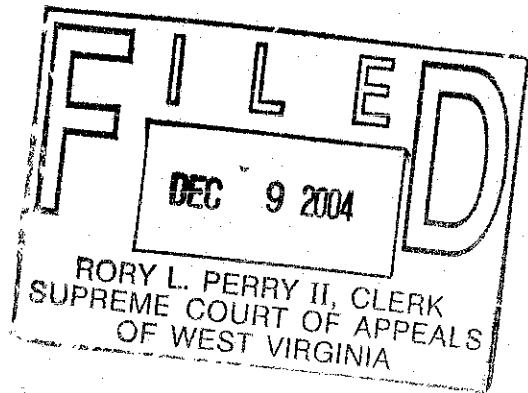


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

No. 31970



FEFE S. GORDON and  
JEFFREY GORDON,

Plaintiffs,

v.

FIRST REPUBLIC MORTGAGE  
CORPORATION, INC. d/b/a FIRST  
SECURITY MORTGAGE CORP., et al.,

Defendants.

BRIEF OF APPELLANTS

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This appeal arises out of a predatory lending case filed in the Circuit Court of Kanawha County against a loan broker, lender, and appraiser alleging various state law claims of predatory lending in connection with a home equity loan.<sup>1</sup> The Plaintiffs settled with the lender, the loan broker defaulted and did not appear to defend the action, and the Plaintiffs proceeded to trial against the broker on issues

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<sup>1</sup> Specifically, the Plaintiffs' Complaint alleged eleven separate counts: Illegal Mortgage Solicitation (Count I), Breach of Fiduciary Duty (Count II), Predatory Lending - Unconscionable Contract (Count III), Unauthorized Practice of Law (Count IV), Fraud and Conspiracy (Count V), Dishonesty, Misrepresentation, and Breach of Professional Standards (Count VI), Acceptance of Fee Contingent on Predetermined Conclusion (Count VII), Fraud (Count VIII), Unlawful Debt Collection (Count IX), Breach of Duty of Good Faith and Fair Dealing (Count X), and Joint Venture, Conspiracy, and Agency (Count XI).

of damages on Counts I, II, V, and VII and against the appraiser, Larry McDaniel on Counts V, VI, VII, and XI.

Prior to commencement of trial, the Circuit Court excluded the testimony of Plaintiffs' witness, Timothy Alfred, and limited the testimony of witness Felicia Spencer and Plaintiffs' expert Sean Andrews. Prior to the close of the case, the Circuit Court granted the Defendants judgment as a matter of law on Plaintiffs' joint venture and conspiracy claim. Because the Plaintiffs were denied the opportunity to present to the jury critical evidence to establish the appraiser had fraudulently inflated the market value of the Plaintiffs' property, the jury returned a verdict in favor of the Defendant appraiser on July 15, 2003.

## II. STATEMENT OF FACTS

The Defendant, Larry McDaniel, represents the epitome of a wide-spread problem with real estate appraisal fraud in connection with predatory loans in this State. McDaniel, a member of the Standards Committee for the West Virginia Real Estate Appraisal Licensing and Certification Board and, incredibly, a teacher of ethics to West Virginia appraisers, routinely inflates the market value of homes for mortgage brokers originating high-interest, exploitive loans.

The relief sought in this case is intended to bring to a halt the key ingredient to home equity fraud: the bogus appraisal. The Plaintiffs proceeded against the appraiser and defaulting broker, seeking primarily declaratory relief that McDaniel has fraudulently inflated the market value of the Gordons' home in connection with a predatory loan brokered by First Security Mortgage Corp. ("First Security") and originated by Option One Mortgage Corp. ("Option One"), a California mortgage lender. At the trial of this matter, the Plaintiffs presented the following evidence.

The Plaintiffs, Jeff and Fefe Gordon, are working people who met while working in a windows factory outside Parkersburg, West Virginia. Ms. Gordon acquired her home at 507 Postlewait Street,

Parkersburg, West Virginia through a divorce settlement with her former husband in January, 1998. Ms. Gordon and her ex-husband had purchased the home for approximately \$15,000 in 1988. In May 1999, Ms. Gordon obtained a home equity loan from American General Finance to buy out her ex-husband's interest in the home. On April 28, 1999, an appraisal was performed on the property in connection with the American General loan. The appraisal concluded the market value of the home at that time to be \$14,500.00.

In June or July of the same year, only a couple of months after the American General loan and before the Gordons had married, Ms. Gordon was solicited by phone by the now defunct mortgage broker, First Security. Gordon, then Ms. Kerns, was not looking for a loan so close in time to the loan she had obtained from American General, but First Security suggested Ms. Gordon refinance to obtain cash so that she and her fiancé, the Plaintiff Jeffrey Gordon, could purchase Mr. Gordon's mother's home. When Ms. Gordon suggested that there was not enough equity in her Parkersburg home to refinance, the loan broker, Rusty Neff responded with something to the effect of, "You'd be surprised of what property's worth, because neither of us are appraisers."

Neff directed the Gordons to come to First Security's office, where an application was taken. Neff then suggested an appraisal and arranged for the Defendant, Larry McDaniel, to appraise Ms. Gordon's property. On July 23, 1999, McDaniel performed the appraisal, indicating the market value was \$46,000.00. The appraisal report was signed also by McDaniel's business partner, Jack G. Weaver, Jr. as supervisor. This amount suggested by the appraisal is wildly inflated. The true market value of the home at that time, as suggested by the appraisal conducted three months earlier, was between around \$13,000 to \$14,500.00. McDaniel and Weaver inflated the value of property pursuant to a secret agreement McDaniel's appraisal company had with the broker First Security. It was the practice of First

Security to provide McDaniel's company with the market value it needed for the loan, and McDaniel or his appraisers would cook-up an appraisal to support that value.

Fefe Gordon was present when McDaniel appraised the property. She inquired to McDaniel about the market value of the home. McDaniel stated the value of the property had increased because Corridor D would pass through the neighborhood. This statement was undisputedly false. Corridor D never came through the Plaintiffs' neighborhood and the values of property generally in that area were in no way affected by the building of Corridor D.

At trial, McDaniel testified that both he and Weaver went to the Gordons property to conduct the appraisal. However, this too turned out to be a lie. In fact, McDaniel was alone when he conducted the appraisal. On rebuttal, the Plaintiffs called Ms. Gordon's sister, who had also been at the property when it was appraised by McDaniel. Ms. Gordon's sister testified that McDaniel had been alone when he came to the Gordons' property.

As a result of the appraisal, the Gordons were induced into an unconscionable loan that far exceeded the actual market value of the home. Before trial, the lender in the transaction, Option One, settled with the Gordons because it recognized the unfairness of the loan.

In connection with the earlier American General loan, the Gordon's property was appraised by an appraiser from Parkersburg, Sean Andrews. Andrews concluded in April, 1999 that the home was worth only \$14,500. After the Complaint was filed, the Plaintiffs hired Andrews to re-evaluate the value of the home for the purpose of providing expert testimony. Andrews went back out to the Gordon property and consulted a retrospective appraisal by John Bango, who had concluded the home in July, 1999 was worth \$13,500. (See Ex. A.) Andrews then testified that the McDaniel appraisal was inflated and that the actual value of the home was \$14,500, less than 1/3 the value reached by McDaniel.

The jury then heard from Felicia Spencer, who worked for McDaniel's appraisal company P.M. Services. Ms. Spencer testified to the existence of an agreement between the broker, First Security, and McDaniel's appraisal company to inflate appraisals. Ms. Spencer stated she personally worked with Jack Weaver, who signed the appraisal of the Plaintiffs' property, to intentionally inflate appraisals for First Security. Ms. Spencer testified it was PM Services's practice to obtain from First Security the value they needed to do a loan, referred to as the "Christmas figure," by fax before conducting the appraisal. Then, the appraiser at PM Services would obtain the values requested by First Security. At trial, McDaniel testified that Jack Weaver had sent a memorandum to all brokers and loan companies insisting that this same procedure be followed for appraisals requested from PM Services.

The Gordons testified McDaniel's false appraisal induced them into the loan with First Security and that they would never had entered into the loan had they known McDaniel over-appraised the home. In fact, the Gordons testified they attempted to refinance a year later with Huntington Bank, but were denied when the bank sent someone out to confirm the value of the home. After the Plaintiffs became aware that the appraisal was inflated, they went to the local tax assessor, and the assessor lowered the appraisal of the Plaintiffs' home to approximately \$15,000.

As a result of the appraisal, the Gordons testified they assumed a loan that far exceeded the value of the property and that they could not refinance and could not sell the house. In turn, the Gordons were burdened with a high-interest, predatory loan, from which they could not escape.

Before the trial, the Plaintiffs proffered that their witness, Timothy Alfred, would testify as to his personal knowledge about McDaniel and Weaver's practice of inflating appraisals. Mr. Alfred was a former mortgage broker who worked at the Defendant, Larry McDaniel's broker firm, Accelerated Mortgage. Alfred was familiar with McDaniel's practice of inflating appraisals for Accelerated Mortgage

loans.<sup>2</sup> In addition, Mr. Alfred would have testified that McDaniel appraised Alfred's home for a loan and inflated the market value without Alfred's knowledge. However, the Court excluded Alfred as a witness, concluding the testimony was too remote.

### III. ASSIGNMENTS OF ERROR

- (1) The Circuit Court improperly excluded the Plaintiffs' witness, Timothy Alfred, who would have testified as to Larry McDaniel and Jack Weaver's practice of inflated appraisals.
- (2) The Circuit Court improperly granted the Defendant judgment as a matter of law on Plaintiffs' joint venture and conspiracy claims.
- (3) An appraisal performed by a third appraiser, John Bango, which indicated the market value of the Plaintiffs' property was \$13,500, was erroneously excluded.
- (4) The jury failed to award any damages against the Defendant, First Security, despite having been instructed to return a damage amount no less than the broker fees.
- (5) The jury returned a verdict for the Defendant, which was against the clear weight of the evidence.

### IV. POINTS AND AUTHORITIES

#### Cases

<u>Armor v. Lantz</u> , 207 W.Va. 672, 678, 535 S.E.2d 737, 743 (2000) .....	12
<u>Bowers v. Wurzburg</u> , 207 W.Va. 28, 37, 528 S.E.2d 475, 484 (1999) .....	12
(quoting <u>Lasry v. Lederman</u> , 305 P.2d 663 (1957)) .....	12
<u>Brannon v. Riffle</u> , 197 W.Va. 97, 475 S.E.2d 97 (1996) .....	8

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<sup>2</sup> McDaniel owned a brokering firm, Accelerated Mortgage, and several appraisal companies, including P.M. Services. McDaniel testified that his appraisal companies would provide appraisals for his brokering firm, but denied that he himself had performed appraisals for his broker companies. However, fact, Alfred would have testified that McDaniel himself would perform appraisals for Accelerated. McDaniel testified that he was able to avoid this apparent conflict of interest due to an interpretation of a specific rule by the State Board, on which he served and was member of its Standards Committee.

<u>Culbertson v. Jno. McCall Coal Co., Inc.</u> , 275 F. Supp. 662,676 (D.C. W.Va. 1967) .....	10
<u>Huddleston v. U.S.</u> , 485 U.S. 681, 688 (quoting H.R. Rep. No. 93-650, p.7 (1973) .....	9
<u>Kessell v. Leavitt</u> , 204 W.Va. 95, 129, 511 S.E.2d 720, 754 (1998) .....	12
<u>Mayhorn v. Logan Med. Foundation</u> , 193 W.Va. 42, 46, 454 S.E.2d 87, 91 (1994) .....	13
<u>Maynard v. Adkins</u> , 193 W.Va. 456, 459, 457 S.E.2d 133, 136 (1995) .....	7, 8
<u>McDougal v. McCammon</u> , 193, W.Va. 229, 235, 455 S.E.2d 788, 794 (1995) .....	8
<u>Morrison v. Sharma</u> , 200 W.Va. 192, 195-98, 488 S.E.2d, 467, 469-70 (1997) .....	7, 8 & 14
<u>Price v. Halstead</u> , 177 W.Va. 592, 595, 355 S.E.2d 380,384 (1987) .....	12
<u>accord Simple v. Starr</u> , 205 W.Va. 717, 725, 520 S.E.2d 884, 892 (1999) .....	12
<u>Richmond v. Campbell</u> , 148 W.Va. 595, 601, 136 S.E.2d 877, 881 (1984) .....	7
<u>Smith v. First Community Bank Share, Inc.</u> , 212 W.Va. 809, 819, 575 S.E.2d 419, 429 (2002) (quoting <u>State v. McGinnis</u> , 193 W.Va. 147, 154, 455 S.E.2d 516, 523 (1994) .....	9
<u>Tudor v. Charleston Area Med. Ctr. Inc.</u> , 203 W.Va. 111, 129, 506 S.E.2d 554, 572 (1997) .....	10
<u>U.S. v. Daniels</u> , 117 F. Supp. 2d 1040, 1041 (D.Kan 2000) .....	9

**Statutes**

W.Va. R. Civ. P. 61 .....	7
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W.Va. R. Evid.404(b) .....	10
46 Am. Jur. 2d Joint Ventures §1 (1994) .....	12
46 Am. Jur. 2d Joint Ventures § 42 .....	12
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**V. DISCUSSION OF LAW**

In this case, McDaniel and his business partner Jack Weaver intentionally inflated the market value of the Gordon's property by three times its actual value, from \$14,500 to \$46,000 pursuant to a

secret agreement between First Security and the appraisers to fraudulently appraise homes for high-interest, exploitive consumer loans. However, because the jury was unable to hear from the Plaintiffs' witness, Timothy Alfred, a former broker for McDaniel's mortgage brokering firm who had his own home over-appraised by McDaniel, and because the Court excluded testimony regarding a third appraisal of the property by Parkersburg appraiser John Bango, it rendered a verdict in favor of the Defendants. The error so permeated the verdict that the jury failed even to award damages on the broker claims, despite being instructed to award no less than the broker fees. In addition, the Court improperly granted judgment as a matter of law in favor of the Defendant on the Plaintiffs' claims of joint venture and conspiracy. Finally, even if the exclusion of this critical evidence were not an error, the jury's verdict was against the clear weight of the evidence, which consisted of an undisputed agreement between the broker, First Security, and McDaniel's appraisal company, P.M. Services, to inflate the value of homes for predatory loans and McDaniel and Weaver inflating the market value of the Gordons' home from \$14,500 to \$46,000. Accordingly, as is more fully explained below, the Court should reverse the circuit court below and grant the Plaintiffs a new trial.

**A. Standard for New Trial.**

Rule 59 permits a court to grant a new trial when "substantial justice' would be effectuated." Maynard v. Adkins, 193 W.Va. 456, 459, 457 S.E.2d 133, 136 (1995). Additionally, a court may grant a new trial when significant error has affected the fairness of the trial. See generally W. Va. R. Civ. P. 61. A court should set aside a jury verdict if an award is so small it clearly indicates the jury was influenced by improper motive or if the jury ignores the court's instructions. See Richmond v. Campbell, 148 W. Va. 595, 601, 136 S.E.2d 877, 881 (1984). The trial judge may weigh the evidence and consider the credibility of witnesses, and if he concludes that manifest injustice has occurred, should set aside the verdict and grant a new trial. See Morrison v. Sharma, 200 W. Va. 192, 194-95, 488 S.E.2d

467, 469-70 (1997). A court may reverse its own evidentiary ruling and grant a new trial on that basis.

See id.

A trial judge's grant of a new trial will not be disturbed on appeal unless it was "clearly wrong." Maynard, 193 W. Va. at 459, 457 S.E.2d at 136. Evidentiary rulings by the circuit court are reviewed for an abuse of discretion. See, e.g., McDougal v. McCammon, 193 W. Va. 229, 235, 455 S.E.2d 788, 794(1995). However, legal determinations, including granting judgment as a matter of law, are reviewed *de novo*.

The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, the court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.

Smith v. First Community Bancshares, Inc., 212 W. Va. 809, 819 575 S.E.2d 419, 429 (2002) (quoting Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996)).

**B. The Court Erred in Excluding Plaintiffs' Witness Timothy Alfred.**

The Plaintiffs proffered the testimony of Timothy Alfred, who was prepared to deliver critical testimony about McDaniel's practice of inflating appraisals and McDaniel's participation in agreements with other brokers to inflate the market value of homes in connections with predatory loans. The trial judge excluded the evidence on the ground that the evidence of prior inflated appraisals and secret agreements with brokers was "too remote" and therefore inadmissible. However, the testimony concerned the identical course of conduct as was alleged and in dispute in the Gordons' trial.

Evidence of other bad acts is admissible under Rule 406 so long as the evidence is not offered to prove the character of the Defendant and his likelihood to act in conformity therewith. See W. Va. R. Civ. P. 406(b). This Court has previously recognized that 404(b) is a rule of inclusion, rather than

a rule of exclusion. See State v. McGinnis, 193 W. Va. 147, 154, 455 S.E.2d 516, 523 (1994) (“Rule 404(b) adopts an inclusionary rather than exclusionary approach making evidence of prior crimes, wrongs, or acts potentially admissible, subject to other limitations such as Rule 403 where they may be offered for *any* relevant purpose that does not compel an inference from character to conduct.”). In adopting the federal rules, the Congress clearly contemplated that 404(b) was to have an inclusive effect: “The House made clear that the version of Rule 404(b) which became law was intended to ‘plac[e] greater emphasis on admissibility than did the final Court version.’” Huddleston v. U.S., 485 U.S. 681, 688 (quoting H.R. Rep. No. 93-650, p. 7 (1973)). Indeed, one court has observed in proving criminal fraud, where the prior bad acts “are similar in method, they are highly probative and are thus virtually guaranteed admittance.” U.S. v. Daniels, 117 F. Supp. 2d 1040, 1041 (D. Kan. 2000).

In McGinnis, the Court laid out in detail the procedure for admitting 404(b) evidence. First, the evidence must meet the four-part test articulated by the United States Supreme Court for the federal counterpart of 404(b), which also serve to protect the party it is offered against from unfair prejudice:

[F]irst, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402--as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, . . . and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

Huddleston v. U.S., 485 U.S. 681, 691-92 (1988); accord McGinnis, 193 W. Va. at 155, 455 S.E.2d at 524. In practice, the Huddleston test is applied through *in camera* consideration of the 404(b) evidence prior to its presentation at trial:

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must

be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 129, 506 S.E.2d 554, 572 (1997) (quoting McGinnis, 193 W. Va. at 151, Syl. Pt. 2, 455 S.E.2d at 520, Syl. Pt. 2).

As a practical matter, rarely does direct evidence exist sufficient to prove an intent to commit a wrongful act. But, where intent is an issue, it is widely recognized that proof of acts substantially similar to those charged are admissible for the purpose of indicating a common plan or scheme or to prove intent or lack of mistake. For example, the *West Virginia Rules of Evidence* provide for the admissibility of “[e]vidence of other crimes, wrongs or acts . . . for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” W. Va. R. Evid. 404(b).

The admissibility of similar transaction evidence in civil actions is well established, particularly where intentional misrepresentation is alleged:

The law seems well settled that in civil cases, where fraud is at issue, evidence of other fraud of like character, committed by the same party, at or about the same time, is admissible to indicate a scheme, plan, or design on his part broad enough to include the act in question.

Culbertson v. Jno. McCall Coal Co., Inc., 275 F. Supp. 662, 676 (D.C.W. Va. 1967). In Culbertson, the court, upon a thorough review of pertinent authorities, held that evidence tending to show the

defendant practiced fraud and deceit upon another in a similar transaction was admissible. See id. at 677.

In this case, the circuit court conducted the *in camera* hearing required by McGinnis. There was never any issue whether the prior acts occurred. Rather, the trial court, concluded that the prior acts were "too remote." Timothy Alfred would have testified that Larry McDaniel inflated appraisals for predatory loans originated by his brokering company, Accelerated Mortgage, and he inflated the appraisal on Alfred's home. The evidence was not offered to prove McDaniel's character, but rather to prove the inflated appraisal was intentional and not a mere difference of opinion, as contended by the defense.

The Court held that Alfred's testimony was too remote to be admissible. Essentially, the trial court necessarily concluded that the probative value of the testimony was relatively low. This conclusion was clearly wrong and the trial court abused its discretion in excluding the evidence on this basis. On the contrary, the evidence was highly probative and indeed critical to the Plaintiffs' case. The Plaintiffs' other witness, Felicia Spencer, testified as to an agreement with First Security to inflate appraisals. Alfred's testimony demonstrated McDaniel's participation in the same conduct with another broker, and the fact that McDaniel has inflated appraisals on other occasions. Without Mr. Alfred's testimony, there was only evidence of an agreement but not evidence that tended to show McDaniel himself personally inflated appraisals. Alfred's testimony was relevant, not substantially outweighed by unfair prejudice, and should have been admitted. The Plaintiffs therefore should be granted a new trial in which they are permitted to present the testimony of Timothy Alfred.

**C. The Court Erred in Granting Judgment as a Matter of Law on Plaintiffs' Joint Venture, and Conspiracy Claims.**

West Virginia law recognizes claims for civil conspiracy and joint venture. This court has described a civil conspiracy as follows:

[A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff. (Citing 15A C.J.S. *Conspiracy* §§ 1(1) and 16 Am. Jur. 2d *Conspiracy* §§ 44). Given the tort-based liability of participants in a civil conspiracy, a plaintiff can maintain such a claim provided he/she satisfies the enumerated standard: "In order for civil conspiracy to be actionable it must be proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff[.]"

Kessel v. Leavitt, 204 W.Va. 95, 129, 511 S.E.2d 720, 754 (1998).

"A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit." 46 Am. Jur. 2d *Joint Ventures* § 1 (1994). "[A] joint venture arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied." Price v. Halstead, 177 W.Va. 592, 595, 355 S.E.2d 380, 384 (1987); accord Simple v. Starr, 205 W.Va. 717, 725, 520 S.E.2d 884, 892 (1999). In a joint venture, each party is liable for the unlawful acts of a joint venturer when the act is committed within the scope of the venture and with the implied consent of the venturer. See 46 Am. Jur. 2d *Joint Ventures* § 42. "[T]he question of whether or not a joint venture exists is to be answered by the jury. 'A plaintiff has a right to a jury trial upon the factual issues to determine whether a joint venture existed.'" Bowers v. Wurzburg, 207 W.Va. 28, 37, 528 S.E.2d 475, 484 (1999) (emphasis added) (quoting Lasry v. Lederman, 305 P.2d 663 (1957)); see also Armor v. Lantz, 207 W.Va. 672, 678, 535 S.E.2d 737, 743 (2000) ("Whether or not a joint venture exists is normally a question to be answered by the trier of fact.").

The Plaintiff submitted sufficient evidence on which a reasonable juror could conclude that there was a civil conspiracy or at least a joint venture between First Security and Larry McDaniel. The record included undisputed evidence of an agreement between the broker and McDaniel's appraisal company to inflate appraisals. McDaniel himself testified that his partner, and co-appraiser on the Gordons' property, Jack Weaver, had solicited brokers and loan companies to order appraisals pursuant

to this same procedure. Additionally, the Plaintiffs presented evidence that McDaniel inflated the appraisal of the Gordons' property from \$14,500 to \$46,000, over three times its actual value. The jury could have concluded from this evidence that a conspiracy existed. At the very least the jury could conclude the agreement formed the basis of a joint venture, considering the on-going agreement to perform inflated appraisals for First Security. Felicia Spencer would have testified that McDaniel and his appraisers would not receive payment for the appraisal if the loan did not go through, demonstrating that the broker and appraisers shared in the profits and losses on the loan, but she was not permitted to testify as to this arrangement. Had Spencer been permitted to fully testify, and had the jury been permitted to consider the claim, it could have found based on the Plaintiffs' evidence that a conspiracy and joint venture existed. Accordingly, judgment as a matter of law on this claim was improper. The Plaintiffs therefore should be entitled to a new trial in which their joint venture and conspiracy claims could be considered by the jury.

**D. The Court Erred by Excluding Testimony of the John Bango Appraisal.**

The Court concluded that Plaintiffs' expert Sean Andrews could not testify regarding an appraisal conducted by appraiser John Bango. Bango concluded that the Plaintiffs' property was valued at \$13,500. (See Ex. A). Rule 703 permits experts to testify as to facts that would not otherwise be admissible, if typically relied upon by experts in the field. See W. Va. R. Evid. 703; Mayhorn v. Logan Med. Foundation, 193 W. Va. 42, 46, 454 S.E.2d 87, 91 (1994). Experts may rely on the reports of others, even if the report would otherwise be hearsay. See id. Plaintiffs' expert, Sean Andrews, should have been permitted to testify regarding the Bango appraisal. The existence of another appraisal around the same value as that found by the Plaintiffs' expert would tend to corroborate Andrews's conclusions and contradict McDaniel's contention that the difference in value was a mere difference of opinion. The exclusion of this evidence was not harmless error and a new trial therefore should be granted.

**E. The Jury's Verdict Ignored the Court's Instruction as to Damages Against the Broker and Demonstrates the Jury Was Influenced by Improper Motive.**

The jury was instructed to award damages against the broker, First Security, in an amount no less than the broker fees:

West Virginia law provides that a broker owes a duty to (1) provide disclosures required by West Virginia law; and (2) disclose loan options and risks available to the borrower; and (3) act as an agent of the borrower in pursuing a loan on the best terms available to the borrower. The Court has concluded that the Plaintiffs have demonstrated the broker, First Security, breached its duty, so liability is established on this claim. You therefore should determine what if any damages the Plaintiffs suffered as a proximate result of this breach. Any damages you award shall not be less than the amount of the broker services paid by the Plaintiffs.

(Final Jury Instructions at 9.) The Plaintiffs submitted undisputed evidence that the Plaintiffs incurred \$1,800.00 in illegal broker fees. Nevertheless, the jury awarded no damages against the broker. The jury evidently ignored the Court's instruction. The verdict is clearly wrong and demonstrates the jury was influenced by improper motive. Accordingly, the entire verdict should be set aside. See Richmond, 148 W. Va. at 601, 136 S.E.2d at 881.

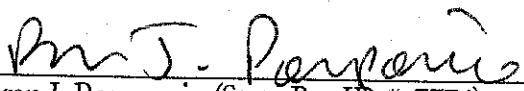
**F. The Jury's Verdict Was Against the Clear Weight of the Evidence.**

The Plaintiffs' evidence in this case demonstrated the Defendant, Larry McDaniel inflated the appraisal of the Gordons' property from \$14,500 to \$46,000 and that there was a secret agreement between the broker and McDaniel's appraisal company to inflate the value of homes for predatory loans. The difference between \$14,500 and \$46,000 could not be a reasonable difference of opinion, as the Defendant contended. The jury's verdict, in favor of the Defendant, was against the clear weight of the evidence. See Morrison v. Sharma, 200 W. Va. at 194-95, 488 S.E. 2d at 469-70. Accordingly, a new trial is warranted.

## VI. CONCLUSION

The Court erred (1) in excluding the testimony of Timothy Alfred, (2) in limiting the testimony of Plaintiffs' expert, Sean Andrews, and (3) by granting judgment as a matter of law on Plaintiffs' conspiracy and joint venture claims. In addition, the jury's verdict ignored the Court's instruction and was against the clear weight of the evidence. A new trial is warranted.

Respectfully Submitted,  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Defendants.

CERTIFICATE OF SERVICE

I, Bren J. Pomponio, counsel for Plaintiffs, do hereby certify that I have served a true and exact copy of the foregoing "BRIEF OF APPELLANTS" upon counsel of record as listed below, via United States mail with postage prepaid on this the 9<sup>th</sup> day of December, 2004, addressed as follows:

Larry M. McDaniel  
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Bren J. Pomponio (State Bar ID No. 7774)