

13-0925

NOTED DOCKET  
DATE: AUG 12 2013  
DAVID "BUGS" STOVER  
CLERK CIRCUIT COURT  
WYOMING COUNTY

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

POSEY GENE COOK,

Plaintiff,

v.

Civil Action No. 12-C-37  
Judge Charles M. Vickers

ELIZABETH CHICHESTER, individually and  
as the purported personal representative of the  
Estate of George P. Cook, KATHERINE LAMBSON,  
JAMES D. COOK, JERRY LEE COOK, and  
TONEY'S FORK LAND, LLC, a Delaware  
limited liability company,

Defendants,

and

ELIZABETH CHICHESTER, as  
personal representative of the Estate of George  
P. Cook, ELIZABETH CHICHESTER, individually  
and KATHERINE LAMBSON,

Counter-Plaintiffs,

vs.

POSEY GENE COOK,

Counter-Defendant.

FINAL ORDER

On August 1, 2013, the parties appeared for a hearing on "Defendants, Elizabeth Chichester, as Personal Representative of the Estate of George P. Cook, Elizabeth Chichester and Katherine Lambson's Motion for Clarification of Summary Judgment Order." Upon consideration of this motion and the parties' arguments, this Court makes the following findings:

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1. This Court entered its “Order Granting Motion for Summary Judgment, Granting Motion *in Limine* in Part, and Granting Motion to Quash Notice and for Protective Order” (“Order Granting Summary Judgment”) on March 19, 2013, following a hearing on the issues presented within those motions.

2. Defendants Elizabeth Chichester, as personal representative of the Estate of George P. Cook, Elizabeth Chichester, and Katherine Lambson seek clarification of this Order Granting Summary Judgment. Namely, these Defendants contend that summary judgment was limited to the scrivener’s error issue and does not affect any pending counterclaims.

3. In their “Answer to Amended Complaint to Quiet Title, Affirmative Defenses and Counterclaim,” these Defendants seek a judgment declaring the June 6, 2008, Deed of Correction to be null and void, the Deed and Memorandum of Coal Lease to be null and void, and the Estate of George P. Cook to be beneficial owner of the land, rights, and privileges bequeathed to him under George W. Cook’s Will. These Defendants also assert counterclaims for breach of fiduciary duty, fraud, wrongful interference with testamentary expectancy, and for an accounting. As explained below, these counterclaims do not survive following the grant of summary judgment.

4. By its Order Granting Summary Judgment, this Court found that a scrivener’s error permitted Plaintiff to reform the deed to the property located in Wyoming County, West Virginia that was the subject of this action. Defendants’ request for a judgment declaring the Deed of Correction void does not survive the grant of summary judgment. As this Court permitted reformation of the deed to correct the scrivener’s error, it does not follow that the Deed of Correction could subsequently be declared void.

5. Likewise, Defendants' cause of action for breach of fiduciary does not survive. Defendants claim that Plaintiff breached the fiduciary duty owed to his father as his attorney-in-fact "when he attempted to deed himself his father's inheritance without his father's permission."

6. In opposing Plaintiff's Motion for Summary Judgment, Defendants claimed that the Power of Attorney Plaintiff used to transfer the property to himself was forged; however, aside from the uncorroborated testimony of Defendant Chichester, Defendants offered no evidence to substantiate this contention. As self-serving assertions without factual support will not preclude a grant of summary judgment, this Court found Defendants' argument to be incredible. Thus, the Power of Attorney Plaintiff used to transfer the property to himself is legally valid. As Plaintiff transferred the property to himself pursuant to that Power of Attorney, it cannot be said that Plaintiff breached his fiduciary duty as attorney-in-fact in deeding the property to himself.

7. Moreover, this Court's Order Granting Summary Judgment explicitly resolved Defendants' contentions that Plaintiff breached the fiduciary duty owed to his father. (Order Granting Summary Judgment, ¶¶ 31-34.)

8. This Court's Order Granting Summary Judgment also disposed of Defendants' fraud claim. Defendants claim that Plaintiff falsely represented that he was a beneficiary of George W. Cook's estate and made additional false statements by signing a Deed of Correction. Defendants did not, however, rely on these statements to their detriment.

9. Defendants argued fraud at the hearing on Plaintiff's Motion for Summary Judgment and also failed to present any evidence of detrimental reliance. Accordingly, as addressed in this Court's Order Granting Summary Judgment, Defendants' fraud claim was dismissed. (Order Granting Summary Judgment, ¶¶ 35-37.)

10. Defendants further claim that they “had an expectancy to be beneficiaries of and receive property from George P. Cook’s estate,” which Plaintiff allegedly “intentionally interfered with . . . through tortious and fraudulent conduct as described above.”

11. As set forth above, the Order Granting Summary Judgment explicitly found no tortious or fraudulent conduct by Plaintiff; therefore, he was permitted to reform the deed to correct the scrivener’s error. As Plaintiff lawfully transferred the subject property to himself, Defendants claim of wrongful interference with testamentary expectancy is no longer viable.

12. Finally, Defendants seek an accounting pursuant to West Virginia Code § 55-8-13, which provides that

[a]n action of account may be maintained against the personal representative of any guardian or receiver; and also by one joint tenant, tenant in common, or coparcener or his personal representative against the other, or against the personal representative of the other, for receiving more than his just share or proportion.

Defendants seek an accounting based upon the allegation that Plaintiff “has received revenues from various sources, including the coal lease, sale of timber and natural gas leases that belong to the Estate of George Posey Cook.”

13. Plaintiff lawfully transferred the subject property to himself pursuant to the valid and lawfully executed Power of Attorney. The property belongs to Plaintiff – not Defendants. Defendants are not joint tenants, tenants in common, or coparceners; accordingly, Defendants have no viable action for an accounting.

As a result of the foregoing, this Court hereby **GRANTS** the Motion for Summary Judgment of P. Gene Cook and dismisses this action with prejudice.

The Court directs the Clerk to provide certified copies of this Order to the following:

John F. Hussell, IV  
Staci N. Criswell  
Dinsmore & Shohl, LLP  
P. O. Box 11887  
900 Lee Street, Suite 600  
Charleston, WV 25339  
*Counsel for Plaintiff*

Jackson O. Brownlee  
Beusse Wolter Sanks Mora & Maire, P.A.  
390 North Orange Avenue, Suite 2500  
Orlando, FL 32801  
*Counsel for Defendants Elizabeth Chichester, individually and as the purported personal representative of the Estate of George P. Cook, and Katherine Lambson*

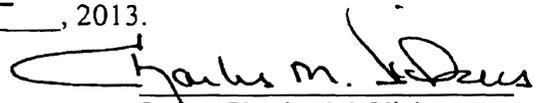
G. Todd Houck  
105 Guyandotte Avenue  
Mullens, WV 25882  
*Counsel for Defendants Elizabeth Chichester, individually and as the purported personal representative of the Estate of George P. Cook, and Katherine Lambson*

Jennifer Anderson Hill  
Steven P. McGowan  
Serry A. Habash  
Steptoe & Johnson PLLC  
Chase Tower – Eighth Floor  
707 Virginia Street, E.  
P. O. Box 1588  
Charleston, WV 25301  
*Counsel for Defendant Toney's Fork Land, LLC*

James D. Cook  
902 Rock Bay Drive  
Jacksonville, FL 32218  
*Pro Se Defendant*

Jerry Lee Cook  
145 Briarfield Drive  
Mooresville, NC 28115  
*Pro Se Defendant*

ENTERED this 12<sup>th</sup> day of August, 2013.

  
Judge Charles M. Vickers

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ATP  
DAVID ... CLERK

THIS CASE FILED Aug 13  
By [Signature]

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

POSEY GENE COOK,

Plaintiff,

v.

Civil Action No. 12-C-37  
Judge Charles M. Vickers

ELIZABETH CHICHESTER, individually and  
as the purported personal representative of the  
Estate of George P. Cook, KATHERINE LAMBSON,  
JAMES D. COOK, JERRY LEE COOK, and  
TONEY'S FORK LAND, LLC, a Delaware  
limited liability company,

Defendants,

and

ELIZABETH CHICHESTER, as  
personal representative of the Estate of George  
P. Cook, ELIZABETH CHICHESTER, individually  
and KATHERINE LAMBSON,

Counter-Plaintiffs,

vs.

POSEY GENE COOK,

Counter-Defendant.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT,  
GRANTING MOTION *IN LIMINE* IN PART, AND  
GRANTING MOTION TO QUASH NOTICE AND FOR PROTECTIVE ORDER**

On February 6, 2013, the parties appeared for a hearing on Plaintiff Posey Gene Cook's  
Motion for Summary Judgment, Defendant Elizabeth Chichester's Motion *in Limine*, and

Toney's Fork Land, LLC's Motion to Quash Notice and for Protective Order. Upon consideration of these motions, the responses, and the parties' oral argument, this Court makes the following findings of fact and conclusions of law:

### FINDINGS OF FACT

#### Motion for Summary Judgment

1. George P. Cook, the father of Plaintiff and Defendants Elizabeth Chichester, Katherine Lambson, James D. Cook, and Jerry Lee Cook, executed a Durable Power of Attorney on or about May 30, 1996.

2. This Power of Attorney authorized Plaintiff

to handle any and all matters relative to any interest [George P. Cook] own[s] in real property or oil, gas, mineral or other interests in any and all property owned by [George P. Cook] or to which [George P. Cook] [is] entitled to own under the Estate of the late George Washington Cook, in and throughout the State of West Virginia.

3. This instrument also authorized Plaintiff "to transfer ownership of said property or rights thereto, to himself personally, without limitation."

4. Pursuant to this Power of Attorney and by deed dated August 28, 1997, Plaintiff conveyed to himself an undivided one-fifth interest in two tracts of real estate located in Wyoming County, West Virginia (the "Property"). George P. Cook inherited the Property from his father, George Washington Cook.

5. In 2008, it was discovered that the August 28, 1997, deed incorrectly identified the source of title for one of the tracts constituting the Property ("Tract 1") as a deed dated May 28, 1929. Accordingly, Plaintiff executed a Deed of Correction on June 6, 2008. The Deed of Correction did nothing more than clarify that the source of title for Tract 1 is a December 20, 1910, deed.

6. On October 24, 2008, Plaintiff and his wife conveyed the Property to Defendant Toney's Fork Land, LLC ("Toney's Fork").

7. Plaintiff subsequently instituted the present action to reform the August 28, 1997, deed.

8. Defendants Chichester and Lambson oppose Plaintiff's Motion for Summary Judgment. Defendants Chichester and Lambson challenge the authenticity of the Power of Attorney Plaintiff used to transfer the Property to himself. Defendant Chichester claims that she prepared the Power of Attorney and swears that the first page of this document is not the one she prepared. Specifically, Defendant Chichester states that the Power of Attorney that she prepared and that her father signed did not contain language authorizing the attorney-in-fact to convey property to himself.

9. Defendants Chichester and Lambson also claim that, by deeding himself the Property, Plaintiff breached the fiduciary duty owed to his father.

**Motion in Limine**

10. Defendant Chichester has also moved to

prohibit the examination of any witness in regard to any personal transaction or communication between the witness and the deceased, GEORGE P. COOK or the introduction of any evidence in violation of W.Va. Code §57-3-1 commonly referred to as the Dead Man's Statute and to prohibit any evidence as to the sale of any land, unless there be a contract or note or memorandum thereof in writing and signed by the deceased, GEORGE P. COOK, as required by W.Va. Code §36-1-3 known as the Statute of Frauds[.]

11. With respect to the statute of frauds issue, Defendant Elizabeth Chichester acknowledges that she does not seek to enforce an oral agreement; however, she argues that

efforts to bring in statements of the deceased as to the transfer of his real property to substantiate what Plaintiff has attempted to do

using his power of attorney amounts to an attempt to create an oral contract and then have the Court enforce it by reforming his inadequate deed and deed of correction.

12. Plaintiff's response to Defendant Chichester's Motion *in Limine* highlights only that "to bar a witness' testimony, the witness must be either a party to the suit or interested in its outcome." Thus, "[t]o the extent a witness is not a party to this civil action or interested in its outcome, he or she cannot be barred from testifying about any personal transactions or communications he or she may have had with George P. Cook, deceased." In short, Plaintiff argues that Defendant Chichester's motion is overly broad.

13. Plaintiff also argues that reliance on the statute of frauds is misplaced. No one is attempting to enforce an oral contract; rather, Plaintiff seeks to have this Court reform a deed and quiet title to the Property.

#### **Motion to Quash Notice and for Protective Order**

14. Lastly, Toney's Fork moves to quash notice and for entry of a protective order precluding the deposition of Toney's Fork former General Counsel, Charles Dollison. Toney's Fork claims that any information held by Mr. Dollison is not discoverable as it is subject to the attorney-client privilege.

15. Based upon conversations with counsel, Toney's Fork believes that Mr. Dollison will be asked about his mental impressions, conclusions, opinions, and / or legal theories that relate to the coal lease.

16. Toney's Fork believes any discoverable information known by Mr. Dollison can be obtained by an alternative witness, and Toney's Fork has agreed to make an alternative witness available for deposition to discuss topics Toney's Fork believes would have been asked of Mr. Dollison.

17. As a result of the attempt to obtain non-discoverable information, Toney's Fork has requested that this Court enter a protective order prohibiting Mr. Dollison's deposition.

18. The parties have fully briefed these issues, and the motions are ripe for disposition.

## CONCLUSIONS OF LAW

### Motion for Summary Judgment

19. West Virginia Rule of Civil Procedure 56 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

20. "Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine dispute over a material fact." *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995). Rule 56(e) mandates that a properly supported summary judgment motion be opposed by "specific facts showing that there is a genuine issue for trial." Mere denials or arguments unsupported by factual evidence are insufficient. *Id.*

While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some 'concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor' or other 'significant probative evidence tending to support the complaint.'

*Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59-60, 459 S.E.2d 329, 336-37 (1995) (citations omitted).

21. "[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." *Id.* at 60, 459 S.E.2d at 337 (citation

omitted). “The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve.” *Id.* “[T]he nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party[, and] unsupported speculation is not sufficient to defeat a summary judgment motion.” *Id.* at 60-61, 459 S.E.2d at 337-38 (citations omitted).

22.

[A] nonmoving party cannot avoid summary judgment merely by asserting that the moving party is lying. Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party’s claims or raise significant issues of credibility. . . . Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.

*Williams*, at n.14. “[S]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment.” *Id.*, see also Syl. Pt. 3, *Guthrie v. Northwestern Mut. Life Ins. Co.*, 158 W. Va. 1, 208 S.E.2d 60 (1974) (“Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment.”).

23. “Equity has jurisdiction to reform and correct a deed executed through a mutual mistake of fact to conform to the actual agreement of the parties to the deed when such mistake results from the mistake of the scrivener in the preparation of the deed.” Syl. Pt. 1, *Edmiston v. Wilson*, 146 W. Va. 511, 120 S.E.2d 491 (1961). “Generally, to warrant equity to reform a deed for mistake the mistake must be mutual; but the mistake of a scrivener in preparing a deed is regarded as the mistake of both parties, he being regarded as the agent of both.” *Id.* at Syl. Pt. 2 (citation omitted).

24. Plaintiff argues that this Court may reform the August 28, 1997, deed to the Property because it incorrectly identifies the source of title for Tract 1 of the Property. The

parties to this deed intended to transfer the property inherited by George Posey Cook from George Washington Cook, Jr.; however, the August 28, 1997, deed mistakenly references property not inherited by George Posey Cook as the source of title for Tract 1. The deed references a source deed for a different George W. Cook living in Wyoming County.

25. Joni Rundle, who prepared the June 6, 2008, deed of correction, testified that she prepared the deed of correction to correct “what [she] consider[s] a typographical error in the description of Tract No. 1 on Page 1 of the 1997 Deed. It appeared to erroneously state the source of the property.” She stated “that it was to clarify the change of title, and did not in any way affect its conveyance, the original conveyance[.]”

26. This Court finds that the parties to the August 28, 1997, deed, Plaintiff as attorney-in-fact for George Posey Cook and Plaintiff, intended to convey property owned by George Posey Cook and inherited from George Washington Cook, Jr. In other words. George Posey Cook intended only to convey that which he owned. Accordingly, this Court finds that the August 28, 1997, deed may be properly reformed to reflect that the correct source of Tract 1 is the December 20, 1910, deed conveying the Property to George W. Cook from C. F. Cook and Lucinda Cook.

27. Moreover, “where the estate intended to be conveyed is sufficiently described in the deed or other writing, the addition of a circumstance, false or mistaken, will be rejected as surplusage, in order to carry that intention into effect.” *McQueen v. Ahbe*, 99 W. Va. 650, 130 S.E. 261, 263 (1925). The August 28, 1997, deed states that the property being conveyed is “the same property, one fifth (1/5) interest, inherited by Grantor, George Posey Cook. under the provision of The Last Will and Testament of George W. Cook, Jr. . . . .” The August 28, 1997, deed, however, mistakenly references a deed conveying property not inherited by George Posey

Cook. “Where a part of the description in a deed is inconsistent with the remaining part, and thus shown to be erroneous, it may be rejected; or, when the description given is uncertain and ambiguous, parol or extrinsic evidence will be admitted to show to what truly applies.” *Hartmyer v. Everly*, 73 W. Va. 88, 79 S.E. 1093, 1095 (1913). This Court finds that the reference to the deed conveying property different from that owned by George Posey Cook is erroneous, and it can be rejected as surplusage.

28. Defendants Chichester and Lambson, however, assert that the Power of Attorney by which the conveyance was made was fraudulent. Defendant Chichester asserts that she prepared the Power of Attorney for her father’s signature, and that page one of that document as it exists today is not the page she prepared. She also claims that the initials on that page one, which purport to be George P. Cook’s, do not match his handwriting.

29. These assertions are insufficient to preclude granting summary judgment to Plaintiff. Defendant Chichester has offered no expert handwriting analysis in support of her assertion that George P. Cook did not initial page one of the Power of Attorney. Moreover, aside from Defendant Chichester’s testimony, there is no evidence to support the existence of this alternate power of attorney that does not contain a provision allowing Plaintiff to deed property to himself. To the contrary, as set forth below, P. Don Cook, George P. Cook’s nephew, took part in a conversation in which George P. Cook expressed his intention to convey the Property to one of his children. Thus, there is support in the record for George P. Cook’s inclusion of a provision allowing his attorney-in-fact to deed the Property to himself.

30. Because “self-serving assertions without factual support in the record will not defeat a motion for summary judgment,” Defendants Chichester and Lambson’s assertions fail here. *Williams*, at n.14.

31. With respect to whether Plaintiff's transfer of the Property to himself violated a fiduciary duty owed to his father, *Rosier v. Rosier*, 227 W. Va. 88, 705 S.E.2d 595 (2010) is instructive. There, Leeorr Rosier, as the widow of Stearl Rosier and as the executrix of his estate, sued her son, Robert Lee Rosier. Among other things, Leeorr Rosier took issue with a conveyance of land Robert Lee Rosier made to himself pursuant to a power of attorney given to Robert Lee Rosier by his father, Stearl Rosier. *Id.* at 92, 705 S.E.2d at 599. Leeorr argued that, because Robert Lee owed his father a fiduciary duty as a result of the power of attorney, "his conveyances of Stearl Rosier's property to himself for little or no consideration was fraudulent." *Id.* at 101, 705 S.E.2d at 608. In affirming the circuit court's grant of summary judgment to Robert Lee, the Supreme Court of Appeals of West Virginia noted first that "the power of attorney executed by Stearl Rosier expressly provides for Robert Lee Rosier to convey property and resources to himself." *Id.*

32. Here, too, the Power of Attorney explicitly authorized Plaintiff to transfer George P. Cook's West Virginia property to himself. The *Rosier* Court, however, also considered other evidence of the decedent's intent. This evidence included testimony of the attorney who prepared the power of attorney and deeds conveying Stearl Rosier's interest to Robert Lee Rosier. *Id.* at 103, 705 S.E.2d at 610. The attorney's testimony was sufficient to establish Stearl Rosier's intent to allow Robert Lee Rosier to convey the property to himself. *Id.* at 104, 705 S.E.2d at 611.

33. As in *Rosier*, P. Don Cook, the nephew of George P. Cook, testified that George P. Cook wanted to transfer his property in West Virginia to one of his children and that Plaintiff expressed his willingness to receive the Property.

34. Accordingly, because the Power of Attorney explicitly authorizes Plaintiff to transfer property to himself, and because there is corroborating evidence of George P. Cook's intention to allow such a transfer, this Court finds no breach of the fiduciary duty Plaintiff owed to George P. Cook as his attorney-in-fact.

35. Finally, during oral argument on this motion, Defendants Chichester and Lambson argued that Plaintiff committed fraud in identifying himself as both the attorney-in-fact for George P. Cook and executor of his estate. Defendants claim that "in no case is summary judgment available where fraud is an issue[.]" This Court finds that there is no evidence of fraud, and these assertions will not preclude a grant of summary judgment in Plaintiff's favor.

36.

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.

Syl. Pt. 5. *Kidd v. Mull*, 215 W. Va. 151, 595 S.E.2d 308 (2004).

37. The allegation of fraud may be easily dispensed with when considering the elements of reliance and damages. Defendants did not rely on the deed of correction in any way nor have they been damaged.

38. For the foregoing reasons, this Court GRANTS Plaintiff Posey Gene Cook's Motion for Summary Judgment.

### **Motion in Limine**

39. West Virginia's Dead Man's Statute provides that

[n]o party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a

witness in regard to any personal transaction or communication between such witness and a person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence[.]

W. Va. Code § 57-3-1.

40. Thus, for the Dead Man's Statute to bar testimony, three conditions must be met:

[f]irst, the testimony must relate to a personal transaction with a deceased or insane person. Second, the witness must be a party to the suit or interested in its events or outcome. Third, the testimony must be against the deceased's personal representative, heir at law, or beneficiaries or the assignee or committee of an insane person.

*Rosier v. Rosier*, 227 W. Va. 88, 103, 705 S.E.2d 595, 610 (2010) (citation omitted).

41. Plaintiff does not object to the Motion *in Limine* save to argue that it is overly broad in its attempt to bar "any testimony as to what the deceased may have said concerning his real property in West Virginia." As set forth above, three conditions must be met to bar testimony under the Dead Man's Statute. To the extent Defendant Chichester is attempting to prohibit testimony that does not fall under the purview of the Dead Man's Statute, it is DENIED.

42. This Court GRANTS Defendant Chichester's Motion *in Limine*, however, as to all testimony relating to a personal transaction or communication with George P. Cook from parties to this suit and those interested in its outcome where that testimony is against George P. Cook's personal representative, heir at law, or beneficiaries.

43. West Virginia's statute of frauds for the sale of land states that "[n]o contract for the sale of land, or the lease thereof for more than one year, shall be enforceable unless the

contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or by his agent.” W. Va. Code § 36-1-3.

44. Defendant Chichester acknowledges that no one is seeking to enforce an oral contract for the sale of land. Accordingly, her reliance on the Statute of Frauds is misplaced. This Court DENIES Defendant Chichester’s motion to the extent it attempts to bar testimony by application of the Statute of Frauds found in West Virginia Code § 36-1-3.

**Motion to Quash Notice and for Protective Order**

45.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[. . . .] It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b)(1).

46. The West Virginia Rules of Civil Procedure also specify that, when permitting discovery of material

prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative[. . . .] the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

W. Va. R. Civ. P. 26(b)(3).

47.

Upon motion by a party or by the person from whom discovery is sought, . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had[.]

W. Va. R. Civ. P. 26(c).

48. Toney's Fork seeks to quash notice of Charles Dollison's deposition and asks this Court for entry of a protective order precluding his deposition. Mr. Dollison was counsel for Toney's Fork and then came in-house at Toney's Fork. Mr. Dollison performed work for Toney's Fork related to the instant matter.

49. At the hearing on this Motion, counsel for Plaintiff indicated that he intends to call Mr. Dollison as a witness at trial as "he's a fact witness because he prepared the deed, he's a fact witness because he negotiated with representatives of the Cook family, and there may be documents out there such as a certificate of title that would have a bearing on the question presented in this case[.]"

50. Counsel for Defendants Chichester and Lambson offered that "if the Court were to allow deposition, the Court could instruct us on anything discovered in that deposition, which was allowable, to be used in trial, or if we got into an area, the Court says, well, that's clearly attorney / client, I'm going to strike those pages in response to that question."

51. To begin, parties may not obtain discovery of privileged material. W. Va. R. Civ. P. 26(b)(1). For that reason, this Court rejects any offer to analyze Mr. Dollison's deposition testimony after the fact for privileged matters. Simply, the West Virginia Rules of Civil Procedure make clear that privileged matter may not be discovered in the first instance.

52. Plaintiff and Defendants Chichester and Lambson indicate that there may be matters to which Mr. Dollison could testify that are not protected by the attorney-client privilege. For these issues, Toney's Fork has designated an alternative witness so as to protect the attorney-client privilege. Rule 26 provides that discovery may be limited where "[t]he discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less

expensive[.]” W. Va. R. Civ. P. 26(b)(1)(A). Plaintiff and Defendants Chichester and Lambson have not provided this Court with any argument as to how the offered alternative witness is unable to provide information on any of the topics on which the parties seek to depose Mr. Dollison. Because privileged matter is not discoverable, and because Toney’s Fork has offered an alternative witness to testify to those matters sought of Mr. Dollison, this Court GRANTS Toney’s Fork’s Motion to Quash Notice and prohibits the taking of Mr. Dollison’s deposition.

Pursuant to the foregoing, this Court GRANTS the Motion for Summary Judgment of P. Gene Cook, GRANTS in part and DENIES in part Defendant’s Motion *in Limine* as outlined above, and GRANTS the Motion of Toney’s Fork Land, LLC to Quash Notice and for Protective Order.

The Court directs the Clerk to provide certified copies of this Order to the following:

John F. Hussell, IV  
Staci N. Criswell  
Dinsmore & Shohl, LLP  
P. O. Box 11887  
900 Lee Street, Suite 600  
Charleston, WV 25339  
*Counsel for Plaintiff*

Jackson O. Brownlee  
Beusse Wolter Sanks Mora & Maire, P.A.  
390 North Orange Avenue, Suite 2500  
Orlando, FL 32801  
*Counsel for Defendants Elizabeth Chichester, individually and as the purported personal representative of the Estate of George P. Cook, and Katherine Lambson*

G. Todd Houck  
105 Guyandotte Avenue  
Mullens, WV 25882  
*Counsel for Defendants Elizabeth Chichester, individually and as the purported personal representative of the Estate of George P. Cook, and Katherine Lambson*

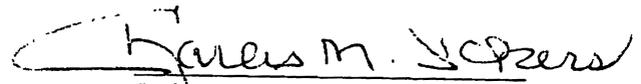
Jennifer Anderson Hill  
Steven P. McGowan  
Serry A. Habash

Steptoe & Johnson PLLC  
Chase Tower – Eighth Floor  
707 Virginia Street, E.  
P. O. Box 1588  
Charleston, WV 25301  
*Counsel for Defendant Toney's Fork Land, LLC*

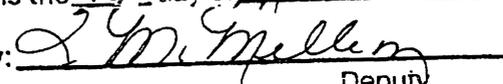
James D. Cook  
902 Rock Bay Drive  
Jacksonville, FL 32218  
*Pro Se Defendant*

Jerry Lee Cook  
145 Briarfield Drive  
Mooresville, NC 28115  
*Pro Se Defendant*

ENTERED this 11<sup>th</sup> day of March, 2013.

  
Judge Charles M. Vickers

A TRUE COPY, ATTEST.  
DAVID "BUGS" STOVER, CLERK

This the 19<sup>th</sup> day of March, 2013  
By:   
Deputy.