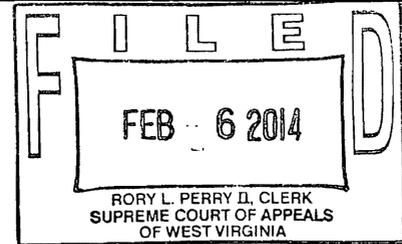


---

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' REPLY BRIEF**

---

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

G. Todd Houck (WVSB #5674)  
105 Guyandotte Ave.,  
Mullens, WV 25882  
Telephone: (304) 294-8055  
Facsimile: (304) 294-8077  
Email: [Gthouck@aol.com](mailto:Gthouck@aol.com)  
*Counsel for Petitioners*

**Jackson O. Brownlee, *Pro Hac Vice***  
Florida Bar No. 9581  
Beusse Wolter Sanks Mora & Maire, P.A.  
390 N. Orange Ave., Suite 3500  
Orlando, FL 32801  
Telephone: (407) 926-7702  
Facsimile: (407) 926-7720  
Email: [jbrownlee@iplawfl.com](mailto:jbrownlee@iplawfl.com)  
*Counsel for Petitioners*

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	1
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	1
ARGUMENT .....	1
I.    Standard of Review .....	1
II.   The Circuit Court Erred in Granting Summary Judgment on the Issue of “Scrivener’s Error” and Thus Reforming the Deed.....	2
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” .....	5
IV.  The Court Erred in Finding “No Breach of the Fiduciary Duty Plaintiff Owed to George P. cook as his Attorney- In-Fact” .....	7
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.....	8
VI.  The Court Erred in Granting Defendant, Toney’s Fork Land, LLC’s Motion to Quash Notice of Deposition and for Protective Order.....	9
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	13

## TABLE OF AUTHORITIES

	<u>Page</u>
<i>Petros v. Kellas</i> , 146 W.Va. 619, 122 S.E.2d 177 .....	4
<i>Sly. Pt. 5, Aetna Cas. &amp; Sur. Co. v. Federal Ins. Co.</i> , 148 W. Va. 160, 133 S.E. 2d 770 (1963) .....	7
<i>Rosier v. Rosier</i> , 227 W. Va. 88, 705 S.E.2d 595 (2012) .....	7
<i>Kanawha Valley Bank v. Friend</i> , 162 W.Va. 925, 929, 253 S.E.2d 528 (1979) .....	8
<i>Work v. Rogerson</i> , 152 W.Va. 169, 160 S.E. 2d 159 (1968) .....	8
<i>State ex rel. United Hospital Center, Inc. v. Bedell</i> , 199 W. Va. 316, 484 S.E. 2d 199 at 216 (1997) .....	10
<i>In re Arthur Treacher’s Franchisee Litigation</i> , 92 F.R.D. 429, 437-438 (E.D. Pa. 1981) .....	10
 <b>Rules</b>	
Rule 19 of the Rules of Appellate Procedure .....	1
Rule 20 of the Rules of Appellate Procedure.....	1
W.Va. Evidence Rule 701 .....	1, 5
West Virginia Rule of Civil Procedure 56(c) .....	3
West Virginia Rule of Appellate Procedure 10(d) .....	5
 <b>Other</b>	
37 Am. Jur. 2d Fraud and Deceits §441 .....	8

## **STATEMENT OF THE CASE**

Petitioners rely upon the “Statement of the Case” as contained in their Initial Appeal Brief.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners respectfully continue their request for oral argument. The grant of summary judgment as to counter-claims that were not subject to the Motion for Summary Judgment and the grant of summary judgment when there are disputed material issues of fact certainly fall within the category of “error in the application of settled law” as provided in Rule 19 of the Rules of Appellate Procedure. In addition, the grant of summary judgment on claims not referenced in the Motion for Summary Judgment and not briefed by either party is probably also a case of first impression under Rule 20 as well as to the question of whether or not, 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.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

There is no dispute that a circuit court’s entry of summary judgment is reviewed *de novo*.

Petitioners concur with Toney's Fork Land, LLC's position that the grant of a protective order pursuant to West Virginia Rule of Civil Procedure 26(c) is reviewed under an abuse of discretion standard.

**II. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF "SCRIVENER'S ERROR" AND THUS REFORMING THE DEED.**

Posey Gene Cook continues to rely on the testimony of Joni Rundle to prove that a "scrivener's error" occurred. Joni Rundle's testimony is not properly before the Court. Petitioners, in their Response in Opposition to Plaintiff/Counter-Defendant, Posey Gene Cook's Motion for Summary Judgment, dated December 7, 2012, pointed out that ". . . there is absolutely no evidence before this Court upon which to determine if 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 simply no sworn testimony before the Court that it is a wrong legal description or that the description is a "scrivener's error" or a mutual mistake." Therefore, there is no evidence upon which this Court can make a ruling. (APP 258-259)

Plaintiff then improperly attempted to correct the lack of evidence by filing a Reply to Response in Opposition to Plaintiff/Counter-Defendant Posey Gene Cook's Motion for Summary Judgment which contained portions of Joni Rundle's deposition testimony. (APP 328-334) The Certificate of Service for said Reply is dated February 4, 2013. (APP 334) The fax imprint on the Reply reflects the time

of 16:57 which is three minutes before 5:00 p.m. The summary judgment hearing was scheduled for February 6, 2013. (APP 335) Any supporting documentation for the Motion for Summary Judgment was to have been filed ten (10) days prior to the scheduled hearing as required by West Virginia Rule of Civil Procedure 56(c). Only the adverse party may file affidavits up to the day before the hearing. Joni Rundle's deposition has never been filed with the Court.

Plaintiff's counsel then proceeded to read portions of Joni Rundle's deposition into the record at the scheduled February 6, 2013 Summary Judgment hearing. (APP 376-378)

The trial court obviously relied upon Joni Rundle's testimony in that it quoted same at paragraph 25 in the Summary Judgment Order. (APP 341) Plaintiff's Response Brief (Pg. 11) again refers to counsel's reading of Rundle's testimony at the time of the Summary Judgment hearing in support of its position. (APP 330) West Virginia Rule of Civil Procedure 56(c) requires that Summary Judgment be based upon "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," (emphasis added) not upon the creation of a record at oral argument by counsel at the summary judgment hearing.

Summary Judgment is a harsh remedy. The adverse party should expect and the Court's should demand strict compliance with the rules pertaining thereto, before such harsh remedy is imposed.

It may very well be that the trial court would grant a directed verdict as to the issue of "scrivener's error." And it may very well be that a directed verdict as to that issue would be proper at that time. However, even in cases in which the trial judge is of the opinion that he should direct a verdict for one or the other of the parties on the issues involved, he should nevertheless ordinarily hear evidence and upon a trial direct a verdict rather than to try the case in advance on a motion for summary judgment. *Petros v. Kellas*, 146 W.Va. 619, 122 S.E.2d 177.

Without conceding that there was in fact a "scrivener's error," which Respondent may very well be able to prove at trial, as stated in Petitioner's Initial Brief, there is a more fundamental and basic reason the trial court erred in granting summary judgment as to that issue. 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. 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) She also 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) It is testimony that is permitted pursuant to WV Evidence Rule 701. It is testimony that creates material issues of fact to be determined by the trier of facts.

Respondent's brief does not in any way address why these two material issues of fact do not prohibit the grant of summary judgment.

**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."**

Petitioners respectfully submit that neither Respondent has responded to this assignment of error.

West Virginia Rule of Appellate Procedure 10(d), provides; "Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the case."

Toney's Fork Land, LLC states in its brief (Pg. 7) that it is mindful of the Rule and that "With regard to those assignments of error relating to the circuit

court's grant of summary judgment, Toney's Fork Land, LLC joins the response brief of Posey Gene Cook."

However, Respondent, Posey Gene Cook does not address the issue. Instead, Posey Gene Cook's responsive brief simply rehashes the scrivener's error as to the source of title and concludes that "the Trial Court correctly granted Gene Cook summary judgment as a matter of law and permitted the Deed to be reformed to conform to the actual intention of the parties. Accordingly, Defendants' claims against Plaintiff fail as a matter of law." The Response totally fails to explain why.

As stated in Petitioner's initial brief, "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." Respondents have not, in any way, provided this Court with any basis as to why these counterclaims do not survive the grant of summary judgment on the issue of "scrivener's error." There is no basis for the trial court to dismiss the counterclaims. In addition, summary judgment as to the counterclaims was not even requested in Respondent's Motion for Summary Judgment.

Respondents having failed to brief the issue in their responsive briefs, this Court should assume that they agree with Petitioners' position and reverse the trial court's dismissal of all counterclaims.

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

Petitioners’ counterclaim alleges that Respondent, Posey Gene Cook breached his fiduciary duty to his father, George P. Cook, when he conveyed property to himself as attorney-in-fact for his father. This was not an issue pled in the summary judgment motion nor briefed by any of the parties. Respondent’s brief states: “Fortunately, this Court has already determined that such an action is not a breach of fiduciary duty.” Such determination is an improper finding of facts, not a finding that there is no dispute of a material issue of fact. The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined. *Sly, Pt. 5, Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E. 2d 770 (1963).

Petitioners continue to maintain their position that the trial court’s reliance upon *Rosier v. Rosier*, 227 W. Va. 88, 705 S.E.2d 595 (2012) is misplaced. In *Rosier* there was undisputed testimony to support the language of the power of attorney. In this case, we have the testimony of the preparer of the power of attorney (APP 309-314) that such provision was not contained in the document, and in addition we have a Codicil (APP 262-264) prepared twenty six (26) 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.

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.”**

Respondent’s brief claims that Petitioners are unable to produce any evidence of fraud. Knowingly signing a Deed of Correction as the Executor of his father’s estate, which he was not, in addition to signing the Deed of Correction as his father’s power of attorney when his father had been deceased for nine (9) years, is certainly evidence of fraud. However, even without the fraudulently created document, a presumption of fraud arises where the fiduciary is shown to have obtained any benefit from the fiduciary relationship. 37 Am. Jur. 2d Fraud and Deceits §441, 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. *Kanawha Valley Bank v. Friend*, 162 W.Va. 925, 929, 253 S.E.2d 528 (1979); *Work v. Rogerson*, 152 W.Va. 169, 160 S.E. 2d 159 (1968).

Because of the shifting of the burden of proof due to the fiduciary relationship, it is not necessary for the Petitioners to prove the three traditional elements of fraud.

However, all are present. (1) The Deed of Correction was fraudulent as previously explained (the fraudulent act); (2) The Coal Company leased the land (reliance on the fraudulent deed); and, (3) the Petitioners lost their inheritance (damages).

Lastly, Respondent Cook's brief claims that Petitioners have failed to cite any relevant case law as to this issue. That is not correct. Since the breach of fiduciary duty, assignment of error IV, and fraud, assignment of error V, are so interrelated, counsel simply referenced back to the case law cited in assignment of error IV. The same case law supports both the claim of breach of fiduciary duty and fraud since breach of fiduciary duty is in essence 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.**

Respondent, Posey Gene Cook has not responded to this assignment of error. That, of course, is appropriate since his counsel's arguments at the hearing were very cogent and on point as to why Charles Dollison is a fact witness and his deposition should be permitted. (APP 399-401)

Respondent, Toney's Fork Land, LLC appears to be making an issue of the fact that "no subpoena was issued to compel his attendance at a deposition." (Brief of Respondent, Toney's Fork Land, LLC, Pg. 1) This is somewhat surprising since Toney's Fork's counsel represented the following to the trial court at the hearing on the Motion for Protective Order: "—Mr. Hussell had initially named him as a

witness, and then Mr. Brownlee said, well, if you're going to name him as a witness, I want to take his deposition, and all of us talked and said, well, I don't know about that, and I said to everyone, let me file a Motion for Protective Order before you actually notice the deposition. So a deposition was noticed that set forth that the deposition of Charles Dollison would be taken generally at some time in the future." (APP 394) This is nothing more than attorneys working together in a courteous and professional manner to resolve a problem. It should not be an issue on this appeal.

Charles Dollison is not an attorney of record for any of the parties to this litigation or a member of any firms which are. Therefore no one is attempting to take the deposition of "opposing counsel." There is no reason his deposition would disrupt the adversarial system, lower the standards of the profession or add to the already burdensome time and cost of litigation.

No one is seeking attorney/client privileged information or attorney work product. As this Court stated in *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W. Va. 316, 484 S.E. 2d 199 at 216 (1997) "If the questions to be asked of [the deponent/attorney] delve into privileged areas then his recourse will be to object and refuse to answer." In the same case, this Court, citing *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 429, 437-438 (E.D. Pa. 1981) stated; "The fact

that the proposed deponent is an attorney for one of the parties in the case is clearly not enough, by itself, to justify granting in full the motion for a protective order.”

Petitioner does seek to discover from this witness the contents of his discussions and communications with members of the Cook family in connection with negotiating the coal lease and specifically with Posey Gene Cook. What were the discussions between the witness and Posey Gene Cook relative to the title to the property? What were the discussions between him and Posey Gene Cook in connection with the Deed of Correction dated June 6, 2008? Did he know that Posey Gene Cook’s father was deceased as of the date of the Deed of Correction? Did he know that Posey Gene Cook was never the Executor of his father’s estate as indicated on the Deed of Correction as well as all other conversations and communications with Posey Gene Cook in connection with or relative to his preparation of the Coal Lease.

It is respectfully submitted to the Court that these are matters of critical importance to this case, they are not privileged matters and the trial court abused its discretion in granting the Protective Order prohibiting Charles Dollison’s deposition.

### **CONCLUSION**

Based on the reasons set forth in the Initial Brief and this Reply Brief, Petitioners, Elizabeth Chichester, as personal representative of the Estate of

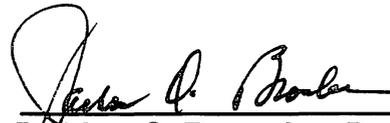
George P. Cook, Elizabeth Chichester, and Katherine Lambson, respectfully request that this Court reverse the Circuit Court's Order dated March 11, 2013, Granting Motion for Summary Judgment and Granting Motion to Quash Notice and for Protective Order and the Courts subsequent Final Order dated August 12, 2013 and to remand the case for trial on the merits..

Dated this 5<sup>th</sup> day of February, 2014.

Respectfully submitted,



G. Todd Houck (WVSB #5674)  
105 Guyandotte Ave.,  
Mullens, WV 25882  
Telephone: (304) 294-8055  
Facsimile: (304) 294-8077  
Email: [Gthouck@aol.com](mailto:Gthouck@aol.com)  
*Counsel for Petitioners*



Jackson O. Brownlee, Pro Hac Vice  
Florida Bar No. 9581  
Beusse Wolter Sanks Mora & Maire, P.A.  
390 N. Orange Ave., Suite 3500  
Orlando, FL 32801  
Telephone: (407) 926-7702  
Facsimile: (407) 926-7720  
Email: [jbrownlee@iplawfl.com](mailto:jbrownlee@iplawfl.com)  
*Counsel for Petitioners*

---

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 5<sup>th</sup> day of February, 2014, I served a copy of the foregoing Petitioners' Reply 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, STEPTOE & JOHNSON, PLLC, P.O. Box 1588, Charleston, West Virginia 25326-1588; and Amy M. Smith,

Esquire, STEPTOE & JOHNSON, PLLC, 400 White Oaks Blvd., Bridgeport,  
West Virginia 26330 (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.

A handwritten signature in cursive script, appearing to read "G. Todd Houck".

---

G. Todd Houck (WVSB #5674)