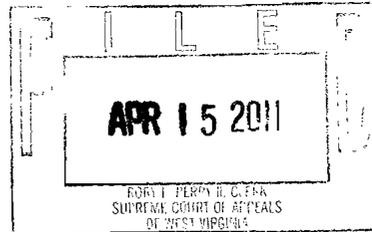


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## IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Robin W. Hammer, Defendant Below,  
Petitioner



vs.) No. 11-0075

Thomas M. Hammer, Robert B. Hammer,  
Teresa C. Hammer Lang, Mark J. Hammer  
and Sharon M. Helms, Plaintiffs Below,  
Respondents

### PETITIONER'S BRIEF

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## I. ASSIGNMENTS OF ERROR

1. Without any notice, the plaintiffs' attorney requested, on October 27, 2010, that the circuit court make a declaratory judgment based upon the pleadings. The circuit court erred in granting judgment in favor of the plaintiffs while a motion for more definitive statement made pursuant to Rule 12(e) *W. Va. R. C. P.* was pending before the court and the pleadings were not closed because Rule 12(c) *W. Va. R. C. P.* requires that a motion for judgment on the pleadings be made after the pleadings are closed.

2. The circuit court made a judgment on the pleadings and dismissed the case based upon findings contained in a report by a guardian ad litem that was not introduced until during the hearing on October 27, 2010 and was not part of the pleadings. An order based upon evidence introduced outside of the pleadings converted the Rule 12(c) *W. Va. R. C. P.* judgment on the pleadings into a Rule 56 *W. Va. R. C. P.* summary judgment and the circuit court erred in its failure to notify petitioner, Robin W. Hammer, that such a conversion had occurred.

3. The circuit court erred in granting summary judgment in favor of the plaintiffs without a motion for such judgment ever having been filed. Rule 56(c) of the *W. Va. R. C. P.* requires that a motion for summary judgment shall be served at least 10 days before the hearing.

4. The circuit court erred by abusing its discretion when it refused to allow the defendants to call witnesses during the hearing on October 27, 2010 and thereby violated procedural rights granted under *West Virginia Code* §55-13-9 and Rule 39(b) of the *West Virginia Rules of Civil Procedure*.

5. The circuit court erred in its failure to "issue a formal decision" as it indicated that it would do in the letter dated October 27, 2010.

6. The circuit court erred in its failure to respond to objections concerning the proposed final order prepared by plaintiffs' attorney.

7. It was plain error for the circuit court to declare the power of attorney executed on September 22, 2008 void due in part on the basis that said document granted power and authority to multiple agents and contained a reversal clause that allowed any three agents to collectively rescind a decision of an agent.

8. The circuit court erred in making a summary judgment in a complex case involving the motive of plaintiffs to obtain power of attorney in order to control access to documents and thereby avoid civil liability and criminal prosecution for fiduciary fraud.

9. It was plain error that the circuit court judge failed to recuse herself to avoid the appearance of impropriety due to a possible conflict of interest in that the judge's spouse, mother and father all work as sales persons for a local mobile home dealer and plaintiff Thomas M. Hammer has purchased eight new mobile homes from members of the judge's family.

10. The circuit court decision to grant summary judgment for plaintiffs was clearly erroneous and was plain error in light of the record as a whole and therefore summary judgment should have been granted in favor of the defendants.

## **II. STATEMENT OF THE CASE**

Plaintiffs filed a petition for declaratory judgment on June 8, 2010 requesting the Randolph County Circuit Court to declare a power of attorney executed by Ethel M. Hammer on November 27, 2002 to be "valid" and to declare a power of attorney executed by Ethel M. Hammer on September 22, 2008 to be "void and of no force or effect." Attached to the complaint as Exhibit C is a document titled Notice of Objection to Action wherein the notarized signatures of three of the five plaintiffs were affixed thereto stating that they, "contest the competency of Ethel M. Hammer at the time of the execution of that certain Power of Attorney dated September 22, 2008." (see Appendix Record page 14)

Plaintiffs did not serve the complaint, summons and notice of hearing upon the defendants until June 21, 2010, just ten days prior to the hearing date. (Id. page 21) During the hearing on July 1, 2010 the circuit court asked defendant Robin W. Hammer what his position was in this matter and he responded: “The position that we’re taking is that that my mother, Ethel Marie Hammer, is – needs to be in a protected status, needs a Guardian Ad Litem appointed. And the – neither Power of Attorney should be used. And, I’m not really prepared to argue the merits or the position.” Robin W. Hammer further stated to the circuit court: “Okay, well our – my position is that a competency hearing needs to be conducted and a Guardian Ad Litem needs to be appointed to protect the interest of my mother. And the position – another point I want to make is that this struggle over the use of a Power of Attorney is – the reason for it is because of criminal tax fraud and 45 mobile homes were purchased directly from an out-of-state factory and sales and use tax were not paid on it.” (Id. page 33) As a result of defendants’ motions to dismiss the case due to the insufficiency of service of process the circuit court ordered that the defendants would have thirty days from the date of the hearing on July 1, 2010 to file an answer to the complaint.

On July 30, 2010 defendant Robin W. Hammer filed a motion for more definitive statement requesting the circuit court to enter an order directing plaintiffs Thomas M. Hammer and Sharon M. Helms to state their position regarding the claim that Ethel M. Hammer was incompetent when she executed the power of attorney on September 22, 2008. In Exhibit C of the complaint the other three plaintiffs (Robert B. Hammer, Teresa C. Hammer Lang and Mark J. Hammer) contested the competency of Ethel M. Hammer at the time of the execution of the power of attorney dated September 22, 2008. Rule 10(c) *W. Va. R. C. P.* states: “A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” This

would include the purpose of challenging the validity of the power of attorney dated September 22, 2008 on the basis that Ethel M. Hammer was not competent at the time that she executed said document.

A medical power of attorney executed by Ethel M. Hammer on October 13, 2009 was attached to the motion for more definitive statement as Exhibit A. Plaintiff Thomas M. Hammer lured Ethel M. Hammer out of her home on the pretense that he was taking her to visit her great grandchildren. Instead, he took her to the U.S. Forestry Building where plaintiff Sharon M. Helms had her fellow employees notarize and witnessed the signature of Ethel M. Hammer on the medical power of attorney dated October 13, 2009. (Id. page 45 ¶5) It was the contention of three of the plaintiffs that Ethel M. Hammer was incompetent on September 22, 2008 when she signed the general power of attorney. However the other two plaintiffs, Thomas M. Hammer and Sharon M. Helms, had Ethel M. Hammer sign a medical power of attorney more than a year later stating that she was “of sound mind.” The collective position of the plaintiffs regarding the issue of whether Ethel M. Hammer was competent to sign a power of attorney (be it general or medical) is ambiguous.

There is ambiguity in the individual positions taken by plaintiffs Thomas M. Hammer and Sharon M. Helms regarding the competency of Ethel M. Hammer. Ethel M. Hammer signed the second power of attorney on September 22, 2008 and on the same date plaintiffs Thomas M. Hammer and Sharon M. Helms were notified by certified mail that all powers and authority granted to them under the previous power of attorney had been revoked. (Id. page 68 and page 34 line 8) On September 26, 2008 attorney Stephen G. Jory responded on behalf of plaintiff Thomas M. Hammer to the notice of revocation of powers of attorney and a request for the return of financial documents belonging to Ethel M. Hammer. Attorney Stephen G. Jory referred to

Ethel M. Hammer as “an incompetent person” with respect to her capacity to sign the power of attorney dated September 22, 2008. (Id. page 44 ¶3) Plaintiff Thomas M. Hammer’s position is ambiguous in that more than a year later he reversed direction and had Ethel M. Hammer sign a living will and medical power of attorney appointing him as the medical power of attorney for Ethel M. Hammer and appointing Sharon M. Helms as the successor agent. (Id. page 49)

This excerpt from the final written argument submitted to the circuit court by defendant Robin W. Hammer will provide context for an otherwise cryptic email received from plaintiff Sharon M. Helms that follows:

In October of 2009 defendant Robin W. Hammer went to the Randolph County Prosecuting Attorney’s Office and spoke to attorney Andy Mendelson about pressing charges against plaintiffs Thomas M. Hammer and Robert B. Hammer for their involvement in efforts to defraud the defendant out of more than \$40,000.00 associated with the purchase of a house from Ethel M. Hammer. Instead of crediting the defendant for all of the money that he had paid toward the purchase of the house, plaintiffs drafted a false amortization for a loan agreement that was never entered into between the defendant and Ethel M. Hammer. The defendant had paid \$25,000 to Ethel M. hammer in 2002 and 2003 alone. Plaintiffs did not credit the defendant for payment of one single penny to Ethel M. Hammer. Plaintiffs additionally retroactively charged the defendant for interest on money that had been paid to Ethel M. Hammer years ago. The defendant told Mr. Mendelson that Robert B. Hammer had stated that none of the siblings would sign as power of attorney to sell the property and that they wanted the transaction to occur based solely on the signature of Ethel M. Hammer alone. Robert B. Hammer said that he along with Sharon M. Helms, Thomas M. Hammer, Teresa C. (Hammer) Lang and Mark J. Hammer would all agree not to contest the transfer of property as long as the defendant agreed to be disinherited by Ethel M. Hammer. Defendant Robin W. Hammer told Mr. Mendelson that this would all be illegal because several of his siblings had already raised the issue of the competency of Ethel M. Hammer. Mr. Mendelson said that he was not allowed to give legal advice but if Mrs. Hammer had not been legally declared incompetent and if a family doctor would sign a statement that she was competent then maybe the transaction could be worked out without resorting to pressing criminal charges. The defendant informed Robert B. Hammer that if a medical doctor such as a family doctor would sign a statement indicating that Ethel M. Hammer was competent then her signature could stand alone during the transfer of the property. (Id. pages 261-262)

On Monday October 26, 2009 Sharon M. Helms sent defendant Robin W. Hammer and plaintiff Robert B. Hammer an email stating that, “Dr. Hummer said she could not provide that statement.” (Id. page 314) Defendant Robin W. Hammer sent the following email to Sharon M. Helms on October 28, 2009 inquiring as to why Dr. Hummer was unable to provide such a statement:

Sharon,

Did Dr. Hummer state that she was not capable of evaluating Mom's competency? Or did Dr. Hummer state that she believed that Mom was incompetent and therefore "could not" provide a statement to the contrary? Or did Dr. Hummer state that she as a matter of practice "would not" provide statements concerning the competency of a patient.

I am sure that you can see my dilemma. Dena [Teresa Hammer Lang] has written more than a year ago that anything that Mom signs is "null and void". Tom, through his criminal defense attorney Stephen Jory, has raised the issue of Mom's competency and elevated the issue to a level of possible "fraud". Yet now, the five of you (Sharon, Tom, Bob, Dena and Mark) all want me to be a party to a transfer of property based solely on Mom's signature.

What we have here is a situation where anytime the five of you want to spend Mom's money or dispose of her assets and have her sign documents to that effect, she is having a lucid moment. But whenever somebody asks to see Mom's financial documents, like Guy did more than a year ago, then Mom is incompetent and anybody who acts on anything signed by her is guilty of fraud.

Bob stated in a tape recorded conversation that he is not Mom's power of attorney and he doesn't know who is Mom's power of attorney. Bob also stated that not one of the five of you (Sharon, Tom, Bob, Dena or Mark) would sign the deed transferring the Currence property to me. Bob also told me that you researched the procedure for having a competency hearing before even contacting Dr. Hummer on Monday about having Mom evaluated. Please answer the questions as to why Dr. Hummer "could not" provide a statement regarding Mom's competency.  
Rob (Id. page 315)

Plaintiff Sharon M. Helms did not respond to the preceding email nor did she ever acknowledge the role that she played in facilitating the signing of a new medical power of attorney in which Ethel M. Hammer stated that she was "of sound mind" just two weeks earlier. The drafting of the medical power of attorney by plaintiffs and/or their attorney and the execution of said document on October 13, 2009 was shrouded in secrecy.

According to plaintiff Robert B. Hammer, all five plaintiffs would agree not to contest the transfer of property from Ethel M. Hammer to defendant Robin W. Hammer based solely on her signature as long as he would agree to be disinherited by Ethel M. Hammer. To place this proposition into perspective it is important to take a look at what the basis for contesting the transfer would be. This information can be gleaned from an email in which plaintiff Robert B. Hammer waived his attorney client privilege and wrote that based upon the advice of attorney David H. Wilmoth; "The second Power of Attorney written by Guy on 9/22/08 could be easily contested because Mom had been treated for dementia for two years prior to her signing the

Power of Attorney.” (Id. page 45 ¶4) The communication from plaintiff Robert B. Hammer stating that plaintiffs Thomas M. Hammer and Sharon M. Helms would agree not to contest the transfer of property from Ethel M. Hammer to defendant Robin W. Hammer occurred during approximately the same time period that Thomas M. Hammer and Sharon M. Helms had Ethel M. Hammer sign a medical power of attorney stating that she was “of sound mind.” This is ambiguous in that the likely basis for contesting the transfer of property would be the issue of whether or not Ethel M. Hammer was competent.

On or about February 4, 2010, “Plaintiff Sharon M. Helms filed the Living Will of Ethel M. Hammer dated October 13, 2009 with the Davis Memorial Hospital despite the concerns expressed by her attorney, David Wilmoth, about the validity of anything signed after the diagnosis of dementia was made.” (Id. page 46 in ¶7) The following interrogatories were served upon plaintiff Sharon M. Helms on August 30, 2010:

**INTERROGATORY NO. 22**

Did Dr. Terri Hummer inform you in October of 2009 that she could not provide a statement indicating that Ethel M. Hammer was competent?

**INTERROGATORY NO. 27**

What knowledge do you have concerning the creation of a *Living Will* which appointed Thomas M. Hammer as the medical power of attorney for Ethel M. Hammer and was conveniently notarized and witnessed by your fellow employees at the United States Forestry Building on October 13, 2009?

**INTERROGATORY NO. 28**

Given that in October of 2009 Dr. Terri Hummer said that she could not sign a statement indicating that Ethel M. Hammer was competent, that in November of 2009 your attorney advised you that anything signed by Ethel M. Hammer could be easily contested because she had been treated for dementia since August of 2006, and that on December 14, 2009 Dr. Terri Hummer signed a document enabling Ethel M. Hammer to receive services under the Alzheimer’s Disease Demonstration Grant In-Home Respite Program, why did you submit a new secret *Living Will* to the Davis Memorial Hospital in February of 2010, which had been executed as recently as October 13, 2009?

**INTERROGATORY NO. 31**

What knowledge do you have concerning other secret documents that plaintiffs have had Ethel M. Hammer sign? (Id. pages 156-157, 159-161)

Plaintiff Sharon M. Helms refused to answer these interrogatories within 30 days of service therefore any grounds for objection were waived pursuant to Rule 33(b)(4) *W. Va. R. C. P.*

The summons served upon defendant Robin W. Hammer required him to serve an answer, including any related counterclaim, and notified him that; “If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above-styled civil action.” (Id. page 16) Formulating counterclaims related to and/or arising out of the issue of the competency of Ethel M. Hammer was extremely difficult and for that reason defendant Robin W. Hammer filed a motion for more definitive statement stating that he, “finds the pleadings so vague and ambiguous with respect to plaintiffs’ claim that Ethel M. Hammer is incompetent that he cannot reasonably be required to respond.” (Id. page 46 bottom ¶) The defendant complied with the requirement of Rule 12(e) *W. Va. R. C. P.* and filed a motion for more definitive statement prior to filing a responsive pleading. On August 3, 2010 defendant Robin W. Hammer filed an answer to the complaint but did not enumerate any counterclaims. The defendant stated in his answer that plaintiff Robert B. Hammer succeeded plaintiffs Thomas M. Hammer and Sharon M. Helms as the agent/attorney in fact for Ethel M. Hammer in 2008 and resigned effective October 16, 2009 rendering the power of attorney executed on November 27, 2002 invalid as there was no successor agent named to succeed him.

In a response to a counter-motion dated October 18, 2010, defendant Robin W. Hammer represented to the circuit court; “Attorney David H. Wilmoth should be aware that the defendant’s Motion for More Definitive Statement is scheduled for hearing on October 27, 2010. The motion specifically asks the Court to direct plaintiffs Thomas M. Hammer and Sharon M. Helms to state their position regarding the claim that Ethel M. Hammer is incompetent... The only reason the defendant Robin W. Hammer filed an answer was to prevent plaintiffs from

filing a motion for default judgment against him. Defendant Robin W. Hammer intends to amend his answer to incorporate his counterclaims after the Court addresses the issue of competency as it relates to the positions being taken by each of the five plaintiffs.” (Id. page 186 ¶6)

The plaintiffs filed a motion for default judgment against defendant Guy S. Hammer, II who responded that his “failure to file an answer to the complaint was due to the mistaken belief that he would not be required to respond until the Court ruled on the *Motion for More Definitive Statement...*” (Id. page 128 ¶6) Defendant Guy S. Hammer, II filed a memorandum of law in support of his motion to set aside plaintiffs motion for entry of default judgment against him, citing the holding in *Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006), and stated the following reason for failure to timely file an answer:

The reason for the defendant’s failure to timely file an answer is because the complaint was vague and ambiguous with regard to the underlying issue of the competence of Ethel M. Hammer... Intractable and unmanageable problems arose, however, in the preparation of a counterclaim that included all related claims that must be asserted in order to prevent them from being barred in other actions. Three of the plaintiffs signed notarized statements in which they contested the competency of Ethel M. Hammer on September 22, 2008, which was attached to the complaint as Exhibit C. Rule 10(c) of the *W. Va. Rules of Civil Procedure* states that, “A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” On August 19, 2010 plaintiffs’ attorney represented to the Court that the plaintiffs did not raise the issue of competency. In light of this revelation it should be abundantly clear that it would be unreasonable to expect the defendant to formulate a responsive pleading considering that the complaint is so vague and ambiguous that the attorney who drafted it does not know what it means. The defendant is still at a loss in understanding how plaintiffs can maintain that Ethel M. Hammer was incompetent in September of 2008 when she executed the General Power of Attorney which was only used to ask for the return of her financial documents, and then later plaintiffs had Ethel M. Hammer apply for a bank loan in February of 2009, then they had her sign a deed of trust securing a revolving credit line for \$142,400.00 in April of 2009, and then they had her sign a new living will appointing Thomas M. Hammer as her medical power of attorney in October of 2009. To the extent that the defendant relied upon the *Motion for More Definitive Statement* filed by co-defendant Robin W. Hammer concerning the ambiguity of the complaint, defendant concedes that he may have made a mistake as a pro se litigant that would best be dealt with by the provisions of Rule 60(b) of the *W. Va. Rules of Civil Procedure*. (Id. pages 194-195)

During a scheduling conference on August 19, 2010 plaintiffs’ attorney moved the circuit court for a judgment on the pleadings despite the fact that the pleadings were not closed as a

motion for more definitive statement was pending and consequently defendant Guy S. Hammer, II had not filed an answer to the complaint. (Id. page 75 line 21) Defendant Robin W. Hammer responded to the circuit court, “the issue in the **motion for a more definitive statement**, the issue of competence needs to be addressed. That’s the underlying issue of the whole case and my mother’s rights need to be protected by a Guardian ad Litem.” (Id. page 76 line 8) The defendant complied with the requirements of Rule 22.04 *W. Va. T. C. R.* by calling to the attention of the circuit court the motion for more definitive statement. Plaintiffs’ attorney, David H. Wilmoth, responded, “We did not raise the issue of competency. There’s been no answer filed that counterclaims as to issue of competency.” (Id. page 77 line 1) Plaintiffs’ attorney further stated in reference to the issue of competency, “I haven’t seen any pleadings that raise that other than their [defendants] reference to a **motion for a more definitive statement**, but that doesn’t raise the issue in a - - - for the Court’s consideration.” (Id. page 77 line 11) The circuit court corrected plaintiffs’ attorney and stated, “The issue of competency is raised in Robin Hammer’s answer that was filed August 3<sup>rd</sup>.” (Id. page 77 line 15) The circuit court appointed attorney Steven B. Nanners as guardian ad litem to conduct an investigation into the competency of Ethel M. Hammer.

Defendant Robin W. Hammer filed a motion for sanctions against plaintiffs’ attorney David H. Wilmoth for falsely representing to the circuit court that plaintiffs never raised the issue of competency in the petition for declaratory judgment. In Exhibit C of the complaint three of the plaintiffs contested the competency of Ethel M. Hammer as of the date that she executed the power of attorney on September 22, 2008. Tessa M. Ware, an employee of attorney David H. Wilmoth, notarized the signature of Robert B. Hammer on November 20, 2009. (Id. pages 170-171 ¶2) The defendant argued that Exhibit C was likely “the attorney work product of

David H. Wilmoth and that he intentionally drafted the document in 2009 with the purpose of contesting the competency of Ethel M. Hammer and that he deliberately attached said document to the complaint in 2010 as an exhibit for that reason.” (Id. page 172) On September 1, 2010 the following interrogatory was issued to plaintiff Mark J. Hammer, whose notarized signature appears on Exhibit C of the complaint:

**INTERROGATORY NO. 12**

Please identify the genesis of the *Notice of Objection to Action*, which you attached to the complaint as Exhibit C with the notarized signatures of Robert B. Hammer, Teresa C. Hammer (Lang) and Mark J. Hammer. (Id. page 109)

Plaintiff Mark J. Hammer refused to answer this interrogatory within 30 days of service therefore any grounds for objection were waived pursuant to Rule 33(b)(4) *W. Va. R. C. P.*

Plaintiffs’ attorney, David H. Wilmoth, stated to the circuit court on August 19, 2010, “We did not raise the issue of competency.” In a response to a counter-motion for sanctions defendant Robin W. Hammer asserted the following facts, which remain uncontroverted by the record including the transcript of the October 27, 2010 hearing and plaintiffs final written argument submitted to the circuit court on November 8, 2010:

- a) On or before November 12, 2009 attorney David H. Wilmoth entered into an attorney/client relationship with the plaintiffs.
- b) On November 12, 2009 plaintiff Robert B. Hammer wrote in an email that based upon the legal advice of attorney David Wilmoth, “*The second Power of Attorney written by Guy on 9/22/08 could be easily contested because Mom [Ethel M. Hammer] had been treated for dementia for two years prior to her signing the Power of Attorney.*”
- c) During November of 2009 plaintiff Sharon M. Helms informed Heidi Ferguson, a caregiver of Ethel M. Hammer, that Dr. Terry Hummer was going to testify that she had diagnosed Ethel M. Hammer with dementia.
- d) On or about November 20, 2009 attorney David H. Wilmoth drafted a document with the notarized signatures of three of the plaintiffs affixed thereon stating, “*You are also put on NOTICE that the undersigned contest the competency of Ethel M. Hammer at the time of the execution of that certain Power of Attorney dated September 22, 2008.*” This document was not served upon the defendants for more than half a year.
- e) On November 27, 2009 defendant Robin W. Hammer showed Dr. Terry Hummer the email [subparagraph b above] written by plaintiff Robert B. Hammer and asked her what the date was when she diagnosed Ethel M. Hammer with dementia. Dr. Hummer reviewed her records and said that she diagnosed Mrs. Hammer with dementia on July 15, 2005.

- f) On November 27, 2009 plaintiff Thomas M. Hammer talked about the appointment of a guardian *ad litem* for Ethel M. Hammer during a family meeting that was tape recorded by plaintiff Sharon M. Helms and defendant Robin W. Hammer.
- g) On April 19, 2010 Dr. Terry Hummer wrote attorney David H. Wilmoth a letter stating, "I would be unable to state that Ms. Hammer is competent, from a cognitive standpoint."
- h) On May 27, 2010 attorney David H. Wilmoth had a process server deliver a letter to both defendants informing them that he had been retained to represent the five plaintiffs and attached to the letter was a NOTICE informing the defendants that Robert B. Hammer, Teresa C. Hammer Lang, and Mark J. Hammer, all plaintiffs in the above styled civil action, that they, "*contest the competency of Ethel M. Hammer at the time of the execution of that certain Power of Attorney dated September 22, 2008.*"
- i) On June 8, 2010 David H. Wilmoth filed a Petition for Declaratory Judgment asking the Court to find the general power of attorney executed by Ethel M. Hammer on September 22, 2008 "*to be void and of no force or effect.*" Attorney David H. Wilmoth attached a notice wherein three of the plaintiffs signed notarized statements stating that they "*contest the competency of Ethel M. Hammer at the time of the execution of that certain Power of Attorney dated September 22, 2008.*" David H. Wilmoth already had in his possession the medical opinion of Dr. Terry Hummer to use as evidence in a challenge of the validity of said power of attorney on the basis of the mental capacity of Ethel M. Hammer at the time that she executed the document. (Id. pages 183-185)

Attorney David H. Wilmoth's representation to the Court on August 19, 2010 that plaintiffs did not raise the issue of competency is a patently false statement made in violation of Rule 3.3(a)(1) of the *West Virginia Rules of Professional Conduct*.

On September 20, 2010 a notice of hearing on the motion for more definitive statement was filed with the circuit court and served upon plaintiffs' attorney. (Id. page 132) The hearing was originally scheduled for September 30, 2010, but was continued by order of the circuit court until October 27, 2010. At the commencement of the hearing on October 27, 2010 the circuit court identified the issues that were continued from the status conference scheduled for September 30<sup>th</sup> as presentation of the Guardian's report, the motion for default judgment, setting the case for trial and the issue of sanctions. (Id. page 203 line 8) The circuit court did not mention the hearing on the motion for more definitive statement. During the hearing on October 27, 2010 defendant Robin W. Hammer informed the circuit court that he had filed a **motion for more definitive statement**. (Id. page 211 line 11)

The circuit court stated on the record that Dennis Willett was in for Mr. Nanners. (Id. page 203 line 5) At the commencement of the hearing attorney Dennis J. Willett handed both defendants a copy of a report prepared by Steven B. Nanners, the guardian ad litem for Ethel M. Hammer. “When attorney Dennis Willett, who was substituting for attorney Steven Nanners, handed the defendants copies of the report prepared by the guardian ad litem he did not hand copies to David H. Wilmoth or the Court.” (Id. page 404) The defendants were taken by surprise in that they had to read and try to understand the report of the guardian ad litem while the hearing was going on without them. Defendant Robin W. Hammer filed the following objection to the proposed final order:

1. The proposed order states that Steven B. Nanners, the court appointed guardian *ad litem* for Ethel M. Hammer, came to the hearing on October 27, 2010. Steven B. Nanners did not appear at the hearing and no reason was given for his absence. The defendant objects to the Order reflecting that Mr. Nanners was present when in fact he wasn't. Rule 4.04 of the *W. Va. T.C.R.* states that, “A stipulation for substitution of counsel shall (c) be accompanied by a proposed written order, which may be presented ex parte, and (d) be served upon opposing counsel.” Neither of the defendants received a stipulation for substitution of counsel as guardian *ad litem* for Ethel M. Hammer nor did they receive a proposed written order indicating that substitution of counsel had occurred. (Id. page 403 ¶1)

A review of the certified copy of the case docket sheet will reveal that a proposed written order stipulating substitution of counsel was never filed with the circuit court. (Id. pages 411-412)

The hearing conducted on October 27, 2010, which was originally a scheduling conference, morphed into a final hearing when plaintiffs' attorney made a verbal motion for the circuit court to make a judgment on the pleadings that day. (Id. page 205 line 20) Both defendants objected to a final decision being made because the hearing was not supposed to be a final hearing and the defendants had “evidence to submit into the record” and they wanted to “call witnesses to show that there are material issues of fact.” (Id. page 224 line 23 to page 226 line 9) The circuit court denied defendants' request to call witnesses and stated; “So certainly, it's an appealable issue, and your objections are both noted for the purpose of the record. And

Mr. Wilmoth, if you would include that in the order, as well.” (Id. page 226 line 10) The circuit court denied the motion and counter-motion for sanctions. For housekeeping purposes the circuit court determined that the motion for default judgment was moot in light of the decision to grant a declaratory judgment in favor of the plaintiffs. (Id. page 223 lines 9-16)

Six days prior to the hearing of October 27, 2010, defendant Robin W. Hammer mailed a letter to Steven B. Nanners, the guardian ad litem for Ethel M. Hammer, containing a 33-page document that was delivered to Heather M. Weese, the special fiduciary commissioner appointed to hear a related probate issue involving fiduciary fraud. The letter to Mr. Nanners and the 33-page attachment was submitted to the circuit court and is made a part of the appendix record. (Id. pages 345-379) The documents submitted to the guardian ad litem contained a partial transcript of the sworn testimony of Thomas M. Hammer and Sharon M. Helms along with an audio recording of the testimony. The following excerpt is from the letter to Mr. Nanners:

Enclosed is a copy of the letter [to Commissioner Weese] with attachments and a transcript with the accompanying audio recording. The total amount of three loans owed by Thomas M. Hammer to the estate of Guy S. Hammer was \$239,754.31 as of the last annual statement preceding my father’s death. If you add the total amount of the three loans to all of the money that was in my father’s checking accounts, money market account and certificates of deposit, the total amount of assets that Thomas M. Hammer and Sharon M. Helms failed to list anywhere on the probate appraisal easily exceeded a quarter of a million dollars. (Id. page 345)

Defendant Guy S. Hammer, II informed the circuit court that Mr. Nanners believed that a conservator should be appointed for Ethel M. Hammer and he was surprised that this was not a part of the findings in the Guardian’s report. Dennis Willett responded, “We did consider the conservatorship, but in light of The Court’s order [moments before ?] and the issues joined herein [what issues ?], that’s not been made a part of this proceeding, so conservatorship was left out and may be proceeded on later, but is not part of this.” (Id. page 227 line 20) This statement by the substitute guardian ad litem was very disconcerting. The guardian ad litem’s report indicates that Steven B. Nanners reviewed the Court file. In doing so he would have surely read

the circuit court order that appointed him as the guardian ad litem for Ethel M. Hammer, which stated:

“the Court determined that a trial date for this matter should await the opportunity of the guardian ad litem to review this matter and make a report to the Court as to the competency of Ethel M. Hammer. In consideration of all of which this Court does hereby ORDER that Steven B. Nanners, Esq., be and hereby is appointed as guardian ad litem to represent the best interests of Ethel M. Hammer, and make a report to the Court as to her competency.” (Id. page 85)

Nowhere in the record did the circuit court outsource its judicial responsibility to the guardian ad litem for a legal determination of the validity of both powers of attorney executed by Ethel M. Hammer. During the hearing on August 19, 2010 the circuit court made clear the focus of the scope of the guardian ad litem’s role, “The issue of competence he’s raising is the issue of whether she was competent September of ’08. So, you know, that might be an evidentiary issue. It might be something that a Guardian could explore.” (Id. page 78 line 12) However, the guardian ad litem made legal determinations unrelated to the issue of competency, regarding the validity of both powers of attorney, and included his findings in the report submitted to, and adopted by, the circuit court. (Id. page 198 and page 305)

Defendant Robin W. Hammer wrote the following in an objection to the proposed final order concerning the possibility of ex parte communications: “When Steven B. Nanners met with the defendants on September 27, 2010 he said that he was going to call “Jaymie” about having a conservator appointed for Ethel M. Hammer. The defendants presumed that he was referring to Randolph County Circuit Court Judge Jaymie Godwin Wilfong.” (Id. page 404) This statement in conjunction with Dennis Willett’s statement that conservatorship was left out of the Guardian’s report “in light of The Court’s order and the issues joined herein” gives the impression that the outcome of the October 27, 2010 hearing was a foregone conclusion. When the guardian ad litem decided to leave conservatorship out of the report, which was prepared prior to the hearing, how did he know what the circuit court’s order was going to be and what

issues were going to be joined during the hearing? The circuit court dismissed the case and an allocation of the fee for the guardian ad litem was made as his services were at an end.

Both defendants were at a complete loss in understanding how a hearing that was supposed to be a scheduling conference, a presentation of a report by a guardian ad litem and hearings on three different motions wound up being the final hearing on all issues. Defendant Robin W. Hammer returned to the circuit court judge's office an hour or two later and informed the secretary that he would like to purchase a copy of the transcript of the hearing. By letter dated October 27, 2010 the circuit court decided after the conclusion of the hearing that due to objections raised by the defendants the court would afford parties the opportunity to submit all arguments for final decision prior to November 20, 2010. (page 231) It is worth noting that this letter which referenced objections made by the defendants was not filed with the circuit clerk nor were the defendants' objections incorporated into the final order as the circuit court originally directed attorney David H. Wilmoth to do. Defendant Robin W. Hammer filed the following objection to the proposed final order:

The defendant objects to David H. Wilmoth's failure to include in the proposed final order the objections raised by both defendants during the hearing on October 27, 2010. The defendant proposes that the final order include the following:

- At the commencement of the hearing on October 27, 2010 the Court stated that the issues to be taken up were the Guardian's report, the motion for default judgment, setting the case for trial, and motions for sanctions. (See line 9 of page 4 of the transcript)
- Plaintiffs' attorney, David H. Wilmoth, asked the Court to make a ruling "today" (10/27/10) that the 2002 power of attorney was the valid and enforceable power of attorney. (See line 10 of page 6 of the transcript)
- Defendants objected to a decision being made on 10/27/10 regarding the validity of the 2002 power of attorney because the hearing was not supposed to be for that issue, and the defendants were denied the opportunity to call witnesses and present evidence. (See line 23 of page 25 of the transcript)
- Shortly after the conclusion of the hearing on October 27, 2010 defendant Robin W. Hammer went to the Circuit Judge's office and filed a written request for a transcript of the hearing at which time the Judge's Secretary asked him if he intended to appeal the decision of the Court.
- After the conclusion of the hearing and dismissal of the case on October 27, 2010 the Court sent a letter to the parties stating that the declaratory judgment issue was not

noticed for final decision, therefore the parties would be afforded the opportunity to submit arguments for final decision. (Id. pages 404-405)

Attorney David H. Wilmoth and the circuit court ignored all of the objections to the proposed final order.

On November 8, 2010 plaintiffs submitted to the circuit court a final written argument with 19 pages of documents attached thereto. Plaintiffs introduced this evidence into the record despite the fact that on October 12, 2010 identical responses were given to the following interrogatory that was issued to both plaintiffs Sharon M. Helms and Mark J. Hammer:

**INTERROGATORY NO. 2**

Identify each and every exhibit and document you intend to introduce into evidence at trial, and each exhibit and document you intend to use without introducing into evidence. (Id. pages 90 & 107)

**RESPONSE:** 2 Power of Attorneys executed by Ethel M. Hammer (Id. page 144)

Admissions made by plaintiffs in the final written argument and documents attached thereto supported defendant Robin W. Hammer's claim that plaintiff Robert B. Hammer succeeded plaintiffs Thomas M. Hammer and Sharon M. Helms in August of 2008 as the attorney-in-fact / agent for Ethel M. Hammer under the provisions of the power of attorney executed on November 27, 2002.

On November 19, 2010 defendant Robin W. Hammer submitted his final written argument to the circuit court in the form of a 149-page memorandum including exhibits. The issue of fiduciary fraud on the part of plaintiffs Thomas M. Hammer and Sharon M. Helms was brought to the attention of the circuit court. Thomas M. Hammer and/or Sharon M. Helms have been administering the estate of Guy S. Hammer, the deceased husband of Ethel M. Hammer, at all times from the date of their appointment as fiduciaries on July 30, 1998 to the present. Thomas M. Hammer testified under oath during a probate hearing on June 28, 2010 that there were "three outstanding loans – three debts" that he owed to his mother and father at the time of

his father's death on June 29, 1998. (Id. page 292) Thomas M. Hammer testified under oath that three documents titled – (1) Deed Of Trust for 6.2 Acre Mobile Home Park, (2) Deed Of Trust for 18 Mobile Homes, and (3) Loan Information for Demand Note were all his work product and represented the balance statements for three loans that he owed as of the end of calendar year 1997, which were the last annual statements preceding the death of Guy S. Hammer. (Id. page 288-291) According to these documents the total amount of money owed to Guy S. Hammer from Thomas M. Hammer as of December 31, 1997 was \$239,754.31. Not one penny of this amount was listed anywhere on the appraisal of the estate of Guy S. Hammer. (Id. page 281-284) The name of the mobile home park was Aero Mobile Home Park. (Id. page 367)

### **III. SUMMARY OF ARGUMENT**

**A.** This issue may be one of first impression in this jurisdiction. A motion for more definitive statement was pending before the Court on December 14, 2010 when the case was dismissed. On seven separate instances, on the record, during the period from July 30, 2010 until November 19, 2010, Defendant raised the issue of a “motion for more definitive statement”. Plaintiff refused to answer five interrogatories related to the issue of competency, the principal subject of the motion for more definitive statement. Defendants were denied both discovery and the opportunity to file concise counterclaims arising from the competency issue. There is a current collateral matter of probate fraud, of an unknown amount over one quarter million dollars by two plaintiffs, represented by their attorney. Plaintiff's attorney has a conflict of interest among his clients.

**B.** Plaintiffs made a surprise verbal motion for judgment on incomplete pleadings. The Court granted judgment for plaintiffs based on a surprise report by guardian ad litem not part of the pleadings. Defendants were well-prepared for noticed hearings, but unprepared for this. The

Court then temporarily stayed this decision pending submission of final arguments for a “declaratory judgment” not noticed for final decision. Defendant was unsure, in final argument, whether the proceeding was a summary or declaratory judgment. The Court erred by failure to notify defendants that the verbal motion for a judgment on the pleadings had been converted into a summary judgment and not permitting defendants any opportunity to submit pertinent material.

**C.** No motion for summary judgment was ever filed. A surprise substitute guardian ad litem presented a surprise report to the Court. Defendants were stunned to hear a contested power of attorney declared valid, a matter outside the pleadings, rather than of the critical underlying issue of signatory competence, the task assigned by the Court. While defendants first read the report, plaintiffs’ attorney verbally requested a judgment on the pleadings. The Court adopted the report findings as basis for granting judgment in favor of plaintiffs. The Court considered extra-pleadings matters and the motion for judgment on the pleadings morphed into a motion for summary judgment. Granting a summary judgment after considering extra-pleadings matters and without a motion filed is error by the Court.

**D.** The Court failed to acknowledge a fundamental principle of justice, *Audi alteram partem*, to hear the other side. An issue of determination of material fact existed. There was no demand for a jury trial. Issues not demanded for trial by jury **shall** be tried by the Court. Plaintiffs moved for summary judgment and had the burden of showing that there was no genuine issue of material fact, any doubt to be resolved against the movement for such order. The Court must grant defendants benefit of inferences. All three plaintiffs who signed contested POA were present at hearing. Defendants were prepared. Defendants asked for ten or fifteen minutes to point out material issues regarding lack of validity of the POA. The Court erred, by abuse of

discretion, in refusing to allow defendants to call present witnesses to hear evidence of material fact.

E. The Court said it would issue a “formal decision”. A court’s order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review, to include those relevant, determinative and undisputed findings. Defendant informed the Court of material issues of fact and issues in dispute regarding to a POA, as well as problems with discovery. Facts of POA authority extinguishment, a matter of substantive law, are germane to POA validity, in this declaratory judgment case. Facts related to the POA successor clause are also relevant to POA validity. The Court failed to reconcile its decision to declare the contested POA valid in the face of disputed contrary facts. The court erred in its failure to issue a proper formal decision and thus shifted this onerous task to others, without findings sufficient to permit meaningful appellate review.

F. Defendant objected to final order prepared by plaintiffs’ attorney. The Court had directed plaintiffs’ attorney to include defendants’ objections in the final order. Plaintiffs’ attorney also misstated provisions of contested power of attorney. Preservation of objections for the record is critical on appeal, especially since the Court failed to file its pivotal letter referencing defendants’ objections in the case file. Final order should be based on law supported by facts and truth, not omissions and misstatements of the facts. The Court erred in failure to respond to objections and mistakes in final order.

G. In plain error, the Court declared a POA void, in part, due to appointment of multiple agents and a reversal clause allowing a majority of any three agents to rescind a decision of one agent. The Uniform Durable Power of Attorney Act contains no prohibition against multiple agents, but does provide for two or more co-agents exercising authority independently. Plaintiffs’ attorney,

guardian ad litem and the Court took the position that the POA should be declared void due, in part, to a reversal clause that allows for any three agents to reverse the decision of one agent. The Court could/should have simply declared the reversal clause invalid and left the remainder in place under existing POA provisions. The Court erred in declaring reasons that the POA was unworkable, and void, because it appointed multiple agents and/or provided for a majority veto.

**H.** Randolph County Commission appointed special fiduciary commissioner to hear petition, by defendant, Guy S. Hammer, II, to remove plaintiffs as fiduciaries, for his father's estate, not settled in 12 years. Defendants got a declaratory judgment complaint seven days before probate hearing. Fraud issue: one quarter million dollars left off estate appraisal. In three days defendants appeared in Court on the POA declaratory judgment issue. One plaintiff said POA was not used before September 30, 2008. Supreme Court ruled in two cases that summary judgment not proper in complex cases involving motive and/or intent. Motive: resurrect never used, dead POA to avoid civil liability and criminal fiduciary fraud prosecution. Intent: retaliate against defendant. The Court erred in granting summary judgment in complex case with both motive and intent.

**I.** The circuit court judge, in this case, failed to acknowledge the second fundamental principal of justice, *nemo iudex in causa sua*. About 5-10% of the population lives in **mobile homes**. The circuit court judge's husband sells **mobile homes** and was raised by a mother and father who sell **mobile homes** with him. When the judge heard about **fraud** and later saw that plaintiff claimed a judge in his pocket and bragged about buying his last eight new **mobile homes** from her parents she must have known any reasonable person could or would have seen a conflict. In plain error, with knowledge of actual or apparent impropriety well established in the record

reviewed by the circuit court judge and known by plaintiff, but unknown by defendants, the circuit court judge failed in her duty to disqualify herself from this matter.

**J.** The moving party had the burden to show no genuine issue of material fact. Plaintiffs failed to submit any affidavits or verified answers to interrogatories in support of their motion for summary judgment. Defendant Robin W. Hammer's claim that Robert B. Hammer became the agent for Ethel M. Hammer in 2008 under the successor clause of the 2002 power of attorney, then resigned in 2009 leaving the instrument void went uncontradicted. It was plain error and clearly erroneous for the circuit court to grant summary judgment in favor of plaintiffs as judgment should have been granted in favor of the defendants

#### **IV. ORAL ARGUMENT**

Defendant does not request oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

#### **V. ARGUMENT**

##### **A. THE CIRCUIT COURT ERRED BY DISMISSING THE CASE WHILE A MOTION FOR MORE DEFINITIVE STATEMENT WAS PENDING**

Defendant Robin W. Hammer filed a motion for more definitive statement on July 30, 2010 pursuant to Rule 12(e) *W. Va. R. C. P.* and requested that plaintiffs Thomas M. Hammer and Sharon M. Helms state their positions regarding the claim that Ethel M. Hammer was incompetent when she executed the power of attorney on September 22, 2010. (Id. page 44) During a scheduling conference on August 19, 2010 the defendant complied with the requirements of Rule 22.04 *W. Va. T. C. R.* by calling to the attention of the circuit court the motion for more definitive statement. (Id. page 76 line 8) This action by the defendant was not enough to prompt the circuit court to expeditiously decide the motion. Plaintiffs' attorney stated

during the hearing, “I haven’t seen any pleadings that raise that [issue of competency] other than their reference to a motion for a more definitive statement, but that doesn’t raise the issue in a --- for the Court’s consideration.” (Id. page 77 line 11) On September 20, 2010 the defendant served upon plaintiffs a notice of hearing on the motion for more definitive statement. (Id. page 132-133) The hearing was continued by order of the circuit court from September 30, 2010 until October 27, 2010. In a motion for sanctions that was served upon plaintiffs on October 5, 2010 the defendant reiterated that, “On July 30, 2010 the defendant filed a motion for more definitive statement alleging that the pleadings are so vague and ambiguous with respect to plaintiffs’ claim that Ethel M. Hammer is incompetent that he cannot reasonable be required to respond.” (Id. page 171 ¶7 and page 138) In a response to counter-motion for sanctions the defendant wrote, “Attorney David H. Wilmoth should be aware that the defendant’s Motion for More Definitive Statement is scheduled for hearing on October 27, 2010. The motion specifically asks the Court to direct plaintiffs Thomas M. Hammer and Sharon M. Helms to state their position regarding the claim that Ethel M. Hammer is incompetent.” (Id. page 186 ¶6) During the hearing on October 27, 2010 defendant Robin W. Hammer informed the circuit court that he had filed a motion for more definitive statement. (Id. page 211 line 11) On November 19, 2010 Defendant Robin W. Hammer wrote in his memorandum of final argument that he “tried repeatedly to have the Court rule on his motion for more definitive statement.” (Id. page 17)

Defendant Guy S. Hammer was awaiting a ruling on the motion for more definitive statement in order to file his answer, which he never did because the circuit court ignored the motion for 4 ½ months. Defendant Robin W. Hammer intended to amend his answer with counterclaims arising out of the issue of the competency of Ethel M. Hammer but was denied the opportunity to do so. This issue may be one of first impression in this jurisdiction. There are no

local rules pursuant to Rule 78 for dispensing with pretrial motions. The 4<sup>th</sup> Circuit Court of Appeals restated in ¶8 of *United States Fidelity and Guaranty Co. v. Lawrenson* the interpretation by the district court that while motions “will automatically be decided on the memoranda filed unless the court or either side requests a hearing, it is still within the discretion of the court to grant or refuse a request for a hearing.” *United States Fidelity and Guaranty Co. v. Lawrenson*, 334 F.2d 464, 466-67 (4th Cir.), cert. denied, 379 U.S. 869, 85 S.Ct. 141, 13 L.Ed.2d 71 (1964). The plaintiffs did not file a written response to the motion for more definitive statement and the circuit court did not “automatically” decide the motion on the memoranda filed. Defendant Robin W. Hammer obtained the hearing date from the circuit court’s secretary prior to filing a notice of hearing on the motion for more definitive statement. At no time did the circuit court subsequently state that it was denying a hearing on the motion for more definitive statement. The West Virginia Supreme Court noted in footnote 2 of *Coberly v. Coberly*, “that the Rules of Civil Procedure provide means for clarifying claims. For instance, Rule 12(e) provides that a party may move for a more definite statement of a claim, and Rule 15 provides for amendment of a complaint.” *Coberly v. Coberly*, 213 W.Va. 236, 580 S.E.2d 515 (2003) Plaintiffs’ attorney was cognizant of the importance of filing an understandable complaint and the means for clarifying a claim as he was counsel in the *Coberly* case that was reversed by the Supreme Court. To permit litigants to file complaints that are vague and ambiguous and then allow them to move for default judgment, judgment on the pleadings and summary judgment, while the defendants are trying to ascertain what the complaint says, violates the spirit and intent of Rule 8(f) *W. Va. R. C. P.*, which mandates that, “All pleadings shall be so construed as to do substantial justice.”

The circuit court should have either granted the motion or denied it on the basis that the information was obtainable through discovery, which would have set discovery in motion in this case. Defendant Robin W. Hammer issued interrogatories to two of the plaintiffs. Plaintiff Sharon M. Helms refused to answer interrogatories #22, #23, #24, #27 & #28 that were related to the issue of competency, which was the subject of the motion for more definitive statement. (Id. pages 156-160) The defendant made a good faith attempt to confer with Sharon M. Helms about her failure to comply with the discovery request. (See exhibit B of Motion for Leave to Supplement Record filed with the Supreme Court – letters to Sharon M. Helms and her attorney David H. Wilmoth both dated October 11, 2010) This was a preliminary step to filing a motion to compel discovery.

Plaintiffs' attorney is in the untenable position of advocating that three of his clients are asserting that Ethel M. Hammer has been incompetent since September 22, 2008 while his other two clients are borrowing and spending her money on a \$142,400 credit line deed of trust which was signed by Ethel M. Hammer alone in 2009 at a time which the circuit court has determined that she was not competent, all of which is in addition to the fact that these same two plaintiffs have failed to account for more than a quarter of a million dollars in assets that were fraudulently left off of the appraisal of the estate of Guy S. Hammer, which is still unsettled and litigation is pending in probate court. It appears that plaintiffs' attorney has a conflict of interest among his clients and his representation of them may be prohibited by Rule 1.7 of the *West Virginia Rules of Professional Conduct*.

**B. THE CIRCUIT COURT ERRED IN ITS FAILURE TO NOTIFY THE PARTIES THAT A JUDGMENT ON THE PLEADINGS HAD BEEN CONVERTED INTO A SUMMARY JUDGMENT**

During a hearing on October 27, 2010 plaintiffs made a verbal motion for judgment on the pleadings. The circuit court granted judgment in favor of the plaintiffs based upon findings contained in a report by a guardian ad litem that was not introduced until during the hearing on October 27, 2010 and was not part of the pleadings. Rule 12(c) *W. Va. R. C. P.* states that, “If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”

The West Virginia Supreme Court stated in syllabus point 1 of *Kopelman and Associates, L.C. v. Collins* (1996):

1. When a motion for judgment on the pleadings under Rule 12(c) of the West Virginia Rules of Civil Procedure is converted into a motion for summary judgment, the requirements of Rule 56 of the West Virginia Rules of Civil Procedure become operable. Under these circumstances, a circuit court is required to give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In this way, no litigant will be taken by surprise by the conversion. The absence of formal notice will be excused only when it is harmless or the parties were otherwise apprised of the conversion. Once the proceeding becomes one for summary judgment, the moving party’s burden changes and the moving party is obliged to demonstrate that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Kopelman and Associates, L.C. v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996). Restated in *Riffle v. C.J. Hughes Construction*, Civil Action 05-C-0438 (W.Va. Nov. 1, 2010).

The Supreme Court held in *Kopelman*, “that to treat a motion for judgment on the pleadings as a motion for summary judgment without permitting the adverse party a reasonable opportunity to submit pertinent material is error.” There is a nexus between having a reasonable opportunity to submit pertinent material and the requirement that the circuit court notify the parties of the changed status of the motion. When the circuit court stayed its own decision on October 27, 2010 pending the submission of written arguments for final decision the circuit court specifically stated that the reason was because “the declaratory judgment issue was not noticed for final decision.” (Id. page 231) No mention whatsoever was made to “judgment on the pleadings” or

“summary judgment” in the letters from Randolph County Circuit Court Judge Jaymie Godwin Wilfong dated October 27, 2010 and November 22, 2010, or in the final order entered December 15, 2010. (Id. pages 231, 402 and 407)

Although defendant Robin W. Hammer stated twice in his memorandum of final argument that the proceeding he was involved in appeared to be a summary judgment, he was not sure that the proceeding wasn't some type of a declaratory judgment proceeding that he knew nothing about as a pro se litigant. The WV Supreme Court stated in footnote 1 of *Booker v. Foose*, 216 W.Va. 727, 613 S.E.2d 94 (2005), “We are not bound by the label below, and we will treat the dismissal as one made pursuant to’ the most appropriate rule.” (Citation omitted) This was not harmless error for the defendant as a great deal of time and energy was expended during the preparation of his 149-page memorandum of final argument in dealing with issues unrelated to Rule 56 of the *W. Va. R. C. P.* and consequently the defendant was not afforded a “reasonable opportunity” for discovery to be had pursuant to Rule 56(f) *W. Va. R. C. P.* Insofar as the issue of whether or not Robert B. Hammer succeeded Thomas M. Hammer and Sharon M. Helms as the power of attorney for Ethel M. Hammer and then resigned was not addressed by the plaintiffs or the circuit court, the defendant had the right to conduct discovery on such matters prior to the circuit court's summary judgment determination. The West Virginia Supreme Court has noted that “a decision for summary judgment before discovery has been completed must be viewed as precipitous.” *Board of Educ. of the County of Ohio v. Van Buren & Firestone Architects, Inc.*, 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980). Therefore, the circuit court erred in its failure to notify the parties that the verbal motion for a judgment on the pleadings had been converted into a summary judgment.

**C. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WITHOUT A MOTION FOR SUCH JUDGMENT EVER HAVING BEEN FILED**

Rule 56(c) of the *W. Va. R. C. P.* requires that a motion for summary judgment “shall be served at least 10 days before the time fixed for the hearing.” No motion for summary judgment was ever filed. Near the beginning of the hearing on October 27, 2010 plaintiffs’ attorney made a verbal request for a judgment on the pleadings after a substitute guardian ad litem presented a report to the circuit court. The defendants were completely taken by surprise when the report was presented to the circuit court. Steven B. Nanners, the guardian ad litem appointed for Ethel M. Hammer had indicated on September 27, 2010 that he was going to call “Jaymie” about having a conservator appointed for Ethel M. Hammer. The defendants presumed that he was referring to Randolph County Circuit Court Judge Jaymie Godwin Wilfong. The defendants were in a state of shock when they discovered that the guardian ad litem instead issued a report finding that the power of attorney executed on November 27, 2002 should be declared the valid power of attorney for Ethel M. Hammer. The defendants were simultaneously trying to digest this report while the hearing was going on. The circuit court adopted the findings of the guardian ad litem as the basis for granting judgment in favor of the plaintiffs. The circuit court considered matters outside the pleadings, therefore the verbal motion for judgment on the pleadings should have been treated as a motion for summary judgment which requires service of such motion upon the opposing parties at least 10 days before the hearing. The circuit court erred in granting summary judgment in favor of the plaintiffs without a motion for such judgment ever having been filed. The West Virginia Supreme Court has stated that, “ordinarily, in the absence of a written motion for summary judgment by one of the parties, the court is not authorized sua sponte to grant a summary judgment.” Syllabus Point 2, *Gavitt v. Swiger*, 162 W.Va. 238, 248 S.E.2d 849 (1978).

**D. THE CIRCUIT COURT ERRED BY REFUSING TO ALLOW THE DEFENDANTS TO CALL WITNESSES DURING THE HEARING ON OCTOBER 27, 2010**

The circuit court erred by abusing its discretion when it refused to allow the defendants to call witnesses during the hearing on October 27, 2010 and thereby violated procedural rights granted under West Virginia Code §55-13-9 and Rule 39(b) of the West Virginia Rules of Civil Procedure. West Virginia Code §55-13-9 of the Uniform Declaratory Judgments Act provides that, “When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.” Rule 39(b) of the *W. Va. R. C. P.* states in the imperative that, “Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court”. In *Hargrove v. American Cent. Ins. Co.*, 125 F.2d 225 (1942) the 10<sup>th</sup> Circuit Court of Appeals ruled in a declaratory judgment case brought under Rule 57 *F. R. C. P.* that a litigant who did not demand a jury trial but received a bench trial with a jury impaneled in an advisory capacity was not harmed because the court wholly disregarded the verdict of the jury, “the insured had only the right to insist that the cause be submitted to and tried by the court, without the advice of a jury, and that is exactly what he received.”

The West Virginia Supreme Court stated that “a party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such an issue is to be resolved against the movant for such judgment.” Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. at 161, 133 S.E.2d at 772 (1963). The rule set forth in *Williams v. Precision Coil, Inc.* 194 W.Va. at 59, 459 S.E.2d 336 (1995) is that a court considering a motion for summary judgment “must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” In *Mountain Lodge*

*Assoc. v. Crum & Forster Indemnity Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001) the complaint was for declaratory judgment and summary judgment was granted in the case. The questions before the Supreme Court in that case are equally applicable to this case, “whether reasonable minds might draw differing inferences and, therefore, conclusions from the evidence and whether there is additional evidence that might assist the finder of fact and the court in resolving the ultimate issue.”

The issue in this case is whether or not Robert B. Hammer succeeded Thomas M. Hammer and Sharon M. Helms as the power of attorney for Ethel M. Hammer under the provisions of paragraph two of the power of attorney executed on November 27, 2002 and whether or not Robert B. Hammer resigned as power of attorney effective October 16, 2009 rendering the instrument void. (Id. page 6) During the hearing on October 27, 2020 all three of these plaintiffs listed on the 2002 power of attorney were sitting at the plaintiffs’ table with their attorney David H. Wilmoth. Three hearings on motions were scheduled for October 27, 2010. “On October 26, 2010 the defendants [Robin W. Hammer and Guy S. Hammer, II] called the WV Supreme Court lawyer information services and inquired about the calling of witnesses during the motion hearings scheduled for October 27, 2010. The defendants were fully prepared to call witnesses but were denied the opportunity.” (Id. page 276) The defendants asked the attorney if there was any rule that would prohibit them from calling any of the plaintiffs who happened to show up in court the next day to testify during the scheduled hearings. The defendants had folders prepared for each of the potential witnesses and multiple copies of exhibits to introduce into evidence and question the plaintiffs about. The defendants left their names and phone number with the attorney who they talked to on October 26, 2010.

The following is an excerpt from the transcript of the October 27, 2010 hearing:

**MR. GUY HAMMER:** Yes, Your Honor, I would also like to object for the record, because there are material issues of fact with regard to – and there are witnesses that could be called. In fact, they could – it could be settled today. Is that right, Rob?

**MR. ROBIN HAMMER:** Yes.

**MR. GUY HAMMER:** Yes. With just 10, 15 minutes, we could point out to you the material issues here regarding the lack of validity of that power of attorney.

**THE COURT:** And I understand, I understand you disagree with the Court’s ruling, but the ruling stands. Okay. So certainly, it’s an appealable issue, and your objections are both noted for the purpose of the record. (Id. page 225 line 23 to page 226 line 14)

This refusal by the circuit court to allow just 10 or 15 minutes to get to the heart of the issue is in stark contrast to how accommodating the circuit court was when plaintiffs first presented this case to the court on July 1, 2010:

**THE COURT:** How long do you think you’ll need to put on your case?

**MR. WILMOTH:** Half a day – not, well I think the whole matter can be heard in half a day. (Id. page 32 line 15)

The circuit court certainly did not embrace a fundamental principle of justice, *audi alteram partem*, to hear the other side by allowing a fair opportunity for the defendants to summon their own witnesses and to present evidence. Accordingly, the circuit court erred in an abuse of discretion in its refusal to allow the defendants to call witnesses during the hearing on October 27, 2010.

#### **E. THE CIRCUIT COURT ERRED IN ITS FAILURE TO ISSUE A FORMAL DECISION**

The circuit court stated in a letter dated October 27, 2010 that after the submission of final written arguments it would “issue a formal decision.” (Id. page 231) By letter dated November 22, 2010 the circuit court informed the parties, “I have reviewed the memoranda submitted by Plaintiffs’ counsel and the Defendants. My ruling stands as issued on October 27, 2010.” (Id. page 402) The circuit court failed to identify the factual and legal analysis used in arriving at the decision. The West Virginia Supreme Court stated in syllabus point 6 of *Mountain Lodge Assoc. v. Crum & Forster Indemnity Co.*, 210 W.Va. 536, 558 S.E.2d 336 (2001) that, “Although our standard of review for summary judgment remains de novo, a circuit

court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." Syl. Pt. 3, *Fayette County Nat. Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997).

Defendant Robin W. Hammer represented to the circuit court that there were material issues of fact related to the 2002 power of attorney as evidenced by the following excerpt from the transcript of the October 27, 2010 hearing:

**Mr. Robin Hammer:** Yes. Your Honor, this isn't simply a case about deciding the declaratory judgment, the issue of the 2002 power of attorney. What the real case is, the power of attorney from 2002, the provisions of it, have already exhausted themselves; it's no longer in force and effect. So this isn't a case where you just say that that's the valid power of attorney; there are issues of material fact that need to be addressed.

**The Court:** How has the '02 power of attorney exhausted itself?

**Mr. Robin Hammer:** The provision was that if either party, either of the two principle attorney's in fact – that would have been Sharon [Helms] and Tom [Hammer] – if either of them couldn't serve, then Robert B. Hammer was to succeed as power of attorney; and he succeeded as power of attorney. Then in October of 2009, he resigned as power of attorney. So, therefore, it was left void and ineffective, because it was no longer in effect. (Id. page 208 line 14 to page 209 line 9)

Defendant Robin W. Hammer informed the circuit court of what issues of material fact that he believed were still in dispute regarding the validity of the 2002 general power of attorney and problems encountered with discovery requests as evidenced by the following excerpt from the transcript of the October 27, 2010 hearing:

**The Court:** What issues of fact do you believe are still in dispute?

**Mr. Robin Hammer:** The issues of fact in dispute are whether or not the – Robert Hammer, the successor of the – in the 2002 power of attorney had resigned; and whether or not the other two, the first attorneys-in-fact, Tom [Hammer] and Sharon [Helms], whether or not they could no longer function as powers of attorney, and whether it actually – Robert Hammer succeeded. The provisions of the power of attorney didn't provide for an alternate, it provided for a successor. And that's – those are material issues that need to be dealt with.

I have tried to issue some discovery requests to two of the plaintiffs, and 38 out of 40 interrogatories were objected to with overly broad objections that actually included every possible objection that they could write; and the discovery has just gone nowhere. (Id. page 216 line 22 to page 217 line 17)

Whether or not the authority to act under the provisions of the 2002 general power of attorney had been extinguished is a matter of substantive law that is germane to making a determination of the validity of said document in this declaratory judgment case. Otherwise, it would be the purview of lower courts to resurrect such powers in legal documents which had already expired. Therefore, facts related to the successor clause of the 2002 general power of attorney and the resignation of the successor agent under said general power of attorney are relevant and material in determining the validity of the document. The circuit court failed to reconcile its decision to declare the 2002 power of attorney valid in the face of a multitude of facts which would indicate otherwise. The circuit court erred in its failure to issue a formal decision as it stated that it would do in the letter to the parties dated October 27, 2010 and thereby failed to set out factual findings sufficient to permit meaningful appellate review.

**F. THE CIRCUIT COURT ERRED IN ITS FAILURE TO RESPOND  
TO OBJECTIONS CONCERNING THE FINAL ORDER**

Defendant Robin W. Hammer objected to the proposed final order prepared by plaintiffs' attorney. (Id. page 403) During the hearing on October 27, 2010 the circuit court directed plaintiffs' attorney to include the defendants' objections in the final order, which was not done.

The following excerpt was taken from defendant's objections to proposed order:

Plaintiffs' attorney, David H. Wilmoth, misstated the provisions of the general power of attorney dated September 22, 2008. That power of attorney appointed precisely five individuals as her agents not "at least five individuals" as Mr. Wilmoth has written. Any of the agents could act under that power of attorney, not "any two" as Mr. Wilmoth has suggested. There was a veto provision that permitted any three agents to rescind any action taken by any agent, not "any two" of the appointed agents. The defendant objects to these mistakes to be allowed to remain in the final order as it could only serve to confuse matters on appeal.

The defendant intends to appeal the decision of the Court and therefore believes that the final order should be a clear and concise reflection of the proceedings had and the ruling issued on October 27, 2010. (Id. page 405)

The preservation of a party's objections is an important issue on appeal and given that the circuit court did not file the pivotal letter dated October 27, 2010 containing a reference to defendants' objections in the case file it was all the more reason why the final order should have contained the defendants' objections as the circuit court instructed attorney David H. Wilmoth to do. The misstatements of the provisions of the 2008 power of attorney are relevant to the next argument. The circuit court erred in ignoring the omission of the defendants' objections from the final order and the misstatement of facts concerning the provisions of the 2008 power of attorney. Final orders of the circuit court should be based on law and supported with facts and the truth, not omissions and misstatements of facts.

**G. IT WAS PLAIN ERROR FOR THE CIRCUIT COURT TO DECLARE THE 2008 POWER OF ATTORNEY VOID DUE IN PART TO ITS PROVISIONS**

The circuit court declared the power of attorney executed on September 22, 2008 void due in part on the basis that said document granted power and authority to multiple agents and contained a reversal clause that allowed any three agents to collectively rescind a decision of an agent. Section 111(a) of the Uniform Power of Attorney Act of 2006 states that, "A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently." The National Conference of Commissioners on Uniform State Laws drafted this act. Although the West Virginia State Legislature has not adopted this act yet, the probability is good that they will because the NCCUSL also drafted the Uniform Durable Power of Attorney Act which has been codified in chapter 39 article 4 of the *West Virginia Code*. Nowhere in the Uniform Durable Power of Attorney Act is there a prohibition against multiple agents.

Plaintiffs' attorney, David H. Wilmoth, Steven B. Nanners, the guardian ad litem for Ethel M. Hammer and Randolph County Circuit Court Judge Jaymie Godwin Wilfong have all

taken the position that the 2008 power of attorney should be declared void due in part to a reversal clause that allows for any three agents to reverse the decision of another agent because a third party would not be able to rely on the action of any single agent due to the possibility that three other agents could reverse the decision. The power of attorney executed by Ethel M. Hammer on September 22, 2008 stated:

**"If any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument." (Id. page 12)**

David Wilmoth, Steven Nanners and Judge Wilfong all should have known that under the provisions of the 2008 power of attorney the court should have simply declared that the reversal clause was invalid and left the rest of the document alone as having multiple agents wasn't a problem. The circuit court erred in declaring that one of the reasons that the 2008 power of attorney was void is because it was unworkable in that it appointed multiple agents and had a veto or reversal clause. (Id. page 220 line 21 to page 221 line 16)

#### **H. THE CIRCUIT COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN A COMPLEX CASE INVOLVING MOTIVE AND INTENT**

The Randolph County Commission appointed a special fiduciary commissioner to hear a petition to have Thomas M. Hammer and Sharon M. Helms removed as fiduciaries to the estate of Guy S. Hammer, which has not been settled in more than 12 years. (Id. page 285) On June 21, 2010 the declaratory judgment complaint was served upon the defendants. On June 28, 2010 a probate hearing was held in which the sworn testimony of Thomas M. Hammer and Sharon M. Helms revealed that more than a quarter of a million dollars was fraudulently left off of the appraisal of the estate of Guy S. Hammer. (Id. pages 345-379) Three days later the defendants were summoned to appear in circuit court on the declaratory judgment issue of the power of attorney for Ethel M. Hammer. It is important to note that according to Sharon M.

Helms from the time the 2002 power of attorney was drafted until September 30, 2008 it was never used by plaintiffs. (Id. page 69) The motive to obtain the power of attorney for Ethel M. Hammer is to avoid civil liability and criminal prosecution for fiduciary fraud. The intent of the plaintiffs was to be empowered in order to retaliate against defendant Guy S. Hammer for reporting the fraudulent acts of the plaintiffs. (Id. pages 390-391) In *Karnell v. Nutting*, 166 W.Va. 269, 273 S.E.2d 93 (1980) the WV Supreme Court decided, “Concluding as we do in the instant case that issues involving motive and intent were involved and that the issues were too complex for the granting of summary judgment, we reverse the judgment of the trial court”. In *Dawson v. Allstate Ins. Co.*, 189 W.Va. 557, 433 S.E.2d 268 (1994) the WV Supreme Court stated that “summary judgment is not proper in complex cases which involve motive or intent.”

The guardian ad litem for Ethel M. Hammer determined that she has not been competent for a period of at least two years. For more than a year Mrs. Hammer has received care provided through the Alzheimer’s Disease Demonstration Grant In-Home Respite Program. (Id. pages 324-330) A search of the WV Supreme Court opinions using the keyword “Alzheimer’s” yields an interesting case where an elderly woman with the onset of Alzheimer’s filed suit against her son alleging fraud regarding the transfer of property. She alleged that her son asked her to sign a piece of paper conveying a right of way to move cattle from one pasture to another only to find out that she had signed a deed conveying the property to her son. The plaintiff dropped the fraud claim with prejudice and the circuit court granted summary judgment in favor of the son. The Supreme Court affirmed the lower court’s decision noting “that at first blush the result here might seem harsh to the casual reader.” The case was analogous in that it involved an elderly woman and her son, the onset of Alzheimer’s disease, and the issue of fraud. The case was *Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003) and it is interesting that attorney David H. Wilmoth represented the

son in that case. The circuit court erred in the instant case by granting a summary judgment in a complex case involving the motive of plaintiffs to obtain power of attorney in order to control access to documents and thereby avoid civil liability and criminal prosecution for fiduciary fraud.

**I. IT WAS PLAIN ERROR THAT THE CIRCUIT COURT JUDGE FAILED TO RECUSE HERSELF TO AVOID THE APPEARANCE OF IMPROPRIETY**

The circuit court failed to acknowledge the second fundamental principal of justice, *nemo iudex in causa sua*, for no [wo]man a judge in his[her] own case. The court was aware of plaintiff's **mobile home business** and a claim of **fraud** on July 1, 2010. The court heard defendant state:

another point I want to make is that this struggle over the use of a Power of Attorney is – the reason for it is because of criminal tax **fraud** and **45 mobile homes** were purchased directly from an out-of-state factory and sales and use tax were not paid (Id. pg 33)

On October 29, 2010 defendant recorded dialog with plaintiff acting as POA:

And if you get in my way **I have a judge who is prepared to get you in contempt of court.** And I will call the state police and you will spend tonight and the next thirty days in jail. Don't push me here!!! Okay? Now I'm trying to control myself. (Id. Page 390)

On November 19, 2010 defendant submitted final written argument to the circuit court . . . The issue of plaintiffs fiduciary **fraud** was again brought to the attention of the court:

As well as (1) Deed Of Trust for 6.2 Acre **Mobile Home Park**, (2) Deed Of Trust for **18 Mobile Homes**...the **mobile home park** was **Aero Mobile Home Park**. (Id. page 367)

On November 22, 2010 the circuit court reviewed all final arguments by parties.

On January 20, 2011, defendant requested that:

whatever **influence or control** that millionaire Thomas M. Hammer claims to have over the **Twentieth Judicial Circuit of West Virginia** and the West Virginia State Police be put in abeyance by staying the order of the court entered December 14, 2010 pending appeal to the West Virginia Supreme Court of Appeals. (Motion to Stay Circuit Court Order dated January 20, 2011)

On February 9, 2011 the circuit court "**having reviewed**" such motion ordered "Defendant's Motion to Stay be and it is hereby DENIED."

The *WV Code of Judicial Conduct* states:

A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities. The prohibition...applies to...personal conduct of a judge. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired. A judge shall not allow family...relationships to influence the judge's judicial conduct or judgment...[not] knowingly permit others to convey the impression that they are in a special position to influence the judge.

A judge **shall disqualify ... herself** in a proceeding in which the judge's impartiality might reasonably be questioned, a judge is disqualified whenever the judge's impartiality might reasonably be questioned...A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

[A judge shall disqualify herself where] the judge knows that...she, individually...or the judge's spouse, parent ...has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;...A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse ...

In plain error, the circuit court judge failed to disqualify herself to avoid impropriety or the appearance of impropriety, due to conflict of interest, since three of the judge's first-degree relatives (spouse, mother and father) all work in sales for a local **mobile home** dealer and plaintiff purchased eight new **mobile homes** from them which could have a value of approximately \$250,000.00.

#### **J. THE CIRCUIT COURT DECISION TO GRANT SUMMARY JUDGMENT FOR PLAINTIFFS WAS CLEARLY ERRONEOUS AND WAS PLAIN ERROR**

"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). "A circuit court's entry of a declaratory judgment is reviewed *de novo*." Syl. Pt. 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). "A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. Pt. 6, *Aetna Cas. & Surety Co. v. Federal Ins. Co.*, 148

W.Va. 160, 133 S.E.2d 770 (1970). This case turns on one issue; did Robert B. Hammer succeed Thomas M. Hammer and Sharon M. Helms in 2008 as the power of attorney for Ethel M. Hammer and then resign the position effective October 16, 2009? Plaintiffs carry the burden of showing that this issue is not in dispute. Defendant Robin W. Hammer stated in his answer that Robert B. Hammer succeeded Thomas M. Hammer and Sharon M. Helms as the power of attorney for Ethel M. Hammer in 2008 “to serve alone” as the power of attorney for Ethel M. Hammer until his resignation on October 16, 2009, which then rendered the 2002 power of attorney void. (Id. page 63 and page 66) The plaintiffs prevailed in showing that this paramount issue regarding the validity of the 2002 power of attorney was not in dispute. Plaintiffs admitted in their final argument that Thomas M. Hammer and Sharon M. Helms were not the powers of attorney for Ethel M. Hammer between August and December of 2008. (Id. page 232) Furthermore, plaintiffs submitted a document dated July 1, 2009 proving that Robert B. Hammer was the acting power of attorney in 2009. (Id. page 250) The circuit court was correct in finding that there was no material issue of fact with respect to whether or not Robert B. Hammer succeeded the prior agents as power of attorney and then resigned. The complaint was not verified; no verified answers to interrogatories were made; and plaintiffs did not submit any affidavits that contradicted the defendant’s answer.

What the circuit court got wrong was the end result. The circuit court’s decision was clearly erroneous and summary judgment should have been granted for the defendants:

When it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under this rule, that a party who has moved for summary judgment in his favor is not entitled to judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered against that party. *Employers’ Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W.Va. 1062, 158 S.E.2d 212, (1967).

Summary judgment should be granted in favor of Robin W. Hammer for the reason set out in

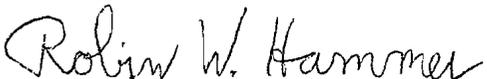
*Employers’ Liab. Assurance Corp.:*

An obvious reason for permitting the entry of summary judgment, without motion or cross motion by the adverse party when it appears that he, instead of the moving party, is entitled to such judgment is the avoidance of the delay and hardship which would result from withholding such judgment until formal motion should be made or reopening or remanding the proceeding solely for that purpose and subsequently entering such judgment upon such delayed formal motion. *Employers' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W.Va. 1062, 158 S.E.2d 212, (1967).

## VI. CONCLUSION

For all of the foregoing reasons the petitioner, Robin W. Hammer, respectfully requests that this Honorable Court reverse the decision of the circuit court and grant summary judgment in favor of the nonmoving party, the defendants below; that the issue of the circuit court's failure to respond to the motion for more definitive statement as it relates to the preservation of counterclaims be addressed; and that the statute of limitations regarding any counterclaims arising out of the issue of the competency of Ethel M. Hammer and/or any actions taken by agents of Ethel M. Hammer be tolled for the period of time that this declaratory judgment action was pending.

Respectfully submitted,

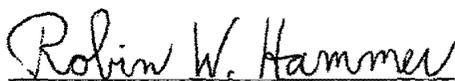
  
\_\_\_\_\_  
Robin W. Hammer, petitioner

**CERTIFICATE OF SERVICE**

I, ROBIN W. HAMMER, hereby certify that I have served a true and correct copy of the foregoing *Petitioner's Brief* upon David H. Wilmoth, attorney of record for the Respondents, Thomas M. Hammer, Robert B. Hammer, Teresa C. Hammer Lang, Mark J. Hammer, and Sharon M. Helms, via hand delivery to the following address:

David H. Wilmoth  
427 Kerens Avenue, Suite 3  
Elkins, WV 26241

DATED: This 15<sup>th</sup> day of April, 2011.



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