

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Dana and Nancy Singleton,
Plaintiffs Below, Petitioners**

vs) **No. 11-0570** (Lewis County 09-C-146)

FILED

February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**The Citizens Bank of Weston, Inc.,
Defendant Below, Respondents**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Lewis County, wherein the Respondent's, Citizens Bank of Weston, Inc., ("Bank") motion for summary judgment was granted. This appeal of the order granting summary judgment to the Bank was timely perfected by counsel, with Petitioners Singletons' appendix accompanying the petition. Respondent Bank filed a response in support of the circuit court's decision.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On June 25, 2003, Petitioners Dana and Nancy Singleton, who are son and mother, leased Box Number 3835 from Respondent Bank. Petitioners and Bank entered into a Safe Deposit Box Lease Agreement and the petitioners signed a signature specimen card for access to their safe deposit box. Between June 25, 2003, and April 24, 2009, the petitioners made ten visits to their safe deposit box. On all visits except for one, the two entered their safe deposit box together. On their second to last date of visiting their safe deposit box, which occurred on September 8, 2008, vault attendant Kimberly Blake assisted them with closing and locking the safe deposit box. On the morning of April 24, 2009, Petitioner Dana Singleton entered the safe deposit box by himself. Upon this entrance, Petitioner Dana Singleton asserted that \$60,000.00 in cash, jewelry, and personal documents were missing from the box. Dana Singleton subsequently returned home, reported to his mother that items were missing from their box, and the two of them returned to the Bank together in the early afternoon. The Singletons reported their assertions to the Bank. The petitioners filed suit against the Bank, raising claims under breach of contract, conversion, tort of outrage, punitive damages, negligence, breach of fiduciary duty, and compensatory damages. The

Bank thereafter filed for summary judgment. The circuit court held a hearing on this motion and considered the parties' submitted depositions and pleadings. Consequently, upon this review and consideration, the circuit court granted the Bank summary judgment. It is this order that petitioners appeal, arguing that the circuit court erred in granting the Bank's motion for summary judgment.

"We have held that '[a] circuit court's entry of summary judgment is reviewed *de novo*.' Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)." *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 244, 557 S.E.2d 294, 298 (2001). "[A] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 2, *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001).

After careful consideration of the merits of the parties' arguments as set forth in their briefs and after a review of the submitted appendix and circuit court order, the Court finds no error in the circuit court's order granting summary judgment to Respondent Bank. Accordingly, the Court fully incorporates and adopts the circuit court's detailed and well-reasoned "Order Granting [Respondent], The Citizens Bank of Weston, Inc.'s, Motion for Summary Judgment," entered on March 1, 2011, and attaches the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

IN THE CIRCUIT COURT OF LEWIS COUNTY, WEST VIRGINIA

DANA SINGLETON and
NANCY SINGLETON,

Plaintiffs,

v.

CIVIL ACTION NO. 09-C-146

THE CITIZENS BANK OF WESTON, INC.,

Defendant.

**ORDER GRANTING DEFENDANT,
THE CITIZEN'S BANK OF WESTON, INC.'S,
MOTION FOR SUMMARY JUDGMENT**

On the 15th day of February, 2011, came Defendant, The Citizen's Bank of Weston, Inc., (hereinafter "Defendant"), by Martin J. Riley, its corporate representative, and by W. T. Weber, Jr., Esquire, and W. T. Weber, III, Esquire, its counsel, and Plaintiffs, Dana Singleton and Nancy Singleton, (hereinafter "Plaintiffs"), in person and by Erika K. Kolenich, Esquire, their counsel, for hearing on Defendant's Motion for Summary Judgment having been duly filed with the Court and served on Plaintiffs February 4, 2011, pursuant to Rule 56 of the *West Virginia Rules of Civil Procedure*.

Thereupon, the Court heard the argument and representations of counsel for Defendant The Citizen's Bank of Weston, Inc., in support of its Motion for Summary Judgment.

Thereupon, the Court heard the argument and representations of counsel for Plaintiffs Dana Singleton and Nancy Singleton, in opposition to Defendant's Motion for Summary Judgment.

Upon consideration of the pleadings, depositions, answers to discovery on file, the Defendant's Motion for Summary Judgment and the exhibits attached thereto, and the Plaintiffs' Response to Defendant's Motion for Summary Judgment, and the exhibits and affidavit of John

Noulton, attached thereto, the Court makes the following FINDINGS OF FACT and

CONCLUSIONS OF LAW:

1. That Defendant timely filed its Motion for Summary Judgment with the Court and served same on Plaintiffs February 4, 2011, in compliance with Rule 56(c) of the *West Virginia Rules of Civil Procedure*.
2. Defendant is a local, community bank with its principal place of operation in Weston, Lewis County, West Virginia. It is a chartered bank by the State of West Virginia and insured by the F. D. I. C. It has been in continuous operation for over 108 years.
3. Plaintiffs, Dana Singleton and Nancy Singleton, (hereinafter "Plaintiffs"), are residents of Orlando, Braxton County, West Virginia. They are related by blood, being mother and son. (Dana Singleton Tsp. pg. 6; Nancy Singleton Tsp. pg. 5).
4. Plaintiffs are unemployed, both receiving social security benefits.
5. On June 25, 2003, Plaintiffs leased safe deposit box number 3835 from Defendant at its main office in Weston. The box was leased to both Plaintiffs who executed not only the Safe Deposit Box Lease Agreement, but also the signature specimen card for access to said safe deposit box.
6. The June 25, 2003, Safe Deposit Box Lease Agreement sets forth the contractual obligations of the parties in regard to the lease of Safe Deposit Box No. 3835 by Plaintiffs from Defendant Bank.
7. Paragraph 1 of the June 25, 2003, Safe Deposit Box Lease Agreement states:

"The SOLE duty of the Bank is to exercise reasonable care to prevent the opening of the Safe by anyone other than the Renter or his duly qualified deputy or legal representative. The Bank shall not be liable for any loss by fire, THEFT, burglary, robbery, embezzlement, or any other cause unless it failed to exercise reasonable care to prevent the occurrences". (Emphasis added).
8. Paragraph 11 of the June 25, 2003, Safe Deposit Box Lease Agreement states:

"This lease SHALL NOT be construed to create any relation of bailor and bailee between the renter and the Bank; the Bank has NO KNOWLEDGE of and EXERCISES NO SUPERVISION OVER articles deposited in the Safe". (Emphasis added).

9. Paragraph 12 of the June 25, 2003, Safe Deposit Box Lease Agreement states, in part, that:

“If two or more persons are named herein as Renter, this lease then effects for such persons a joint tenancy in the Safe and in this lease, with right of survivorship and not a tenancy in common therein, but shall not, of itself, affect the title to any contents of the Safe. In such case, this lease shall then have equal and individual application to each of such persons. Without limiting the generality of the foregoing, each of such persons ALONE may have access to the Safe . . . “. (Emphasis added).

10. Paragraph 13 of the June 25, 2003, Safe Deposit Box Lease Agreement states, in part, that”

“[The] Bank shall not be liable for any loss or damage caused by failure of locks on the vault doors or locks thereof to operate...”

11. The safe deposit boxes are located in Defendant Bank’s main vault. The vault is secured by a time lock and other safeguards.
12. The safe deposit box leased by Plaintiffs was located in Defendant Bank’s main vault.
13. Access to the vault is maintained by a “vault clerk”, an employee of Defendant Bank. The vault clerk is positioned at the front entry to the vault and is charged with checking and verifying all entrants to the vault and safe deposit boxes. (Kimberly Blake Tsp. pg. 14).
14. Defendant Bank’s safe deposit boxes are each double locked. Each individual safe deposit box has two (2) locks on it. Two (2) separate keys are required to open an individual box. Each renter is given one (1) key and Defendant Bank maintains a “guard key” for the second lock. Both the renter’s key and the Bank guard key must be inserted and turned in a like direction to open the box. Without both keys, entry to the box is impossible. (Kimberly Blake Tsp. pgs. 8-11).
15. In this case, each Plaintiff, as a renter, received one (1) key.
16. Defendant Bank follows a recognized procedure to verify the signatures of safe deposit box renters each time the renter enters the bank and seeks access to their particular safe deposit box. Upon verification that the signatures are the same, the individual is then required to sign the Safe Deposit Admission Record Card, which indicates the date and time the box is accessed by the renter, and then permitted entry to the vault. (Kimberly Blake Tsp. pg. 8).
17. The procedure followed by Defendant Bank for granting access to a safe deposit box by a renter is that upon entry of the bank, the renter goes to the vault clerk and requests access. The renter is presented with the Admission Card which the renter

must sign. The vault clerk then verifies the signature with the signature sample. If all matches, the renter is permitted access. The vault clerk enters the vault with the renter. The renter produces his key and the vault clerk produces the Bank's "guard key". Both parties open the box door by unlocking the separate locks. (Each safe deposit box has two locks). The box is removed and placed upon a shelf for use by the renter. The vault clerk immediately exits the vault upon opening the box door so as to not infringe upon the privacy of the renter. The vault clerk removes and takes the "guard key" while leaving the renter's key in the lock in the individual box door. The renter goes about his business. When completed, the renter replaces the box, closes the safe deposit box door, locks the box door, removes his key and exits the vault. (Kimberly Blake Tsp. pgs. 8-12; Kimberly Brown Tsp. pgs. 15-18).

18. Upon exit, the renter is required to close the safe deposit box door and turn the renter's key to lock the box. The renter then removes his key and exits the vault. (The "guard key" having already been removed by the vault clerk upon opening of the box for the renter). (Kimberly Blake Tsp. pgs. 11-12).
19. The vault clerk is never alone in the vault with either a renter's opened safe deposit box or the renter's safe deposit box key, the renter being present at all times with the vault clerk. (Kimberly Brown Tsp. pgs. 18).
20. The Bank is not aware of the contents of any renter's safe deposit box. There are no cameras in the vault so as to maintain the renter's privacy. (Kimberly Brown Tsp. pg. 19).
21. That the vault clerk is permitted to assist renters with the replacement of the safe deposit box and locking of the door in the presence of the renters. (Kimberly Blake Tsp. pg. 11-13).
22. According to the Plaintiffs' Admission Card, Plaintiffs entered Safe Deposit Box No. 3835 a total of ten (10) times from June 25, 2003, through April 24, 2009.
23. Plaintiffs aver that they placed in Safe Deposit Box No. 3835 the sum and amount of \$60,000.00, cash, in sixty (60) \$1000.00 rubber band bundles of \$100.00 dollar bills. This cash was placed in a plastic "Wal-Mart" bag in the said safe deposit box. Moreover, Plaintiffs claim to have placed at least two (2) non-descript rings and some personal documents in the safe deposit box as well. Plaintiffs claim dual ownership of the cash and jewelry, while the personal documents were the property of Mr. Singleton. (Dana Singleton Tsp. pgs. 30-31; 38-40).
24. Plaintiffs produced no exact or specific evidence of where they obtained the six hundred (600) one hundred dollar bills alleged to be in Safe Deposit Box 3835.
25. Plaintiffs aver that the above stated items were in Safe Deposit Box No. 3835 as of September 22, 2008. Plaintiffs further aver that the items were missing from Safe

- Deposit Box 3835 on April 24, 2009. (Dana Singleton Tsp. 22-24; Nancy Singleton Tsp. pgs. 17-22).
26. Plaintiffs each testified that they were both present on September 22, 2008, when Safe Deposit Box No. 3835 was opened. (Dana Singleton Tsp. pg. 23; Nancy Singleton Tsp. pg. 16-17).
 27. On April 24, 2009, there were two (2) entries to Safe Deposit Box No. 3835. At 9:57 a.m., Plaintiff Dana Singleton entered Safe Deposit Box No. 3835 by himself. He testified that he noticed the contents outlined above missing. He made no report to Bank personnel. He closed the box and left the Bank. He further testified that he went home, got his mother, Plaintiff Nancy Singleton, and returned to the Bank. Plaintiffs then entered Safe Deposit Box No. 3835 for a second time at 1:20 p.m., on April 24, 2009. (Dana Singleton Tsp. pgs. 20-23).
 28. It was only after Mr. Singleton's morning visit to the safe deposit box on April 24, 2009, that he reported the contents above missing to Defendant Bank. (Dana Singleton Tsp. pgs. 35-36).
 29. Plaintiffs have produced no evidence, other than the Plaintiffs' own statements, that the money, jewelry or personal documents alleged to have been placed in Safe Deposit Box No. 3835 were ever actually in said Safe Deposit Box 3835.
 30. Count One of Plaintiffs' Amended Complaint alleges breach of contract.
 31. Based upon the June 25, 2003, Safe Deposit Box Lease Agreement, as executed by the parties hereto, Plaintiffs as Renters were responsible for the placement and removal of items in Safe Deposit Box No. 3835.
 32. The only "evidence" that Plaintiffs produced to support their claims is a). the testimony of Plaintiffs that the items were placed in Safe Deposit Box No. 3835, and that the items were in said Safe Deposit Box No. 3835 on September 22, 2008, and b). that on September 22, 2008, the vault clerk, Kim Blake, was left alone in the vault with the Plaintiffs' safe deposit box key for a period of five to ten seconds, (Answer to Defendant's Interrogatory No. 15), or five minutes. (Dana Singleton Tsp. pgs. 24-26 and pgs. 57-58; Nancy Singleton Tsp. pgs. 19-21).
 33. Plaintiffs' have not shown a material fact that evidences and supports their inferred claim that on September 22, 2008, either the vault clerk removed the items or failed to secure the safe deposit box lock on exit allowing another patron access to Safe Deposit Box No. 3835.
 34. Each Plaintiff testified that neither saw the vault clerk, (Kimberly Blake), remove anything from the safe deposit box on September 22, 2008, or any other date. (Dana Singleton Tsp. pg. 58; Nancy Singleton Tsp. pgs. 19-20).

35. Plaintiff Dana Singleton has testified that he “was not for sure” when asked if the vault clerk took his items. (Dana Singleton Tsp. 58).
36. On April 24, 2009, Plaintiffs did not report to Defendant Bank that the vault clerk had remained in the vault with their safe deposit key unattended. (Kimberly Brown Tsp. pg. 15).
37. Plaintiffs’ allegation that the vault clerk was alone in the vault with their key was not contained in either written complaint of Plaintiff Dana Singleton lodged with the FDIC and the West Virginia Division of Banking.
38. Plaintiff Dana Singleton testified that his view of the safe deposit box was blocked by his mother on September 22, 2008, and therefore could not testify to anything regarding the locking of the box. (Dana Singleton Tsp. pg. 26).
39. Plaintiff Nancy Singleton testified that she clearly saw Ms. Blake close the safe deposit box door and lock it. (Nancy Singleton Tsp. pgs. 18-20).
40. Plaintiffs have stated that the vault clerk handed Plaintiff Nancy Singleton the key immediately upon locking the safe deposit box for Plaintiffs on September 22, 2008. (Answer to Defendant’s Interrogatory No. 15).
41. The vault clerk, Kimberly Blake has testified that she was never alone in the vault with the Plaintiffs’ opened safe deposit box, ever. (Kimberly Blake Tsp. pg. 17).
42. The vault clerk, Kimberly Blake testified that she did not ever recall Plaintiffs starting to exit the vault or actually exiting the vault while she had possession of their safe deposit box key. (Kimberly Blake Tsp. pg. 17).
43. The uncontested testimony of both Plaintiffs, as verified by vault clerk Kim Blake and the Admission Record for Safe Deposit Box No. 3835, is that only Plaintiff Dana Singleton had sole unrestricted access to Safe Deposit Box No. 3835 on April 24, 2009, at 9:57 a.m. (Dana Singleton Tsp. pg. 28; Nancy Singleton Tsp. pg. 21; Kimberly Blake Tsp. pg. 26).
44. Plaintiff Dana Singleton’s vague allegation that the lock on the door of Safe Deposit Box No. 3835 was “malfunctioning” on September 22, 2008, (Dana Singleton Tsp. pg. 26) is not supported by evidence.
45. Plaintiff Nancy Singleton testified to no malfunction of the locks on Safe Deposit Box No. 3835 and that she clearly saw the vault clerk, Kimberly Blake, lock the safe deposit box door on this date. (Nancy Singleton Tsp. 18-19).

46. Neither Plaintiff made any report to the Bank that the locks on Safe Deposit Box No. 3835 ever "malfunctioned". (Dana Singleton Tsp. 27). (Kimberly Brown Tsp. pgs. 10-14).
47. Plaintiff Dana Singleton did not report any lock "malfunction" in his written reports to the FDIC or the West Virginia Division of Banking.
48. Plaintiffs' assertion that Safe Deposit Box No. 3835 could have been left open on September 22, 2008, is not supported by any credible evidence. It is uncontested that Safe Deposit Box No. 3835 was closed and locked upon Plaintiffs' return April 24, 2009. In that Plaintiffs testimony indicates that they had possession both of their keys in their possession the entire time from September 22, 2008, to April 24, 2009, it is not possible for Safe Deposit Box 3835 to have remained open after the September 22, 2008, entry and have been closed and locked by anyone thereafter without Plaintiffs' key. Once the renter key is removed, the lock mechanism engages and the deadbolt will set. The deadbolt cannot be deactivated without the renter and guard key being used together in unison. (Kimberly Blake Tsp. 10; Kimberly Brown Tsp. 16).
49. Plaintiffs' testimony indicates that they made written and oral report of their allegations to the FDIC, West Virginia Division of Banking, the Weston Police Department, the West Virginia State Police, the Federal Bureau of Investigation, the Federal Trade Commission, the West Virginia Attorney General and possibly the Securities and Exchange Commission. (Dana Singleton Tsp. 46-51). No threatened or punitive action was taken by any of these entities against Defendant Bank. (Dana Singleton Tsp. 50-51; Kimberly Brown Tsp. pg. 20).
50. Based upon the evidence presented to the Court, it appears that Defendant Bank, at all times, secured the Plaintiffs' safe deposit box in the Bank's main vault. It maintained restricted access at all times with a vault clerk. The same vault clerk checked Plaintiffs in on each visit. All signatures and identities were verified prior to granting of access. There is no credible evidence the vault clerk was ever alone with the Plaintiffs' open safe deposit box. There were no malfunctions reported to the Defendant regarding the operation of the Plaintiffs' safe deposit box or locks. No keys were reported stolen or missing regarding Plaintiffs' safe deposit box. The evidence clearly indicates that the only persons with access to Safe Deposit Box 3835 were Plaintiffs.
51. The uncontroverted testimony is that the only person with unattended access to Safe Deposit Box No. 3835 was Dana Singleton on the morning of April 24, 2009, at 9:57 a.m.
52. The Court concludes as a matter of law that Plaintiffs have not produced a material question of fact through their pleadings, depositions or discovery responses that evidences and verifies their allegations that the Defendant failed to exercise

reasonable care to prevent loss, thereby negating their breach of contract claim and negligence claim. Their claims are speculation and conjecture without verification

53. Count Two of Plaintiffs' Amended Complaint alleges Conversion.

54. The June 25, 2003, Safe Deposit Box Lease Agreement specifically states:

"This lease SHALL NOT be construed to create any relation of bailor and bailee between the renter and the Bank; the Bank has NO KNOWLEDGE of and EXERCISES NO SUPERVISION OVER articles deposited in the Safe". (Emphasis added).

55. Plaintiffs have produced no evidence that Defendant Bank wrongfully exercised authority over Plaintiffs' property. The record is devoid of any facts that the Defendant assumed control of the contents of Plaintiffs' safe deposit box to the Plaintiffs' exclusion.

56. From the evidence before it, the Court concludes that the legal theory of conversion is not supported and that the Plaintiffs have failed to produce any material fact supporting a conversion.

57. Count Three of the Amended Complaint alleges the tort of outrage.

58. Based upon the evidence before it, the Court finds that Plaintiffs have not produced a material fact that evidences that Defendant Bank took any intentional or reckless action to specifically harm them, let alone an intentional or reckless action that was so extreme and outrageous that it exceeded the bounds of decency, that any action so taken by the Defendant was so taken with the specific intent to inflict emotional distress upon Plaintiffs, that Plaintiffs have actually suffered emotional distress, and that any emotional distress suffered allegedly by Plaintiff, as allegedly caused by Defendant Bank, was so severe that Plaintiffs, as reasonable persons, could not be expected to endure it.

59. Plaintiffs have produced no medical records of any type or other evidence to support their claim of tort of outrage.

60. Count Four of the Plaintiffs' Amended Complaint alleges that Plaintiffs' are entitled to punitive damages.

61. Plaintiffs have not produced a material fact that evidences that Defendant acted with gross fraud, malice, oppression or wanton, willful or reckless conduct or criminal indifference to civil obligations affecting the rights of Plaintiffs.

62. The Court finds that the Plaintiffs' testimony regarding their own eyewitness accounts of the incidents giving rise to the allegations stated in the Amended Complaint do not support Plaintiffs' allegation for an award of punitive damages.

63. To the extent that Plaintiffs seek recovery for a breach of contract, it is the finding of the Court that the law in West Virginia prohibits an award for punitive damages in breach of contract actions. (*Cotton v. Otis Elevator Co.*, 627 F. Supp. 519, (S.D.W.Va. 1986), citing *Horn v. Bowen*, 67 SE2d 737, (W.Va. 1951) and *Teller v. McCoy*, 253 SE2d 114 (W.Va. 1979)).
64. Count Five of the Plaintiffs' Amended Complaint alleges negligence.
65. The obligations of Defendant Bank are spelled out in the June 25, 2003, Safe Deposit Box Lease Agreement, signed by both Plaintiffs.
66. Plaintiff Dana Singleton testified that he read, understood and signed said June 25, 2003, Safe Deposit Box Lease Agreement. (Dana Singleton Tsp. pg. 15).
67. Plaintiff Nancy Singleton testified that she also signed the June 25, 2003, Safe Deposit Box Lease Agreement. (Nancy Singleton Tsp. pg. 12).
68. The uncontested testimony is that Defendant Bank performed its obligations under the contract. (Kimberly Brown Tsp. pg. 13).
69. The Court finds that Defendant Bank provided a safe and secure vault for the safe deposit box. It employed a qualified and experienced vault clerk that monitored vault access continually during hours of operation. Defendant Bank adhered to strict, internal admission protocols, including routine safe deposit box renter identity and signature checks. Defendant Bank conducts reference checks and credit report checks of its employees. (Martin Riley Tsp. pg. 7). Additionally, testimony indicates that Defendant Bank employs the use of security cameras in the Bank, including the vicinity of the vault door. (Kimberly Brown Tsp. pg. 20). There are no cameras in the vault for privacy reasons.
70. The Court finds that Defendant Bank did investigate the claim of Plaintiffs' regarding missing safe deposit box contents. (Kimberly Brown Tsp. 18-19).
71. Plaintiffs have not shown a material fact that evidences and supports their claim that Defendant Bank was negligent in the performance of its safe deposit box services.
72. Plaintiffs have not shown a material fact evidencing that Defendant Bank failed to use such care as a reasonable, prudent and careful person would use under similar circumstances.
73. Plaintiffs have not produced any material or credible evidence supporting their allegation that Defendant Bank was negligent in this action.

74. That none of the investigating agencies contacted by Plaintiffs issued any report of negligence or wrongdoing on the part of Defendant Bank in this action.
75. Plaintiffs' reference to the "opinion" of banking expert, John Moulton, is materially unresponsive. The "opinion" as produced at this hearing was unexecuted. Plaintiff filed the same "opinion", materially unchanged, on or about February 21, 2011, with an executed signature page and California All-Purpose Acknowledgement being attached thereto. The Court finds that the "opinion" as submitted by Plaintiffs not to comply with the filing requirements for an affidavit in opposition as mandated by Rule 56(e) of the *West Virginia Rules of Civil Procedure*. It does not appear to be based on the expert's personal knowledge nor set forth any relevant fact of evidence for the Court. The opinion vaguely references "Safe Deposit Procedures" from an unknown source, relies solely upon the Plaintiffs own self serving testimony and is conclusory in nature. There is no independent analysis referenced in the opinion. The Court finds the "opinion" of Plaintiffs' expert banking witness unsupportive of any material fact before the Court.
76. The Court recognizes that, "An expert witness's affidavit that is wholly conclusory and devoid of reasoning does not comply with Rule 56(e)". *Jividen v. Law*, 461 SE2d 451 (W.Va. 1995).
77. Count Six of Plaintiffs' Amended Complaint alleges breach of fiduciary duty.
78. Based upon the June 25, 2003, Safe Deposit Box Lease Agreement, no bailment was created, so no fiduciary duty was created.
79. Plaintiffs have not produced any material or relevant fact evidencing the existence of a fiduciary relationship existing between Plaintiffs and Defendant in this action, nor the breach thereof.
80. The Court finds that Plaintiffs have failed to show a material fact to substantiate any claim of theft regarding the alleged removal of the contents of Safe Deposit Box No. 3835 by Defendant Bank, and concludes as a matter of law that Defendant Bank is not liable for any alleged criminal act or intentional violation of law, if any, of Defendant's employee taken outside the scope of employment and without authorization.
81. The West Virginia Supreme Court holds that:
- "If the evidence favoring the nonmoving party is merely colorable, not significantly probative, irrelevant, or unnecessary, a genuine issue of material fact does not arise, and summary judgment is appropriate". *Jividen v. Law*, 461 SE2d 451, (W. Va. 1995).

82. Moreover, the West Virginia Supreme Court holds that:

“The evidence illustrating the factual controversy [necessary in order to support the denial of a motion for summary judgment] cannot be conjectural or problematic”. *Williams v. Precision Coil, Inc.*, (W. Va. 1995).

“Rule 56 requires a nonmoving party to produce specific facts that ... raise significant issues of credibility. The nonmoving party is required to make this showing because he is the only one entitled to the benefit of all reasonable or justified inferences when confronted with a motion for summary judgment. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.” *Id.*

83. The Court concludes as a matter of law that that Defendant Bank’s Motion for Summary Judgment is made and supported by Rule 56 of the West Virginia Rules of Civil Procedure.

84. The Court further concludes as a matter of law that Plaintiffs, as the adverse party to the Defendant’s Summary Judgment Motion, have rested upon mere allegation, supposition, conjecture and denials as set forth in their pleadings. Plaintiffs have not produced any material or credible fact, including any affidavit in support thereof, to evidence a genuine issue for trial.

85. The Court further concludes as a matter of law that Plaintiffs have not shown that there is a genuine issue as to any material fact and, therefore, Defendant Bank is entitled to an award of Summary Judgment as a matter of law.

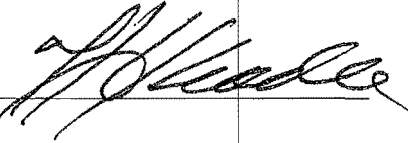
Based upon the above FINDINGS OF FACT and CONCLUSIONS OF LAW, it is accordingly ADJUDGED and ORDERED that:

1. Defendant, The Citizen’s Bank of Weston, Inc.’s., Motion for Summary Judgment be and it is hereby granted.
2. That this civil action be and it is hereby dismissed, with prejudice, and permanently removed from the Court’s active docket.

3. The Court directs the Clerk of forward certified copies of this Order to all counsel of record.

Enter: February 28, 2011

JUDGE



STATE OF WEST VIRGINIA, COUNTY OF LEWIS, TO-WIT:
I, JOHN B. HINZMAN, Clerk of the Circuit Court of Lewis
County, do hereby certify that the foregoing is a true copy of
an Order entered in the above styled action on the 28th day
of February, 20 11.
Given under my hand and official seal this the 1st day
of March, 20 11.

JOHN B. HINZMAN

Clerk of the Circuit Court of
Lewis County, West Virginia

