



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 Reply Brief

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**PETITIONER JAMES P. CAMPBELL'S REPLY BRIEF TO
RESPONDENT GLEN POE'S SUMMARY RESPONSE**

COMES NOW, Petitioner, James P. Campbell, and files this Reply Brief to the Summary Response filed by Respondent, Glen Poe.

I. SUMMARY OF THE ARGUMENT

At the core of this appeal is the Jefferson County Circuit Court's grant of Summary Judgment, without identifying or explaining in any respect the testimony of Michael E. Briel that the signature pages to the guarantee at issue were attached to a different document when Briel signed the underlying Promissory Note. The Circuit Court did not explain how Briel's testimony was not an undisputed fact compelling Summary Judgment in favor of your Petitioners, Campbell and Foster, or a contested issue of material fact that made Summary Judgment in favor of Respondent Glen Poe improper.

Much like the Circuit Court's Order granting Summary Judgment (Appendix, No. 37, pages 460- 464) and the Circuit Court's Order denying the Motion to Alter or Amend Judgment Order (Appendix, No. 41, pages 493-497), Mr. Poe in his Summary Response has also simply failed to identify, or address any aspect of Michael E. Briel's testimony that the signature pages to the Trial Exhibit 10, the Promissory Note and Guarantee (hereinafter "Promissory Note and Guarantee), were attached to a different document when Michael E. Briel signed the Promissory Note and Guarantee which the Circuit Court enforced.

The Revised Appellate Rules plainly indicate that if a party fails to address an issue on appeal, this Honorable Court will conclude that the responding party agrees with the Petitioner's view of the facts and the law. Accordingly, Glen Poe's silence as to the testimony of Michael E. Briel must be interpreted as a concession that the signature pages to the Promissory Note and Guarantee at issue were attached to a different document. Accordingly, as a matter of law Summary Judgment was inappropriate.

In addition to the foregoing, the so-called "undisputed facts" identified by Mr. Poe in his response are misleading. First, Mr. Poe relies upon the pleadings, specifically the Answer to the Amended Complaint (Appendix, No. 16) filed May 6, 2009), but does not address the fact that consistent with Rule 15 of the Rules of Civil Procedure the Circuit Court allowed both Defendants, Campbell and Foster to file an Amended Answer to the Amended Complaint. This Amended Answer was filed on May 12, 2011 after Michael Briel's testimony on May 10, 2011. Glen Poe first raised the issue of Briel's testimony on December 22, 2010, twenty months after the Answer to the Amended Complaint was filed.

II. ARGUMENT

A. THE CIRCUIT COURT IMPROPERLY IGNORED THE TESTIMONY OF MICHAEL E. BRIEL

Michael E. Briel was the representative of 210 West Liberty Street Holdings, LLC, who was called at the May, 2011 trial as a witness by Mr. Poe.

Mr. Briel¹ is identified in the Summary Response as being another member of 210 West Liberty Holdings, LLC. Mr. Briel was also an alleged guarantor of the promissory note at issue, but was not a defendant in this proceeding.

Mr. Briel testified that he signed a different promissory note and guarantee, with different terms than the document attached to the Amended Complaint. Part of Mr. Briel's testimony about the Promissory Note and Guarantee is reproduced as follows:

- 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.

- 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)

Remarkably, Glen Poe does not identify or even address Mr. Briel's testimony *whatsoever* in his Summary Response. Briel's testimony rendered the Promissory Note and Guarantee unenforceable; or created a disputed issue of material fact. The Circuit Court likewise failed to address, discuss or mention Briel's testimony in the November 9, 2011 Summary Judgment Order (Appendix, No. 31) or in the January 5, 2012 Order

¹ Mr. Briel is Mr. Poe's partner in other ventures and is his attorney. It is undisputed that neither Campbell nor Foster were present when Briel executed the Promissory Note (See Appendix No. 20, page 200, lines 2-20) and where not involved in the transmission of the executed Promissory Note from Mr. Briel to Mr. Poe.

Denying the Petitioner's Motion to Alter or Amend the Judgment

(Appendix, No. 41).

Finally, in the October 31, 2011 transcript, wherein the Court granted the oral Motion, the Court did not even mention Mr. Briel or his testimony. See Transcript, Appendix, No. 36, pages 449-453.

B. POE'S CLAIM WAS BASED ONLY UPON THE PROMISSORY NOTE AND THE GUARANTEE ATTACHED TO THE COMPLAINT AND THE AMENDED COMPLAINT

This appeal relates to the Jefferson County Circuit Court's Order granting Summary Judgment in relation to Count 4 of the Amended Complaint. See Amended Complaint at Appendix, No. 13, pages 137 through 140. Paragraph 56 of the Amended Complaint, clearly and unequivocally predicates Glen Poe's claim on the written personal guarantee contained in Exhibit A to Amended Complaint. Paragraphs 55, 56, 57, 58 and 59 of the Amended Complaint all make specific reference to the written guarantee, attached as Exhibit A to the Amended Complaint. The Summary Response improperly alleges that a loan was made directly by Glen Poe to Campbell and Foster², but no such claim was ever asserted in the Circuit Court. The claim which resulted in Summary Judgment, and to which this appeal applies, is based solely upon Count 4 of the Amended Complaint and

² See Summary Response page 3, paragraph 2; page 6, paragraph 3; page 8, paragraph 2.

the written Promissory Note and Guarantee attached to the Amended Complaint as Exhibit A.

C. JUDICIAL ESTOPPEL AND THE AMENDED ANSWER

The Summary Response relies upon judicial estoppel by asserting that Campbell and Foster admitted to the execution of the Promissory Note and Guarantee and accordingly cannot change position in this litigation. The improper execution of the Promissory Note and Guarantee was not an issue raised first by either Campbell or Foster and accordingly cannot give rise to judicial estoppel.³ The issue of the improper execution of the Promissory Note and Guarantee was first raised by Glen Poe on December 22, 2011 in his deposition.

Based upon Glen Poe's December 22, 2010 deposition testimony, that Michael Briel signed a different Note, Campbell and Foster moved for summary judgment on the Promissory Note and Guarantee claim based upon Poe's testimony. This issue was fully briefed to the Circuit Court on summary judgment. The Circuit Court denied summary judgment for both parties concluding that "The Court finds that material question of fact exist as to who signed the Promissory Note, who was expected to sign the

³ 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).

Promissory Note, whether it was personally guaranteed and by whom, and what the terms of the note are." See Appendix, No. 28 at page 7.

Michael Briel was called by Poe as a witness on May 10, 2011, the very first day of trial. On May 12, 2011 Campbell and Foster moved to amend their Answers as follows:

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

The Motion to Amend the Answer was granted on May 12, 2011. The Amended Answer was read to the jury, because Mr. Poe, through counsel, had requested earlier that excerpts from the Answers to the Amended Complaint be read to the jury. Accordingly, given the four part test set forth in *West Virginia Department of Highways v. Robertson*, 217 W.Va. 497, 618 S.E.2d 506 (2005) judicial estoppel was not a basis for Summary Judgment. Mr. Poe and Michael Briel introduced a new fact in the litigation, and the Amended Answer relates to that new fact.

D. ADMISSIONS RELATED TO A DIFFERENT NOTE

Glen Poe contends that Campbell and Foster improperly changed positions after admitting to their signatures on the exhibit attached to the Amended Complaint. However, Mr. Poe fails to point out that it was he who first asserted

that the document attached to the Complaint was not the document that Michael Briel in fact signed. Based on Mr. Poe's December 22, 2010 deposition testimony, both Campbell and Foster moved for summary judgment on the issue of the enforcement of the Promissory Note and Guarantee. As noted above on May 14, 2011 the Circuit Court denied summary judgment finding the issue to be one contested material facts.

May 10, 2011 was the very first day of trial, which resulted in a mistrial. On the first day of that trial, Michael Briel was called as a witness by Glen Poe. Michael Briel testified unequivocally that the signature pages to Exhibit A to the Amended Complaint were attached to a different document, with different terms when he signed on behalf of the borrower. This issue was created by Glen Poe's evidence, not by any act or evidence by Campbell or Foster. Given the testimony of Glen Poe and Michael Briel, the admission identified in the pleadings, attributed to Campbell and Foster, is an admission that each signed a different document than the Promissory Note and Guarantee at issue in this case.

Glen Poe's argument regarding closing arguments on the punitive damage phase should be rejected as being meritless. First, it is axiomatic that arguments are not evidence, even when the arguments are by *pro se* parties. See Trial Court Rule 23.04 and *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010); *Smith v. Andreini*, 223 W.Va. 605, 678 S.E.2d 858 (2009); *Farmer v. Knight*, 207 W.Va. 716, 536 S.E.2d 140 (2000); *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

Second, the arguments to the jury occurred after the jury had allegedly found the Promissory Note and Guarantee to be enforceable. During closing arguments on the punitive damage phase counsel for Mr. Poe accused Campbell and Foster of committing fraud by lying about their signature on the documents.⁴ Closing argument by Poe's counsel on the punitive damages phase was highly improper given that the fraud claim before the jury was limited to four issues: (1) the turnkey nature of the restaurant; (2) capitalization of the restaurant; (3) identity of the investors; and (4) obligations of the investors. See May 4, 2011 Order Denying Summary Judgment, Appendix, No. 28, page 377. Yet counsel for Mr. Poe argued to the jury that false statements regarding the signature on the Promissory Note and Guarantee was the fraud. Campbell's closing argument acknowledged that the jury had found the Promissory Note and Guarantee to be enforceable, and that he had never denied signature of the document that Briel's testimony called into question. It was only after closing arguments that the jury disclosed that they, in fact, clearly did not intend to find the Promissory Note and Guarantee to be enforceable. The mistrial occurred when the jury determined that it had misunderstood the Court's special interrogatory and, in fact, intended to find the Promissory Note and

⁴ Improper argument continues even in the Summary Response. Glen Poe's fraud claim, which has now been voluntarily dismissed, was never about the guarantee, and is addressed later in this reply. Nevertheless, on page 6 of the Summary Response it is submitted by Mr. Poe that the jury found fraud relating to the Promissory Note and Guarantee.

Guarantee to be unenforceable – yet another issue not addressed in the Summary Response.⁵

E. THE PLEADINGS; MATTERS BEYOND THE RECORD AND/OR MISLEADING REPRESENTATIONS

In his Summary Response Glen Poe relies principally on Answers to the Amended Complaint, without regard to his December 22, 2010 deposition testimony, which first disclosed that Michael Briel asserted that the signature pages to the Promissory Note and Guarantee to his Amended Complaint were attached to a different document when Michael Briel signed the same. Glen Poe's asserted undisputed facts, beginning on page 4 of his Summary Response and continuing through page 6, simply ignore his December 22, 2010 deposition testimony; Michael Briel's May 10, 2011 trial testimony; and Campbell and Foster's Amended Answers on May 12, 2012.

Some of the other assertions of fact in the ten page Summary Response are even more troubling, because Poe does not provide a reference to the record. In several instances the references to the record do not support the proposition asserted. The first example of this improper argument is contained on page 2, footnote 2 of the Summary Response which allegedly relates to a Bankruptcy Court Order. Mr. Poe cites Campbell Appendix, No. 27, 308- 311 to support something allegedly identified in a Bankruptcy Court Order that is relevant to this appeal. However Campbell Appendix, No. 27, 308-311 is a copy of Mr. Poe's

⁵ The Circuit Court granted a mistrial based upon the jury question during the punitive damage phase. The jury's question clearly indicates that the jury intended to find the Promissory Note and Guarantee to be unenforceable. See Appendix No. 32.

Memorandum opposing Summary Judgment. Not a single word in Appendix, No. 27, pages 308 through 311 relates to any Order of any Court, much less any discussion by a bankruptcy judge. Page 3 footnote 3 contains similarly improper argument. This footnote asserts that "Campbell and Foster attempted to hide relevant facts behind a misplaced assertion of attorney-client privilege." This assertion is completely unsupported. Simply stated, no assertion of attorney-client privilege was ever made in this case for any purpose, much less in relation to highly relevant facts.

In his Summary Response Mr. Poe also mischaracterizes the results of the jury trial in May of 2011 that resulted in a mistrial. On page 6 Poe argues that the jury found fraud in relation to the Promissory Note and Guarantee.⁶ Apparently Poe does not recall that a claim of fraud must be plead with specificity in West Virgini, and that his Amended Complaint makes no such claim. On May 4, 2011 the Jefferson County Circuit entered an Order denying summary judgment specifically concluding that the fraud claim had been reduced to four issues: (1) turnkey nature of the restaurant; (2) capitalization; (3) identity of the investors; and (4) obligations of the investors. See May 4, 2011 Order, Appendix, No. 28, page 377.

⁶ In the Summary Response, Poe argues that Campbell "switched the original Note with another draft" and "it was on this point, among others, that a jury found Campbell and Foster had defrauded Poe." This argument is improper, and completely unsupported by the record given the allegations of fraud in the Amended Complaint –unrelated to the Promissory Note and Guarantee.

III. CONCLUSION

Following the mistrial and prior to the October 31, 2011 scheduled pretrial conference, Campbell and Foster each moved the Jefferson County Circuit Court for Judgment as a Matter of Law pursuant to Rule 50 and renewed their Motions for Summary Judgment pursuant to Rule 56. At the core of these Motions was the trial testimony of Michael E. Briel, Glen Poe's witness. Yes, it is true that Campbell and Foster viewed Briel's May 10, 2011 trial testimony as the kind of "undisputed fact" that should have resulted in the award of summary judgment in their favor. Glen Poe is bound by Michael Briel's testimony, that he signed a different document than the instrument that Poe sought to enforce; and that the signature pages to the Exhibit offered at trial were attached to a materially different document when Briel signed. Accordingly, is respectfully asserted that the evidence of Michael Briel should have resulted in summary judgment in favor of James P. Campbell and Steven D. Foster.

In the alternative, if this Honorable Court does not view Michael Briel's testimony as dispositive, his testimony and evidence certainly created a disputed issue of material fact. On this disputed record, the Jefferson County jury, which tendered the question attached to the Appendix as No. 32, clearly and unequivocally intended to find the Promissory Note and Guarantee to be **unenforceable**. Further, upon any remand, it is clear that the Jefferson County Circuit Court had no authority to allow the voluntary dismissal of Glen Poe's

remaining claims, without prejudice, pending the outcome of this appeal.

Therefore, the “dismissal without prejudice pending appeal” portion of the Jefferson County Circuit Court's November 9, 2011 Order must be reversed.

IV. REQUEST FOR RELIEF

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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CERTIFICATE OF SERVICE

The undersigned Petitioner hereby certifies that true and accurate copies of the
Petitioner's Reply Brief were sent by U.S. First Class Mail on July 10, 2012 to the following
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