

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 16-0068

William G. Erps,
Defendant Below, Petitioner

V.)

Appeal from a Final Order of the
Circuit Court of Mercer County
(13-C-442-WS)

Leslie Meadows,
Plaintiff Below, Respondent

Petitioner's Brief

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ENCYCLOPEDIA:

1. Michie's Jurisprudence, 2012 Edition, Book 7(A) Estoppel,"Estoppel by Contract", fnt #3150, page 544 13

ASSIGNMENTS OF ERROR

“SUTPHIN” PROPERTY

1. The Circuit Court made a clearly erroneous finding of fact that William Erps did not produce a check at trial in the amount of \$25,000.00 representing his company’s payment of the balance owed for the Sutphin property at closing, when that check was introduced as evidence as Defendant’s exhibit #7 during the trial.

2. The Circuit Court made a clearly erroneous finding of fact that Leslie Meadows invested \$53,675.00 in the Sutphin property instead of \$32,300.00.

3. The Circuit Court abused its discretion in awarding a judgment against William Erps in the amount of \$18,675.00 for the Sutphin property when the Court did not find or conclude that he breached a contract.

4. The Circuit Court abused its discretion in awarding a judgment against William Erps in the amount of \$18,675.00 for the Sutphin property when Leslie Meadows admitted that she accepted \$35,000.00 for her interest in the property from Erps, while knowing what she had invested in the property.

LOAN FOR THE APARTMENTS

5. The Circuit Court erred by entering a judgment against William Erps for \$67,000.00 instead of \$30,000.00 regarding a loan for apartments: the Court made a clearly erroneous finding of fact against the clear weight and preponderance of the evidence that Leslie Meadows had loaned William Erps \$67,000.00, when she wrote on a document that she prepared that she only paid \$30,000.00.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On November 1, 2013, Plaintiff, Leslie Meadows filed her complaint, and the same was served on November 22, 2013. The Answer and Affirmative Defenses were filed December 12, 2013, and Defendant Erps filed and served discovery requests on January 14, 2014, depositions were taken in August and October, 2015, and a bench trial was conducted on October 27, 2015.

On November 2, 2015, the Clerk filed Plaintiff's Exhibits 1 through 22 and Defendant's Exhibits 1 through 7, and the same were filed and sealed in a manilla envelope, and placed on shelf 7 in the basement (App Vol I, p 20). The Defendant's Proposed Findings of Fact and Conclusions of Law were filed on December 1, 2015, and the Plaintiff also submitted Proposed Findings of Fact and conclusions of Law which apparently were not filed in the Clerk's Office according to the docket sheet.

On December 22, 2015, the Circuit Court entered a Judgment Order in favor of Meadows against Erps in the amount of \$88,375.00. On December 29, 2015, William Winfrey II, Counsel for Meadows, wrote a letter to the Circuit Court advising the Circuit Court that there was a "typographical" error in the Judgment Order, and consequently on December 29, 2015, the Circuit Court entered an Amended Judgment Order which lowered the amount of the judgment rendered against Erps due to the mistake made by the Court in his original Judgment Order.

II. FACTS

Meadows, and Erps, had known each other for several years before the Complaint was filed. Erps had worked at the Meadows property. (App Vol II, pp 22, 23). When Erps worked, Meadows would write a check after an invoice was presented. (App Vol II, pp 23)

Starting in 2008, and concluding in 2010, Meadows and Erps engaged in four primary business dealings which are more appropriately classified as: (1) improvements to her residence; (2) acquisition and improvement of the “Hatcher” property; (3) acquisition and improvement of the “Sutphin” property; and (4) an unsecured loan from Meadows to Erps for some apartments purchased by Erps. (App Vol I, p 38-57,73-75, 80, 81, 89-97,123, 124).

Although Meadows paid for several improvement and repairs to her residence at different times, the first significant business relationship involved the “Hatcher” property wherein Meadows initially invested \$120,000.00 to purchase the property, and later she invested additional funds for significant improvements thereto. (App Vol I, pp 38-44) Although Erps and Meadows intended to sell the “Hatcher” property for a profit, the market collapsed in the fall of 2008, and thereafter, significant additional improvements were made to the property which resulted in Meadows electing to keep the property as a rental property. (App Vol I, pp 80, 89-94; App Vol II, pp 81-85). Meadows has rented the property since the improvements were made. (App Vol I, pp 98-106; App Vol II, pp 106, 107)

Meadows and Erps, on April 22, 2009, entered into a written contract to purchase the “Sutphin” property. (App Vol I, pp 47-49) The agreement required Erps and Meadows to (1) initially make \$25,000.00 in repairs or improvements, and (2) pay an additional \$25,000.00 in cash at a closing to occur on or about April 22, 2010. (App Vol I, p 47). Erps acknowledged that Meadows actually invested \$32,300.00 in improvements to the “Sutphin” property. (App Vol I, p 54; App Vol III, p 19). Erps does state that he (through his company) paid the remaining \$25,000.00 in cash due for the April 2010 closing, and he produced that check which was admitted into evidence as Defendant’s Exhibit 7. (App Vol I, p 124; App Vol III, pp 19-21)

In August, 2010, Meadows voluntarily sold her interest in the “Suthpin” property to Erps for the sum of \$35,000.00. (App Vol I, pp 55-57, 125; App Vol II, pp 33, 34) With an investment of \$32,300.00, Meadows made a profit of \$2,700.00 for her investment of only one year. (App Vol III, p 19-21)

Meadows alleged in her complaint that she provided Erps financing in the form of checks in that amounts of \$67,000.00, \$90,000.00, \$6,000.00, \$10,000.00, and \$30,000.00 for financing of apartment buildings on Lovell Avenue and Guard Drive, Princeton, Mercer County, West Virginia. (App Vol I, p 23) There were no \$30,000.00 or \$10,000.00 checks. (App Vol I, p 7; App Vol II, pp 61-65) Meadows wrote on her handwritten summary that she had paid Erps \$30,000.00 for the apartments, but her complaint stated otherwise, claiming that she paid the greater sums of money referred to above. (App Vol I, pp 23, 24, 72; App Vol II, pp 41, 42) Erps agrees that Meadows loaned him \$30,000.00 for the apartments. (App Vol III, pp 27, 28)

The Court rejected that Meadows purchased an interest in the apartments given that her other business dealings with Erps were reduced to writing (“Hatcher” and “Sutphin” properties) but there was no written contract for the purchase of the apartments. The Court did however award a \$67,000.00 judgment to Meadows for a “loan” regarding the apartments. Meadows also alleged that she and Erps entered into a written agreement to purchase property in Lerona, Mercer County, West Virginia, and that Erps was to make certain improvements thereon; Meadows claimed that the improvements were not made as agreed. During the bench trial, Meadows withdrew her claims for the “Hatcher” property. (App Vol I, p 3; App Vol II pp 9, 10)

In her complaint, Meadows alleged that she had invested “approximately \$35,000.00” in the “Sutphin” property, and that she sustained a loss regarding the same. (App Vol I, p 23, 24) During her direct examination at trial, Meadows attempted to claim that she invested \$57,300.00,

in the “Sutphin” property. (App Vol I, p 72; App Vol II, pp 34, 35) She later admitted during her re-direct examination that she did not know whether she invested \$32,300.00 or \$57,300.00 in the property (App Vol II, p 117, 118). Erps introduced as Defendant’s Exhibit 7 a check which establishes that he, through his company, Improvements Unlimited, invested the \$25,000.00 in cash at closing, and that Meadows did not pay that additional \$25,000.00 for the “Sutphin” property. (App Vol I, p 124; App Vol III, pp 19-21)

Since Meadows last had dealings with Erps in August 2010, but filed her complaint on November 1, 2013, Erps asserted the statute of limitations as a defense to all claims except the contract claims. (App Vol I, pp 3, 26; App Vol II, pp 10, 11)

SUMMARY OF THE ARGUMENT

“SUTPHIN” PROPERTY

The Circuit Court ruled that Erps did not produce the \$25,000.00 check for his portion of the consideration paid for the “Sutphin” property when, in fact, Erps did produce that check and it was introduced into evidence as Defendant’s Exhibit 7. This occurred because the reporter mismarked Defendant’s Exhibit 15 as Defendant’s Exhibit 7, and the correct Defendant’s Exhibit 7 together with Defendant’s Exhibit 8 through 14 were not timely filed with the Court; the Court did not have the \$25,000.00 check when he made his ruling in December 2015.

Furthermore, the only viable claims which remained in the Meadows’s complaint were contract claims because all others were barred by the statute of limitations. The Court did not find or conclude that Erps breached any contract. In fact, the record does not support a breach of contract claim, or any claim for that matter, because Erps not only paid the \$25,000.00 at closing, but Meadows voluntarily sold her interest in the “Sutphin” property to Erps for \$35,000.00 knowing what her investment was in the property at the time of the sale.

LOAN FOR APARTMENTS

Meadows wrote on a summary of improvements that she had made to her residence that she had paid \$30,000.00 for apartments. Although the last check written by Meadows to Erps was for \$67,000.00 and had “APT” written in the memorandum, that check not only provided the \$30,000.00 in loan proceeds to Erps for the apartments, but also paid the invoice due and owing for the improvements made to Meadows’ residence in the amount of \$32,080.90. It is not possible, and the record does not support, that the \$67,000.00 check was paid exclusively for loan proceeds since, by necessity and by the testimony of the Plaintiff, that check also paid the \$32,080.90 for improvements to the residence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Erps respectfully submits that a Rule 19 oral argument is appropriate in this case, given that there are no issues of law or otherwise for which a Rule 20 oral argument would be appropriate. Erps believes that this case should be disposed of with a memorandum opinion.

STANDARD OF REVIEW

This Court reviews the findings of fact of the Circuit Court under the *clearly erroneous* standard and the application of facts to the law under the *abuse of discretion* standard. McConaha v. Rust, 219 W.Va. 112, 632 S.E.2d 52 (2006)

ARGUMENT

Meadows could only pursue a contract claim against Erps because any other possible claim was barred by the statute of limitations—the complaint was filed on November 1, 2013, and the last event between Meadows and Erps was on August 9, 2010, when Meadows conveyed her interest in the Sutphin property to Erps for \$35,000.00. (App Vol I, pp 22, 23, 55) The defense of the statute of limitations was referred to by the Court in the amended judgment order.

I. The Sutphin Property

The Circuit Court erred by making incorrect factual findings that are clearly contradicted by the record. The Court further erred by granting a judgment where no breach of contract, or other viable claim, was supported by the record or concluded by the Court.

(A) The Circuit Court made a clear factual error by finding that Erps did not produce a check for the payment of one half of the Sutphin property purchase price when Defendant's Exhibit 7 represents the \$25,000.00 cancelled check from Erp's company, Improvements Unlimited, LLC, used to pay the remaining purchase price.

The Circuit Court recited the following in finding number "10" on page 4 of the amended judgment order:

"10. Pursuant to the Sales Contract with Sutphin, on April 27, 2010, a Deed from Sutphin to Erps and Meadows was recorded for a consideration of \$50,000.00. At the closing, Erps provided a check for \$25,000.00 and stated that the funds for the payment came from his company.² Meadows claims the funds came from her in the form of cash (\$21,375.00 of which came from the aforementioned C.D.). The Court finds credible Meadows claim that this money was given to Erps to close the Sutphin house.

²However, no such check was produced by Erps." (emphasis added, App Vol I, p 4)

The Court made a clear mistake: the check was produced and admitted into evidence without objection as Defendant's exhibit #7. The contract between Sutphin, Meadows, and Erps provided an advance of \$25,000.00 for improvements in April, 2009, *but the balance of \$25,000.00 of the total consideration of \$50,000.00 was not to be paid until April 21, 2010.* Consider the trial testimony of Mr. Erps where he stated that his company provided the \$25,000.00 check in April, 2010 as follows:

"MR. VENERI: It's already pre-marked. I'm handing you Defense Exhibit 7.

MR. ERPS: Yes.

MR. VENERI: We'll see that on April 21, 2010, there's a check from Improvements Unlimited, LLC, to Robert Sutphin, for how much?

MR. ERPS: \$25,000.00

MR. VENERI: And, that was from your company's account?

MR. ERPS: That's correct.

MR. VENERI: And that was for the other \$25,000.00 for Sutphin. Right?

MR. ERPS: That's correct.

MR. VENERI: So, at closing, you paid that \$25,000.00.

MR. ERPS: I did.

MR. VENERI: And, Ms. Meadows did not.

MR. ERPS: She did not pay it.

MR. VENERI: So, if you paid the \$25,000.00, she did not sustain a loss on this property. Did she?

MR. ERPS: She did not.

MR. VENERI: She made \$2,700.00. Correct?

MR. ERPS: That's correct.

MR. VENERI: I move for the introduction of Exhibit 7, Your Honor, D-7.

THE COURT: Any objection?

MR. WINFREY: No, sir.

THE COURT: Alright. It will be admitted."

(APP Vol III, pp 19, 20)

The face of the check after processing from the bank is reproduced below:

Improvements Unlimited, LLC 1010 PO Box 37 Laroca, WV 25117 (304) 407-1200	NEW PEOPLE BANK, INC. Princeton, WV 00-000014	2200
PAY TO THE ORDER OF Robert Sulphin		4/21/2010
		\$ 25,000.00
Twenty-Five Thousand and 00/100		DOLLARS
Robert Sulphin Princeton, WV 24740		
⑈002200⑈ 1:051408897:10000 5842⑈		

2200 \$25,000.00 04/23/2010

(App Vol I, p 124)

The most likely explanation for the Circuit Court's mistake is that the court reporter: (1) failed to list all fifteen of the Defendant's exhibits on the exhibit listing sheet (App Vol I, p 37); (2) erroneously identified Defendant's exhibit #7 on the listing sheet as "Invoice 2412, Improvement's Unlimited, LLC" instead of the \$25,000.00 check which was actually marked and introduced as Defendant's exhibit 7 (App Vol I, p 37, 123, 124; App Vol III, pp 19, 20); and (3) did not file Defendant's exhibits 7 through 14 (to include the \$25,000.00 check). (App Vol I, p 20) The reporter's Defendant's exhibit list recited that Defendant's exhibit 7 was: "Invoice # 2412, Improvements Unlimited, LLC" *when it had actually been introduced as Defendant's exhibit 15.* (App Vol III, p 69-72). In fact, the court reporter placed a "7" on Defendant's exhibit 15 which mismarked the exhibit: a copy of the original Defendant's exhibit 15 was copied by the clerk for counsel for each party, *and it does not contain the "#7" on it like the one that was filed by the clerk and listed as exhibit 7.* (Compare App Vol I, p 123 with p 151)

The above explains why the Court stated in footnote 2 that the \$25,000.00 check was not produced. When the Court ruled, *there was no transcript of the trial testimony.* (App Vol I, pp 20, 21) If the court reporter and the clerk only reflected ***and filed*** seven Defendant's exhibits (*none of which included the \$25,000.00 check*), the Court made his ruling assuming the check was not produced. The docket sheet confirms the above state of the exhibits:

"Line 32 11/02/15 PLTF'S EXHIBIT #1-22 AND DEFT'S EXHIBITS #1-7;
ALL EXHIBITS FILED AND SEALED IN MANILLA ENVELOPE
AND PLACED ON SHELF #7 IN THE BASEMENT;"

(See APP VOL I, P 20)

Regardless of the reason, the Court made a finding that the \$25,000.00 check was not produced when, in fact, it was produced and admitted as evidence, and this was a critical error.

(B) There is no \$21,375.00 CD as recited in the Court's findings #8 and #10—there is only a \$21,475.73 cashier's check payable to Meadows dated April 22, 2009, which was one year before the April 29, 2010, closing for the Sutphin property.

The Court made findings that Meadows cashed a CD in the amount of \$21,375.00 and that sum was paid to Erps for the *remaining* one half of the purchase proceeds for the April 29, 2010 closing where the deed for the Sutphin property was delivered. The Court's findings are clearly erroneous given that (1) there was no \$21,375.00 CD or check introduced as evidence (App Vol I, p 46), and (2) even if the Court intended to rely on Plaintiff's exhibit 5 (the \$21,475.73 check dated April 22, 2009 that was payable to Meadows and not Erps), that check was issued on the same date that the Sutphin property purchase contract was signed (App Vol I, p 47) *which was one year before the closing where a \$25,000.00 check was tendered to Robert Sutphin for the closing and receipt of the Sutphin deed.* (App Vol I, p 50)

The Sutphin property contract required the following consideration to be paid for the purchase of the property:

“A down payment of \$25,000.00 is to be made, which consists of necessary repairs being made to the house located on the property to include electrical wiring, plumbing, painting, roofing, and new carpet, with the balance of \$25,000.00 to be paid in full by April 22, 2010. After all payments have been made in full, the GRANTOR will prepare a deed and deliver the deed to the GRANTEE free from all liens or encumbrances. Said deed shall be general warranty deed with a fee simple interest in the property.” (App Vol I, p 47)

The first \$25,000.00 of the consideration was in the form of repairs to the residence, and was not cash money paid to Robert Sutphin. Erps never disputed that Meadows paid for repairs to the property totaling \$32,300.00. (App Vol III, 19) *The \$21,475.73 check dated April 22, 2009, if truly cashed and delivered to Erps, could only be a portion of that \$32,300.00.* However, as the contract required, one year later on April 21, 2010, after the repairs were made, Erps tendered the \$25,000.00 check from his company, Improvements Unlimited, LLC, for the remaining one half of the \$50,000.00 consideration.

The Court failed to recognize the significance of the one year separation in time from the Meadows' \$21,475.73 check dated April 22, 2009 and the Erps check in the amount of \$25,000.00 dated April 21, 2010. This is confirmed by the Court not getting the amount of the check correct in findings #8 and #10, which demonstrates that perhaps the Court did not review the check when making his decision. The Circuit Court did have to amend its judgment order to correct a "typographical" error regarding the Sutphin property. (App Vol I, pp 9, 19)

(C) The evidence does not support a finding that Meadows invested \$53,675.00 in the Sutphin property, as found by the Court.

The Meadow's complaint only alleges that she invested approximately \$35,000.00 in the Sutphin property, and that complaint was never amended. *After extensive cross examination, even Meadows could not testify that she had invested any more than \$32,300.00 in the Sutphin property, given her testimony under redirect examination by her counsel at trial:*

"Q. Is it your testimony today - - how much money did you contribute to the Sutphin property in cash, repairs, whatever else? How much money did you contribute to the Sutphin property; was it \$32,300 or \$57,300?

A. **I don't recall.**" (App Vol II, p 117, **emphasis added**)

The above testimony came after Meadows confirmed during cross examination that she never produced any checks to support her claims that she invested more than \$32,300.00 in the property. (App Vol II, p 95)

(D) The Circuit Court did not determine that there was any breach of contract, and the evidence does not support a breach of contract.

A careful review of the Amended Judgment Order demonstrates that the Court did not make any factual finding or make any legal conclusion that Erps breached any contract. After making the incorrect factual findings referred to above, the Court stated in finding #14 that:

"The Court finds that she (Meadows) should have recovered from the sale of said property at least the amount of her investment, but has only recovered \$35,000.00, leaving a balance owed to Meadows in the amount of \$18,675.00." (App Vol I, p 5)

The Court went on to say in footnote 3 that it was hard for him to determine the exact “profit,” and that was the basis for limiting Meadows’ recovery to what the Court thought was her investment. (App Vol I, p 5)

As a matter of law, there is no contract that guaranteed Meadows or Erps a “profit” or recovery of her or his investment. A careful reading of the written contract between Sutphin, Meadows, and Erps establishes that the property would be sold for a consideration of \$50,000.00, with \$25,000.00 in improvements, and another \$25,000.00 in cash at the closing one year later on April 21, 2010. (App Vol I, p 47) There is nothing in that contract that states how much of the \$50,000.00 consideration Meadows would contribute and be reimbursed, or how much Erps would contribute and be reimbursed. There is nothing in that contract to establish that Meadows would recover any particular sum of money if the property were sold.

Finally, how could the Court be inclined to ensure that Meadows recovered her investment without also ensuring that Erps recovered his investment? In the absence of a contract to the contrary, what would be fair and proper for Meadows should also be fair and proper for Erps—either both recover their investment or both lose a recovery of some of their investment. However, the Court, by its own admission in footnote 3, did not determine if there was a profit or loss in the transactions, and therefore, the Court did not determine whether Erps also recovered his investment or lost money.

(E) The voluntary act of Meadows to sell her interest in the Sutphin property to Erps for \$35,000.00 operates as an estoppel or waiver of her claims against Erps as to that property.

After completion of the Sutphin to Meadows/Erps contract terms and delivery of the deed signed April 29, 2010, *Meadows voluntarily agreed to sell her interest in the Sutphin property to Erps for \$35,000.00*. This agreement was consummated on August 9, 2010, when the deed from

Meadows to Erps was signed by Meadows and delivered at a closing. (App Vol I, p 55) Consider the Meadows testimony regarding this subject at trial as follows:

“Q. This was - - that deed was in April. In August, there’s a deed from you to Mr. and Mrs. Erps conveying your interest in the property for \$35,000. Tell the judge how that deed came about, please.

A. When he bought the property?

Q. Yes, ma’am. Tell me how and why you sold the property, your interest in the property to them for \$35,000.

A. Well, he said that’s what it would amount to, that’s what he would pay me, **so I accepted it.**

Q. At that time did you know how much money you had in the property?

A. Yes, I did, but I figured this was all I was going to get.”

(App Vol II, pp 33, 34, **emphasis added.**)

While it is difficult to find precise fact patterns in reported cases, this Court has held that a widow who had conveyed her interest in property was “estopped by her solemn deed from asserting her claim” to a dower interest in the property when a subsequent conveyance of the same property was vacated; she had voluntarily relinquished her claims and rights to the property by her own conveyance. Fleming v. Pople, 78 W.Va. 176, 88 S.E. 1058 (1916)

Meadows had the right to decline the \$35,000.00 offer; she could have demanded a greater price from either Erps or some other purchaser. She cannot, *by her own action to sell her interest for \$35,000.00 to Erps*, create a breach of contract by Erps. In addition to *estoppel*, she has *waived* her right to assert such a claim by her own conduct to sell the property to Erps:

“Where, with full knowledge of his rights, the conduct of a party to a contract is wholly inconsistent with reliance on the contract, he will be deemed to have waived his rights thereunder.” See Syllabus point #1 of Beall v. Morgantown & Kingwood R. Co., 118 W.Va. 289, 190 S.E. 333 (1937), cited in Michie’s Jurisprudence, 2012 Edition, Book 7(A) Estoppel, “Estoppel by Contract”, ftnt #3150, page 544.

The \$18,375.00 portion of the judgment of the Court, together with the prejudgment and post-judgment interest thereon, should be reversed and vacated.

II. THE LOAN FOR THE APARTMENTS

Erps does not dispute that he owes Meadows \$30,000.00 for a loan regarding the apartments, however, he does dispute that he owes \$67,000.00 as the Court stated in finding #34. (App Vol I, p 8, 9) Although Erps wrote "APT" on the \$67,000.00 check, that check was for at least two separate projects: Meadows' residence and the loan for the apartments. The clear weight of the evidence is against a loan for \$67,000.00, but fully supports a loan for \$30,000.00.

(A.) After the \$67,000.00 check was written, Meadows wrote that she paid \$30,000.00 regarding the apartments, not \$67,000.00.

Meadows wrote, in her own handwriting, a written summary of the improvements made to her home on a document with a heading "House." (App Vol I, p 75; App Vol II, pp 71-73) In the upper left corner of the "House" summary, she wrote that she paid \$32,080.00. (App Vol I, p 75) In the upper right hand corner, Meadows wrote "\$30,000.00 pd-Appt.s". (App Vol I, p 75) The upper portion of the document was cut and pasted below for ease of reference:



[THE REMAINDER OF THE DOCUMENT CAN BE SEEN AT APP VOL I, P 75]

Meadows conceded that she wrote the "House" summary both (1) *after* the improvements and repairs were made to her home and (2) *after* the June 24, 2009, invoice for those improvements was tendered to her. (App Vol II, pp 72, 73). Such is corroborated by the fact that she wrote that she paid "\$32,080.00" in the upper left corner *which is essentially the same amount of the last invoice for the work performed on her home, the June 29, 2009 invoice from Improvements Unlimited in the amount of \$32,080.90.* (App Vol I, p 74)

(B.) The proven facts support a \$30,000.00 loan, not a \$67,000.00 loan.

The only amounts paid by Meadows to Erps after the “House” improvements and repairs were made was the July 29, 2009, check for \$67,000.00 payable to Erps. (App Vol II, p 76) The invoice for the “House” improvements and repairs was not even due to be paid until July 14, 2009, and the check was dated just fifteen (15) days later. (See “Due Date” on the June 29, 2009, Invoice, App Vol I, p 74)

Since Meadows owed Erps \$32,080.90 for the improvements and repairs to her home per the June 29, 2009, invoice, and the only check that she wrote after that invoice was the \$67,000.00 check, the \$32,080.00 “House” improvements that she wrote on her summary had to be paid with that \$67,000.00 check—no other payment was made from Meadows to Erps which would satisfy the amount due on the June 29, 2009 invoice.

Since Meadows paid the \$32,080.00 invoice for her “House” improvements with the \$67,000.00 check, *that proven fact fully supports her handwritten notation in the upper right corner of her summary that she paid \$30,000.00 for the loan for the apartments.* Both the “House” improvements and the \$30,000.00, which Erps concedes, were paid with the same check for \$67,000.00.

(C.) The judgment for \$67,000.00 for the loan is against the weight and preponderance of the evidence and should be reversed and reduced to \$30,000.00.

The Circuit Court did not render a finding that addressed the Meadows’ notation on her handwritten summary that she had paid \$30,000.00 regarding the apartments. The Circuit Court never addressed the fact that the only check written by Meadows to Erps after she improved her residence (for the cost of \$32,080.90) was the \$67,000.00 check, and therefore that check had to pay for those improvements as well as provide the proceeds for the “loan.”

This Court has held that when a Circuit Court's judgment (sitting as the trier of facts) is against the preponderance of the evidence, the judgment will be reversed:

“When the finding of a trial court in a case tried by it in lieu of a jury is against the preponderance of the evidence, is not supported by the evidence, or is plainly wrong, such finding will be reversed and set aside by this Court upon appellate review.’ Point 4, Syllabus, *Smith v. Godby*, 154 W. Va. 190, 174 S. E.2d 165 (1970).” Syllabus Point 5, *In re Boso*, 160 W. Va. 38, 231 S. E.2d 715 (1977). See the *Syllabus of the Court* in *Ash v. Ravens Metal Products, Inc.* 190 W. Va. 90, 437 S.E.2d 254 (1993).

Ms. Meadows wrote on her summary that she paid \$30,000.00 in connection with the apartments. The summary was written after she also paid for the improvements to her residence totaling \$32,080.90 with the \$67,000.00 check on July 29, 2009. *The clear weight and preponderance of the evidence fully supports that the loan for the apartments was only \$30,000.00.* The judgment should be reversed and reduced to \$30,000.00.

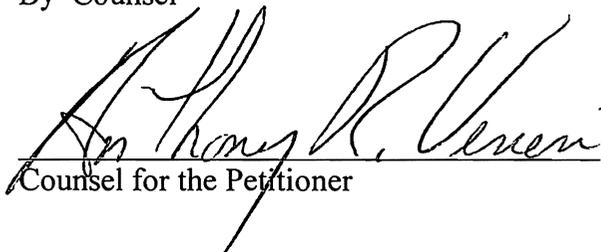
CONCLUSION

William Erps, the Petitioner herein, and defendant below, requests this Court to reverse the judgment of the Circuit Court to grant Respondent Leslie Meadows an award of \$18,675.00 for the “Sutphin” property, and vacate the same.

William Erps further requests this Court to reverse the judgment of the Circuit Court granting an award for a loan regarding the apartments in the amount of \$67,000.00, and reduce the same to a judgment of \$30,000.00, together with appropriate interest.

WILLIAM G. ERPS

By Counsel


Anthony R. Uveni
Counsel for the Petitioner

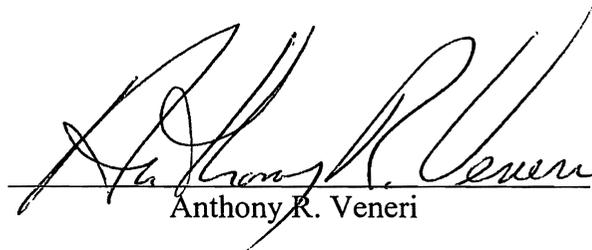
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CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, counsel for the Defendant, do hereby certify that I have this day served a true copy of the foregoing Brief upon William S. Winfrey, II, counsel for the Plaintiff, and Daisey Reporting Services, by HAND DELIVERY as follows:

William S. Winfrey, II, Esq.
1608 West Main Street
PO Box 1159
Princeton, West Virginia 24740

Dated this 2nd day of May, 2016.


Anthony R. Veneri