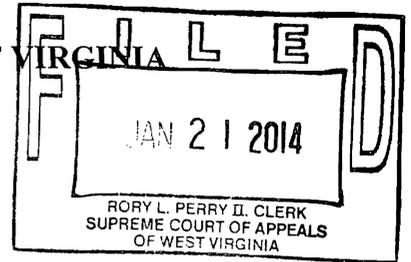


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 13-0925

**Elizabeth Chichester, individually and as the
personal representative of the Estate of George
P. Cook & Katherine Lambson, individually,
Petitioners,**

vs.

**Posey Gene Cook & Toney's Fork Land, LLC,
a Delaware limited liability company,
Respondents.**

**On Appeal from Honorable Charles M. Vickers, Judge
Circuit Court of Wyoming County
Civil Action No. 12-C-37**

**RESPONSE BRIEF OF
RESPONDENT POSEY GENE COOK**

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SUMMARY OF ARGUMENT

The Circuit Court of Wyoming County, West Virginia (the “Trial Court”) correctly granted summary judgment in favor of Respondent Posey Gene (“Gene”) Cook for five reasons. First, the Trial Court correctly found that the parties to the Deed dated August 28, 1997, made a mutual mistake of fact with respect to the source of title to Tract 1 which resulted from a mistake of the scrivener. The Trial Court properly ruled that the mistake of a scrivener in preparing a deed is a mistake of both parties because the scrivener is an agent of both.

Second, the Trial Court correctly found that the reference to the source of title for Tract 1 is mere surplusage and accordingly rejected the reference in order to carry out the intent of the parties to the Deed dated August 28, 1997. The Trial Court ruled that George P. Cook intended to convey to Gene Cook only the property he owned. Therefore, the Deed could be properly reformed to reflect the correct source of Tract 1.

Third, the Trial Court correctly found that there is no genuine issue of material fact regarding the authenticity of the May 30, 1996, Durable Power of Attorney. Elizabeth Chichester and Katherine Lambson have argued that the Trial Court erred in granting summary judgment because there is a genuine issue of material fact regarding the authenticity of the document. However, the Trial Court correctly found that Ms. Chichester and Ms. Lambson’s assertions were insufficient to preclude summary judgment because they offered no expert handwriting analysis or any evidence to support the existence of the alleged alternate power of attorney apart from their self-serving testimony.

Fourth, in relying upon *Rosier v. Rosier*, the Trial Court correctly found that Gene Cook did not breach his fiduciary duty to George P. Cook. In *Rosier v. Rosier*, this Court found that the attorney-in-fact did not breach any fiduciary duty in conveying property to himself because

the power of attorney expressly provided for such an action. 227 W. Va. 88, 705 S.E.2d 595 (2010). The Trial Court properly concluded that the instant matter is directly analogous to that case.

Fifth, the Trial Court correctly found that Gene Cook did not commit fraud, as attorney-in-fact for George P. Cook or otherwise, because Elizabeth Chichester and Katherine Lambson failed to prove the requisite elements, such as providing evidence of their reliance upon any of Gene Cook's actions or any damages which resulted from such reliance.

PROCEEDINGS BELOW AND RULINGS BY THE TRIAL COURT

On March 29, 2012, Gene Cook filed an *Amended Complaint to Quiet Title* (“*Complaint*”) in the Trial Court regarding an undivided one-fifth (1/5) interest in two (2) tracts of real estate situated on Big Huff Creek, Oceana District, Wyoming County, West Virginia (the “Property”) that had been conveyed to him by his father, George P. Cook, on August 28, 1997. APP 4. The parties to the suit included his siblings: Elizabeth Chichester, individually and as the purported representative of the Estate of George P. Cook, Katherine Lambson, James D. Cook, Jerry Lee Cook, and the company that currently leases the Property, Toney's Fork Land, LLC. *Id.*

The manner in which the Property was conveyed to Gene Cook was through a Durable Power of Attorney signed by George P. Cook on May 30, 1996. APP 5, 14, 17.

In the *Complaint*, Gene Cook asserted that a mutual mistake of fact had been made with respect to the source of title for the Property conveyed by the Deed dated August 28, 1997. APP 9. He further asserted that his sisters, Elizabeth Chichester and Katherine Lambson, believed that the Deed dated August 28, 1997, and a subsequent Deed of Correction dated June 6, 2008, were invalid. *Id.* On April 19, 2012, Elizabeth Chichester and Katherine Lambson filed their

Answer to Amended Complaint to Quiet Title, Affirmative Defenses and Counterclaim, asserting questions as to the rights and ownership of the Property, and asking that the Trial Court declare the Deed dated August 28, 1997, and Deed of Correction dated June 6, 2008, null and void. APP 50. They also alleged that Gene Cook breached his fiduciary duty as attorney-in-fact for George P. Cook; made false statements and representations by claiming that he was a beneficiary of the Estate of George W. Cook; and wrongfully interfered with their expectancy to inherit from George P. Cook. APP 56, 62. Finally, they demanded an accounting of the Estate of George P. Cook pursuant to W. Va. Code § 55-8-13. APP 65.

After the close of discovery, Gene Cook filed his *Motion for Summary Judgment* and supporting *Memorandum of Law* stating that that the Deed dated August 28, 1997, and the subsequent Deed of Correction dated June 6, 2008, conveyed the Property to him and that he owns all of the right, title, and interest in and to the Property. APP 212. On December 7, 2012, Appellants filed their *Response in Opposition*. APP 254. On February 4, 2013, Gene Cook filed his *Reply*. APP 328.

On February 6, 2013, the parties appeared before the Honorable Charles M. Vickers for a hearing on the *Motion for Summary Judgment*. APP 335. After hearing argument from the parties, Judge Vickers granted the *Motion for Summary Judgment* and signed an Order to that effect on March 11, 2013. *Id.* Subsequently, on March 27, 2013, Elizabeth Chichester and Katherine Lambson filed a *Motion for Clarification of Summary Judgment Order* to inquire whether the Order disposed of their counterclaims and to argue that the Order did not dismiss the case and therefore was not final. APP 350. However, on April 17, 2013, Elizabeth Chichester and Katherine Lambson filed their *Notice of Appeal* to this Court. On April 25, 2013, Deputy

Clerk Edythe Nash Gasier sent correspondence to counsel stating that the March 19, 2013, Order was an interlocutory order and therefore not subject to appeal.

On August 1, 2013, the parties appeared in the Trial Court for a hearing on the *Motion for Clarification of Summary Judgment Order*. APP 354. Judge Vickers held that Elizabeth Chichester and Katherine Lambson's counterclaims did not survive summary judgment and that the action would be dismissed with prejudice. On August 12, 2013, Judge Vickers signed a *Final Order* dismissing the case with prejudice. *Id.* On August 27, 2013, Elizabeth Chichester and Katherine Lambson filed their second *Notice of Appeal*.

STATEMENT OF FACTS

Gene Cook, Elizabeth Chichester, Katherine Lambson, James D. Cook, and Jerry Lee Cook are the surviving children of George P. Cook. APP 4. On or about May 30, 1996, George P. Cook executed a power of attorney appointing Gene Cook as his attorney-in-fact. APP 15. The power of attorney authorized Gene Cook "to handle any and all matters relative to any interest [George P. Cook] own[s] in real property or oil, gas, mineral or other interests in any and all property owned by [George P. Cook] or to which [George P. Cook] [is] entitled to under the Estate of the late George Washington Cook, in and throughout the State of West Virginia." APP 14. Additionally, the power of attorney conveyed upon Gene Cook "the right to transfer ownership of said property or rights thereto, to himself personally, without limitation." *Id.*

In September of 1996, the Cook family held a reunion in Pigeon Forge, Tennessee. APP 155, 159, 163. At the family reunion, George P. Cook, Gene Cook, James D. Cook, Jerry Lee Cook, and George P. Cook's nephew, P. Don Cook, among others, met to discuss ownership of the Property. *Id.* George P. Cook had inherited his undivided one-fifth (1/5) interest in the Property under the will of his father, George Washington Cook. APP 154-155, 158-159, 162-

163. At the meeting, George P. Cook stated that he no longer wished to own real property in West Virginia and wanted to transfer his interest in the Property to one of his children. Neither James D. Cook nor Jerry Lee Cook had a desire to own the Property. However, Gene Cook indicated that he would be willing to receive the Property. *Id.*

By Deed prepared by Richard Rundle on August 28, 1997, Gene Cook, as attorney-in-fact for George P. Cook, conveyed the Property to himself. Said Deed is of record in the Office of the Clerk of the County Commission of Wyoming County, West Virginia (“Office of the Clerk”). APP 17.

Subsequently, James D. Cook, Jerry Lee Cook, and P. Don Cook considered Gene Cook the owner of the Property. APP 156, 160, 163. Additionally, Gladys M. Cook, the wife of George P. Cook and the parties’ mother, told James D. Cook and Jerry Lee Cook that Gene Cook paid cash as consideration for the Property. APP 156, 160.

On March 20, 1999, George P. Cook passed away in Hernando County, Florida. APP 6. In 2008, it was discovered that as the result of a clerical error, the Deed dated August 28, 1997, incorrectly identified the source of title for one of the tracts constituting the Property (“Tract 1”) as a deed dated May 28, 1929, being of record in the Office of the Clerk. APP 6. On June 6, 2008, Gene Cook, individually, as attorney-in-fact for George P. Cook, and as Executor of the Estate of George P. Cook, executed a Deed of Correction prepared by Joni Rundle to clarify that the source of title for Tract 1 is a deed dated December 20, 1910. Said Deed of Correction is of record in the Office of the Clerk. APP 21.

On October 24, 2008, Gene Cook entered into a coal mining lease with Tony’s Fork Land, LLC, which is of record in the Office of the Clerk. APP 24. As the source of title for

Tract 1, the memorandum of coal lease dated October 24, 2008, identified the same Deed referenced in the Deed of Correction as the source of title for Tract 1. *Id.*

On or about November 14, 2011, over twelve years after the death of George P. Cook, Elizabeth Chichester was purportedly appointed personal representative of the Estate of George P. Cook by the Probate Division of the Circuit Court of Hernando County, Florida. APP 98. The validity of her appointment as personal representative of the Estate of George P. Cook is currently being challenged in a probate proceeding in Hernando County, Florida. APP 7.

By Quitclaim Deed dated February 20, 2012, Jerry Lee Cook released and conveyed to Gene Cook any right, title, and interest which he may have in and to the Property. Said Quitclaim Deed is of record in the Office of the Clerk. APP 35.

By Quitclaim Deed dated February 20, 2012, James D. Cook released and conveyed to Gene Cook any right, title, and interest which he may have in and to the Property. Said Quitclaim Deed is also of record in the Office of the Clerk. APP 39.

On or about March 7, 2012, Gene Cook submitted a Notice of Filing in the Probate Division of the Circuit Court for Hernando County, Florida, giving notice that Assignments of Interest in Estate signed by Jerry Lee Cook and James D. Cook had been filed. APP 43.

Gene Cook has paid all of the real property taxes assessed against the Property since 1997. APP 8. Elizabeth Chichester and Katherine Lambson have never paid any taxes assessed against the Property. APP 248-249, 251. Additionally, Ms. Chichester and Ms. Lambson had never shown any interest in the Property until shortly before the instant matter was filed in the Trial Court. APP 156, 160, 164. Since taking an interest in the Property, Elizabeth Chichester has attempted to coerce James D. Cook and Jerry Lee Cook to sign affidavits regarding the

purported Last Will and Testament of George P. Cook; however, James and Jerry have refused to sign said affidavits. APP 156, 160.

STATEMENT REGARDING ORAL ARGUMENT

Gene Cook does not believe oral argument is necessary because the relevant facts and legal arguments have been adequately presented in the briefs and in the record on appeal. The decisional process would not be significantly aided by oral argument.

Although Elizabeth Chichester and Katherine Lambson requested oral argument pursuant to Rules 19 and 20 of the West Virginia Rules of Appellate Procedure, citing assignments of error in the application of settled law and an issue of alleged first impression, neither is present in the instant matter. Therefore, oral argument is not necessary. Pursuant to Rule 21 of the West Virginia Rules of Appellate Procedure, because there is no substantial question of law and no prejudicial error by the Trial Court, a memorandum decision affirming the Trial Court's decision is appropriate.

DISCUSSION OF LAW

I. Standard of Review

This Court's standard of review for orders of summary judgment is well established. "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). The West Virginia Rules of Civil Procedure provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56. A court should grant summary judgment "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.” Syl. Pt. 1, *Payne’s Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of W. Va.*, 200 W. Va. 695, 490 S.E.2d 772 (1997); Syl. Pt. 1, *Cottrill v. Ranson*, 200 W. Va. 691, 490 S.E.2d 778 (W. Va. 1997); Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

“[A] ‘genuine issue’ is simply one half of a ‘trial worthy’ issue, and a genuine issue does not arise ‘unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.’” *Jividen v. Law*, 194 W. Va. 705, 713, 461 S.E.2d 451, 459 (1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986)). A “material fact” is one that “has the capacity to sway the outcome of the litigation under applicable law . . . [f]actual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 714, 461 S.E.2d at 460. Furthermore, summary judgment is proper “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.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)). Finally,

If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) [of the West Virginia Rules of Civil Procedure].’

Williams, 194 W. Va. at 60, 459 S.E.2d at 337 (citing *Crain v. Lightner*, 178 W. Va. 765, 769, 364 S.E.2d 778, 782 (1987)). In relation to points (1) and (2), the nonmoving party must offer

“more than a ‘scintilla of evidence’ to support his or her claim.” *Jividen*, 194 W. Va. at 713, 461 S.E. 2d at 459 (citing *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337). “While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could render a verdict in . . . [its] favor’ or other ‘significant probative evidence tending to support the complaint.’” *Williams*, 194 W. Va. at 59-60, 459 S.E.2d at 336-37 (citing *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514). Unsupported speculation is insufficient to defeat a motion for summary judgment. *Id.* at 338 (citing *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)).

Because no genuine issue of material fact exists with respect to whether the Deed dated August 28, 1997, and the subsequent Deed of Correction dated June 6, 2008, vested title in and to the Property of Gene Cook, the Trial Court correctly granted summary judgment as a matter of law.

II. The Trial Court correctly found that the parties to the Deed dated August 28, 1997, made a mutual mistake of fact with respect to the source of title to Tract 1 which resulted from a mistake of the scrivener, and therefore, Defendants’ claims against Plaintiff fail.

Elizabeth Chichester and Katherine Lambson have argued that the Trial Court erred in granting summary judgment because there is no evidence that a scrivener’s error occurred. However, the scrivener’s error is obvious. The deeds speak for themselves and the attorney who prepared the Deed of Correction, Joni Rundle, testified to just that.

This Court has consistently held that “[e]quity has jurisdiction to reform and correct a deed executed through a mutual mistake of fact to conform to the actual agreement of the parties to the deed when such mistake results from the mistake of the scrivener in the preparation of the deed.” Syl. Pt. 1, *Edmiston v. Wilson*, 146 W. Va. 511, 120 S.E.2d 491 (1961); Syl. Pt. 1,

Johnson v. Terry, 128 W. Va. 94, 36 S.E.2d 489 (1945); *Warner v. Kittle*, 167 W. Va. 719, 722, 280 S.E.2d 276, 279 (W. Va. 1981). Generally, in order to reform a deed for mistake, the mistake must be mutual. However, the mistake of a scrivener in preparing a deed is regarded as a mistake of both parties because the scrivener is an agent of both. Syl. Pt. 2, *Edmiston*, 146 W. Va. 511, 120 S.E.2d 491.

In *Johnson*, the plaintiffs instituted suit asking that their deed be reformed to exclude a tract of land known as the “mill lot” which was covered by the description contained in the deed. 128 W. Va. at 95, 36 S.E.2d at 490. This Court found that it was clear that the plaintiffs did not intend to convey the mill lot to the purchasers and that the purchasers knew they were not acquiring title to that land. *Id.* at 111, 36 S.E.2d at 497. This Court further found that a mistake was made by the scrivener, who did not realize that the description he used included the mill lot. *Id.* Accordingly, this Court held that there was a mutual mistake, making the case appropriate for reformation of the deed. *Id.*

Similarly, in *Edmiston*, the deed reserved to the grantors a limited right to transport coal and other materials from their lands over the property conveyed to the grantees. 146 W. Va. at 516, 120 S.E.2d at 495. This Court held that the “evidence [showed] clearly and beyond question that the mistake . . . was a mutual mistake of fact of the parties . . . which resulted from the mistake of the scrivener in drafting [the] instrument.” *Id.* at 524, 120 S.E.2d at 499. Thus, this Court held that the deed should be reformed to conform to the actual agreement of the parties, which was to grant the unrestricted right to transport coal over the tract of land. *Id.* at 532, 120 S.E.2d at 503-04.

In the instant case, the Deed dated August 28, 1997, incorrectly identified the source of title for Tract 1 and was executed through a mutual mistake of fact resulting from the mistake of

the attorney preparing the Deed. The parties to the Deed intended that the Property be conveyed to Gene Cook. As a result of the clerical error, the Deed mistakenly references property that did not belong to George P. Cook as the source of title for Tract 1. APP 17. When the clerical error was discovered in 2008, Gene Cook executed the Deed of Correction to fix the incorrectly identified source of title for Tract 1. APP 21. Joni Rundle, who prepared the Deed of Correction, testified in her deposition as follows:

Q: Could you tell us what the purpose of preparing the 2008 Deed was?

A: As I recall, there was what I consider a typographical error in the description of Tract No. 1 on Page 1 of the 1997 Deed. It appeared to erroneously state the source of the property. I'm not sure where that came from, but as I recall, that was the problem. And then Mr. Cook came in to have it corrected, I thought of it more as a correcting the change title for –it was ambiguity that was really resulting from a typographical error in the first deed.

Q: Did you indicate on the 2008 what its intent was?

A: Yes. I indicated that it was to clarify the change of title, and did not in any way affect its conveyance, the original conveyance, which I believe did convey the purported one-fifth interest.

Q: Did you also in the Declaration of Consideration reiterate the purpose behind the Deed of Correction?

A: Yes, I did.

Q: In your mind was the purpose of the Deed of Correction simply to clarify the chain of title and confirm the validity of the conveyance set forth in the 1997 Deed?

A: Yes.

APP 330. Because there are no genuine issues of material fact, 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.

III. The Trial Court correctly found that the reference to the source of title for Tract 1 is mere surplusage and accordingly rejected the reference in order to carry out the intent of the parties to the Deed dated August 28, 1997.

The Trial court correctly found that George P. Cook intended to convey to Gene Cook only the property he owned. Accordingly, the Trial Court found that the August 28, 1997, Deed could be properly reformed to reflect the correct source of Tract 1.

“[W]here the estate intended to be conveyed is sufficiently described in the deed or other writing, the addition of a circumstance, false or mistaken, will be rejected as surplusage, in order to carry that intention into effect.” *McQueen v. Ahbe*, 99 W. Va. 650, 655, 130 S.E. 261, 263 (1925). “Surplusage” is defined as “words in an instrument which add nothing to the force and legal effect of the instrument.” *BALLENTINE’S LAW DICTIONARY* (2010), *surplusage*.

Here, the Deed dated August 28, 1997, provides that the Property is “the same property, one fifth (1/5) interest, inherited by Grantor, George Posey Cook, under the provision of the Last Will and Testament of George W. Cook, Jr. . . .” However, the Deed incorrectly identifies the source of title for Tract 1 as a deed conveying property which was not inherited by George P. Cook. APP 225, 228, 230. The property intended to be conveyed by the Deed is sufficiently described, and the addition of the incorrect source of title for Tract 1 is mere surplusage. Furthermore, Charles B. Dollison, as counsel for Tony’s Fork Land, LLC, prepared a memorandum of coal lease correctly conveying the Property to Tony’s Fork Land, LLC. APP 234. Accordingly, there is no issue of material fact and the Trial Court correctly granted Gene Cook summary judgment as a matter of law.

IV. The Trial Court correctly found that there is no genuine issue of material fact regarding the authenticity of the power of attorney.

Elizabeth Chichester and Katherine Lambson have argued that the Trial Court erred in granting summary judgment because there is a genuine issue of material fact regarding the authenticity of the May 30, 1996, power of attorney. However, the Trial Court correctly found that Ms. Chichester and Ms. Lambson's assertions were insufficient to preclude summary judgment because they offered no expert handwriting analysis or any evidence to support the existence of the alleged alternate power of attorney apart from self-serving testimony. Ms. Chichester filed an affidavit stating that she prepared a power of attorney for her father to sign and later notarized his signature. APP 313-314. Yet, she has failed to produce any such document. In reality, the facts work against this assertion, as James D. Cook, Jerry Lee Cook, and P. Don Cook testified that they took part in a conversation with George P. Cook in which George P. Cook expressed his intention to convey the Property to Gene Cook. APP 154, 158, 162. Indeed, the record supports George P. Cook's inclusion of a provision which allowed Gene Cook, as attorney-in-fact, to convey the Property to himself.

Additionally, Ms. Chichester and Ms. Lambson have argued that there is no sworn testimony that the May 30, 1996, power of attorney is the document signed by George P. Cook. Pursuant to Rule 902 of the West Virginia Rules of Evidence,¹ the document is self-authenticating, as it was acknowledged by a notary public. Therefore, the document speaks for itself.

In *Williams*, this Court held that "self-serving assertions without factual support in the record will not defeat a motion summary judgment." 194 W. Va. at 61 n. 14, 459 S.E.2d at 338

¹ Rule 902 of the West Virginia Rules of Evidence states that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . documents accompanied by a certificate of acknowledgement executed in a manner provided by law by a notary public[.]" W. Va. R. Evid. 902.

n. 14. The Court further held that “a nonmoving party cannot avoid summary judgment merely by asserting that the moving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party’s claims or raise significant issues of credibility . . . Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.” *Id.*

Because Ms. Chichester and Ms. Lambson could not provide any evidence apart from Ms. Chichester’s own testimony, the Trial Court correctly found that there is no genuine issue of material fact regarding the authenticity of the May 30, 1996, power of attorney.

V. The Trial Court correctly found that Gene Cook did not breach any fiduciary duty to George P. Cook.

Elizabeth Chichester and Katherine Lambson have argued that because Gene Cook conveyed the Property to himself, as attorney-in-fact for George P. Cook, he breached his fiduciary duty to George P. Cook. Fortunately, this Court has already determined that such an action is not a breach of fiduciary duty.

Contrary to Ms. Chichester and Ms. Lambson’s assertions, *Rosier v. Rosier* is analogous with the instant case.² In *Rosier v. Rosier*, Leeorr Rosier, as widow of the decedent and executrix of the decedent’s estate, brought suit against her son, Robert Lee Rosier. 227 W. Va. 88, 705 S.E.2d 595 (2010). Robert Lee Rosier had conveyed land to himself pursuant to a power of attorney executed by the decedent. *Id.* at 92, 705 S.E.2d at 599. Leeorr Rosier argued that because Robert Lee Rosier owed the decedent a fiduciary duty as a result of his status as attorney-in-fact for the decedent, “his conveyances of [the subject] property to himself for little or no consideration was fraudulent.” *Id.* at 101, 705 S.E.2d at 608. In affirming the trial court’s

² Ms. Chichester and Ms. Lambson have argued that in *Rosier v. Rosier*, there was no issue as to the authenticity of the power of attorney. Because their argument regarding the authenticity of the May 30, 1996, power of attorney is without merit, *Rosier v. Rosier* is directly instructive to the instant case.

grant of summary judgment, this Court noted that “the power of attorney executed by [the decedent] expressly provides for Robert Lee Rosier to convey property and resources to himself.” *Id.* The Court also considered other evidence of the decedent’s intent, including the testimony of the attorney who prepared the power of attorney and the deeds conveying the decedent’s property to Robert Lee Rosier. *Id.* at 103, 705 S.E.2d at 610.

In the instant case, the May 30, 1996, power of attorney expressly authorized Gene Cook to convey the Property to himself. APP 130. Additionally, James D. Cook, Jerry Lee Cook, and P. Don Cook signed affidavits stating that George P. Cook wanted to transfer the Property to one of his children and Gene Cook expressed his willingness to receive the Property. APP 155, 159, 163.

Because the power of attorney explicitly authorized Gene Cook to transfer the property to himself and because there is corroborating evidence of George P. Cook’s intent, the Trial Court correctly found that Gene Cook did not breach any fiduciary duty to George P. Cook as his attorney-in-fact.

VI. The Trial Court correctly found that there was no evidence of fraud.

Elizabeth Chichester and Katherine Lambson have argued that Gene Cook committed “in your face” fraud by identifying himself as both attorney-in-fact for George P. Cook and executor of George P. Cook’s estate when executing the Deed of Correction. However, because Ms. Chichester and Ms. Lambson were unable to produce any evidence of fraud, the Trial Court correctly granted summary judgment.

This Court has long held that the elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by the defendant; (2) that the act was material and false and that the plaintiff relied upon it and was justified under the

circumstances in doing so; and (3) that the plaintiff was damaged because he relied upon the fraudulent act. Syl. Pt. 5, *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004); Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981); *Horton v. Tyree*, 104 W. Va. 238, 242, 139 S.E.2d 737, 738 (1927).

Ms. Chichester and Ms. Lambson have failed to explain how they relied upon the Deed of Correction or how they were damaged as a result of their reliance. Additionally, they have argued that pursuant to West Virginia law, there is a presumption of fraud in the instant matter, but have failed to explain why there is a presumption of fraud or cite any relevant case law. Accordingly, the Trial Court properly found that Gene Cook did not commit any fraud, as attorney-in-fact for George P. Cook or otherwise.

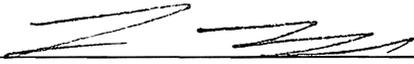
CONCLUSION

Based on the foregoing, the Trial Court correctly ruled in favor of Gene Cook, finding that the parties to the Deed dated August 28, 1997, made a mutual mistake of fact with respect to the source of title to Tract 1 which resulted from a mistake of the scrivener. The Trial Court also properly found that the reference to the source of title for Tract 1 is mere surplusage and accordingly rejected the reference in order to carry out the intent of the parties to the Deed dated August 28, 1997. Finally, the Trial Court appropriately granted summary judgment and dismissed the case in its entirety. For these reasons, the Order of the Trial Court should be affirmed.

Respectfully submitted,

POSEY GENE COOK

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0925

**Elizabeth Chichester, individually and as the
personal representative of the Estate of George
P. Cook & Katherine Lambson, individually,
Petitioners,**

vs.

**Posey Gene Cook & Toney's Fork Land, LLC,
a Delaware limited liability company,
Respondents.**

**On Appeal from Honorable Charles M. Vickers, Judge
Circuit Court of Wyoming County
Civil Action No. 12-C-37**

CERTIFICATE OF SERVICE

The undersigned, of counsel for Respondent Posey Gene Cook, does hereby certify that the foregoing *Response Brief of Respondent Posey Gene Cook* has been served upon the following by this day mailing to them, by first class mail, postage prepaid, a true copy thereof:

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This 21st day of January, 2014.



John F. Hussell, IV