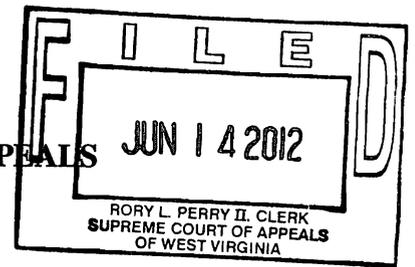


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
Docket No. 12-0130



James Campbell,

Defendant, Petitioner,

v.

**Appeal from WV Circuit Court of
Jefferson County Civil Action
No. 08-C-223**

Glen Poe,

Plaintiff, Respondent

**RESPONDENT'S SUMMARY RESPONSE UNDER RULE 10(e) TO
PETITIONER'S STEVEN D. FOSTER AND JAMES P. CAMPBELL APPEALS**

ARGUMENT

A. There is no issue of fact or law: Petitioners Foster and Campbell, both individually and severally, personally guaranteed payment of a \$100,000.00 Promissory Note

There exists no issue of law or fact pertaining to the execution of a personal guarantee for the payment of a promissory note by Petitioners James Campbell and Steven Foster. The Complaint was filed on May 30, 2008 and amended thereafter on April 14, 2009. It contained four counts for statutory and common law fraud (Count 1), malfeasance and breach of fiduciary duty by attorney and Petitioner James Campbell (Count 2),¹ Wage Payment and Collection Act violations (Count 3), and breach of a Promissory Note (Count 4). For purposes of this appeal, only the claim involving the Promissory Note is relevant. The factual history of this case as it pertains to both Petitioners is adequately set forth in the Circuit Court's Orders.

¹ Mr. Poe was a client of James Campbell. Mr. Poe alleged that Campbell used his position of trust to advise Mr. Poe to "invest" in Campbell's restaurant venture.

With respect to the Promissory Note [Foster App 88-93, Campbell App 021-026], the guarantee of payment was for a loan made by Mr. Poe based on misrepresentations made by Foster and, Mr. Poe's then attorney, James Campbell, regarding investors and capitalization of a venture known as 210 West Liberty, LLC, also known as Tiffin's Restaurant. The LLC at the time of the misrepresentations consisted of four members including Foster and Campbell. A third member also personally guaranteed the Note, and a fourth never did. The Promissory Note, executed by Campbell's and Foster's LLC, was to have been personally guaranteed, as represented by Campbell to Mr. Poe, by each of the four LLC members, but one member, Louis Athey, never signed the guarantee. Indisputably, Foster and Campbell did guarantee payment on the Note and, indisputably, there was a "meeting of the minds" as to the personal obligations of Foster and Campbell on the Note. The Note document guarantees payment by either Foster or Campbell, individually and severally regardless of any other signature, or lack thereof.

Foster and Campbell, to avoid payment of the Note as well as other liabilities, placed the LLC into Chapter 11 Bankruptcy. There, Foster and Campbell identified the Note as a liability, which is far different than the current argument du jour that there was no meeting of the minds. The Bankruptcy Court placed the LLC into liquidation, Chapter 7, finding that Campbell and Foster had committed "gross mismanagement" of the estate. [Foster App at 307-319].²

The motion practice in this case extends over the term of two different Circuit Court judges, and presents within a discouraging view of Mr. Poe's former attorney, James Campbell and Campbell's business partner, Steven Foster. [Foster App 364-376].

² The Bankruptcy Court Order contains a discussion of the conduct of Campbell and Foster in procuring a loan from Poe. [Campbell App at 308-311].

On February 24, 2010 the Court granted Mr. Poe's motion seeking removal of Mr. Campbell as counsel for all defendants given his multiple roles as witness, business partner, defendant, and counsel for the operating entities and his co-defendant and Petitioner, Mr. Foster.³ Thus for most of this litigation, Foster and Campbell not only were co-defendants but were both being represented by James Campbell as their attorney.

Foster and Campbell now file separate petitions challenging the Circuit Court's Order entered on November 9, 2011--- "Order Granting Judgment Against James Campbell, Esq, and Steven D. Foster upon Promissory Note" [Campbell App 460-4, Foster App 0254-258]--- and the "Order Denying Campbell's and Foster's Motion to Alter or Amend the Court's Judgment Order" entered on January 5, 2012. [Foster App 358-362, Campbell 493-497]. Those Orders are largely unchallenged as to the facts and recitation of the history of the case and the behavior of the Petitioners, and are unchallengeable by the record.

There is no dispute that Mr. Poe loaned defendants and their LLC, \$100,000.00, and that these two Petitioners took that money to pay off their own bills rather than using the money first and foremost to advance the restaurant project. Campbell and Foster argue that they successfully got Poe to lend \$100,000.00 to their venture by personally guaranteeing a note, thereafter, used the money, and began making a few payments on the Note. In essence, Campbell and Foster have argued that their successful fraud on Mr. Poe as an investor in the LLC should be rewarded for the sole reason that they did not sign a personal guarantee of the Note which was signed by Campbell and Foster.

³ The Petitioners were attempting to hide relevant facts behind a misplaced assertion of attorney client privilege.

On August 29, 2007 Foster and Campbell executed a Note individually guaranteeing a \$100,000.00 loan made by Mr. Poe to an LLC operated by the Petitioners and known as 210 West Liberty Street. As to the Promissory Note, the following material facts are established by the Note and the pleadings [Foster App 1-19, 22-31, 114-117; Campbell App 123-141, 157-163, 279-284] :

8. Defendant Steven Foster is doing business together with the other defendants in West Virginia. Steven Foster is a member of Woodstar Holdings, LLC and the President of Foster-Herz, Inc. **Admitted.**

9. Defendants James Campbell and Steven Foster are members and managers of Woodstar Holdings, LLC. Woodstar Holdings, LLC address is that of the law firm of Campbell Miller Zimmerman. **Admitted.**

21. On April 26, 2007, defendants Steven Foster and James Campbell did sign, and caused to be signed by others, an "Operating Agreement" showing that defendants James Campbell and Steven Foster each possessed a 25% membership interest in 210 West Liberty Holdings, LLC with Michael Briel and Louis Athey also each possessing 25% membership interest accounting for 100% of the ownership of that LLC. **Admitted by Campbell; Denied by Foster.**

26. Defendants James Campbell and Steven Foster represented that the \$200,000.00 raised through class B membership had been and would continue to be used to complete renovations and for start-up costs for the restaurant.

Petitioners affirmatively admit that \$200,000.00 "could" be raised through Class B Membership." Campbell App 362-5-- August 2007 Memo from

Defendants Campbell and Foster affirmatively misrepresenting that money had already been raised as capital for the restaurant project.

27. Plaintiff agreed to loan the project \$100,000.00. **Admitted.**

55. The Promissory Note attached as Exhibit A to the Amended Complaint is a true and correct copy [containing Campbell's and Foster's signature].

Admitted.

56. Defendants James Campbell and Foster **personally guaranteed performance under the Note.** See Exhibit "A" at 1 [of the Amended Complaint]. **Admitted.**

59. The Note permits Poe to make immediately due the entire outstanding principal, and interest accrued thereon, late charges, all costs, and attorneys' fees without further notice to defendant James Campbell and Foster after the ten (10) day period from when written notice was provided. See Exhibit "A" at 1 [of the Amended Complaint]. **Admitted.**

63. A true and correct copy of an e-mail notice to defendants James Campbell and Foster, dated February 6, 2008, is attached hereto as Exhibit "D" [of the Amended Complaint]. **Admitted.**

64. Poe's counsel, via United Parcel Service, pursuant to the Note, provided Mr. Briel, 201 North George Street, Charles Town, West Virginia, with a copy of the February 6, 2008, written notice of default. A true and correct copy of the written notice dated February 7, 2008, is attached hereto as Exhibit "E," [of the Amended Complaint] and incorporated herein by reference. **Admitted.**

68. On April 21, 2008, Poe provided defendants Campbell and Foster, via electronic and UPS mail service, c/o Mr. Briel, 201 North George Street, Charles Town, West Virginia, a collection notice accelerating the entire amount due. A true and correct copy of the April 21, 2008, collection notice is attached hereto as Exhibit "G," [of the Amended Complaint] and incorporated herein by reference.

Admitted receipt of the letter.

69. Campbell has not made payments to Poe of principal or interest accrued upon the Promissory Note due to Poe. **Admitted by Campbell, while Foster denies having failed to make payments of principal and interest [Foster's denial is without merit as Foster submitted the note as a liability on behalf of his company, Defendant 210 West Liberty Street, LLC, with the U.S. Bankruptcy Court].**

Petitioners mischaracterize Mr. Poe's testimony. When Mr. Poe testified that the Note which is the subject of this litigation was "not the promissory note that was supposed to be created because it was supposed to have an additional guarantor who was Lou Athey" [Foster App 64, 208], Mr. Poe was correct because Campbell, after representing to Mr. Poe that Mr. Athey would be among the guarantors, then switched the original note with another draft which only included three guarantors, Campbell and Foster, and Campbell's business partner Michael Briel. It was on this point, among others, that a jury found Campbell and Foster had defrauded Mr. Poe.

After Mr. Poe wired the \$100,000.00, Campbell "revised" the Promissory Note to remove Athey's name as a guarantor. Campbell App 329-336]. Foster's testimony, under oath in the Bankruptcy proceeding, [Foster App 306], is as follows:

Q. Did you [Foster] guarantee the note?

A. I certainly did.

The Note, as drafted by attorney Campbell, actually provides for Campbell's and Foster's continuing legal obligations to pay on the Note regardless and independent of whether Athey executed on the Note:

Maker and all endorsers, guarantors, and other parties primarily and secondarily liable on this Note, if any, each hereby waive an and all lack of diligence or delays in collection or enforcement hereof and consent that the maturity hereof may be extended without notice, and **each expressly agrees to remain and continue to be bound for the payment of the principal, interest (if any), and other charges provided for by the terms of this Note notwithstanding any extension(s) of the time of payment of said principal, interest, or other charges or any changes in the amounts agreed to be paid under, and by virtue of the obligation to pay provided for in this Note, and each hereby waives all and every kind of notice of such extension(s), or changes, and agrees that the same may be made without the joinder of any of the parties executing this Note and without the joinder of the endorsers or guarantors of, or other parties primarily or secondarily liable upon this Note.**

As the lower court noted, it is Campbell's sworn testimony which secures the just outcome found in the judgment order:

Q. So it is your testimony you don't know what it is

10 that you signed?

11 A. I know what I signed. I believe that I know what

12 I signed.

13 Q. What did you sign?

14 A. I signed a promissory note guarantee but

15 Mr. Briel—

16 Q. Before you on, tell me how much that was?

17 A. \$100,000.

18 Q. Who was it payable to?

19 A. Mr. Poe.

20 Q. What was the interest rate?

21 A. I think it was 12 percent.

22 Q. And have you paid that personal guarantee?

23 A. I have not.

[Foster App 359-60, Campbell 494-495].

Campbell, who was witness, party and lawyer, told the jury the following in his effort to avoid an award of punitive damages:

This is about money. Glen Poe has a note for \$100,000 with 12 percent interest...as I understand Mr. Poe's claim, **he unequivocally loaned \$100,000. Mr. Hammer read to you my answer where I admitted signing the guarantee.**

Why did I admit in papers to this Court because I signed the guarantee because I did. I never lied about that. **I never shied away from that.** I never said I didn't.

Because Steve Foster from day one, the first day that we were asked to respond to the complaint, said that **we signed the note.**

As Mr. Snyder said I hope you didn't hold it against me that the process allowed other issues to come to the forefront because I didn't act with fraud or malice or oppression I don't think in responding to the note because **I admitted that I guaranteed it.**

But the point is your verdict already will compensate Mr. Poe for the full amount of the note plus attorney fees, because you can look at the note, it has the award for attorney fees, and the Court has an obligation to award those attorney fees...."

[Foster App 360-1]. As if to reinforce Campbell's flip flopping and chronically deceptive positions before the Circuit Court, by memorandum on May 17, 2011 in an effort to set aside a jury finding that Campbell and Foster were liable for fraud, Campbell states:

Although the issue of the execution of the Note and the guarantee should not have been a jury question in the first instance, in making a determination that enforcement of the guarantees was appropriate, the jury necessarily concluded that the Note was properly executed.

[Foster App 360] Now, Campbell and Foster tell this Court that they are displeased by their own admissions and seek to reverse the lower court.

CONCLUSION

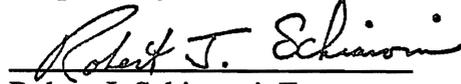
Foster and Campbell stunningly cite cases for a proposition that there was no meeting of the minds between themselves and Mr. Poe. Yet, Campbell and Foster took Mr. Poe's \$100,000.00, and as is clear in the trial record, Foster paid his company and himself for "work" performed rather than use the money Mr. Poe had loaned to advance the work on the restaurant. Moreover, as Foster and Campbell acknowledge to another the Bankruptcy Court and to a Jefferson County jury and at other various times when convenient, there was a meeting of the minds as to their own personal guarantees which is all that is relevant for their liability; they both at various times acknowledged that they signed the Note; Foster under oath told the Bankruptcy Court that he did in fact guarantee the Note (as opposed to simply signing it); and that Campbell, as he told the jury to minimize any finding of punitive damages, was responsible for paying on the Note. The only issue these Petitioners presented then was that Mr. Athey's guarantee was not included on the Note---an issue with no bearing as to their own liability according to the very terms of the Note which these two Petitioners guaranteed--- **"[Foster and Campbell] agree that the same may be made without the joinder of any of the parties executing this Note and without the joinder of the endorsers or guarantors of, or other parties primarily or secondarily liable upon this Note.** By its plain reading, regardless of the primary or secondary liability of anyone else, Campbell and

Foster signed a document assuring their own liability for taking Mr. Poe's money. No caselaw supports Campbell or Foster's truly despicable conduct. Indeed, principles of judicial estoppel are intended to deny giving weight or merit to such conduct. *See W.Va. DOT v. Robertson*, 217 W.Va. 497 (2005); *Riggs v. W.Va. Univ Hosps., Inc.*, 221 W.Va. 646 (2007); *Hager v. Graham*, 267 F.R.D. 486 (N.D.W.V., 2010).

Wherefore, Respondent respectfully requests that these Petitions be denied.

Dated this the 12th day of June, 2012.

Respectfully submitted,



Robert J. Schiavoni, Esq.

(WV #4365)

David M. Hammer, Esq.

(WV #5047)

Hammer, Ferretti & Schiavoni

408 West King Street

Martinsburg, WV 25401

(304) 264-8505

(304) 264-8506 (fax)

Email: rschiavoni@hfslawyers.com

dhammer@hfslawyers.com

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Glen Poe,

Plaintiff, Respondent

CERTIFICATE OF SERVICE

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

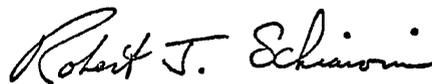
Type of Service: United States Mail, postage Prepaid

Date of Service: June 12, 2012

Persons served and address: Steven Foster
104 Dry Mill Rd, Unit 101
Leesburg, Virginia 20178

James P. Campbell
Campbell Flannery P.C.
1602 Village Market Blvd
Suite 220
Leesburg, VA 20175

Item(s) Served: Respondent's Summary Response Under Rule 10(e)
to Petitioner's Steven D. Foster and James P.
Campbell Appeals



Robert J. Schiavoni