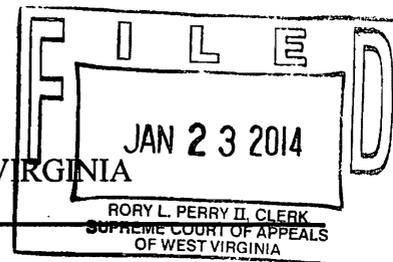


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET NO. 13-0925

**ELIZABETH CHICHESTER**, as personal  
representative of the Estate of George P. Cook;  
**ELIZABETH CHICHESTER**, individually;  
and **KATHERINE LAMBSON**,  
Counter-Plaintiffs Below,  
Petitioners

v.

Appeal from a final order of the  
Circuit court of Wyoming County  
(No. 12-C-37)

**POSEY GENE COOK**,  
Plaintiff Below;  
and **JAMES D. COOK, JERRY LEE COOK**,  
and **TONEY'S FORK LAND, LLC**,  
Defendants Below,  
Respondents

**BRIEF OF RESPONDENT TONEY'S FORK LAND, LLC**

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**I. STATEMENT OF THE CASE**

Respondent Posey Gene Cook initiated this action by filing his original complaint in the Circuit Court of Wyoming County on February 28, 2012. Thereafter, on March 29, 2012, Mr. Cook filed an amended complaint to quiet title, which is the operative complaint. A.R. at 4-45. The amended complaint names as Defendants 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. The prayer for relief requests, among other things, an order affirming the validity of the Coal Mining Lease with Toney's Fork Land, LLC. A.R. at 12. Ms. Chichester and Ms. Lambson served an answer to the amended complaint and a counterclaim against Posey Gene Cook. A.R. at 50-67.

On August 27, 2012, Posey Gene Cook filed a disclosure of twenty-one persons who may be called as fact witnesses at trial. A.R. at 114-16. The former general counsel of Toney's Fork Land, LLC, Charles Dollison, is included on the list as number nineteen. Included on the list as number twenty is a "[r]epresentative of Toney's Fork Land, LLC[.]" A.R. at 115.

On September 22, 2012, Ms. Chichester and Ms. Lambson served a notice of taking deposition, which noticed the deposition of Mr. Dollison "at a time and place to be agreed upon by the parties." A.R. at 184-86. Although Mr. Dollison is not a party to this action, no subpoena was issued to compel his attendance at a deposition.

Toney's Fork Land, LLC filed a motion to quash the notice of deposition and for a protective order directing that the deposition of Mr. Dollison not be taken. A.R. at 187-210. The notice of deposition of Mr. Dollison is attached to the motion as Exhibit A. A. R. at 198-201. Attached as Exhibit B to the motion is a notice of deposition pursuant to West Virginia Rule of Civil Procedure 30(b)(7) directed to Toney's Fork Land, LLC for a corporate representative's

deposition taken on November 8, 2012. This notice was served by Posey Gene Cook. A.R. at 202-05. Attached as Exhibit C to the motion is a letter from counsel for Toney's Fork Land, LLC to counsel for Ms. Chichester and Ms. Lambson, which states:

I am in receipt of your Notice of Taking Deposition, concerning the deposition of Charles Dollison. This letter is being written as a good faith effort to resolve a discovery dispute without the intervention of the Court. As I have discussed with counsel, Mr. Dollison previously served as corporate counsel for my client, Toney's Fork. As such, I do not believe that this Notice is appropriate. Please withdraw this Notice.

A.R. at 208.

No one filed a response to the motion to quash the notice of deposition and for a protective order.

On November, 21, 2012, Posey Gene Cook filed a motion for summary judgment. A.R. at 212-53. Attached as Exhibit 7 to the motion for summary judgment are excerpts from a deposition of Ms. Chichester taken on July 13, 2012. Upon questioning by counsel for Mr. Cook, Ms. Chichester testified as follows:

Q. Do you believe that Charles B. Dollison would have any reason to take a position which would deprive you and your sister Katherine Lambson of something that you were rightfully entitled to receive?

A. No. I doubt that he knew we existed.

Q. Do you know whether or not Charles B. Dollison prepared a title report with respect to the property which is the subject of the coal lease?

A. No clue.

...

Q. Are you seeking to invalidate the coal lease that is in place with respect to the subject property?

...

THE WITNESS: I'm seeking to have four more names added.

A.R. at 248.

Attached as Exhibit 8 to the motion for summary judgment are excerpts from the deposition of Katherine Lambson also taken on July 13, 2012. Ms. Lambson testified similarly that she most likely would like to have the coal lease stay in effect. A.R. at 251.

In December 2012, the parties each served pretrial memoranda. A.R. at 272-99. Although Ms. Chichester had previously testified that she did not think that Mr. Dollison knew who she was and had no reason to think that he would deprive her and Ms. Lambson of something that they were rightfully entitled to receive, Mr. Dollison was included on Ms. Chichester and Ms. Lambson's list of witnesses. A.R. at 276. Posey Gene Cook also listed Mr. Dollison as a witness. A.R. at 295.

On March 19, 2013, the circuit court entered an order granting Posey Gene Cook's motion for summary judgment, granting in part a motion *in limine* filed by Ms. Chichester,<sup>1</sup> and granting Toney's Fork Land LLC's motion to quash the notice of deposition and for a protective order. A.R. at 335-49. With regard to the motion to quash the notice of deposition and for a protective order, the circuit court concluded as follows:

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,

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<sup>1</sup> The circuit court's ruling on Ms. Chichester's motion *in limine* has not been raised on appeal.

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.

A.R. at 347-48.

Thereafter, Ms. Chichester and Ms. Lambson filed a motion for clarification. A.R. at 350-53. The Court entered a final order on August 12, 2013, which clarified that the March 19th order granted summary judgment to Posey Gene Cook on both his claims and the counterclaims in this action. Finally, the circuit court dismissed this entire action with prejudice. A.R. at 354-58.

On August 28, 2013, Ms. Chichester and Ms. Lambson filed a notice of appeal in this Court. The appeal was perfected on December 9, 2013.

## II. SUMMARY OF ARGUMENT

Although Toney's Fork Land, LLC took no position on Posey Gene Cook's motion for summary judgment below, it does not agree with Ms. Chichester and Ms. Lambson's assignments of error relating to the circuit court's grant of summary judgment. With regard to those assignments of error relating to the circuit court's grant of summary judgment, Toney's Fork Land, LLC joins the brief of Posey Gene Cook. For the reasons stated in that brief as well as reasons apparent from the circuit court's orders, this Court should affirm the circuit court's grant of summary judgment to Posey Gene Cook.

In addition, the circuit court properly exercised its discretion to grant Toney's Fork Land, LLC's motion to quash the notice of deposition of its former general counsel Mr. Dollison and for a protective order because it has not caused substantial prejudice. The circuit court's denial of discovery did not cause substantial prejudice because none of the parties argued that Mr. Dollison's deposition would provide information necessary for the circuit court's determination of Posey Gene Cook's motion for summary judgment. Moreover, the circuit court properly determined that none of the parties provided any argument how Toney's Fork Land, LLC's West Virginia Rule of Civil Procedure 30(b)(7) witness was unable to provide information on any of the topics on which they sought to depose Mr. Dollison. The circuit court also properly rejected Ms. Chichester and Ms. Lambson's offer to analyze Mr. Dollison's deposition testimony after the fact for privileged matters. Thus, the circuit court properly exercised its discretion to grant Toney's Fork Land, LLC's motion to quash notice and prohibit the taking of Mr. Dollison's deposition on the bases that privileged matter is not discoverable in the first instance and that Toney's Fork Land, LLC's offered an alternative witness to testify to those matters sought of Mr. Dollison. Therefore, this Court should affirm the circuit court's judgment in all respects.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there is no prejudicial error.

### **IV. ARGUMENT**

#### **A. Standard of Review**

This Court should review an order entered by the circuit court pursuant to West Virginia Rule of Civil Procedure 26(c) under an abuse of discretion standard. Franklin D. Cleckley, Honorable Robin Jean Davis, & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 26(c) at 742 (4th ed. 2012) [hereinafter *Litigation Handbook*] (citing *Fonner v. Fairfax Cnty.*, 415 43d 325 (4th Cir. 2005)). See *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) (holding “[we] review the entry of a protective order under [Federal] Rule 26(c) for abuse of discretion”). “Abuse may be demonstrated by a clear showing that denial of discovery has caused substantial prejudice.” *M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1992) (en banc) (substantial prejudice not shown where plaintiff obtained critical evidence from some sources prior to ban on discovery and on remand district court could determine how to accommodate interests of parties and sources of discovery).

**B. Toney's Fork Land, LLC Joins the Brief of Posey Gene Cook with Regard to those Assignments of Error Relating to the Circuit Court's Grant of Summary judgment.**

With regard to those assignments of error relating to the circuit court's grant of summary judgment, Toney's Fork Land, LLC joins the response brief of Posey Gene Cook. In light of the statements by Ms. Chichester and Ms. Lambson during deposition that they want the coal lease with Toney's Fork Land, LLC to stay in effect with their names added, Toney's Fork Land, LLC took no position on Posey Gene Cook's motion for summary judgment below. A.R. at 21. Toney's Fork Land, LLC, however, does not agree with Ms. Chichester and Ms. Lambson's assignments of error relating to the circuit court's grant of summary judgment. Toney's Fork Land, LLC is mindful of West Virginia Rule of Appellate Procedure 10(d), which provides that "[i]f the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." No such assumption is warranted in this action. For the reasons stated in the response brief of Posey Gene Cook as well as reasons apparent from the circuit court's orders, this Court should affirm the circuit court's grant of summary judgment to Posey Gene Cook.

**C. The Circuit Court Properly Exercised its Discretion to Grant Toney's Fork Land LLC's Motion to Quash the Notice of Deposition of its Former General Counsel and for Protective Order because the Denial of Discovery has not Caused Substantial Prejudice.**

The circuit court properly exercised its discretion to grant Toney's Fork Land LLC's motion to quash the notice of deposition of its former general counsel and for protective order because the denial of discovery has not caused substantial prejudice. West Virginia Rule of Civil Procedure 26(b) provides in pertinent part:

*Discovery scope and limits.* – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. – Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that:

(A) *The discovery sought is unreasonably cumulative or duplicative or is available from some other source that is more convenient, less burdensome, or less expensive;*

...

The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial preparation: materials. – Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) *only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* In ordering discovery of such materials when the required showing has been made, 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.

(Emphasis added).

West Virginia Rule of Civil Procedure 26(c) provides in pertinent part:

*Protective orders.* – Upon motion by a party or by the person from whom discovery is sought, including a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, *the court in the circuit where the deposition is to be taken 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.*

(Emphasis added).

In *State ex rel. United Hospital Center, Inc. v. Bedell*, 199 W. Va. 316, 484 S.E.2d 199 (1997), this Court determined that the defendant waived the work-product doctrine with respect to matters about which its general counsel was designated to testify. Specifically, the Court held:

When a corporation, partnership, association or governmental agency designates an attorney to testify on its behalf at a deposition pursuant to West Virginia Rule of Civil Procedure 30(b)(6), such corporation, partnership, association or governmental agency waives the attorney-client privilege and work product doctrine with regard to matters, set forth in the notice of deposition, about which the attorney was designated to testify.

Syllabus Point 9.

The holding in *State ex rel. United Hospital Center, Inc.* does *not* apply to this action because in this action the parties took the deposition of a non-attorney corporate representative of Toney's Fork Land, LLC pursuant to West Virginia Rule of Civil Procedure 30(b)(7) but still sought the deposition of its former general counsel Charles Dollison. In its opinion in *United Hospital Center, Inc.*, however, the Court commented on a party's attempt to take an attorney for the opposing side's deposition, noting:

We are not presently concerned with the situation in which one party has served a deposition subpoena expressly on an opposing party's counsel. However, many courts have discussed the negative implications of allowing such depositions to take place. These courts, while recognizing that the rules of civil procedure do not prohibit the taking of opposing counsel's deposition, *see* Rule 30(a) (a party may take the deposition of "any person"), were nevertheless concerned that

[T]he increasing practice of taking opposing counsel's deposition [is] a negative development in the area of litigation, and one that should be employed only in limited circumstances. . . . Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds

to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation.

(emphasis added). *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir 1986). See [*S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992)] (“[D]eposition of the attorney [usually] merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine – that involving an attorney’s mental impressions or opinions.” (citation omitted)); *Hay & Forage Industries v. Ford New Holland, Inc.*, 132 F.R.D. 687, 689 (D. Kan. 1990). Thus, some courts will only allow the taking of opposing counsel’s deposition where it is shown that no other means exist to obtain the information, that the information sought is relevant and nonprivileged and that the information is crucial to preparation of the case. *Shelton*, 805 F.2d at 1327; *Hay & Forage Industries*, 132 F.R.D. at 689; *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990). But see *In re Arthur Treacher’s Franchisee Litigation*, 92 F.R.D. 429, 437-38 (E.D. Pa. 1981) (“The fact that the proposed deponent is an attorney for one of the parties in the case is clearly not enough, by itself, to justify granting in full the motion for a protective order. If the questions to be asked of [the deponent/attorney] delve into privileged areas then his recourse will be to object and refuse to answer. Such an objection and refusal to answer should of course be predicated upon a sufficient demonstration that the matter inquired into is privileged.” (citations omitted)).

*Id.*, 484 S.E.2d at 216 n.21 (emphasis added).

In *Asbury v. Litton Loan Servicing, LP*, No. 3:07-0500, 2009 WL 973095 (S.D.W. Va. Apr. 9, 2009), the court found that the defendant failed to establish the necessity of the plaintiffs’ counsel’s deposition to explain a letter and its contents, relying in part on the criteria in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986),<sup>2</sup> referred to by this Court in *State ex rel. United Hospital Center, Inc. v. Bedell*. In *Asbury*, the court noted:

Although the *Shelton* criteria has not been specifically adopted by the Fourth Circuit, it has been applied by courts within this Circuit and by some other circuits. See *N.F.A. [Corp. v. Riverview Narrow Fabrics, Inc.]*, 117 F.R.D. 83, 86

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<sup>2</sup> *Asbury* stated the *Shelton* criteria as follows: “(1) no other means exist to obtain the information . . . (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case” *Id.* at \*3.

((M.D.N.C. 1987)]; *In re Fotso*, No. 05-29843PM, 2006 WL 4482001 (Bankr. D. Md. Nov. 22, 2006); and *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *Thiessen v. General Elec. Capital Corp.*, 267 F.3d 1095, 1112 (10th Cir. 2001); *Nguyen v. Excel Corp.*, 197 F.3d 200, 208-09 (5th Cir. 1999); *but see Kaiser v. Mutual Life Ins. Co.*, 161 F.R.D. 378, 382 (S.D. Ind. 1994) (rejecting *Shelton*, but requiring party seeking deposition “to make a preliminary showing of relevance”).

In *In re: Subpoena Issued to Dennis Friedman*, 350 F.3d 65 (2d Cir. 2003), the Second Circuit declined to adopt the *Shelton’s* criteria, finding “the standards set forth in Rule 26 require a flexible approach to lawyer depositions whereby the judicial officer supervising discovery takes into consideration all of the relevant facts and circumstances to determine whether the proposed depositions would entail an inappropriate burden or hardship.” 350 F.3d at 72. Under this approach, the Second Circuit stated courts should look at considerations such as the necessity of counsel’s deposition, counsel’s role in the discovery matter in relation to the current litigation, the likelihood of encountering privilege and work-product issues, and the amount of discovery already performed. “These factors may, in some circumstances, be especially appropriate to consider in determining whether interrogatories should be used at least initially and sometimes in lieu of depositions.” *Id.*

. . . Defendant in this case did not attempt to use interrogatories to get the information at issue and much of the information Defendant seeks is already available to it from other sources. In addition, the Court finds that Defendant has failed to show the necessity of deposing opposing counsel with respect to the January 2 letter. Thus, the Court finds that Defendant’s arguments to depose counsel fails under either of these approaches.

*Id.* at \*3 n.4.

Significantly, the court in *Asbury* rejected the defendant’s argument that the request to depose the plaintiffs’ counsel should be treated the same as any other request to depose a witness because the attorney’s conduct was pre-litigation. The court reasoned:

Even in cases which distinguish between pre- and post-litigation conduct, courts still apply a balancing test between “the necessity for such discovery in the circumstances of the case against its potential to oppress the adverse party and to burden the adversary process itself.” *Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352 (D.N.J. 1990); *see also Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 730-31 (8th Cir. 2002) (finding *Shelton* does not apply to a situation in which counsel is deposed about prior litigation and there are no concerns about abuse of the discovery process, delay, or additional litigation costs). In this case, the Court finds the balance weighs against allowing

the depositions given the availability of the most of the information from other sources, the lack of necessity of the depositions, and the undue burden it will place upon Plaintiffs, particularly in light of the serious issues raised as to whether counsel will have to disqualify themselves if called as a witness in this case.

*Id.* at \*3.

Similarly, a leading treatise on West Virginia civil procedure explains:

Courts have been especially concerned about the burdens imposed on the adversary process when lawyers themselves have been the subject of discovery requests and have resisted the idea that lawyers should routinely be subject to broad discovery. Consequently, it has been held that a request to depose a party's litigation counsel, by itself, constitutes good cause for obtaining a protective order. The party seeking the deposition of opposing counsel must show the propriety and need for the deposition. This may be done by demonstrating, among other considerations, that: (1) there are no persons other than the attorney available to provide the information; (2) other methods, such as written interrogatories, would not be as effective; (3) the inquiry will not invade attorney-client privilege or work product; and (4) the information is of such relevance that the need for it outweighs the disadvantages and problems inherent in deposing a party's litigation attorney.

*Litigation Handbook* 26 § 26(c)(1) at 749 (footnote omitted) (citing *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001)).

In this action, the circuit court properly exercised its discretion to grant Toney's Fork Land, LLC's motion to quash the notice of deposition of its former general counsel and for a protective order. The circuit court's denial of discovery did not cause substantial prejudice because none of the parties argued that Mr. Dollison's deposition would provide information necessary for the circuit court's determination of Posey Gene Cook's motion for summary judgment. Significantly, Ms. Chichester and Ms. Lambson did not file an affidavit pursuant to West Virginia Rule of Civil Procedure 56(f), testifying that they could not oppose Posey Gene Cook's motion for summary judgment without the deposition of Mr. Dollison. No one even filed a response to Toney's Fork Land, LLC's motion. Moreover, during a hearing held on February 6, 2013, counsel for Ms. Chichester and Ms. Lambson conceded that they would withdraw their

request to depose Mr. Dollison if he is not a witness. A.R. at 399. Counsel for Posey Gene Cook argued: “To the extent that there is a trial in this matter and the Court does not grant our Motion for Summary Judgment, we intent to call Mr. Dollison as a witness.” A.R. at 399. *See also* A.R. at 405 (“we believe Mr. Dollison is a fact witness whose deposition needs to be taken and whose trial testimony needs to be elicited if the Court does not grant our Motion for Summary Judgment”). Because the circuit court properly granted summary judgment to Posey Gene Cook, there can be no substantial prejudice in its grant of Toney’s Fork Land, LLC’s motion to quash<sup>3</sup> and for a protective order to prevent the deposition of Mr. Dollison.

In any event, the circuit court properly determined that none of the parties provided any argument as to how Toney’s Fork Land, LLC’s Rule 30(b)(7) witness was unable to provide information on any of the topics on which the parties sought to depose Mr. Dollison. In its brief in support of the motion to quash notice and for protective order, Toney’s Fork Land, LLC argued that any discoverable information known by Mr. Dollison could be obtained from an alternative witness without invading the attorney-client privilege and work product doctrine. A.R. at 191-97. As discussed above, Toney’s Fork Land, LLC’s 30(b)(7) witness was deposed on November 8, 2012. During the February 6th hearing, counsel for Toney’s Fork Land, LLC argued as follows:

In the discussions of this, I said to the counsel, I said, if you want to know what Toney’s Fork did, give me a Rule 30 Notice, a Rule 30(b), so they did that, and the Rule 30(b) Notice set forth certain things that they wanted to know. They wanted to know what due diligence Toney’s Fork did in connection with this case. We provided a witness to talk about that. They wanted to know whether Toney’s Fork believed that there was a – that they had good title to the property at issue, and we provided a witness to talk about that. We have already provided witnesses to discuss all these things, but I don’t thing that they’re entitled to talk to our attorney about what he did or what he thought, and that’s exactly what I was told

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<sup>3</sup> It should be noted that although Mr. Dollison is not a party in this action or otherwise under the control of Toney’s Fork Land, LLC he was not subpoenaed by any party to appear for a deposition. Without a proper subpoena, Mr. Dollison’s deposition testimony could not be compelled. *See* W. Va. R. Civ. P. 45.

in connection with this, is, well, we want to ask your attorney whether he thought you had good title or not. Well, they're not entitled to that. That's clearly privileged pursuant to Rule 26.

A.R. at 395-96.

Neither counsel for Ms. Chichester and Ms. Lambson nor counsel for Posey Gene Cook identified any inadequacies in the Rule 30(b)(7) witness's testimony or any argument as to how the Rule 30(b)(7) witness was unable to provide information on any of the topics on which the parties sought to depose Mr. Dollison.

The circuit court also properly rejected the offer of counsel for Ms. Chichester and Ms. Lambson to analyze Mr. Dollison's deposition testimony after the fact for privileged matters. Counsel argued during the February 6th hearing as follows:

[I]f 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. That's something well within your bounds to do, that it not be competent evidence to be used at trial, because it violated a privilege.

A.R. at 404.

Counsel for Toney's Fork Land, LLC argued in response:

. . . And I think that this just opens up a lot of problems if Mr. Dollison's deposition is taken for it, because unlike what [counsel for Ms. Chichester and Ms. Lambson] said, oh, we can come to the Court and ask for permission after the fact, well, if my client's privilege is already waived and these parties already have been privy to it, the bell has already been rung, the damage is already done essentially at that point, so I don't think that that wait and see approach is appropriate.

A.R. at 406. See also W. Va. R. Civ. P. 26(b)(1) (“[p]arties may obtain discovery regarding any matter, *not privileged*”) (emphasis added).

Ms. Chichester and Ms. Lambson's argument on appeal is meritless. Predictably, they ignore the fact that the circuit court's grant of the motion to quash notice and for a protective

order did not cause substantial prejudice because Mr. Dollison's deposition was not necessary to a determination of Posey Gene Cook's motion for summary judgment. More troubling, however, they also ignore the fact that Toney's Fork Land, LLC's Rule 30(b)(7) witness provided information on the topics on which the parties sought to depose Mr. Dollison. To the extent that they now complain because they wanted to ask Mr. Dollison about emails between Mr. Dollison and Posey Gene Cook and other representatives of the Cook family, Ms. Chichester and Ms. Lambson, counsel for Toney's Fork Land, LLC appropriately addressed that issue during the February 6th hearing as follows:

Further, there was a discussion about some of the documents that were exchanged back and forth in e-mails. Now, those documents in and of themselves would not be protected by the attorney/client privilege because they were to third parties, not to the client. With that said, Toney's Fork can and would and already has made another witness available that can more appropriately discuss those without the fear of invading the attorney/client privilege.

A.R. at 403-04.

Presumably, Ms. Chichester and Ms. Lambson also could have sought deposition testimony from Posey Gene Cook and/or any other representative of the Cook family regarding such e-mails.<sup>4</sup> The parties also could have requested information on any of these topics on which they sought to depose Mr. Dollison through written interrogatories.

Ms. Chichester and Ms. Lambson's argument on appeal that they do not seek to discover communications between Mr. Dollison and his client is a far cry from the argument of counsel during the February 6th hearing that the circuit court could analyze Mr. Dollison's testimony after the fact for privileged matters. Moreover, their argument on appeal does not address Mr. Dollison's work product, which both Toney's Fork Land, LLC and the circuit court recognized is

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<sup>4</sup> It is not clear from the record whether the emails to which the parties refer were produced during discovery in this action. Obviously, to the extent that such emails were produced their contents were already available to Ms. Chichester and Ms. Lambson.

protected from discovery. Thus, the circuit court properly exercised its discretion to grant Toney's Fork Land, LLC's motion to quash notice and prohibit the taking of Mr. Dollison's deposition on the bases that privileged matter is not discoverable in the first instance and that Toney's Fork Land, LLC's offered an alternative witness to testify to those matters sought of Mr. Dollison.

V. **CONCLUSION**

For all of the foregoing reasons, this Court should affirm the judgment of the circuit court in all respects. Alternatively, the judgment of the circuit court should be affirmed insofar as it granted Toney's Fork Land, LLC's motion to quash the notice of deposition of its former general counsel and for a protective order.

Respectfully submitted this 22nd day of January, 2014.

  
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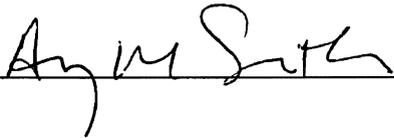
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 22nd of January, 2014, true and accurate copies of the foregoing Brief of Respondent Toney's Fork Land, LLC were deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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