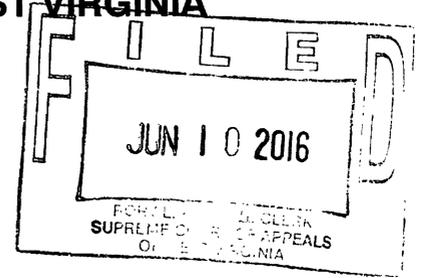


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket Number 16-0068



William G. Erps, Defendant Below
Petitioner

v.

Leslie Meadows, Plaintiff Below
Respondent

On appeal from a Final Order of the Circuit Court of Mercer County,
West Virginia, Civil Action Number 13-C-442-WS

**RESPONDENT'S REPLY BRIEF AND
CROSS-ASSIGNMENT OF ERROR**

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TABLE OF CONTENTS

	<u>Page</u>
1. Table of Authorities	3
2. Assignments of Error and Cross-Assignments of Error	4
3. Statement of the Case	4
4. Summary of the Argument	9
5. Statement Regarding Oral Argument and Decision	10
6. Standard of Review	10
7. Argument	11
8. Conclusion	14
9. Certificate of Service	16

TABLE OF AUTHORITIES

	<u>Page</u>
1. <u>West Virginia Code</u> §47B-4-4 (Westlaw 2016)	13-14
2. <u>West Virginia Code</u> § 36-1-3 (Westlaw 2016)	11
3. <u>McConaha v. Rust</u> , 219 W.Va. 112, 632 S.E.2d 52 (2006).	10, 12
4. <u>Mathena v. Haines</u> , 219 W. Va. 417, 633 S.E.2d 771 (2006).	10
5. <u>Armor v. Lantz</u> , 207 W. Va. 672, 535 S.E.2d 737 (2000).	12-13
6. <u>San Francisco v. Wendy's International, Inc.</u> , 221 W. Va. 734, 656 S.E.2d 485 (2007).	12

ASSIGNMENTS OF ERROR AND CROSS-ASSIGNMENTS OF ERROR

“SUTPHIN” PROPERTY

1. The Circuit Court committed no error in finding a judgment in favor of the Plaintiff. The evidence supported a verdict. The Court erred only in finding that the parties were not engaged in a joint venture; therefore, the amount of the judgment was inadequate and for the Sutphin Property should have been \$26,150.00.

LOAN FOR THE APARTMENTS

2. The Circuit Court erred by entering a judgment against William Erps for \$67,000.00 instead of \$157,000.00 by disregarding Meadows' payment to Erps of \$90,000.00 made at the time he began work on the apartments. Erps admitted that Meadows loaned him money for the apartments. The only issue is the amount of the loan or loans.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

The Petitioner's procedural history is sufficient and, therefore, adopted.

On November 1, 2013, Plaintiff, Leslie Meadows filed her Complaint (App 1, p. 4), and the same was served on November 22, 2013. The Answer and Affirmative Defenses were filed on December 12, 2013. (App. I, p. 26) 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 S. 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. (App I, p. 1)

FACTS

Meadows and Erps have known each other since before the death of Meadows' husband in 2006. Erps provided construction services through his company, Improvements Unlimited, LLC, to Meadows and her deceased husband. In 2006, Mr. Meadows died. Erps continued to do construction work for the Plaintiff after Meadows' death without incident. (App. II, pp, 22-23)

Beginning in 2008, Erps and Meadows were involved in four (4) different transactions which are described as the Hatcher (Lerona) house, the Sutphin (Old Oakvale

Road) house, the Meadows residence, and the Twiford apartments on Lovell Avenue and Guard Drive in or near Princeton, West Virginia.

On May 12, 2008, Erps approached Meadows about buying the Hatcher property in Lerona with an Agreement prepared by him. (App II, p. 24) He knew that she had investments that were not earning her any meaningful return. The Agreement he prepared stated that she would provide \$120,000.00 for the purchase and would receive within a year a profit of \$15,000.00 to \$20,000.00. The sales price of the house was \$110,000.00, and Erps needed \$10,000.00 to clean up the property. The Agreement stated that Erps would have responsibility for repairs. (App. I, p. 38) The parties had been discussing this transaction for a few days. On May 9, 2008, Meadows cashed a CD and gave Erps \$120,000.00 for the purchase as outlined in the May 12, 2008, Agreement. (App I, p. 39) The property was deeded to Meadows. Erps promised Meadows a profit of \$15,000.00 to \$20,000.00 but expected a sale of the house for \$225,000.00. (App. II, pp. 16-17) Accordingly, his intention was to use her money for a profit of upward to \$80,000.00. This transaction models the other transactions involving investment property below.

The Sutphin property was the next investment property. Erps approached Meadows about buying this house, again for an investment for resale. On April 22, 2009, Meadows cashed a CD for \$21,375.00 (App. I, p. 46), signed a Contract to purchase the property for \$50,000.00 (App. I, p. 47), and gave Erps \$25,000.00 for the one-half down payment. Meadows continued to pay for repairs to the Sutphin house by paying Erps a total of \$32,300.00 for the repairs to the property, as itemized in his March 15, 2011, statement to her. (App. I, p. 54, App. III, p. 19) 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. (App. I, p, 50) At the closing, Erps provided a check for \$25,000.00 (App. III, p. 10), which the Circuit Court so found (App. I, p. 15), and stated that the funds for the payment came from his company. He did not identify the source of the money from his company. The Contract called for a payment to Sutphin of \$25,000.00 and repairs of \$25,000.00.

On August 10, 2010, a Deed was prepared from Meadows to Erps and his wife for Meadows' undivided interest in the Sutphin Property for \$35,000.00. (App. I, p. 55) Erps had prearranged financing on the Sutphin property with First Community Bank. On August 13, 2010, First Community Bank loaned to Erps \$90,000.00 as evidenced by a Trust Deed on the Sutphin property for \$90,000.00. (App. 1, p. 58) Erps received \$90,000.00 proceeds, paying to Meadows \$35,000.00 of those proceeds. The Meadows to Erps Deed was recorded the same day as part of the overall transaction. On the same day, August 13, 2010, Erps sold to Shorter by a Sales Contract the Sutphin property for \$90,000.00, the terms of the Contract calling for the payments to be the same as the Erps' First Community Bank loan. (App. I, p. 56) Erps received \$90,000.00 for the sale of the Sutphin property but only paid Meadows \$35,000.00 after she had contributed at least \$32,300.00 for repairs and the initial down payment of \$25,000.00. Erps knew at the time of his offer to Meadows that he had a sale of the Sutphin property for \$90,000.00 and did not disclose that fact to her.

Erps' construction company, Improvements Unlimited, LLC, did substantial work on Meadows' residence. Both parties were unclear about work done on the house and exactly when it began. An invoice dated April 1, 2008, and signed by Erps on April 30, 2008, shows that Meadows paid Improvements Unlimited, LLC, the sum of \$12,090.49 for "labor

and materials for remodeling and painting 3 rooms” and for “plumbing house and new comb”. (App. I, p. 151) The evidence further shows that on January 30, 2009, Meadows gave a check to Improvements Unlimited, LLC, for house work for \$6,000.00, which appears to have been for painting. (App. I, p. 73) On June 29, 2009, Improvements Unlimited, LLC, gave Meadows a bill for “material and labor for remodel” for \$32,080.00. (App. I, p. 74) Further, Erps testified that the \$25,000.00 payment in August, 2008 (App. I, p. 45) was for her house work. (App. III, pp. 7, 31) Based on these three exhibits and Erps’ testimony, Meadows paid Erps or his company at least \$75,000.00 for home remodeling. Erps testified that he thought the repairs were \$70,000.00 to \$80,000.00 (App. III, p. 5) but had no invoices or other records to substantiate that amount.

Erps also mentioned in the late spring of 2009 to Meadows about his purchase of apartments from Twiford on Lovell Avenue and Guard Drive in or near Princeton. She had no other way of knowing about these transactions but from him. (App. II, p. 42) He had arranged to buy the apartment buildings from Twiford, which were in a state of disrepair rendering them uninhabitable, for the sum of \$116,228.86. On May 26, 2009, Erps obtained a Building Permit from the City of Princeton for repairs at an estimate of \$50,000.00. (App. I, p. 85) On June 15, 2009, two events occurred that were not coincidence: Meadows cashed a CD for \$93,173.00 (App 1, p. 113), then gave to Erps a check in amount of \$90,000.00 (App. 1, p. 113), and in the attorney’s office the Twiford to Erps Deed was prepared. Meadows had no other reason to give Erps such an amount than for some investment of some type in the apartments he was purchasing and renovating. She testified that the apartment renovation was the reason for the check.

On July 10, 2009, the Twiford to Erps Deed for Lovell Avenue and Guard Drive apartments for \$116,228.86 was recorded (App. 1, p. 77), along with a First Community Bank Trust Deed from Erps with the Twiford apartments as collateral for \$116,228.86. (App. 1, p. 82) Renovations began. Erps testified that renovations to both apartments exceeded \$100,000.00. (App. III, p. 52) On July 29, 2009, Meadows cashed a CD for \$91,556.09 (App. I, p. 114) and gave Erps another check for \$67,000.00. (App. I, p. 81) On October 5, 2009, a Supplemental Building Permit for repairs to Lovell Avenue was obtained estimated at \$5,000.00. (App. 1, p. 86) On January 10, 2010, First Community Bank loaned Erps as evidenced by a new Trust Deed \$190,822.86. (App. 1, p. 87) On September 10, 2010, First Community Bank loaned Erps as evidenced by a new Trust Deed the amount of \$240,000.00.

It was a common business practice of Erps to improve property and then borrow the equity created by the improvements as shown by the Sutphin house and the Twiford apartments. He borrowed his equity in a two-step transaction on the Twiford apartments - equity provided by Meadows' funds.

SUMMARY OF THE ARGUMENT

“SUTPHIN” PROPERTY

The Circuit Court erred in not finding that Meadows and Erps were engaged in a joint venture on the Sutphin property. The Circuit Court found that Erps did not prove the source of the \$25,000.00 that he provided at closing on the Sutphin property, not that he did not prove providing the sum of \$25,000.00. The Circuit Court found that Meadows provided

her cashed CD and the amount of the repairs and that Erps knew at the time he offered her \$35,000.00 that he had a sale of the property for \$90,000.00, not \$70,000.00.

LOAN FOR APARTMENTS

The Circuit Court erred and was clearly wrong in finding that Meadows did not loan Erps an additional \$90,000.00 for work on the apartments in accordance with the check that she produced evidencing that amount. The Circuit Court did NOT err by not finding that Meadows had only loaned Erps \$30,000.00 rather than \$67,000.00 or \$157,000.00 for his apartments.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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. A memorandum decision is appropriate.

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). This Court reviews errors of law under the *de novo* standard. Mathena v. Haines, 219 W. Va. 417, 633 S.E.2d 771 (2006).

ARGUMENT

While there was no explicit agreement to share profits and losses on the Twiford apartments, the only reason that Meadows would have contributed money to Erps was an expectation from Erps that she would participate in profits as she was to participate in the profits of the Hatcher and Sutphin houses. However, there is no written contract wherein Meadows would have any ownership interest in the Twiford apartments, so any claim to ownership interest of those would require her to prove an exception to West Virginia Code § 36-1-3, which she has not proven. Rather, she has loaned Erps \$157,000.00 for the Twiford apartments that she is entitled to be repaid. Erps admits that he owes her \$30,000.00 for a loan, and he derives that figure from a notation that Meadows made to a recorded recollection that she prepared as part of a list of repairs made to her house. She asserts that the \$30,000.00 reference was to a further loan for a gate and appliances. Neither party produced a check evidencing that specific amount. Erps asserts that the amount came from the \$67,000.00 check in July noted as for "apt." The Circuit Court found against Erps on this assertion and found Meadows to be more credible.

Meadows paid Erps and Erps' company all sums due it for her home remodeling. She paid over \$75,000.00. The invoice of June 29, 2009, given to Meadows by Erps for home improvements was not paid out of the \$90,000.00 check she gave him June 15, 2009. That \$90,000.00 check clearly was for a loan for work at the Twiford apartments. There was no other reason or purpose, and Meadows so testified. Indeed, the parties admit that there were ONLY four transactions between them: the Hatcher house for which there is no claim, the Sutphin house for which all money has been accounted (see infra),

the Meadows' house, and the Twiford Apartments. There was no other reason for Meadows to be giving any money to Erps. And, in the absence of direct evidence of the existence of the loan, recovery can be supported by circumstantial evidence if every other reasonable hypothesis as to why the money was transferred can be excluded. See, e.g. San Francisco v. Wendy's International, Inc., 221 W. Va. 734, 750, 656 S.E.2d 485, 501 (2007).

Erps stated that the two checks for \$67,000.00 and \$90,000.00 were for work at her house. (App. III, p. 47) That statement was impeached by competent and overwhelming evidence. The Circuit Court was clearly wrong in failing to recognize the \$90,000.00 check as the first loan to Erps for the apartments. McConaha v. Rust, 219 W.Va. 112, 632 S.E.2d 52 (2006). Meadows was not a joint venturer with Erps for the Twiford Apartments but rather was a lender of \$157,000.00. Meadows was a lender to Erps on the Apartments that he purchased and renovated in the amount of \$157,000.00.

On the transaction involving the Sutphin house, Meadows and Erps, at Erps' suggestion, were engaged in a joint venture:

A joint venture "is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied." Syl. pt. 2, Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987). See also syl. pt. 4, Sipple v. Starr, 205 W.Va. 717, 520 S.E.2d 884 (1999); syl. pt. 2, Johnson v. State Farm Mut. Auto. Ins. Co., 190 W.Va. 526, 438 S.E.2d 869 (1993); Nesbitt v. Flaccus, 149 W.Va. 65, 73-74, 138 S.E.2d 859, 865 (1964). While this Court has **743 *678 frequently likened a joint venture to a partnership, e.g., Price, 177 W.Va. at 595, 355 S.E.2d at 384, we have nevertheless distinguished the two: "[A] partnership relates to a general business ... while [a] joint adventure relates to a single business transaction." Nesbitt, 149 W.Va. at 74, 138 S.E.2d at 865. See also Lilly v. Munsey, 135 W.Va. 247, 254, 63 S.E.2d 519, 523 (1951) (joint venture "is sometimes called a limited partnership; not limited as to liability, but as to its scope and

duration”) (citation omitted); *Gelwicks v. Homan*, 124 W.Va. 572, 578, 20 S.E.2d 666, 669 (1942) (“Joint adventure is akin to partnership, and one of the distinctions is that, whereas a partnership relates to a general business of a certain type, joint adventure relates to a single business transaction.”) (citing *Kaufman v. Catzen*, 100 W.Va. 79, 130 S.E. 292 (1925))

46 Am.Jur.2d *Joint Ventures* § 3, at 22 (2d ed. 1994) (“The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships.”) (footnotes omitted). Thus, since all partners are jointly liable for all debts and obligations of a partnership, see W. Va. Code § 47B-3-6(a) (1996), members of a joint venture are likewise jointly and severally liable for all obligations pertaining to the venture, and the actions of the joint venture bind the individual co-venturers.

Armor v. Lantz, 207 W. Va. 672, 677-78, 535 S.E.2d 737, 742-43 (2000).

A “joint venture” is regarded as a transactional partnership. A partner owes a fiduciary responsibility to his other partner or partners:

West Virginia Code § 47B-4-4 states:

General standards of partner's conduct

(a) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) *To account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;*

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and (3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(g) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner. (Emphasis Added.)

Meadows and Erps were joint venturers in the Sutphin house, Meadows put \$57,300.00 into the house Accordingly, Meadows should have been repaid from the \$90,000.00 consideration \$57,300.00 and the parties should have divided the remaining \$32,700.00 to receive \$16,350.00 each. Even at the evidence of Erps, Meadows should have been repaid \$32,300.00 and the parties divided the remaining \$57,700.00, or \$28,850.00 each, which would have resulted in Meadows receiving \$61,150.00. Meadows only received \$35,000.00. Erps did not treat Meadows with the duty required of a partner to another partner of good faith and fair dealing. Erps appropriated a partnership opportunity for his personal benefit.

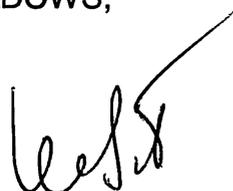
CONCLUSION

Meadows received an inadequate judgment, and the Circuit Court abused its discretion by failing to award her an appropriate judgment, which would be \$157,000.00 for the apartment loans and \$26,150,00 for the Sutphin transaction, totaling a judgment in the

amount of \$193,150.00 instead of a judgment of \$85,675.00, plus prejudgment and post-judgment interest as ordered by the Circuit Court and not appealed.

LESLIE MEADOWS,

By Counsel.

A handwritten signature in black ink, appearing to read 'Wesley', written over a horizontal line.

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BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

WILLIAM G. ERPS,
Defendant Below, Petitioner

vs.) No. 16-0068

LESLIE MEADOWS,
Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, WILLIAM S. WINFREY, II, of counsel for the Respondent, do hereby certify that a true and correct copy of the foregoing *Respondent's Reply Brief and Cross-Assignment of Error* has this day been served upon the following counsel of record, by hand delivery:

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This the 9th day of June, 2016.



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