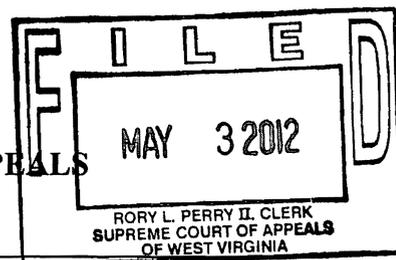


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



NO. 12-0165
(Circuit Court of Jefferson County Civil Action No. 08-C-223)

STEVEN D. FOSTER,
Defendant Below, Petitioner,

v.

GLEN POE,
Plaintiff Below, Respondent.

PETITIONER'S BRIEF

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEVEN D. FOSTER,)	
)	
Defendant Below, Petitioner,)	
)	No. 12-0165
v.)	(Jefferson County Circuit
)	Court Civil Action
GLEN POE,)	No. 08-C-223)
)	
Plaintiff Below, Respondent.)	

PETITIONER’S BRIEF

COMES NOW, Petitioner Steven D. Foster, *pro se*, (“Foster”) and files the following Brief. Foster seeks the reverse and remand of the Circuit Court of Jefferson County’s (the “Circuit Court”) November 9, 2011 Order Granting Judgment (Appendix¹, pages 0254-58 (“App.”)) against James P. Campbell, Esq. (“Campbell”) and Foster upon Promissory Note (the “Judgment Order”) and the Circuit Court’s January 5, 2012 Order Denying Campbell’s and Foster’s Motion to Alter or Amend the Court’s Judgment Order (“Order Denying Motion to Alter Judgment”) (App. 0358-62). The Circuit Court granted judgment in favor of Plaintiff Glen Poe (“Poe”) based upon an oral motion for summary judgment (the “Oral Motion”) at the October 31, 2011 pre-trial (the “Pre-Trial”). A transcript of the Pre-Trial is included in the Appendix at 0209-34.

I. ASSIGNMENTS OF ERROR

Foster presents the following Assignments of Error:

1. Poe failed to establish a valid and enforceable guarantee under the \$100,000 Promissory Note (the “Promissory Note”);

¹ The Appendix in this matter is filed simultaneously herewith. Note that Foster has excluded from the Appendix Doc. No. 26 – Foster’s November 22, 2011 Additional Memorandum in Support of the Motion for Summary Judgment – as this pleading was not filed in this case.

2. The Circuit Court ignored the jury's finding regarding Foster's obligation on the Promissory Note;
3. The Circuit Court saddled Foster with dispositive rulings based on Campbell's testimony, closing arguments, proposed exhibits and post-trial filings;
4. The Circuit Court ignored dispositive testimony as to the existence of the underlying Promissory Note, including that the original Promissory Note has never been admitted into evidence in this matter;
5. The Circuit Court accepted a settlement offer made by Poe's counsel to Foster and Campbell at the Pre-Trial;
6. The Circuit Court ignored the Rules of Civil Procedure with regard to the Oral Motion;
7. The Circuit Court failed to hear argument on, or even consider, the Motion for Judgment as a Matter of Law Pursuant to Rule 50 and a Renewed Motion for Summary Judgment Pursuant to Rule 56 (App. 0187-0203), Motion for Election of Remedies (App. 0204-08) and a Motion in *Limine* (collectively, the "Pending Motions") as filed on October 20, 2011 by Campbell and joined by Foster; and
8. Circuit Court Judge David Sanders ("Judge Sanders") demonstrated bias against Foster and Campbell and should have been disqualified.

Foster respectfully asserts that the Circuit Court erred when it entered both the Judgment Order and the Order Denying the Motion to Alter Judgment.

II. STATEMENT OF THE CASE

As evidenced by the Circuit Court's docket in this case, this matter has been extremely contentious and litigious.

This matter was filed by Poe over four (4) years ago (in April 2008) against seven different defendants – three individuals, including Foster and Campbell; two (2) corporations; and two (2) limited liability companies – seeking wages for work Poe claimed that he performed on behalf of all the defendants. In other words, Poe alleged that he was working for seven different people and entities at the same time. Poe’s amended complaint also included counts for fraud; negligent legal counsel; and breach of the Promissory Note.

All the parties involved filed various motions to dismiss and/or motions for summary judgment. By its order dated May 4, 2011 (App. 0138-145), the Circuit Court granted Foster’s and Foster-Herz, Inc.’s (“Foster-Herz”) motion for summary judgment as to Count 2 (negligent legal counsel) and Count 3 (wage payment). The only remaining count against Foster and Foster-Herz was Count 1 (fraud) and against Foster solely was Count 4 (breach of promissory note)

At Trial, the jury returned a general verdict of fraud against Foster for \$60,000; a general verdict of fraud against Foster-Herz for \$22,500; and found that both Foster and Foster-Herz were liable for punitive damages. On May 17, 2011, Foster filed a motion to set aside the jury verdict prior to the Circuit Court’s hearing on punitive damages (App. 0165-72). The Circuit Court denied the motion.

At the punitive damages hearing on May 17, 2011, a mistrial was declared after the jury impeached its own verdict based on questions it had sent to the Circuit Court during the Trial. A copy of the jury’s questions are included in the Appendix at 0173-74. Subsequent to the mistrial, this case was again placed on the trial docket and scheduled to

begin on November 15, 2011 with the Pre-Trial scheduled for October 31, 2011.

Following the mistrial, the parties were returned to their pre-trial status.

On or about October 20, 2011, Campbell, joined by Foster as a movant, filed the Pending Motions as identified above and appearing in the Appendix at 0187-0208.

At the Pre-Trial and without notice to any of the parties or to the Circuit Court, Poe's counsel proffered the Oral Motion for summary judgment against Foster and Campbell on the Promissory Note (Count 4 of Poe's Amended Complaint) (the "Promissory Note Claim") (App. 0209-34). Poe's counsel previously filed a written motion for partial summary judgment on the Promissory Note Claim (App. 0084-98) which was denied by the Circuit Court on or about April 13, 2011.

In support of the Oral Motion, Poe's counsel argued the following: (a) purported findings of the jury from the Trial; (b) statements made by Campbell in a post-trial filing (specifically, Motion to Vacate a Portion of the Verdict Pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure or in the alternative for a New Trial); (c) Campbell's testimony concerning the Promissory Note during the Trial; (d) evidence that Campbell attempted and failed to admit during the Trial that was ultimately objected to by Poe's counsel and only marked for identification purposes; and (e) statements made by Campbell during his closing arguments of the Trial.

At the Pre-Trial, Poe's counsel offered to Foster and Campbell that if they would take judgment against them on the Promissory Note Claim, Poe would non-suit his remaining claims against them. Foster voiced his concerns to the Circuit Court regarding the authenticity of the Promissory Note but certainly did not consent to Poe's settlement offer. The only argument that Foster was permitted to offer to the Circuit Court was a

short recitation of how the parties found themselves at this juncture – that no one knows who signed which Promissory Note. (App. 0221, lines 13-23.)

In fact, Poe’s counsel articulated such as a “proposal” (App. 0212, lines 11-16) and the Circuit Court identified it as a motion for summary judgment (App. 0228, line 14).

In response to this settlement offer, the Circuit Court accepted Poe’s terms and granted Poe’s counsel’s Oral Motion against Foster and Campbell in favor of Poe. (App. 0228, lines 17-21). The Court directed Poe’s counsel to provide the Circuit Court with a draft order. (App. 0228, line 28 through 0229, line 1). Poe’s draft order (App. 0235-45) was woefully deficient and did not accurately reflect what had taken place at the Pre-Trial. Both Foster and Campbell filed separate and timely objections to the draft order. (App. 0246-49 for Campbell and 0250-53 for Foster).² Without ruling on the objections filed or providing any information to Foster or Campbell, the Circuit Court entered Poe’s proposed order verbatim (App. 0254-58) with the addition of a stamp on the last page, specifically: “The Clerk is directed to retire this action from the active docket and place it among the causes ended.” (App. 0258).

Foster filed a Motion to Alter Judgment Pursuant to West Virginia Rule of Civil Procedure 59 and for Discretionary Stay of Proceedings Pursuant to West Virginia Rule of Civil Procedure 62(b) (App. 0269-84), as well as a Memorandum in Further Support of Motion to Alter Judgment (App. 0338-45). Campbell also filed a separate motion to

² Foster also filed a Motion to Disqualify Judge Sanders, as well as an Amended Motion to Disqualify (App. 0259-0265). Judge Sanders forwarded Foster’s Motion to Disqualify to this Court with his November 16, 2011 letter. (App. 0266-67). This Court entered an order on November 18, 2011 denying Foster’s motion (App. 0266). However, based upon a review of that order, as well as Judge Sanders’ November 16, 2011 letter to the Chief Justice, it is not clear if this Court had been provided with, or was even aware of, Foster’s Amended Motion.

amend. The Circuit Court denied the motion to alter judgment and entered its Order Denying Motion to Alter Judgment. (App. 0358-62).

Foster filed his timely Notice of Appeal and this Brief follows.

III. SUMMARY OF THE ARGUMENT

A. Standard of Review

“The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to West Virginia Rule of Civil Procedure 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Syl. Pt. 1, *Wickland v. American Travellers Life Insurance Company*, 204 W.Va. 430, 513 S.E.2d 657 (1998). In this case, the underlying judgment was an order granting summary judgment to plaintiffs. “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

“While Rule 59(e) does not itself provide a standard under which a circuit court may grant a motion to alter or amend, other courts and commentators have set forth the grounds for amending earlier judgments.” This Court has cited the following standard under which a court may grant a motion to alter or amend: “(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.” *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011) (citing *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 59(e) at 1178–1179 (3d. Ed. 2008)).

Foster appeals the Circuit Court’s grant of the Oral Motion in favor of Poe. This Court reviews a circuit court’s entry of summary judgment under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In conducting a *de novo* review, this Court applies the same standard for granting summary judgment that a circuit court must apply. *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 383, 624 S.E.2d 815, 820 (2005). Further, “[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). “[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor.” *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986].” *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337.

The legal standard for considering a motion for summary judgment provides that the Circuit Court must review all facts and reasonable inferences in the light most favorable to the nonmoving party – in this case, Foster. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335-36 (1995)(citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). A grant of summary judgment may only be granted where the totality of the evidence available of record shows “. . . there is no genuine issue as to any material fact

and the moving party is entitled to judgment as a matter of law.” West Virginia Rule of Civil Procedure 56(c).

It is worthy to note that summary judgment is not a remedy to be exercised at the circuit court’s option; it may be granted *only* when there is no genuine disputed issue of a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); *Williams*, 194 W.Va. at 59 n.7, 459 S.E.2d at 335-36 n.7. A “dispute about a material fact is ‘genuine’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Foster emphasizes the above language to reinforce his position that it is the Circuit Court’s duty to consider the totality of the evidence entered into the record of this action. As is unequivocally demonstrated herein, Foster met the burden for judgment in his favor against Poe – not the other way around.

B. Summary

As stated herein, the Order Denying Motion to Alter Judgment must be reversed and remanded to the Circuit Court, the Judgment Order reversed and judgment be entered in favor Foster because of the numerous errors committed by the Circuit Court in this matter, including Poe’s failure to establish a valid and enforceable guarantee under the Promissory Note; the Circuit Court’s decision to ignore dispositive testimony as to the

existence of the underlying Promissory Note, including that the original Promissory Note has never been admitted into evidence in this matter; the Circuit Court's acceptance of a settlement offer made by Poe's counsel to Foster and Campbell at the Pre-Trial; the Circuit Court's decision to ignore the Rules of Civil Procedure with regard to the Oral Motion; and the failure of the Circuit Court failed to hear argument on, or even consider, the Pending Motions. In addition, Foster believes that the bias demonstrated by Judge Sanders in favor of Poe merited his disqualification as the trier of fact.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Foster respectfully submits that this matter should be scheduled for oral argument pursuant to Rule 19(a)(3) of the West Virginia Rules of Appellate Procedure. Further, Foster believes that this matter should be consolidated for oral argument with the matter of *Campbell v. Poe* pending before this Court as No. 12-0130 pursuant to Rule 18(c) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. The Judgment Order Must Be Vacated Because Poe Failed to Establish a Valid and Enforceable Guarantee (Assignment of Error No. 1)

At Trial, it was Poe's burden to establish a valid written guarantee of the Promissory Note in order to recover based upon the promise to pay. In West Virginia, personal guarantees fall within the Statute of Frauds. *See* W.Va. Code § 55-1-1. An agreement, required by the statute of frauds to be in writing, must be certain in itself or capable of being made so by reference to something else, whereby its terms can be ascertained with reasonable certainty. *Milton Bradley Co. v. Moore*, 92 W.Va. 77, 112 S.E. 236 (1922). "To be enforceable under the statute of frauds a signed writing must

express the essential terms of the agreement with a degree of certainty such that the agreement of the parties can be determined without recourse to parol evidence.”

Heartland, LLC v. McIntosh Racing Stable, LLC, 219 W.Va. 140, 149, 632 S.E.2d 296 (2006)(citations omitted).

Likewise, under Virginia law, the statute of frauds bars guaranties unless they are evidenced by writing. Va. Code § 11-2. Additionally, contracts that are within the statute of frauds retain all of the usual contract requirements in order to be valid and enforceable. “There is only superadded the requirement that the agreement shall be in writing, signed by the party to be charged, or his agent. Hence, for guaranties there must be, as in all other cases, competent parties, a lawful subject matter, a valuable consideration, and mutuality of assent.” *Southside Brick Works v. Anderson*, 147 Va. 566, 573, 137 S.E. 371 (1927)(emphasis added). West Virginia law is precisely the same: “The fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.” *Wellington Power Corp. v. CAN Sur. Corp.*, 217 W.Va. 33, 37, 614 S.E.2d 680, 684 (2005).

By ruling in favor of Poe, the Circuit Court was required to determine that there was a valid and enforceable guarantee signed by mutual assent of the parties. Unfortunately, the Circuit Court did not rule on which document it based its Judgment Order. As demonstrated by contract law and the statute of frauds, neither of the documents produced during trial are valid and enforceable agreements, and Poe has failed to meet his burden of proof.

It is and was Poe's burden to prove that a written instrument exists and the terms thereof. When the written instrument is the very basis of the cause of action, as the guarantee to the Promissory Note in this case is, then the failure to introduce and prove the validity of the document is fatal to the cause. For example, in *Ente v. Merry*, 443 N.E.2d 1323 (Mass.App. 1982), an injunction was lifted upon evidence that the signature page was missing from the contract that was the basis of the right to an injunction. The court held that the lack of a signature page made existence of the contract "obviously uncertain," and the injunction would remain dissolved until the moving party could show sufficient probability that an enforceable contract existed. *Id.* at 1325.

Similarly, in *Campbell v. Campbell*, 843 N.Y.S.2d 471 (N.Y. 2007), summary judgment was precluded because the plaintiff claimed that the first page of a document was different than the first page of the document she had signed. The court held that triable issues of fact remained as to the authenticity of the document produced.

In another similar case, a guarantor signed a guarantee, and the signature page was later attached to a different guarantee with different terms. The court held that no contract existed because there was never a meeting of the minds. *See Loyola Federal Sav. & Loan Ass'n v. Fickling*, 783 F.Supp. 620 (M.D. Ga. 1992). In *Loyola Federal*, the document was proved to be piecemealed together because the footers on the document were different from those on the signature pages. Accordingly, the plaintiff had failed to introduce a contract in which there was a meeting of the minds, and "the substitution of the signature pages would be sufficient in itself to prohibit there being a binding contract." *Id.* at 624.

In the present case, Poe's witness, Michael Briel ("Briel") testified that the document he signed included Lou Athey ("Athey") as a co-guarantor on the first page of the Promissory Note. None of the documents before the Circuit Court include Athey as a co-guarantor. Poe is bound by his witness's testimony; therefore, the only logical conclusion from the evidence is that the document containing the original terms and signatures has not been produced. The only document containing a signature binding 210 West Liberty does not include Athey. It is a clear error of law to enforce the terms of a guarantee to the Promissory Note when the specific documents before the Circuit Court have been discredited by one of the signatories to the original document.

Additionally, in *TranSouth Financial Corp. v. Rooks*, 604 S.E.2d 562 (Ga.App. 2004), the court held that lack of signatures in the signature block was a fatal defect to a contract amendment, since there was no evidence that the parties had executed the entire document and no evidence showing that the parties agreed to all of the essential terms. Likewise, the terms to which Briel testified were in the guarantee are not before the Circuit Court in a document containing the signatures of Campbell and Foster. It was, therefore, clear error of law to enter the Judgment Order based on a document that did not have the proper signatures attached, if the Circuit Court based its decision on the document lacking the signature.

The two documents upon which the Circuit Court could have based its Judgment Order are insufficient as a matter of law to bind the parties. Accordingly, the Circuit Court committed clear error which will result in manifest injustice if not corrected.

Further, there is a genuine issue of material fact as to which document is the authentic version of the Promissory Note. As indicated herein, neither document is

consistent with Briel's testimony; therefore, it is an error of law for the Circuit Court to base its ruling on either document.

The Order Denying Motion to Alter Judgment must be reversed and remanded to the Circuit Court; the Judgment Order vacated; and judgment in favor of Foster be entered.

B. The Judgment Order Must Be Vacated Because the Circuit Court Ignored the Jury's Finding Regarding Foster's Obligation on the Promissory Note (Assignment of Error No. 2)

In a prior ruling, the Circuit Court stated that the existence of the Promissory Note was a question for the jury. The jury made its finding on the existence of the Promissory Note and the Circuit Court, in granting the Oral Motion and entering the Judgment Order, ignored the jury's finding and its own prior finding. Clearly, this is error.

At the conclusion of the Trial, the jury was posed with Special Interrogatory No. 2³: "Do you find that the Defendant Steven Foster personally guaranteed payment to Glen Poe under the terms set forth in the August 29, 2007 Promissory Note in exhibit 10?" The jury answered "Yes."

At the May 17, 2011 hearing on punitive damages, the jury sent a note to the Circuit Court that ultimately caused the mistrial to be granted. A copy of the jury's questions to the Circuit Court are included in the Appendix at page 0284. The question posed by the jury affirmatively states that "we read this to be that in answering yes to #1 & #2 would not obligate the \$ in the promissory note." (Emphasis in the original.)

In granting the Oral Motion, the Circuit Court erred in ignoring the findings of the jury. Further, Judge Sanders noted on various occasions that he highly valued and

³ Special Interrogatory No. 1 is identical to No. 2 except is posed with regard to Campbell as opposed to Foster.

praised the character and ultimate decision of the jury, including at the Pre-Trial. (App. 0226, lines 19-24 and App. 0227, lines 1-3). The Circuit Court entered the Judgment Order against Foster despite the jury's finding that Foster would not be obligated to the sums owed in the Promissory Note.

For this reason alone, the Order Denying Motion to Alter Judgment must be reversed and remanded to the Circuit Court; the Judgment Order vacated; and judgment b entered in favor of Foster.

C. The Judgment Order Must Be Vacated as the Circuit Court Improperly Saddled Foster with Dispositive Rulings Attributable Only to Campbell (Assignment of Error No. 3)

Poe's arguments in support of the Oral Motion directed the Circuit Court to the following: (a) statements made by Campbell in his post-trial filing (specifically, Motion to Vacate a Portion of the Verdict Pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure or in the alternative for a New Trial); (b) Campbell's testimony concerning the Promissory Note during Trial; (c) evidence that Campbell attempted to admit during the Trial that was ultimately objected to by Poe's counsel and only marked for identification purposes; and (d) statements made by Campbell during his closing arguments of Trial. (App. 0209-34). All of Poe's arguments are directed to the filings, actions, testimony or argument of Campbell, not Foster or his previous counsel.

Saddling Foster with dispositive rulings based on Campbell's testimony, closing arguments, proposed exhibits and post-trial filings in unfair. Poe is required to prove that all of these "facts" are attributable to Foster. The Circuit Court is not permitted to paint Foster with the same brush as Campbell, especially with arguments or statements that Campbell made when acting on his own behalf.

In order to grant judgment against Foster, Poe is required to submit proof that warrants judgment against Foster. Poe is not permitted, and the Circuit Court should not accept, that just because Poe points to Campbell that Foster is also “guilty” of the same. A review of the docket of this case shows that Foster has not always followed Campbell in his filings. Foster has submitted his own various motions that greatly differ from those of Campbell and these two defendants are not “joined at the hip.” They are separate defendants and should be treated that way.

Reversal of the Judgment Order as to Foster is warranted on these grounds alone, as even the Judgment Order itself is devoid of any reason for which judgment should have been granted against Foster.

D. The Judgment Order Must Be Vacated as the Circuit Court Ignored Dispositive Testimony Regarding the Promissory Note (Assignment of Error No. 4)

As stated above, Poe and his witness, Briel each testified regarding the Promissory Note at Trial and during discovery. Poe repeatedly testified at his deposition that the Promissory Note was not the Promissory Note between the parties. (App. 038-39; 53; 72-76). Briel testified at Trial that the Promissory Note admitted into evidence was not the Promissory Note he had signed. It certainly appears that there are questions concerning the Promissory Note that should not be ignored by the Circuit Court, let alone justifying the entry of the Judgment Order.

In addition, the Circuit Court ignores that the original Promissory Note has never been admitted into evidence. Poe testified that he did not have the same. (App. 38, 74-76). Neither the Defendants nor Briel are in possession of the original Promissory Note.

Under the best evidence rule, “[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.” West Virginia Rules of Evidence 1002, Requirement of Original. Pursuant to Rule 1003, a duplicate is admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original. Briel’s testimony raised serious concerns about the authenticity of the document because he explicitly stated that the duplicate document was not the document that he signed. Accordingly, it could neither be the original document nor a reliable duplicate of the original. If the Circuit Court based its ruling on Promissory Note that Poe introduced at Trial, the Circuit Court committed clear error because the document was not the best evidence, there was no evidence presented of its authenticity, and Poe’s own witness discredited it. In fact, Poe discredited the Promissory Note as well.

Granting judgment under the Promissory Note that the holder, as well as his own witness, testified is not the Promissory Note is unfathomable and justifies a reversal of the Judgment Order. Further, if no one is able to produce the original Promissory Note, how can judgment be granted on the missing instrument?

For this reason alone, the Order Denying Motion to Alter Judgment must be reversed and remanded to the Circuit Court; the Judgment Order vacated; and judgment entered in favor of Foster.

**E. The Judgment Order Must Be Vacated as the Circuit Court Accepted a Settlement on Behalf of the Defendants that They Rejected
(Assignment of Error No. 5)**

During the course of his argument on the Oral Motion at the Pre-Trial, Poe’s counsel proffered a settlement: if Foster and Campbell would take judgment against

them on the Promissory Note Claim, Poe would non-suit his remaining claims against them which would eliminate the need for a retrial. (App. 0218, lines 2-7).

The Court accepted Poe's "proposal" and granted judgment against Foster. The Judgment Order clearly reflects these terms: "The plaintiff's election to non-suit his remaining claims against all defendants without prejudice pending any appeal of this Judgment is also GRANTED." *See* page 4 of the Judgment Order (App. 0257). There is no provision of the West Virginia Rules of Civil Procedure or any West Virginia statute that grants the Court authority to dismiss an action without prejudice pending an appeal.

Forcing a settlement on the parties is clearly error and the Judgment Order must be vacated accordingly. In addition, authorizing remedies in a Judgment Order that are not legally possible requires that the Judgment Order be reversed.

F. The Judgment Order Must Be Vacated Because of the Circuit Court's Actions with Regard to the Oral Motion (Assignment of Error No. 6)

The Circuit Court also threw out the Rules of Civil Procedure with regard to the Oral Motion. Although it previously denied a written motion for summary judgment with regard to the Promissory Note Claim (App. 144-45), the Circuit Court did not require Poe to file an additional written formal written motion, failed to require at least 10 days notice prior to the hearing, and did not allow for a written response by Foster, as required by Rule 56. The precise requirements of the rule are:

(a) **For Claimant.** A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **Motion and Proceedings Thereon.** The motion **shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits.**

See Rule 56 of the West Virginia Rules of Civil Procedure. (Emphasis added.)

The failure to follow the explicit requirements of Rule 56 is clear error of law and must be altered in the interest of justice.

At the Pre-Trial, Poe argued an oral motion for summary judgment against Foster and Campbell ignoring the following requirements of Rule 56 of the West Virginia Rules of Civil Procedure: (a) no additional formal written motion for the same as Poe's previous motion for summary judgment had been denied; (b) providing 10 days notice prior to hearing on the same; and (c) allowing Foster and Campbell to file a written response. *See Cremeans v. Goad*, 158 W.Va. 192, 210 S.E.2d 169 (1974); *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997); and *Truman v. Auxler*, 220 W.Va. 358, 647 S.E.2d 794 (2007).

The Circuit Court clearly erred when it failed to follow the basic procedural requirements for summary judgment proceedings established to protect a non-moving party from surprise and prejudice. Foster and Campbell came before the Court at the Pre-Trial to argue motions previously filed and pending by them – not by Poe. Neither Foster nor Campbell were not aware of, nor prepared for, the Oral Motion based on the Promissory Note Claim on the day of the Pre-Trial. At the very least, Foster and Campbell were prejudiced by the deprivation of their right to prepare and be heard on an opposition to the Oral Motion.

G. The Judgment Order Must Be Vacated as the Circuit Court Failed to Rule on the Pending Motions (Assignment of Error No. 7)

As stated above, on or about October 20, 2011, Campbell, joined by Foster as a movant, filed the Pending Motions – specifically, Motion for Judgment as a Matter of Law Pursuant to Rule 50 and a Renewed Motion for Summary Judgment Pursuant to Rule 56, Motion for Election of Remedies and a Motion in *Limine*. (App. 0187-0208).

The Circuit Court was required to rule on the Pending Motions as they had a direct effect on the outcome of this case. In addition, in entering the Judgment Order, the Circuit Court directed the clerk to “retire this case from the active docket and place it among the causes ended.” (App. 0258). Clearly, retiring a case from the active docket with motions for which a ruling has never been issued, either orally or in written, is error. The clerk cannot be permitted to close a case with motions pending.

At the Pre-Trial, the Pending Motions were not argued nor were they scheduled for argument despite that they had a direct effect on the outcome of this case. In fact, when the Court entered the Judgment Order, it directed the clerk to “retire this case from the active docket and place it among the causes ended.” Closing a case and retiring the same from the active docket requires that all pending motions be decided. This is clearly not what happened in this matter.

The sole basis for the Circuit Court’s award of summary judgment and its denial of Foster’s Motion to Alter Judgment is judicial estoppel. *See* Order Denying Motion to Alter Judgment (App. 0358-62); *see also* the Judgment Order (App. 254-58). However, the Circuit Court failed to apply the judicial estoppel test established by this Honorable Court in *West Virginia Dept. of Transp., Div. of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005). The test used in West Virginia to determine if judicial estoppel is appropriate requires the following elements to be met: (1) The party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the

adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *Id.*

The Circuit Court did not address elements three or four of the *Robertson* test, and based its decision solely on elements one and two of *Robertson*. If properly applied, the judicial estoppel test is not met for three reasons — Foster’s position was consistent, Foster received no benefit from the alleged change in position, and Poe was not misled or injured.

Looking at the issue of inconsistency first, Foster consistently denied the validity of the instrument that was introduced at trial. The validity of the Promissory Note was first raised in Poe’s December 2010 deposition, in which he admitted that the Promissory Note in his possession was not the one signed by all of the parties to the agreement (App. 038-39; 53; 72-76). The issue arose again at trial, when both the Poe and his witness, Briel, testified that Promissory Note introduced into evidence to establish the terms of the note between the parties was not the actual Promissory Note signed by the parties. At this time, Foster amended his Answer to the Amended Complaint to include the instrument’s lack of authenticity as a defense (App. 0146-48). The amended answer stated:

The Promissory Note attached to the Amended Complaint was not properly executed. Specifically, Michael E. Briel, the representative of 210 W. Liberty Holding, LLC who signed the asserted Promissory Note testified as part of the Plaintiff’s case that the signatures attached to Exhibit 10 related to a different Note, and that the first page of Exhibit 10 and the guarantee pages of Exhibit 10 were part of a different document and not Exhibit 10.

The burden was at all times on Poe to establish the correct written instrument because a personal guarantee must be in writing pursuant to the Statute of Frauds to be

enforceable. Foster at no time agreed that the Promissory Note introduced by Poe at trial was the properly executed and enforceable Promissory Note that all parties had signed. Just the opposite, Foster consistently raised Briel's testimony and Poe's testimony at his deposition as evidence that Exhibit 10 was not the valid and enforceable Promissory Note.

In addition to Briel's testimony that the Promissory Note he signed was not before the Circuit Court, the jury found that the Promissory Note that was introduced at trial was unenforceable. The jury verdict was vacated and, without explanation, summary judgment was entered contrary to the jury's intentions.

The mistrial that resulted left the parties in their original positions — as equal litigants without any adverse findings against either party. Therefore, even if Poe could establish an inconsistency in the positions taken by Foster at trial, Foster did not in any way benefit from it. Benefit is an essential element in order to invoke judicial estoppel. *See Robertson* at 217 W.Va. at 506, 618 S.E.2d at 515. The mistrial was not caused by any inconsistency in Foster's position, nor did Foster benefit in any way from any of the positions he took at trial. To the contrary, the parties were back to square one of the litigation after the mistrial.

Finally, Foster never misled Poe and Poe was not injured. The judicial estoppel test requires that an inconsistent position mislead the other party. Poe was never misled as to Foster position, which consistently required Poe to carry his burden of proving an enforceable instrument. When evidence was introduced at trial that the instrument held by Poe was not the instrument signed by Briel, Foster promptly amended his Answer to preserve the defense.

As a result of the mistrial, Poe, like Foster, was returned to the same position as he was in prior to the trial. Consequently, Poe can claim no injury resulting from the alleged inconsistency.

The Circuit Court based its decision to grant summary judgment solely on the issue of judicial estoppel. The Circuit Court's failure to address prongs two and three of the judicial estoppel test required by *Robertson* was legal error that this Court must reverse upon *de novo* review.

H. The Judgment Order Must Be Vacated Because Judge Sanders Demonstrated Bias against Foster and Campbell and Should Have Been Disqualified (Assignment of Error No. 8)

The record of this case before the Circuit Court of demonstrates a pattern of continuing bias by Judge Sanders in favor of Poe and his counsel and against Foster. At different times during the course of this matter, Campbell and Foster separately moved to disqualify Judge Sanders for violations of the Code of Judicial Conduct Canon Nos. 2 and 3. (App. 0259-65). Judge Sanders refused to decide the merits of Foster's motion for entry of judgment consistent with the answer to the special interrogatory and the evidence adduced at trial (App. 0165-72); ignored all of the motions that Foster filed post-trial (*see* Assignment of Error No. 7 herein); and granted an oral summary judgment in favor of Poe at the Pre-Trial (*see* Assignment of Error No. 6 herein).

Both the Judgment Order and the Order Denying Motion to Alter Judgment entered by Judge Sanders demonstrate bias. With regard to the Judgment Order, Foster directs this Court to the citations of Poe's counsel with regard to Campbell. No proof is offered against Foster. (*See* Assignment of Error No. 3 herein).

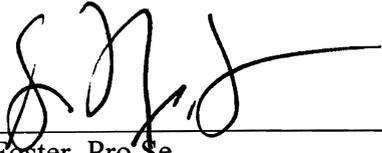
With regard to the Order Denying Motion to Alter Judgment, references are made to evidence not before the Court (assurances to a “bankruptcy judge” on page 2 (App. 0359)) and arguments made by Campbell (not Foster) on page 3 (App. 0360). (See Assignment of Error No. 3 herein).

In addition, the testimony offered by Poe’s witness, Briel, is ignored completely in both Orders, as well as Poe’s contradictory statements regarding the authenticity of the Promissory Note. (See Assignment of Error No. 1 herein).

VI. CONCLUSION

For all the reasons stated above, whether considered independently, but especially when considered in totality, the Judgment Order and the Order Denying Motion to Alter Judgment in this case scream to be overturned. The sheer number and severity of the errors with regard to the Judgment Order, and the subsequent Order Denying Motion to Alter Judgment, is outstanding including that Poe’s non-suit of his remaining claims is granted without prejudice pending any appeal of the Judgment, as well as the Court’s stamp directing the clerk to retire this action “from the active docket and place it among the causes ended” when there are numerous motions that have not been decided by the Court, either orally or in writing.

WHEREFORE, Steven D. Foster respectfully requests that (a) the Order Denying Motion to Alter Judgment be reversed and remanded; (b) the Judgment Order be vacated; (c) judgment be entered in Foster’s favor; and (d) for such further relief as this Court deems just and proper.



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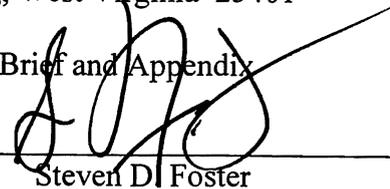
CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the foregoing has been made as follows:

Type of Service: First-Class, U.S. Mail
Date of Service: May 2, 2012
Persons Served and Address: James P. Campbell
19 East Market Street
Leesburg, Virginia 20176

David M. Hammer
Robert J. Schiavoni
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Item Served: Petitioner's Brief and Appendix



Steven D. Foster