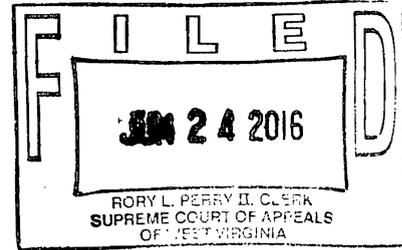


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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

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**Petitioner's Reply Brief**

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# REPLY

Erps received Meadows' "Respondent's Reply Brief and Cross-Assignment of Error" on or about June 9, 2016 by hand delivery. The format of the Meadows' brief seems to mix Erps' assignments of error with what Meadows has attempted to classify as cross-assignments of error. Erps will therefore first address what is perceived to be the Meadows argument opposing the Erps' argument, and will then separately respond to what Erps perceives the cross-assignment of error to be.

## I. THE ERPS' ASSIGNMENTS OF ERROR

The Erps' assignments of error are categorized into (1) the "Sutphin" property and (2) the loan for the apartments.

### A. "Sutphin" Property – the Erps' \$25,000.00 check was not accounted for.

Meadows has not addressed that the Circuit Court made a clear mistake and an erroneous factual finding by stating that Erps failed to produce a check demonstrating that his company wrote a \$25,000.00 check in April of 2010 to close the "Sutphin" property transaction. In finding number 10, the Court determined that Erps and his company had contributed nothing (and therefore, Meadows contributed \$25,000.00 for the closing) *because Erps produced no \$25,000.00 from his company*. This was erroneous and the record supports a determination of such error.

The Court was not given the correct Defendant's exhibit 7 (the \$25,000.00 check) by the clerk or court reporter when the Court made its initial determination in deciding the case. The court reporter did not file the correct Defendant's exhibits 7 through 15 at the conclusion of the trial, *and the reporter even changed the exhibit number from what had been marked and introduced as Defendant's exhibit 15 to incorrectly classify as Defendant's exhibit 7*. This was

extremely significant because the \$25,000.00 check from Erps' company was the correct Defendant's exhibit 7.

The record before this Court substantiates the above because the correct Defendant's exhibits 7 through 14 were not even *timestamped* into the clerk's file on November 2, 2015, like Defendant's exhibits 1 through 6 (which were correctly timestamped for November 2, 2015). (Compare App Vol I, 89 through 123 with App Vol I, 124 through 151). To further confirm the above, this Court only needs to look at the reporter's list of the Defendant's exhibits, and the Court will see that the Erps' \$25,000.00 check (the correct Defendant's exhibit 7), together with the other remaining exhibits (the correct Defendant's exhibits 8 through 15), are not even listed on the reporter's exhibit list. (App Vol I, 37). The correct Defendant's exhibits 7-15 are fully supported by the trial transcript. (App Vol III)

**B. "Sutphin" Property – Meadows never proved investing more than \$32,300.00.**

The Circuit Court, after failing to acknowledge and account for the Erps' \$25,000.00 check, determined that Meadows had invested \$53,675.00 in the "Sutphin" property. (App Vol I, p 14). The Circuit Court failed to consider the testimony of Meadows where she clearly stated that she could not recall how much money she contributed to the "Sutphin" property. Consider her testimony under redirect examination by her own counsel:

"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**)

Meadows was asked to produce **all** checks in discovery to substantiate the allegations in her complaint, including but not limited to the investment in the "Sutphin" property. (App Vol I, 108-122) She could not identify which check or checks that she used to pay for the \$32,300.00 in improvements to the property. (App Vol II, p 94) She had the burden of proof, not Erps.

When questioned regarding the additional \$25,000.00 she claimed she paid for the closing of the “Sutphin” property, she admitted that she had not produced the checks to substantiate that claim and without the proof with the checks, she made a profit when she sold the property to Erps:

“Q. Okay. Now, in the letter that Ms. Alvis has sent, she says that you reference the fact that you paid the \$25,000 which was the last consideration for the Sutphin property.

Now, let’s kind of put this in perspective, so we don’t get too confused. The contract for the Sutphin house said that \$50,000 would be paid. Right?

A. Yes.

Q. Twenty-five of it would be for improvements, and then on the date of the closing, 25,000 in cash to pay the Sutphins. Right?

A. I paid him 25.

Q. Well, ma’am, where is that check?

A. I paid him 20, and I later him 5 later.

Q. **Ma’am, I don’t have any checks for - -**

A. **You don’t have the checks - -**

Q. **- - 20,000 or 5,000. Would you agree?**

A. **No. These are checks I couldn’t - -**

Q. **Yeah. There’s no checks for 20,000 or 5,000. Right?**

A. **(No response.)**

Q. **Is that true? Is that true?**

A. **True.**

Q. **Ma’am, I did didn’t hear you.**

A. **True.**

Q. True? Okay.

So with that, if you only spent 32,300 in improvements, and sold it to Mr. and Mrs. Erps for 35,000, you actually made a profit on that sale. Correct?

A. Yes.” (App Vol II, pp 95-96, **emphasis added**)

To further underscore the above, *Meadows did not even allege in her complaint that she invested more than \$35,000.00 in the "Sutphin" property- see paragraph 13 of her complaint:*

"13. The Plaintiff has had to take a loss on the Sutphin house because of providing financing to the Defendant of approximately \$35,000.00 and not being repaid." (App Vol I, 24)

In discovery, Erps had requested all checks to substantiate Meadows' claims in her complaint, but no checks for the additional \$25,000.00 were produced. Her bank could produce any checks that had been written on her account in 2009 or 2010, and she was able to produce the checks relating to other claims, including those in 2008. If a check existed to substantiate her claim, she could have produced them as required in discovery. Until produced and introduced into evidence, they do not exist in this case, and she has not proven that claim.

The Circuit Court's reliance on a \$21,375.00 C.D. that was cashed in April 2009 when the property was first purchased does not prove the contribution of \$25,000.00 one year later in April 2010 when Erps directed his company to write the \$25,000.00 check for the remaining consideration at the closing as required by the contract. In fact, Meadows claimed that she had invested an additional \$25,000.00, but the Circuit Court added a \$21,375.00 C.D. (with no supporting checks to Erps) to the \$32,300.00 in improvements. *The Circuit Court has, without the supporting checks, even contradicted Meadows' claim for \$57,300.00.*

If Meadows used her \$21,475.00 C.D. for the "Sutphin" property, *it was part of the \$32,300.00 in improvements that she did get credit for.* A certificate of deposit cashed in April 2009 was not the consideration for the Erps' \$25,000.00 check from his company in April 2010.

**C. "Sutphin" Property – Meadows waived her claims by selling to Erps.**

Meadows does not even address the legal argument that after knowing what her investment was in the "Sutphin" property, she voluntarily sold her interest to Erps. If she was dissatisfied with the return on her investment, she could have declined to sell to Erps for the

price of \$35,000.00. She cannot create her damages by her own conduct, and therefore, she has waived such a claim and should be estopped from asserting the same. Beall v. Morgantown & Kingwood R. Co., 118 W.Va. 289, 190 S.E. 333 (1937); Fleming v. Pople, 78 W.Va. 176, 88 S.E. 1058 (1916).

**D. The best evidence—the loan for the apartments was for \$30,000.00.**

Meadows does not explain that *after* she wrote the \$67,000.00 check (the last dated check she produced at any time in the case), she wrote on the summary of repairs to her home the notation: “\$30,000.00 Pd. Appt.s” (App Vol I, p. 75) She ignores that the \$67,000.00 check had to also pay an invoice for improvements to her residence in the amount of \$32,080.00; this left slightly more than \$30,000.00 *which funded the \$30,000.00 loan that she wrote on her summary.*

During her testimony, Meadows confirmed that the best evidence to establish her case was what she had written down:

“Q. Ma’am, isn’t it true that the things that you have written down are really the best evidence you have of what happened and what your memory is?

A. Yes sir.

Q. So if you wrote it down, we can kind of bank on it, can’t we?

A. Yes sir.

\* \* \* \* \*

Q. So the best thing we have is what you wrote at the time you wrote it. Right?

A. Yes, sir.” (App Vol II, pp 54, 55)

\* \* \* \* \*

“Q. Now, that’s why we’ve got to rely on what you’ve written. Isn’t that true?

A. Yes.

Q. We’ve got to rely on what you wrote in the past. Right?

A. Yes.” (App Vol II, p 77)

The Circuit Court did not address the \$30,000.00 written notation, and such was clear error. Meadows' handwriting confirms that the loan was only for \$30,000.00 and that amount is mathematically supported by the record.

**E. The math confirms that the apartment loan was for \$30,000.00.**

The math is the best indicator that the loan was only for \$30,000.00. The evidence yields that Meadows spent at least \$75,000.00 for improvements to her residence: the August 11, 2008, \$25,000.00 check was by her admission for the residence (App Vol II, pp 67, 68); the January 30, 2009, \$6,000.00 check was for the residence (App Vol II, p 68); and the invoice of June 24, 2009 for \$32,080.00 was paid with the only check written after that invoice was submitted—the \$67,000.00 check written on July 29, 2009. (App Vol I, pp 74, 81) Defendant's exhibit 15 established that an additional \$12,090.00 was spent on the residence which made the total \$75,170.00. (App Vol II, p 151)

In her brief, Meadows admits that she spent more than \$75,000.00 on her residence:

“Based on these three exhibits and Erps' testimony, Meadows paid Erps or his company at least \$75,000.00 for home remodeling.” (Meadows' brief @ page 8)

“Meadows paid Erps and Erps company all sums due it for home remodeling. She paid over \$75,000.00” (Meadows' brief @ page 11)

Consequently, it is very significant that Meadows invested *more* in the “Hatcher” property (also described as “Lerona”) than the \$75,000.00 in improvements to her residence:

“Q. Now, ma'am, would you say that the improvements made to the Lerona property was more than the improvements that were made to your residence by Mr. Erps?

A. Oh, yes.

Q. A lot more?

A. A lot more.” (App Vol II, p 88)

As the Circuit Court established in the order, Meadows voluntarily withdrew her claims for the “Hatcher” property. (App Vol I, p 3) She continues to own the property and rents it.

If Meadows’ testimony above is taken as true, she had invested at least the following in all properties excluding the loan for the apartments:

Meadows’ personal residence	\$ 75,000.00 (at least)
“Hatcher” property purchase	\$120,000.00
“Hatcher”—improvements	\$ 75,000.00 (at least)
“Sutphin”—improvements	\$ 32,300.00
Total excluding apartment loan	\$302,300.00

In discovery, Erps requested all checks written to him for all claims in Meadows’ complaint: request for production of documents (App Vol I, p 108) and notice of deposition with a request for production of documents (App Vol I, p 32) Meadows produced the following checks prior to trial:

“Hatcher” purchase check 5-9-08	\$120,000.00 (App Vol I, p 39)
August 11, 2008 check	\$ 25,000.00 (App Vol I, p 45)
January 30, 2009 check	\$ 6,000.00 (App Vol I, p 73)
June 15, 2009 check	\$ 90,000.00 (App Vol I, p 80, 95)
July 29, 2007(9) check	\$ 67,000.00 (App Vol I, p 81)
Total Checks Produced	\$308,000.00

At trial, Meadows claimed that a C.D. in the amount of \$21,475.00 “...probably would be one I gave Bill.” (App Vol II, p 30, 31) While there is no check to Erps to support that contention, assuming that the testimony is true, for the sake of argument, yields the following:

Total of all produced checks	\$308,000.00
C.D.	\$ 21,475.00
Total of all sums allegedly given to Erps	\$329,475.00
Total amount invested in properties <u>excluding</u> the loan	\$302,300.00
<b>Left for the “loan” for the apartments</b>	<b>\$ 27,178.00</b>

Meadows’ handwritten notation on her summary that she prepared *after the last check or payment of any kind to Erps* is significant because it is her statement that the amount of the apartment loan was for \$30,000.00. She did not make that number up, and she had no reason or motive to make that number up.

## II. CROSS ASSIGNMENT OF ERROR

Meadows seems to assign as a cross assignment of error that (1) regarding the “Sutphin” property, the Circuit Court should have considered a legal theory of joint venture and (2) regarding the loan for the apartments, the Circuit Court should have added the \$90,000.00 check to the \$67,000.00 check for a loan of \$157,000.00. Each will be addressed separately.

### A. “Sutphin” Property-“Joint Venture” was never presented to the Court.

Meadows argues that the Circuit Court should have considered a legal theory of “joint venture”, but, Meadows did not ask the Circuit Court to consider the theory of joint venture. The complaint does not allege a joint venture, but alleges in paragraph 13 that Meadows provided “financing to the Defendant of approximately \$35,000.00 and not being repaid.”

Frankly, there was no need to allege a joint venture because there was a written contract which provided the consideration that was to be paid by Meadows and Erps. Meadows voluntarily invested \$32,080.00 in the property, *and voluntarily sold her interest in the property to Erps for the sum of \$35,000.00 being fully aware of what she had invested.* Meadows did

generate a profit on the property, and while Erps had invested at least \$25,000.00 in the property, the record is void as to what the actual profit was on the sale of the property from Erps to Shorter *because Erps and Shorter incorporated a loss from a separate piece of property into the transaction for the “Sutphin” property.* (App Vol III, pp 22-26)

**B. Loan for the Apartments-the \$90,000.00 check can’t be for the loan.**

Meadows next argues that the Circuit Court erred by not including the proceeds from a \$90,000.00 check with the \$67,000.00 check to rule that the loan for the apartments was \$157,000.00, instead of \$67,000.00. This argument ignores multiple glaring facts supported by the record, most of which were determined by the Circuit Court.

**1. Meadows fabricated evidence regarding the \$90,000.00 check.**

It is undisputed that Meadows added “Apt property” in the memo of the \$90,000.00 check **after** the check had cleared the bank, but **before** she gave the check to her attorney to produce in discovery as one of the checks paid for the properties at issue in the complaint.

In written discovery, Meadows produced a check in the amount of \$90,000.00 which had in the memo “Apt property” and on the paper where it was copied, she had written beside of the check “Pd for apt’s Lovell and Gard Dr.” (App Vol I, p. 110)

Erps, by counsel, issued a subpoena duces tecum to Meadows’ bank to receive a duplicate of the check, as it was processed through the bank after the delivery to Erps. There was nothing written in the memo; in fact, Meadows introduced this “clean” version of the \$90,000.00 check as her Plaintiff’s exhibit 17 *instead of the altered one given in discovery.* (App Vol I, p 80)

During her trial testimony, Meadows was confronted with her deposition testimony which was read and presented to the Circuit Court during the trial:

“Q. Now, on the \$90,000.00 check written to Mr. Erps, you had told me before the only handwriting on there that’s yours is the signature. Is that true?

A. Yes, sir.

Q. Did you put any of the other handwriting that’s on there, other than the signature, on that check?

A. I don’t – unless I put what it was for there.

Q. Well, let’s look at that memo down there. Is that your handwriting or somebody else’s?

A. It’s my handwriting, it looks like, yes.

Q. Okay. So as we look at that check, that June 15, ’09 check to Mr. Erps for \$90,000.00, the signature is your handwriting and in the memo it’s got something that’s your handwriting. Correct?

A. Yes, sir.

Q. **And what did you write in that memo?**

A. **It looks like “apartment property.”**

Q. **Okay. And did you write that when you signed the check?**

A. **Yes.**

Q. **Okay. So when this check was tendered to Mr. Erps, the \$90,000.00, you had signed it and you wrote “Apt property” on the check to memorialize that that was for the apartment property?**

A. **Yes.**

Q. **Is that true?**

A. **Yes.**

Q. **So when Mr. Erps received that check, it had in the memo “apartment property” that you had written. Right?**

A. **Yes, sir.**

Q. **Are you sure of that?**

A. **Yes.” (App Vol II, pp 102-104, emphasis added).**

The above testimony was false, because Meadows, while being impeached, testified at trial that the check did not have anything written in the memo when it was tendered to Erps—she tried, at trial, to explain that she wrote the notation “apt property” after the check was processed through the bank so that she would know what is was written for. (App Vol II, p 98) Meadows changed the \$90,000.00 check after it was returned from the bank, but before it was tendered in her answers to discovery through her counsel—her lawyer, Mr. Winfrey, did not know of that change when the check was tendered in discovery because if he had, he would have advised the undersigned counsel of that change.

The Circuit Court was clearly justified in finding that Meadows fabricated information on the check prior to discovery to promote that the \$90,000.00 check was related to the apartment loan, when it was clearly established that no such information was on the check when it was delivered to Erps and processed through the bank.

**2. The \$90,000.00 check was for improvements to Hatcher, Sutphin, and residence.**

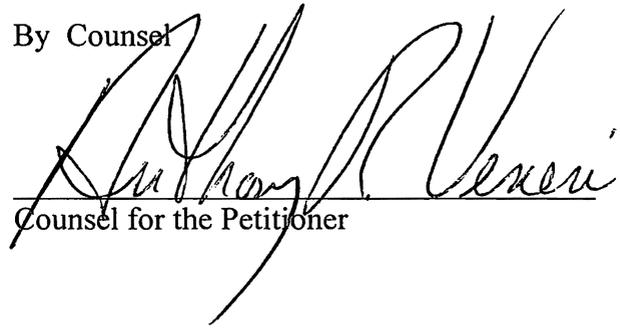
As established above, the record fully supports that the \$90,000.00 check was consumed by either (1) the \$75,000.00 in improvements to Meadows residence, (2) the \$75,000.00 in improvements to the “Hatcher” (Lerona) property, or (3) the \$32,300.00 in improvements to the “Sutphin” property. (See pages 6-8 of this brief above for the mathematical analysis.) Even Meadows acknowledged that the above sums were incurred for improvements to the three properties at issue, and there is no mathematical basis in the record to believe that the check was part of a loan for the apartments.

## **REQUEST**

Erps requests this Court to reverse the judgment of the Circuit Court and enter judgment against Erps in the amount of \$30,000.00.

**WILLIAM G. ERPS**

By Counsel

A handwritten signature in black ink, appearing to read "Anthony R. Veneri". The signature is written in a cursive style with a large initial "A".

Counsel for the Petitioner

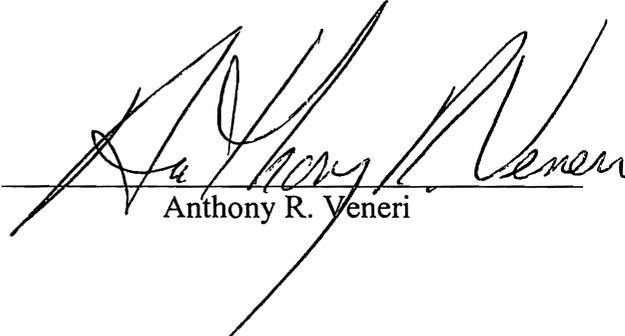
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**CERTIFICATE OF SERVICE**

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, by HAND DELIVERY as follows:

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

Dated this 23<sup>rd</sup> day of June, 2016.

  
\_\_\_\_\_  
Anthony R. Veneri