive on the point, holding that “Where, . . . a confidential relation existed between the parties at the time of the transaction relied on, a higher degree of corroboration is required than in ordinary transactions.” P. Don Cook’s Affidavit does not meet the corroboration requirement of an ordinary transaction, much less one involving a fiduciary.

It is respectfully submitted that the Court erred in making a factual determination of no breach of fiduciary duty.

V. THE COURT ERRED IN FINDING THAT “THERE IS NO EVIDENCE OF FRAUD,” THAT WOULD PRECLUDE A GRANT OF SUMMARY JUDGMENT IN PLAINTIFF’S FAVOR.”

The “in your face” evidence of fraud is the 2008 Deed of Correction. The Plaintiff signed the Deed of Correction using an invalid Power of Attorney, since his father had been deceased since 1999. He also held himself out as being the Executor of the father’s estate, which he was not.

Pursuant to West Virginia law there is a presumption of fraud relative to the 1997 Deed as explained under assignment of error IV. There is also an inference of fraud relative to the 1997 deed based upon the actions of the relative to the Deed of Correction.

If there were no fraud in the fiduciary deeding himself the property, then the proper and correct procedure upon finding out the incorrect description of the property in 2008 would have been to (1) obtain a deed of correction from the executor of his father’s estate; (2) obtain the consent and signatures of the beneficiaries of his father’s estate; or (3) file a suit to quiet title wherein the other interested parties, which are now the parties to this suit, would have been notified and have had an opportunity to object. That, of course, is not what the Plaintiff did. Instead, he signed a “Deed of Correction” in his capacity as “Power of Attorney” for his father who had been dead for nine years at that time and if that was not enough to show his fraudulent intent, he fraudulently added that his was

the executor of his father's estate which was absolutely not true. It was error for the Court to find that there is no evidence of fraud.

VI. THE COURT ERRED IN GRANTING DEFENDANT TONY'S FORK LAND, LLC'S MOTION TO QUASH NOTICE OF DEPOSITION AND FOR PROTECTIVE ORDER OF A FACT WITNESS.

Plaintiff's Fact Witness Disclosure (APP 114 - 116) lists Charles B. Dollison as a fact witness. There should be no question that he is in fact a "fact witness." He prepared the Memorandum of Coal Lease; he notarized the signature of P. GENE COOK, the Plaintiff in this case; he notarized the signatures of all the other lessors as well as the lessee. (APP 24 - 33).

W.Va.R.Civ.P. 26(b)(1) state that "Parties may obtain discovery regarding any matter, not privileged." Defendant/Counter-Plaintiffs do not seek to discover any matter that is privileged and especially not attorney client privilege. Defendant/Counter-Plaintiffs do seek the truth as to what occurred prior to and leading up to the Coal Lease being executed by POSEY GENE COOK. Counsel for Plaintiff, who listed Mr. Dollison as a fact witness stated at the hearing on this motion that "we also have a number of e-mails between Mr. Dollison, my client, and other representatives of the Cook family with respect to negotiations concerning Toney's Fork's acquisition of the property and the lease agreement between the Cook family and Toney's Fork, . ." That makes him a fact witness relative to non-privileged information. Counter-Plaintiffs are entitled to inquire

concerning those emails and should be entitled to inquire from the person that wrote and received the emails, not some other person designated by Defendant TONY'S FORK LAND, LLC. Counter-Plaintiffs need to know and are entitled to know what was said to the Plaintiff by the witness concerning the title to land for which the witness prepared all the documents. These communications with the Plaintiff are not privileged and are certainly discoverable.

In order to assert an attorney-client privilege, three main elements must be present; (1) both parties must contemplate that the attorney client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and the client must be intended to be confidential. Syllabus Point 2, *State v. Burton*, 163 W.Va. 40, 254 S.E. 2d 129 (1979)

None of these elements are present in connection with the witness and the Plaintiff or any other third parties. Counter-Plaintiff does not seek to discover communications between the witness and his client, TONY'S FORK LAND, LLC The Court erred in prohibiting this witness' deposition.

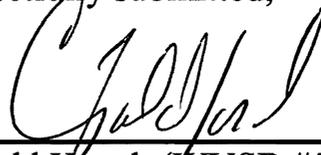
CONCLUSION

Based on the foregoing reasons set forth above, Petitioners, ELIZABETH CHICHESTER, as personal representative of the Estate of George P. Cook, ELIZABETH CHICHESTER, and KATHERINE LAMBSON, respectfully request

that this Court reverse the Circuit Court's Order dated March 11, 2013, Granting Motion for Summary Judgment and Granting Motion to Quash Notice and for Protective Order and the Courts subsequent Final Order dated August 12, 2013 and to remand the case for trial on the merits..

Dated this 6th day of December, 2013.

Respectfully submitted,



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Mullens, WV 25882
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Fax: 304-294-8077

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**ELIZABETH CHICHESTER, as personal
representative of the Estate of George P. Cook;
ELIZABETH CHICHESTER, individually;
and KATHERINE LAMBSON,**
Counter-Plaintiffs Below,
Petitioners,

vs.

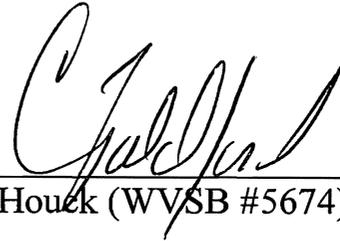
No. 13-0925

POSEY GENE COOK,
Plaintiff Below;
and **JAMES D. COOK, JERRY D. COOK,**
and **TONEY'S FORK LAND, LLC,**
Defendants Below,
Respondents.

CERTIFICATE OF SERVICE

I, G. Todd Houck, hereby certify that on the 6th day of December, 2013,
I served a copy of the foregoing Petitioners' Brief by United States Mail, postage
prepaid, to the following: John F. Hussell, IV, Esquire, Katherine M. Mullins,
Esquire, DINSMORE & SHOHL, LLP, P.O. Box 11887, Charleston, West
Virginia 25339; (Counsel for Defendant, Gene Posey Cook); Steven P. McGowan,
Esquire, Jennifer A. Hill, Esquire, Serry A. Habash, Esquire, STEPTOE &
JOHNSON, PLLC, P.O. Box 1588, Charleston, West Virginia 25326-1588

(Counsel for Defendant, Toney's Fork Land, LLC); Jerry Lee Cook, 145 Briarfield Drive, Mooresville, NC 28115; and, James D. Cook, 268 Spinner Drive, Jefferson, GA 30549.



G. Todd Houck (WVSB #5674)