



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-0130

JAMES P. CAMPBELL,
Defendant below, Petitioner,

V.)

GLEN POE,
Plaintiff below, Respondent.

Appeal from a final order
of the Circuit Court of Jefferson County (08-C-
223)

Petitioner's Brief

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PETITIONER'S BRIEF PURSUANT TO RULE 10

COMES NOW the Petitioner, James P. Campbell, Esquire, ("Petitioner") and files the following Brief. Petitioner seeks the reversal of the Circuit Court of Jefferson County's ("Circuit Court") November 9, 2011 Order Granting Judgment against Petitioner and Steven D. Foster ("Foster") upon Promissory Note ("Judgment Order") (Appendix, No. 37, pages 460-464) and the Circuit Court's January 5, 2012 Order Denying Campbell's and Foster's Motion to Alter or Amend the Court's Judgment Order ("Order Denying Motion to Alter Judgment") (Appendix, No. 41, pages 493-497). The Circuit Court granted judgment in favor of Plaintiff, Glen Poe ("Poe") based upon an oral Motion for Summary Judgment ("Oral Motion") at the October 31, 2011 pre-trial conference ("Pre-Trial"). The transcript of the Pre-Trial is included in the Appendix (Appendix, No. 36, pages 433-459) ("October 31, 2011 Transcript").

I. ASSIGNMENTS OF ERROR

A. Whether the Circuit Court erred in ruling in favor of Poe's Motion for Summary Judgment to enforce the promissory note guarantee when Poe failed to establish a validly executed promissory note at trial; or whether questions of fact were in dispute as to the existence of a properly executed promissory note.

B. Whether the Circuit Court committed reversible error by Granting Poe's oral Motion for Summary Judgment without prior notice to the Petitioner.

C. Whether the Circuit Court erred in failing to grant Petitioner's Motion for Summary Judgment on the guarantee claim.

D. Whether the Circuit Court erred by denying Petitioner's Motion to Alter or Amend because the Circuit Court did not apply this Court's test for judicial estoppel;

E. Whether the Circuit Court improperly dismissed the remaining claims without prejudice pending the outcome of this Appeal.

F. Whether the Honorable David Sanders of the Circuit Court demonstrated bias against the Petitioner and should have been disqualified.

II. STATEMENT OF THE CASE

The appeal in this case relates to the grant of summary judgment in favor of a note holder in relation to guarantees allegedly pertaining to a promissory note. The instrument at issue in this case is attached to the original Complaint and to the Amended Complaint as Exhibit A. *See* Appendix, No. 13, pages 123-141.

On December 22, 2010, two and one half years after the litigation began, Poe submitted to a discovery deposition. During his deposition, Poe disclaimed the validity of the promissory note attached to both the Complaint and the Amended Complaint. Foster's Memorandum in support of his Motion for Summary Judgment (Appendix, No. 20, pages 179-227) and Petitioner's Motion for Summary Judgment (Appendix, No. 17, 167-176 (Motion), Appendix, No. 23, pages 246-258 (Amended Memorandum)), filed with the Circuit Court, included the deposition excerpts from Poe's December 22, 2010 deposition, wherein he questioned the validity of the promissory note. Specifically, in response to questions about the promissory note, Poe said the following:

A. Mike Briel has already testified. That is not the note that he signed. *See* Transcript attached to Foster's Memorandum in Support of his Motion for Summary Judgment (Appendix, No. 20, page 217).¹

¹ In both Petitioner and Foster's Memoranda in Support of their Motions for Summary Judgment, they identify statements of undisputed material facts. Petitioner's Memorandum in Support of his Motion for Summary Judgment is contained at Appendix, No. 18, pages 167-176 and Foster's Memorandum in Support of his Motion for Summary Judgment is contained at Appendix, No. 20, pages 179-226. Both

Later in his deposition the following questions and answers called into question the validity of the promissory note:

- Q. Okay. So the note that attached to your complaint may or may not have been the note that Mr. Foster signed; is that correct?
- A. The note that it was attach -- I mean, I believe that was Mr. Foster's signature. What it was attached to originally I have no idea.
- Q. So it could have been attached to some other note for all you know; is that right?
- A. Yeah.

Appendix, No. 20, pages 218-219.

Notwithstanding the deposition testimony of Poe disclaiming the validity of the promissory note attached to the Amended Complaint, the Circuit Court denied Summary Judgment on May 4, 2011, stating specifically that "material question of fact exists as to who signed the promissory note, who was expected to sign the promissory note, whether it was personally guaranteed and by whom, and what the terms of the Note are." See Appendix, No.28, pages 375-382.

In May 2011, this case went to trial before a jury in the Circuit Court in relation to Poe's wage claim, fraud claim and promissory note guarantee claim. On the issue of the promissory note, on May 31, 2011, Poe presented the testimony of Michael E. Briel ("Briel"), the individual who allegedly signed the promissory note on behalf of the borrower, and a third guarantor of the promissory note (although not a Defendant in the proceeding). Briel testified unequivocally that the promissory note attached as Exhibit A to the Complaint and Amended Complaint, and offered into evidence as Exhibit 10, was not the document that he signed either on behalf of the borrower limited liability company or as a guarantor. When requested to authenticate his signatures on Exhibit 10, this was Briel's testimony:

Memoranda contain identical exhibits and excerpts from the depositions of Poe and Briel. By oversight, the exhibits are not attached to the Petitioner's Memorandum in the Appendix, but are the same documents produced with Foster's Memorandum at Appendix, No. 20, pages 179-226.

Q: Okay. Did you sign page 3 and page 5, Mr. Briel, at the time you received this document?

A: Yes, I did but I will tell you that is not the note I received. That is not the note I signed.

Appendix, No. 34, page 425.

At the conclusion of Poe's evidence the Circuit Court denied a motion for directed verdict on the promissory note guarantee.

The jury returned its initial verdict on the issues of the enforcement of the promissory note, the wage and hour claim and the fraud claim after midnight on the fourth day of trial. Objections were raised to the Circuit Court regarding conducting proceedings late into the evening and permitting the jury to deliberate more than twelve (12) hours after reporting for jury duty that morning. Many employees are prohibited from being on the job more than ten (10) hours in a single day², while the jury had been at work beginning at 9:00 a.m. when they returned a verdict shortly after midnight, more than fifteen (15) hours after they began their working day.

The jury's verdict included special interrogatories given multiple claims against multiple parties in the case. The special interrogatories presented to the jury were straight forward and in plain English. Unfortunately, the jurors did not understand the special interrogatories, which became evident during the punitive damage phase. Specifically, minutes following the conclusion of argument on the issue of punitive damages, the jury impeached their verdict finding the promissory note to be enforceable, by asking a question of the Court that made it clear that they actually intended to find the note to be unenforceable. Here is the question posed by the jury which resulted in the mistrial:

[IMAGE ON FOLLOWING PAGE]

² Truck drivers may not be on the job for more than 14 hours and may not drive more than 11 hours. See §395.5 FMCA. FAA regulations limit pilot flight time to 8 hours in a 24 hour period, and must have 9 hours of rest before resuming flight.

Previously we had asked
about questions 1 & 2 (see
attached note & answer) we
read this to be that in
answering yes to #1 & #2
would not obligate the
in the promissory note. But
in today's arguments they
have stated that each def.
Foster/Campbell owe the
#100K note on top of consorting
could you please elaborate
or explain which is correct -

Jessica D. Sly

Appendix, No. 32, pages 409-410.

As a result of the jury's question and impeachment of the earlier verdict, a mistrial was declared on May 2011. On October 31, 2011 the Circuit Court conducted a Pre-Trial for the retrial. Prior to the October 2011 Pre-Trial the Petitioner filed the following Motions:

1. A Motion for Judgment pursuant to Rules 50 and 56 (Appendix, No. 33, pages 411-414 (Motion); Appendix, No. 34, pages 415-427 (Memorandum));
2. A Motion for the Election of Remedies (Appendix, No. 35, pages 428-432); and
3. A Motion in Limine.

Poe did not have any motions pending prior to the time of the Pre-Trial. Nevertheless, at the Pre-Trial, Poe moved orally for judgment on the promissory note guarantee claim asserting that there were no material disputed facts on the issue of the promissory note guarantee. Poe also offered, to the Petitioner and Foster, a non-suit of the wage claim and the fraud claim if judgment were entered on the promissory note guarantee claim. *See* Appendix, No. 36, pages 436-442.

Petitioner argued in response that judgment could not be entered on the promissory note claim because of the testimony of Poe and Briel, who each disavowed the promissory note admitted into evidence. Their testimony either justified summary judgment for the Petitioner and Foster or created material disputed facts for a new jury. *See* October 31, 2011 Transcript at Appendix, No. 36, pages 436-442. When Briel testified at the May 2011 trial, he unequivocally stated that the promissory note that he signed on behalf of 210 West Liberty Holdings was different than the promissory note attached to the Amended Complaint and admitted into evidence as Exhibit 10.

Rather than consider the merits of any of the Motions filed by the Petitioner, the Circuit Court granted Poe's Oral Motion.³ The Circuit Court also granted Poe's Motion that remaining

³ The Judgment Order entered on November 9, 2011 ignores Briel's testimony and the testimony of Poe. The Judgment Order does not explain how the testimony can be reconciled with the Statute of Frauds, and how the Note can properly be enforced. The Judgment Order does not explain how the Briel testimony is an undisputed material fact in Respondent's favor.

claims be dismissed "without prejudice" and granted leave to Poe to reinstate the same should this Honorable Court reverse the promissory note claim. Further, the Circuit Court simply ignored that the exhausted jury clearly intended to find the promissory note to be unenforceable following a four day trial.

The Petitioner asserts that summary judgment was appropriate for the Petitioner and Foster because of the testimony of Poe and Briel. On November 9, 2011, the Court entered the Summary Judgment Order. Petitioner's post Judgment Order motions were denied by the Order Denying Motion to Alter Judgment (Appendix, No. 41, pages 493-497). This timely appeal follows.

III. SUMMARY OF ARGUMENT

On December 22, 2010 Poe testified at deposition that the promissory note guarantee, attached to his Amended Complaint, and ultimately offered into evidence as trial Exhibit 10 was not a true and true and accurate copy of the original, because he understood the original to have different terms and parties. On February 25, 2011, Petitioner and Foster moved for summary judgment on the promissory note guarantee claim contained in Count IV of the Amended Complaint, stating the following undisputed material facts:

- h. The \$100,000 promissory note identified in Count 4 originated in James P. Campbell's office then went to Michael Briel for signature on behalf of 201 N. George Street. Poe does not know what has become to the original of that Note. See Poe Deposition Transcript page 218, lines 13-21, page 219, lines 1-21 and page 220, lines 1-10.
- i. Poe specifically disavowed that the photocopy of the promissory note attached to the Amended Complaint was a true and accurate copy of the original, and that the photocopy of the Note did not reflect terms he had agreed to.

Appendix, No. 18, page 169 and No. 20, pages 182-183.

The Circuit Court denied summary judgment on the promissory note guarantee claims, finding there to be disputed issues of material facts. Trial commenced on May 11, 2011 before a Jefferson County jury, which rendered certain verdicts at 12:15 AM on Saturday, May 15, 2011. On Tuesday, May 17, 2011, prior to the commencement of the punitive damages phase, your Petitioner filed a Motion pursuant to Rule 49 of the West Virginia Rules of Civil Procedure, because the jury's special interrogatories sought to enforce the promissory note, while also allowing the jury to render a general verdict based on alleged acts of fraud arising out of the same damage (i.e. the sums due pursuant to the promissory note and guarantee). (Appendix, No. 30, pages 389-400). The essence of the Rule 49 Motion was that Poe would have a double recovery if he were permitted to recover pursuant to the promissory note and fraud claim for the same amount of money. Your Petitioner cited as binding authority *Harless v. First National Bank*, 289 S.E.2d 692 (1982).

The Circuit Court declined to read, consider or address the Rule 49 Motion, and the punitive damages phase of the trial commenced before the jury late in the afternoon on Tuesday, May 17, 2011. Minutes following the conclusion of argument on punitive damages, the jury submitted a note to the court which clearly and unequivocally indicated that they did not intend to enforce the promissory note and guarantee. *See* Appendix, No. 32, page 409. Based on the jury's impeachment of its own verdict, the Circuit Court declared a mistrial.

This appeal arises out of the events of October 31, 2011 and the orders that followed that hearing. Specifically, a pre-trial was commenced on that day for the re-trial, which was scheduled for November 14, 2011. Prior to that Pre-Trial, your Petitioner filed a Motion for Judgment as a Matter of Law Pursuant to Rule 50 (Appendix, No. 33, pages 411-414 (Motion) and No. 34, pages 415-427 (Memorandum)) arising out of the facts from the May trial; renewed

his Motion for Summary Judgment Pursuant to Rule 56 (*See* Appendix, No. 33, pages 411-414 (Motion) and No. 34, pages 415-427 (Memorandum)), based in part on the May trial testimony of Michael Briel (Appendix, No. 34, pages 415-427) and filed a Motion for Election of Remedies (Appendix, No. 35, pages 428-432), as Poe was seeking the same recovery but two separate legal theories (i.e. the promissory note guarantee and fraud).

Rather than address the merits of any of the motions of your Petitioner, the Circuit improperly granted summary judgment in favor of Poe on the promissory note guarantee claims. This error is manifest for the following reasons:

1. The grant of Summary Judgment altogether ignored the deposition testimony of Poe disavowing the promissory note and guarantee on which he sought to recover;
2. The grant of summary judgment altogether ignored the trial testimony of Briel, the representative of the borrower who signed the promissory note and testified unequivocally that the signature pages on Exhibit 10, presented into evidence, were attached to a different document when he signed the note;
3. The Summary Judgment motion was oral and without prior notice as required by the Rules of Civil Procedure, to give Petitioner the opportunity to be heard; and
4. Based upon the disavowal of the promissory note and guarantees by Briel, not only was it improper to grant Summary Judgment in favor of Poe, but Summary Judgment should have been granted in favor of the Petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully submits that this matter should be scheduled for oral argument pursuant to Rule 19(a)(3) of the West Virginia Rules of Appellate Procedure. Further, Petitioner believes that this matter should be consolidated for oral argument with the matter of *Foster v.*

Poe pending before this Court as No. 12-0165 pursuant to Rule 18(c) of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Standard of Review.

“The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to West Virginia Rule of Civil Procedure 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Syl. Pt. 1, *Wickland v. American Travellers Life Insurance Company*, 204 W. Va. 430, 513 S.E.2d 657 (1998). In this case, the underlying judgment was an Order granting summary judgment to *Poe*. “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).

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

The legal standard for considering a motion for summary judgment provides that the circuit court must review all facts and reasonable inferences in the light most favorable to the nonmoving party – here, Petitioner. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335-36 (1995) (citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986)). A grant of summary may only be granted where the totality of the evidence available of record shows “. . . there is no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56(c).

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

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

Petitioner emphasizes the above language to reinforce his position that it is the circuit court’s duty to consider the totality of the evidence entered into the record of this action. As is unequivocally demonstrated herein, the testimony of Briel and Poe rendered the promissory note and guarantee unenforceable – thus making summary judgment in favor of the Petitioner appropriate. At a minimum, Briel’s testimony created an issue of fact, which the jury in May

ultimately decided in the Petitioner's favor. Unfortunately, the Circuit Court simply did not address the Petitioner's Motion for Judgment as a Matter of Law pursuant to Rule 50 directed to this issue. (Appendix, No. 33, pages 411-414 (Motion) and No. 34, pages 415-427 (Memorandum)).

B. The Circuit Court erred in ruling in favor of Poe's Motion for Summary Judgment to enforce the promissory note guarantee when Poe failed to establish a validly executed promissory note at trial and questions of fact were in dispute as to the existence of a properly executed promissory note.

In order to prevail in his action to recover on a promissory note, it was Poe's burden to establish a valid written guarantee. In West Virginia, personal guarantees fall within the Statute of Frauds. See W.Va. Code §55-1-1. An agreement required by the statute of frauds to be in writing must be certain in itself or capable of being made so by reference to something else, whereby its terms can be ascertained with reasonable certainty. *See Milton Bradley Co. v. Moore*, 92 W.Va. 77, 112 S.E. 236 (1922). "To be enforceable under the statute of frauds, a *signed writing* must express the essential terms of the agreement with a degree of certainty such that the agreement of the parties can be determined without recourse or parol evidence." *Heartland, LLC v. McIntosh Racing Stable, LLC*, 219 W.Va. 140, 149, 632 S.E.2d 296 (2006)(citations omitted). Contracts within the statute of frauds retain all of the usual contract requirements in order to be valid and enforceable. "The fundamentals of a legal contract are competent parties, legal subject-matter, valuable consideration and mutual assent. There can be no contract if one of these essential elements upon which the minds of the parties are not in agreement." *Wellington Power Corp. v. CAN Sur. Corp.*, 217 W.Va. 33, 614 S.E.2d 680 (2005).

Poe failed to introduce a valid personal guarantee that reflected a meeting of the minds and was signed by all of the parties. Consequently, Poe failed to meet his burden of proving an enforceable promissory note, which should have led the Circuit Court to enter summary

judgment in favor of the Petitioner, not Poe.

In both the November 9, 2011 Order granting judgment (Appendix, No. 37, pages 460-464) as well as the January 5, 2012 Order denying post trial motions (Appendix, No. 41, pages 493-497), the Circuit Court of Jefferson County curiously ignored altogether the testimony of individual who allegedly signed the promissory note on behalf of the borrower, 210 West Liberty Holdings, LLC, Michael E. Briel. Briel was called by Poe in his case in chief. Briel unequivocally testified that the Note that was offered into evidence was not the instrument that he signed on behalf of the borrower. Briel testified that his signature was attached to an entirely different instrument, along with the guarantor signatures of Petitioner and Foster. See Petitioner's Memorandum in Support of Motion for Judgment as Matter of Law. When questioned about the Note, attached to the Complaint, Amended Complaint and Admitted into evidence as Exhibit 10, this is what Briel said:

Q: Okay, Now did you sign Page 3 and Page 5, Mr. Briel, at the time when you received this document?

A: Yes, I did not I will tell you that is not the note that I received. That is not the note that I signed.

(Appendix, No. 34, page 425)

Briel said expressly that the Note he signed and to which his signature was affixed contained Louis B. Athey's name on page 1 and on the guarantee pages.

Q: Let's look at the first page then. What I understand you to be saying is that you are saying unequivocally that this was not the first page of the document you signed?

A: Correct.

(Appendix, No. 34, page 425)

At the May 2011 trial, the Petitioner argued that testimony of Poe and Briel supported a motion for directed verdict that the promissory note and guarantee was unenforceable, yet the Circuit Court decided that claim should go to the jury. We know now that the jury intended to

find the promissory note to be unenforceable, based on the post verdict question from the jury that resulted in a mistrial. Notwithstanding the evidence and record, on October 31, 2011 the Circuit Court announced its decision to grant summary judgment in favor of enforcement of the promissory note guarantee without so much as explaining how the testimony of Poe and Briel could result in enforcement of the Note; or not be a question of disputed material fact for the jury. See Judgment Order (Appendix, No. 37, pages 460-464).

At the very least, the trial testimony indicating that the alleged promissory note introduced at trial was not the instrument signed by the parties should have alerted the court that material facts were in dispute as to the validity of the agreement, which should have prevented an award of summary judgment in favor of Poe.

C. The Circuit Court committed reversible error by granting Poe's oral Motion for Summary Judgment without prior notice to the Petitioner.

The Circuit Court committed obvious error and manifest injustice by ignoring the Rules of Civil Procedure in its summary judgment ruling. The Court did not require Poe to file a formal written motion; failed to require at least 10 days notice prior to the hearing; and did not allow for a written response by the Petitioner, as required by Rule 56. The precise requirements of the rule are:

- (a) **For Claimant.** A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
- (b) **Motion and Proceedings Thereon.** The motion *shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits.* Rule 56 of the West Virginia Rules of Civil Procedure (emphasis added).

Rule 56 of the West Virginia Rules of Civil Procedure requires that a summary judgment motion be served at least ten (10) days before the time fixed for the hearing. In *Cremeans v.*

Goad, 158 W.Va. 192, 194-95, 210 S.E.2d 169, 170 (1974), the court said:

Where a trial court . . . reduces time requirements to the extent that the party entitled to notice *is deprived of all opportunity to prepare for hearing, such action constitutes a denial of due process of law and is in excess of jurisdiction.* (emphasis added)

Accordingly, it is an abuse of discretion when a non-moving party is given little to no notice prior to a hearing on a motion. See *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997); see also *Truman v. Auxler*, 220 W.Va. 358, 647 S.E.2d 794 (2007)(holding that failure to abide by Rule 6(d) requirement for three-day notice of contempt hearing violated Rules of Civil Procedure, therefore, was an abuse of discretion). The Circuit Court, therefore, erred in granting a summary judgment motion without allowing the Petitioner notice and an opportunity to prepare in advance of the hearing.

D. The Circuit Court erred in failing to grant Petitioner's Motion for Summary Judgment on the guarantee claim.

At trial, it was Poe's burden to establish a valid written guarantee in order to recover based upon the Petitioner's promise to pay. In West Virginia, personal guarantees fall within the Statute of Frauds. See W.Va. Code §55-1-1. An agreement, required by the statute of frauds to be in writing, must be certain in itself or capable of being made so by reference to something else, whereby its terms can be ascertained with reasonable certainty. *Milton Bradley Co. v. Moore*, 92 W.Va. 77, 112 S.E. 236 (1922). "To be enforceable under the statute of frauds a *signed writing* must express the essential terms of the agreement with a degree of certainty such that the agreement of the parties can be determined without recourse to parol evidence."

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

Likewise, under Virginia law⁴, the statute of frauds bars guaranties unless they are evidenced by writing. Va.Code §11-2. Additionally, contracts that are within the statute of frauds retain all of the usual contract requirements in order to be valid and enforceable. “There is only superadded the requirement that the agreement shall be in writing, *signed by the party to be charged*, or his agent, Hence, for guaranties there must be, as in all other cases, competent parties, a lawful subject matter, a valuable consideration, and mutuality of assent.” *Southside Brick Works v. Anderson*, 147 Va. 566, 137 S.E. 371 (1927)(emphasis added). West Virginia law is precisely the same: “The fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.” *Wellington Power Corp. v. CAN Sur. Corp.*, 217 W.Va. 33, 614 S.E.2d 680 (2005).

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

It is well settled in both Virginia and West Virginia that a guarantee must be in writing. When the written instrument is the very basis of the cause of action, as the guarantee in this case is, then the failure to introduce and prove the validity the document is fatal to the cause. For example, in *Ente v. Merry*, 443 N.E.2d 1323 (Mass.App. 1982), an injunction was lifted upon

⁴ The promissory note admitted into evidence as Exhibit 10 (Exhibit A to the Complaint and Amended Complaint) which the court enforced purports to be interpreted pursuant to Virginia Law.

evidence that the signature page was missing from the contract that was the basis of the right to an injunction. The court held that the lack of a signature page made existence of the contract “obviously uncertain,” and the injunction would remain dissolved until the moving party could show sufficient probability that an enforceable contract existed. *See id.* at 1325. Similarly, in *Campbell v. Campbell*, 843 N.Y.S.2d 471 (N.Y. 2007), summary judgment was precluded because Poe claimed that the first page of a document was different than the first page of the document she had signed. The court held that triable issues of fact remained as to the authenticity of the document produced.

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

In the present case, Poe’s witness, Briel, testified that the document he signed included Mr. Athey as a co-guarantor on the first page of the Guarantee. None of the documents before the Circuit Court include Mr. Athey as a co-guarantor. Poe is bound by his witness’s testimony; therefore, the only logical conclusion from the evidence is that the document containing the original terms and signatures has not been produced.⁵ The only document containing a signature binding 210 West Liberty does not include Mr. Athey. It is a clear error of law to enforce the

⁵ The Respondent’s deposition testimony from December 22, 2010 is likewise binding upon him, as he also disclaimed the validity of the promissory note and guarantee attached as Exhibit A to the Complaint and Amended Complaint.

terms of a guarantee when the specific guarantees before the Court have been discredited by one of the signatories to the original document.

Additionally, in *TranSouth Financial Corp. v. Rooks*, 269 Ga.App. 321, 604 S.E.2d 562, 564-65 (Ga.App. 2004), the court held that lack of signatures in the signature block was a fatal defect to a contract amendment, since there was no evidence that the parties had executed the entire document and no evidence showing that the parties agreed to all of the essential terms. Likewise, the terms to which Poe's witness testified were in the guarantee are not before the court in a document containing the signatures of the guarantors. It was, therefore, clear error of law to grant summary judgment on a document that did not have the proper signatures attached, if the Court based its summary judgment on the promissory note and guarantee admitted into evidence. If the Court did not base summary judgment on Exhibit 10, which Briel and Poe disavowed, granting summary judgment was an error because no other writing was admitted into evidence.

Under the best evidence rule, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." W.Va.R.Evid. 1002, Requirement of Original. Pursuant to Rule 1003, a duplicate is admissible to the same extent as the original *unless a genuine question is raised as to the authenticity of the original*. Briel's testimony raised serious concerns about the authenticity of the document because he explicitly stated that the duplicate document was not the document that he signed. Accordingly, it could neither be the original document nor a reliable duplicate of the original. If the Court based its ruling on Poe's guarantee that he introduced at trial, the Court committed clear error because the document was not the best

evidence, there was no evidence presented of its authenticity, and Poe's own witness discredited it.

E. The Circuit Court erred by denying Petitioner's Motion to Alter or Amend because the Circuit Court did not apply this Court's test for judicial estoppel.

The theory of judicial estoppel was first raised in the January 5, 2012 Order Denying Campbell's and Foster's Motion to Alter or Amend the Court's Judgment Order (Appendix, No. 41, pages 493-497); see also Order Granting Poe's Motion for Summary Judgment (Appendix, No. 37, pages 460-467). However, the Circuit Court failed to apply the judicial estoppel test established by this Honorable Court in *West Virginia Dept. of Transp., Div. Of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005).

The test used in West Virginia to determine if judicial estoppel is appropriate requires the following elements to be met: (1) The party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. *West Virginia Dept. of Transp., Div. Of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005).

The Circuit Court did not address elements three or four of the *Robertson* test, and based its decision solely on elements one and two of *Robertson*. If properly applied, the judicial estoppel test is not met for three reasons: (1) Petitioner's position was consistent; (2) Petitioner received no benefit from the alleged change in position; and (3) Poe was not misled or injured.

Looking at the issue of inconsistency first, Petitioner consistently denied the validity of the instrument that was introduced at trial. The validity of the promissory note was first raised by Poe at his December 22, 2010 deposition, in which he admitted that the promissory note and alleged guarantee in his possession and attached to the Complaint and Amended Complaint was not the one signed by all of the parties to the agreement. The issue arose again at trial, when both Poe and Briel testified that the promissory note introduced into evidence to establish the terms of the note between the parties was not the actual promissory promissory note signed by the parties. After the first day of trial in May 2011, the Petitioner amended his Answer to include the instrument's lack of authenticity as a defense. The amended answer, which was read to the jury, stated:

“The Promissory Note attached to the Amended Complaint was not properly executed. Specifically, Michael E. Briel, the representative of 210 W. Liberty Holding, LLC who signed the asserted Promissory Note testified as part of [Poe]’s case that the signatures attached to Exhibit 10 related to a different Note, and that the first page of Exhibit 10 and the guarantee pages of Exhibit 10 were part of a different document and not Exhibit 10.” (Appendix, No. 43, page 513).

The burden was at all times on Poe to establish the correct written instrument because a personal guarantee must be in writing pursuant to the Statute of Frauds to be enforceable. Petitioner did not agree that the promissory note introduced by Poe at trial was the properly executed promissory note, particularly after Poe’s testimony at his deposition on December 22, 2010. The evidence showing the invalidity of the promissory note and guarantee became more compelling when Briel was questioned about Exhibit 10, the promissory note and guarantee, at trial. Petitioner consistently raised Poe’s testimony and Briel’s testimony as evidence that Exhibit 10 was not the valid and enforceable note.

In addition to Briel’s testimony that the promissory note he signed was not before the court, the jury intended to find that the promissory note that was introduced at trial was

unenforceable. The jury's verdict was ignored and, without explanation, summary judgment was entered contrary to the jury's intentions.

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

Finally, Petitioner never misled Poe and Poe was not injured. Poe first raised the issue in his December 22, 2010 deposition. The judicial estoppel test requires that an inconsistent position misled the other party. After this issue was raised by Poe on December 22, 2010, the Petitioner's position consistently identified this newly raised issue. Poe was never misled as to Petitioner's position, which consistently required Poe to carry his burden of proving an enforceable instrument. When evidence was introduced at trial that the instrument held by Poe was not the instrument signed by Briel⁶, Petitioner promptly amended his Answer to preserve the defense.

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

⁶ Briel is an attorney with practices in Charles Town, West Virginia, who provided legal services from time to time to Poe. Briel is also partners in various projects with Poe. No discovery deposition was conducted of Briel and his trial testimony was presented on the first day of trial. The Answer was Amended on the second day of trial.

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

F. The Circuit Court improperly dismissed the remaining claims without prejudice pending the outcome of this Appeal.

The Circuit Court entered the Order on November 9, 2011 awarding Summary Judgment in relation to Count IV on the guarantee of the promissory note and granted Poe's Motion for Voluntary Non-Suit of Count I for fraud and Count III for the wage claim. Count II was previously dismissed at Summary Judgment.

The Order dismisses Count I and III "without prejudice pending any appeal . . ." No provision of the Rules of the Civil Procedure or any West Virginia Statute gave the Court authority to dismiss an action "without prejudice" pending an appeal. A voluntary non-suit is only without prejudice if that matter can be reinstated because the instant statute of limitations has not expired. The Circuit Court lacked jurisdiction to dismiss Counts I and III without prejudice, pending an appeal. Accordingly, the Order evidences obvious and manifest injustice.

G. The Honorable David H. Sanders of the Circuit Court demonstrated bias against the Petitioner and Foster and should have been disqualified.

The record in the Circuit Court of Jefferson County of this cause of action demonstrates a pattern of continuing bias by the Honorable David H. Sanders in favor of Poe and his counsel and against the interests of the Petitioner and Foster. Both Petitioner and Foster, at different times, moved to disqualify Judge Sanders from this case. Petitioner moved to disqualify Judge Sanders following the mistrial, in particular when the Circuit Court client refused to review the merits of a Rule 49 Motion to set aside either the verdict on the promissory note or the verdict for fraud citing the following authority:

It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories. *Harless v. First National Bank*, 289 S.E.2d 692 (1982) (Emphasis added.)

The Circuit Court refused to decide the merits of the Rule 49 Motion filed on May 17, 2011 (Appendix, No. 30, pages 389-400), and a mistrial was declared only after it seemed that the jury understood intuitively that double recovery was not proper. Subsequently, on October 31, 2011, the Circuit Court ignored all the post trial motions filed on behalf of the Petitioner and Foster, and granted summary judgment in favor of Poe, when no written summary judgment motion was pending.

Finally, the Orders entered by the Circuit Court likewise demonstrate bias. First of all, the Orders improperly identified matters outside the evidence of this case, in order to justify the outcome. For instance, while a jury in this state is instructed that it must decide the merits of the case based upon the evidence before it rather than the arguments, the Circuit Court's Order of January 5, 2012 relies both on evidence not before the Court and upon argument. The best example is found on page 2 of the Order which makes references to assurances made to "a bankruptcy judge" as if that record was before the Circuit Court. No record from the bankruptcy court was offered into evidence to support this conclusion. The second is detailed on page 3 of the Order, where five separate alleged quotes from closing arguments are included as justification for the summary judgment result. The third element of bias is shown from both the November 9, 2011 and the January 5, 2012 Orders which ignore Briel's testimony – completely. The final element of bias is allowing Poe's claims to be dismissed "without prejudice" pending any appeal of this judgment (Appendix, No. 37, page 463).

No party to a lawsuit is entitled to a perfect trial. However, due process mandates a fair one. The record as a whole indicates that the Honorable David H. Sanders did not provide a level playing field. It is not just that this Petitioner disagrees with this resolution of the facts and application of the law. It is that Judge openly elected to ignore the mandate of the law and the Rules of Civil Procedure in a manner favorable only to Poe.

VI. CONCLUSION

Petitioner, James P. Campbell, respectfully requests that this Honorable Court reverse the January 5, 2012 and November 9, 2011 Orders of the Circuit Court of Jefferson County, as summary judgment in favor of Respondent, Glenn Poe, was not proper from both a procedural and a substantive perspective. Poe's witness, Michael E. Briel, testified clearly that the signature pages to the promissory note in the guarantee at issue were attached to a different document when he signed them. Therefore, consistent with what the Jefferson County jury intended to do by its verdict of May 15, 2011, the promissory note and guarantee should not have been enforced. Summary Judgment in favor of Petitioner is appropriate and this Court has the power and authority to grant such proper judgment. In addition, should this Court remand this case for further proceedings before the Jefferson County Circuit Court, Petitioner respectfully requests that the Honorable David H. Sanders be disqualified, given his clear prejudices against Petitioner and Foster and in favor of Respondent, Poe.

WHEREFORE, your Petitioner respectfully requests that this Honorable Court: (1) Reverse the Circuit Court's January 5, 2012 Order; (2) Reverse the Circuit Court's November 9, 2011 Order; (3) Grant Summary Judgment in favor of the Petitioner, James P. Campbell; (4) if this case is remanded to the Circuit Court of Jefferson County, for the disqualification of Honorable David H. Sanders; and (5) for such further relief as this Court deems just and proper.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
STATE OF WEST VIRGINIA

JAMES P. CAMPBELL, ESQUIRE,
Defendant below, Petitioner,

vs.

No. 12-0130

GLEN POE,
Plaintiff below, Respondent.

CERTIFICATE OF SERVICE

The undersigned Petitioner hereby certifies that true and accurate copies of the
Petitioner's Brief and Appendix were sent by U.S. First Class Mail on May 4, 2012 to the
following individuals:

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