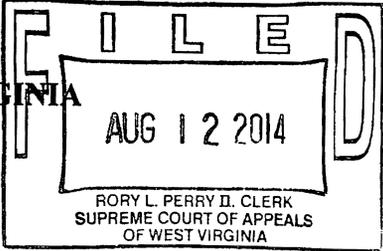


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLES J. EVANS and)
CYNTHIA B. EVANS, et al.)

Plaintiffs Below, Petitioners)

v.)

UNITED BANK, INC., a West Virginia)
Corporation, STAN McQUADE,)
Individually, THELMA MCQUADE, and)
d/b/a McQUADE APPRAISAL SERVICES)

Defendants Below, Respondents)

No. 14-0291

Appeal from a Final Order
of the Circuit Court of
Monroe County (09-C-94)

**BRIEF OF RESPONDENTS
STAN MCQUADE AND THELMA MCQUADE
d/b/a MCQUADE APPRAISAL SERVICE**

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STATEMENT OF THE CASE

1. Procedural History

This action began with the filing of a Complaint in the Circuit Court of Monroe County on November 30, 2009 by Charles J. Evans and Cynthia B. Evans against United Bank, Inc. (A.R. 4). On July 6, 2010, an Amended Complaint was filed by Charles J. Evans, Cynthia B. Evans, Obie Woods, Wayne Cliburn and Lucy Cliburn against United Bank, two of its employees (Ray Leon Cooper and Joyce Durham), and Stan McQuade and Thelma McQuade, individually and d/b/a McQuade Appraisal Services (“McQuade”). (A.R. 20). On September 15, 2010, a Second Amended Complaint was filed against the same defendants by a total of 33 plaintiffs, all of whom are Petitioners here. (A.R. 67).

All Petitioners are non-residents of West Virginia. (A.R. 68-71) (listing residences of the Petitioners). They own lots in the Walnut Springs Mountain Reserve development in Monroe County. The Second Amended Complaint alleged various claims against McQuade, including fraud (actual and constructive), negligence, conspiracy, infliction of emotional distress, and detrimental reliance.

The essence of the Second Amended Complaint was that Petitioners allegedly purchased their lots at inflated prices based on false promises made by the developers. (A.R. 82-84). The developers are not parties to this litigation. They allegedly promised “crystal clear lakes filled with trout and waterfalls,” a “grand lodge with a restaurant, fitness center, game rooms and meeting rooms,” “underground utilities,” and other amenities, none of which allegedly exist. (A.R. 82-83). **There is no allegation that McQuade made any of these promises.** The developers eventually had a falling out with one another which apparently led them to abandon the project.

The purchases occurred at the height of the real estate boom (2005–06), and each Petitioner intended to either build a vacation home or “flip” their property for a profit. (A.R. 85). Unfortunately, the real estate bubble burst, the economy went into recession, and the market for expensive second and third vacation homes crashed. Consequently, Petitioners alleged that their properties are not worth what they had hoped.

All defendants filed Motions to Dismiss. All of the motions were heard by the Circuit Court on May 2, 2011. At the hearing, Petitioners agreed to dismiss the claims against Cooper and Durham. The Circuit Court then considered the motions of United Bank and McQuade.¹

By Order entered February 27, 2014, the Circuit Court granted the Motions to Dismiss on the grounds that the tort claims asserted in the Second Amended Complaint were barred by the two-year statute of limitations in W. Va. Code § 55-2-12. (A.R. 242). The Court also ruled that the equitable claim of detrimental reliance should be dismissed because it was a restatement of the time-barred fraud claim. (A.R. 251-52).²

In reaching the conclusion that the tort claims were barred by the statute of limitations, the Circuit Court took judicial notice of certain adjudicative facts in *MBMA, LLC, et al.*, a matter before the Monroe County Commission sitting as the Board of Equalization and Review. The Circuit Court also took judicial notice of the subsequent appeal of that matter to the Circuit Court of Monroe County (Civil Action No. 07-C-30), and the ensuing appeal to this Court in *Mountain America, LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768 (2009). Specifically, the Circuit Court took judicial notice that on February 7, 2007, the Petitioners or their co-owners challenged

¹ United Bank and McQuade are sometimes collectively referred to herein as the Respondents.

² The Circuit Court also dismissed a claim for breach of the implied covenant of good faith and fair dealing against United Bank. (A.R. 249-51). That claim was not asserted against McQuade.

the 2007 real estate tax assessments of the properties that are the subject of this litigation before the Monroe County Board of Equalization and Review, and that the basis for the challenge was that their tax assessments were not based on the true and actual value of their properties. (A.R. 243-44).³ After taking judicial notice of these facts, the Circuit Court held that because the Petitioners claimed, in February 2007, that their tax assessments exceeded the true and actual values of their properties, and because the fair market value of the properties is the basis for Petitioners' claims in this case, they should have known in February 2007 that the properties they purchased were overvalued and should have inquired as to the identity and conduct of the parties involved in the sale of their properties. (A.R. 248-49). Because they filed suit more than two years later, their claims are time barred.

After entry of the final order on February 27, 2014, Petitioners filed motions under Rules 59 and 60 of the Rules of Civil Procedure (A.R. 254), and subsequently filed a Notice of Appeal. The Circuit Court denied the motions by order entered on May 23, 2014. (A.R. 276).

2. Statement of Facts

A. Prior Tax Assessment Litigation

The Circuit Court took judicial notice of adjudicative facts from proceedings arising out of tax assessments on Petitioners' properties. (A.R. 243-44). Those proceedings culminated before this Court in *Mountain America*. All of the facts that the Circuit Court relied on are apparent from the record in that case, of which this Court can take judicial notice. This includes the fact that the Petitioners or their co-owners in this case were also the Petitioners in *Mountain America*, which is evident from, among other things, the Notice of Appeal in *Mountain America*.

³ The Circuit Court judge in this case heard the appeal of the tax assessment case (Civil Action No. 07-C-30) in the Monroe County Circuit Court.

In *Mountain America*, Petitioners claimed that the tax assessments on their properties were excessive and unequal as compared to the tax assessments of properties owned by other taxpayers in Monroe County. *Id.* at 673, 687 S.E.2d at 773. After receiving their tax assessments in January 2007, the Petitioners appeared by counsel before the Monroe County Commission sitting as the Board of Equalization and Review to protest the assessments. *Id.* at 676, 687 S.E.2d at 775. At that hearing, the Petitioners “claimed that the assessments of their properties for the period from July 1, 2006 to January 31, 2007, were excessive and exceeded their true and actual value.” *Id.* In order to make this claim, Petitioners obviously knew in February 2007 the alleged fair market values of their properties. Equally obvious, they knew what they paid for their properties.

The County Commission issued an order on February 15, 2007 affirming the assessments. *Id.* That order was appealed to the Circuit Court of Monroe County on March 14, 2007. *Id.* The Circuit Court held that the appeal was properly perfected only by Mountain America, LLC, and not the individual landowners. *Id.* at 677, 687 S.E.2d at 776. The Circuit Court then affirmed the County Commission’s ruling on the assessments. *Id.* Mountain America, LLC and the individual landowners appealed that decision to the Court, which affirmed all of the rulings of the Circuit Court.

B. Allegations in Second Amended Complaint

Although lengthy, nearly all of the allegations in the Second Amended Complaint are directed to the developers and United Bank. The limited allegations against McQuade can be distilled to a few key facts.

Petitioners purchased their properties in 2005–06. Most financed their purchases through loans from United Bank. United Bank, in turn, engaged McQuade to appraise the properties in connection with the loans. Petitioners claim that these appraisals were fraudulent.

Petitioners' alleged theory is that there was a "pyramid" of fraudulent appraisals. (A.R. 107). The appraisals that are at the base of this alleged pyramid are the "Schonberger transaction" and the "Shoupe/Chamberland transaction." (A.R. 107) McQuade is not alleged to have had any involvement in the Shoupe/Chamberland transaction and is not alleged to have appraised the property that is the subject of that transaction. (*See* A.R. 76-77, discussing the Shoupe/Chamberland transaction and never alleging any involvement by McQuade). Therefore, the Shoupe/Chamberland transaction cannot be probative of any alleged fraud by McQuade.

As for the Schonberger transaction, this was the initial appraisal by McQuade in Walnut Springs and was for a loan to finance the construction of a house on property owned by Schonberger. (A.R. 79). Petitioners pejoratively refer to this as the "fraudulent Schonberger transaction." Recognizing that McQuade is not alleged to have any involvement in the Shoupe/Chamberland transaction, Petitioners make the Schonberger transaction the lynchpin of their claims against McQuade. *See* Petitioners' Brief at 3 (the sales and the per acre values all rest on the Schonberger transaction); *see also* A.R. 254 ("The fraud underlying the entire development, and forming the basis of Plaintiffs' claims, is the 'fraudulent Schonberger transaction'").

Petitioners' alleged that Schonberger owned 5.88 acres of land. (A.R. 78). Schonberger obtained a construction loan from United Bank to build a home on this lot. (A.R. 78). United Bank engaged McQuade to do the appraisal for the loan. (A.R. 79). McQuade was provided with a real estate purchase agreement showing that Schonberger had purchased the 5.88 acres

from Mountain America, LLC for \$294,000. (A.R. 79). The agreement described the property as “Walnut Ridge Forest Estate Lot 1 Walnut Springs Mtn. Reserve.” (A.R. 79). McQuade appraised the 5.88 acres plus the house at \$656,900.00. (A.R. 79).

As Petitioners admit in the Second Amended Complaint, in 2009 the property and house were sold in an arm’s length transaction for \$699,000.00. (A.R. 90). The fact that the property and house sold for *more* than McQuade’s appraised value (even after the economic downturn) completely undercuts Petitioners’ theory that McQuade’s appraisal was in any way fraudulent or improper.

Petitioners allege that the subsequent appraisals of property by McQuade were fraudulent because they were based on the alleged improper Schonberger appraisal. Of course, by Petitioners’ own admission the Schonberger appraisal proved to be accurate, so reliance on the Schonberger appraisal could not make the other appraisals fraudulent.

The only problem identified by Petitioners with the Schonberger transaction is that the property allegedly had never been owned by Mountain America, LLC (even though that is what was stated in the agreement presented to McQuade) and had not been sold by Mountain America to Schonberger. (A.R. 79). **Petitioners never alleged that McQuade knew about these purported facts.** Nor did they explain how these facts were material, given their admission that the value in the appraisal was validated by a subsequent arm’s length sale.

The Second Amended Complaint reveals additional flaws in the theory that the Schonberger appraisal is the basis for all of the claims in this case. Petitioners Mike and Vivian Hollandsworth, Jan Jerge, James Carroll, Jr., and Jim and Shayna Mackey all purchased their properties *before* the Schonberger transaction. (A.R. 88). Because Petitioners’ fraud theory begins with the Schonberger transaction, the fact that these purchases preceded the Schonberger

transaction necessarily defeats the claims of these Petitioners. Moreover, the Mackeys' did not finance their purchase through United Bank, but instead used a home equity loan. (A.R. 86). Therefore, their property was not appraised by McQuade or anyone else. Obviously McQuade could not have committed fraud as to them.

The other alleged basis for Petitioners' claims is that, as part of their purchases, they received "confidential rebates" from the developers. (E.g., A.R. 89, alleging that Petitioner Baez received a confidential rebate at closing). Petitioners allege that the appraisals did not account for these rebates. (E.g., A.R. 92-93). **Petitioners never alleged that McQuade knew of the confidential rebates.** Indeed, they were, as Petitioners alleged, "confidential" and were not even shown on the sales contracts, settlement statements, or HUD forms. (E.g., A.R. 92, 97). Obviously, McQuade could not account for something that was kept hidden from him by the Petitioners and the developers.

The only other salient fact is that none of the Petitioners alleged that they ever saw any appraisal by McQuade prior to purchasing their property. This is hardly surprising, because none of the Petitioners hired McQuade to perform any appraisals. Instead, McQuade was hired by United Bank, and submitted the appraisals to the bank solely for purposes of the bank's lending decisions. (E.g., A.R. 88).

SUMMARY OF ARGUMENT

The Circuit Court correctly applied well established West Virginia law in granting the Motion to Dismiss. To begin, the Circuit Court properly took judicial notice of certain adjudicative facts from the prior litigation in Monroe County and this Court involving the Petitioners and their properties. These facts were known to the Circuit Court because it presided over that matter in 2007, and are known to this Court by virtue of the *Mountain America* case.

These facts showed that Petitioners claimed in February 2007 that their tax assessments exceeded the true and actual values of their properties. Thus, the Petitioners necessarily knew what the fair market values of their properties were at that time. If they knew the fair market values, they knew or should have known that they allegedly paid too much for their properties.

Next, the Circuit Court correctly identified the five part test for determining whether an action is time barred as articulated by this Court in *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009). It then identified the controlling limitations period for the causes of action asserted (two years for the tort claims asserted against McQuade); found that the elements of the causes of action occurred no later than June 30, 2006 (the latest date on which any Petitioner purchased property); found that the discovery rule tolled the statute of limitations only until February 7, 2007, at which time Petitioners should have known of their claims (because of the assertions before the Monroe County Board of Equalization and Review); found that there were no other allegations of fraudulent concealment by the Respondents; and found that there was no evidence of any other tolling doctrine that could apply. Because the statute of limitations was tolled only until February 7, 2007, and because the Petitioners filed suit more than two years after that date, the Circuit Court held that the tort claims were not timely filed and should be dismissed. All of these conclusions are correct.

With regard to the remaining claim asserted against McQuade (detrimental reliance), the Circuit Court held that this is an equitable claim that is nothing more than a restatement of the fraud claim. Petitioners do not challenge this aspect of the Circuit Court's decision, and therefore have waived the right to appeal this ruling. Moreover, the Circuit Court's ruling is correct. If this is an equitable claim, then it was properly dismissed because Petitioners had an

adequate remedy at law for fraud. If it is not an equitable claim, then it is governed by the two year statute of limitations and is time barred like the other claims.

Additionally, McQuade raised other grounds to dismiss the Second Amended Complaint which were not considered by the Circuit Court, including that Petitioners failed to allege facts showing reliance on any representations made by McQuade. These other grounds also justify dismissal of this case.

For all of the reasons that follow, this Court should affirm the Circuit Court's Order granting the Motion to Dismiss and dismissing the Second Amended Complaint.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, McQuade submits that oral argument is not necessary for this appeal. Petitioners' arguments have no merit, the dispositive issues have been authoritatively decided, the facts and the legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

1. Standard of Review on Appeal

This Court reviews *de novo* the Circuit Court's order granting the Motion to Dismiss. Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

2. Standard of Review on Motion to Dismiss

The Circuit Court granted McQuade's Motion to Dismiss brought pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. A motion under Rule 12(b)(6) tests the formal sufficiency of a complaint. *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242,

243 (1987). A complaint that fails to set forth facts showing a right entitling the plaintiff to relief is properly dismissed on a Rule 12(b)(6) motion. *Id.* at 160, 358 S.E.2d at 244. Likewise, a complaint containing conclusory allegations, or allegations unsupported by essential factual statements, is deficient and properly dismissed. *Fass v. Nowasco Well Service, Ltd.*, 177 W.Va. 50, 53, 350 S.E.2d 562, 564 (1986). Every essential element of a cause of action must be stated in the complaint in order to survive a Rule 12(b)(6) motion. *Sticklin v. Kittle*, 168 W.Va. 147, 164, 287 S.E.2d 148, 157-58 (1981).

The statute of limitations is properly raised on a Rule 12(b)(6) motion “where it is evident from the plaintiff’s pleading that the action is barred, and the pleading fails to raise some basis for tolling or the like.” *Forshey v. Jackson*, 222 W.Va. 743, 746, 671 S.E.2d 748, 751 n. 7 (2008); *see also Rufus v. The Greenbrier Sporting Club Development Co., Inc.*, No. 13-0218 (W.Va. Sup. Ct. November 8, 2013) (memorandum decision) (trial court properly granted Rule 12(b)(6) motion on grounds of statute of limitations even though plaintiffs alleged that they did not know of the fraud until less than two years before filing suit).

In granting the Motion to Dismiss, the Circuit Court took judicial notice of certain facts. “Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice.” *Forshey*, 222 W.Va. at 747, 671 S.E.2d at 752.

3. The Circuit Court Properly Granted the Motion to Dismiss Because the Second Amended Complaint and the Judicially Noticed Facts Conclusively Show That Petitioners Knew or Should Have Known of the Alleged Fraud More Than Two Years Prior to Filing Suit.
 - A. The Circuit Court Properly Took Judicial Notice of the Facts From the Prior Litigation Involving the Petitioners and Their Properties (Assignment of Error II)

Rule 201 of the West Virginia Rules of Evidence permits courts to take judicial notice of

certain facts. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” W. Va. R. Evid. 201(b). Moreover, “a court may take judicial notice of its own records concerning the same subject matter and substantially the same parties.” 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 201.03[3][e] (5th ed. 2012).

In this case, the Circuit Court took judicial notice of the fact that on February 7, 2007 these Petitioners, or their co-owners, challenged the tax assessments on their properties in a proceeding before the Monroe County Commission sitting as the Board of Equalization and Review. The basis for that challenge was that the tax assessments were not based on the true and actual value of the properties. The Board rejected the challenges, and the Petitioners appealed the matter to the Circuit Court of Monroe County, where it was heard by the same judge who decided this case. The Circuit Court affirmed the Board’s rejection of the tax assessment challenges, and the Petitioners appealed that decision to this Court, which likewise affirmed. *Mountain America, LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768 (2009).

The accuracy of these facts cannot reasonably be questioned. Among other things, they are set forth in this Court’s opinion in *Mountain America*, which was an appeal of Civil Action No. 07-C-30 from the Monroe County Circuit Court. Because these facts are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned (*i.e.*, the records of this Court), the Circuit Court properly took judicial notice of these facts.

Petitioners argue that, although they were parties to the prior proceedings involving the challenge to the tax assessments, they were not actively involved and that this somehow prohibited the Circuit Court from taking judicial notice. Petitioners cite no authority for this

proposition. Petitioners actually did challenge their assessments and seek to appeal their claims to this Court in *Mountain America*. Whether they were actively involved or not does not change the fact that they were parties to those proceedings. While they were free not to pay attention, they cannot now claim that they did not challenge the assessments.

Finally, Petitioners misconstrue what the Circuit Court did. The Circuit Court did not take judicial notice of the fact that the Petitioners knew or should have known of the alleged fraud by February 7, 2007. Instead, the Circuit Court simply took judicial notice of the fact that on February 7, 2007, these Petitioners challenged their tax assessments by claiming that the assessments exceeded the fair market value of their properties. This fact is unassailable, and even the Petitioners admit that the Circuit Court has the power to take judicial notice of this fact. *See* Petitioners' Brief as 14 ("The Petitioners do not dispute that the Circuit Court had the legal power to take judicial notice of the fact that at least some of the Petitioners had previously appealed their tax assessments..."). Accordingly, the Circuit Court did not err in taking judicial notice of certain facts from the prior tax assessment proceedings.

B. The Circuit Court Applied the Correct Test for Determining Whether the Petitioners' Claims Were Time Barred.

Petitioners do not dispute that this Court's decision in *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009), sets forth the test for determining whether an action is barred by the statute of limitations. In that case, the Court explained the test as follows:

First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if material questions of fact exist, the jury) should identify when the requisite element of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, supra. Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then

determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation was arrested by some other tolling doctrine.

Id. at 53, 689 S.E.2d at 265.

In this case, the Circuit Court applied the *Dunn* test and concluded (1) that all tort claims alleged against McQuade were governed by the two year statute of limitations found in W. Va. Code § 55-2-12(b) (*see* A.R. 246-47); (2) that the elements of the causes of action occurred no later than June 30, 2006 (*see* A.R. 247); (3) that the discovery rule tolled the statute of limitations only until February 7, 2007 (*see* A.R. 248-49); (4) that there were no other allegations showing that the Respondents fraudulently concealed facts that prevented the Petitioners from discovering or pursuing their causes of action after February 7, 2007 (*see* A.R. 249); and (5) that there was no allegation of any other tolling doctrine that could apply (*see* A.R. 249).

The Petitioners assignments of error implicate only the third conclusion set forth above. Accordingly, the other findings will not be discussed.

C. The Discovery Rule Tolled the Statute of Limitations Only Until February 7, 2007, Because the Judicially Noticed Facts and the Facts Alleged in the Second Amended Complaint Establish that the Petitioners Knew or Should Have Known of the Alleged Fraud by that Date (Assignment of Error I)

The Circuit Court's holding that the discovery rule tolled the statute of limitations only until February 7, 2007 is correct. Petitioners claim that McQuade's appraisals overstated the value of the properties, causing them to pay inflated amounts for their properties. But on February 7, 2007 they admittedly knew the fair market values of their properties, because they challenged their tax assessments on the grounds that the assessments exceeded fair market value. Simply put, they could not have asserted this challenge without knowing the fair market values

of their properties. And if they knew the fair market values, they knew enough to know they allegedly paid amounts in excess of those values.

In an effort to escape this result, the Petitioners now argue that this case “is not about a dispute over value.” Petitioners’ Brief at 15. This concession requires this Court to summarily affirm the dismissal of all claims against McQuade. Simply put, the *only* basis for the claims against McQuade is that McQuade allegedly overstated the values of the properties in the appraisals. Indeed, there can be no other basis for a claim against McQuade, because McQuade had no other involvement in these transactions other than appraising the properties. McQuade is not alleged to have made any misrepresentations to the Petitioners, and is not alleged to have ever communicated with the Petitioners at any time. Thus, if this is not a case about value, as Petitioners now tell the Court, then there are no grounds for Petitioners to have sued McQuade in the first place.

But the Petitioners did make this a case about property values. With regard to each Petitioner, the Second Amended Complaint is replete with allegations about property values. Each property allegedly is not worth what was paid for it. *See generally* A.R. 81-117. The conclusion, as expressed in paragraph 110 of the Second Amended Complaint, is that there was a “pyramid of fraudulent value inflation” for the Petitioners’ properties. (A.R. 108).⁴

Moreover, many of the allegations specific to certain Petitioners relate to value. For example, paragraph 64 alleges that Petitioners Carroll, Jerge, Hollandsworth and Mackey were

⁴ The following are examples of allegations in the Complaint regarding value: paragraph 135 (A.R. 117) alleging fraudulent sale values; paragraph 137 (A.R. 118) alleging misrepresentation of value; paragraph 138f (A.R. 119) alleging representations that the properties were of a value in excess of the amounts financed by Petitioners; paragraph 139 (A.R. 119-20) alleging financing of properties at values that were fraudulent and misrepresented; paragraph 142 (A.R. 120) alleging that the “value of the lots” was far below what was represented; paragraph 144 (A.R. 121) alleging that Petitioners purchased properties at “fraudulently-inflated values.”

given misrepresentations “regarding the value of the property.” (A.R. 87). Paragraph 77 alleges that Petitioner Kim purchased two lots for an “exorbitant” amount of money (A.R. 94), and paragraph 78 alleges a “fraudulent sale value” in connection with Kim’s purchase. (A.R. 95). All of these allegations belie Petitioners’ current argument that this is not a case about values.

For these reasons, the Circuit Court’s holding that the Petitioners knew or should have known of their claims no later than February 7, 2007 is correct. (A.R. 248). As the Circuit Court stated, “knowing that their land was overvalued, a reasonable person would have inquired as to the identity and conduct of the parties involved in the sales of their property, i.e. the Defendants.” (A.R. 249). This is a correct statement of the law and triggers the running of the statute of limitations. *See Dunn*, 225 W.Va. at 53, 689 S.E.2d at 265 (whether a plaintiff knows of or discovered a cause of action is an objective test that focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action). Therefore, the Order dismissing the Second Amended Complaint should be affirmed.

D. The Circuit Court Correctly Dismissed the Detrimental Reliance Claim Because Either it is Duplicative of the Fraud Claim and Therefore is Time Barred, or it is an Equitable Claim Over Which the Court Lacks Jurisdiction (Assignment of Error IV)⁵

Petitioners’ detrimental reliance claim is identical to their fraud claim. Both claims allege that Respondents made false representations that caused Petitioners to purchase their properties. *Compare* A.R. 121 (in Count One, alleging fraud, Petitioners claim that Respondents’ misrepresentations induced Petitioners to purchase property) with A.R. 131-32 (in

⁵ The Petitioners’ third assignment of error concerns the Circuit Court’s dismissal of their claim for breach of the implied covenant of good faith and fair dealing. This claim was asserted only against United Bank. (A.R. 128, alleging that United Bank owed the Petitioners a duty of good faith and fair dealing). Therefore, it will not be addressed by McQuade.

Count Eleven, alleging detrimental reliance, Petitioners claim that they were induced to purchase property based on representations of Respondents).

The Circuit Court held that detrimental reliance is an equitable claim, and therefore it lacked jurisdiction over that claim because Petitioners had a remedy at law for fraud. (A.R. 251-52). Petitioners make no argument that this holding is erroneous, and therefore have waived the right to appeal this issue. See Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure; *Noland v. Virginia Insurance Reciprocal*, 224 W.Va. 377, 378, 686 S.E.2d 23, 29 (2009).

Even if Petitioners had challenged this ruling, it would be unavailing. “Equity will not entertain a suit to recover damages for a fraud which amounts to a tort remediable by an action at law for fraud and deceit.” Syl. Pt. 5, *Mountain State College v. Holsinger*, 230 W.Va. 678, 742 S.E.2d 94 (2013). A “court of equity is without jurisdiction to entertain a suit based on an alleged fraudulent misrepresentation to the prejudice of the complaining party, where the sole relief sought therein is the recovery of damages.” *Id.* at 687, 742 S.E.2d at 103.

There is no reversible error in the Circuit Court’s decision on the detrimental reliance claim. Either it is an equitable claim, in which case *Mountain State College* makes clear the Circuit Court had no jurisdiction, or it is not an equitable claim, in which case it is governed by West Virginia Code § 55-2-12 and is time barred for the same reasons that apply to the fraud claim.

4. There Are Alternative Grounds For Dismissal of the Second Amended Complaint That Were Raised By McQuade Below and Not Decided By the Circuit Court.

The Circuit Court’s decision dismissing the tort claims in the Second Amended Complaint was based entirely on the statute of limitations. However, there are other grounds that warrant dismissal. These grounds were raised by McQuade below but not decided by the Circuit Court. They are properly considered by this Court in this appeal. See *State ex rel. Smith v. West*

Virginia Crime Victims Compensation Fund, 239 W. Va. 728, 753 S.E.2d 886, 892 n. 6 (2013) (“with regard to the fact that this case has been decided on grounds different from those set forth in the final order of the Court of Claims, we note that ‘[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment’”) (citing Syllabus Point 3, *Barnett v. Wolfork*, 149 W.Va. 246, 140 S.E.2d 466 (1965)).

A. Petitioners’ Claims For Actual Fraud, Constructive Fraud, and Detrimental Reliance Failed to State a Claim Against McQuade Because There Are Insufficient Allegations of Reliance.

Three of the claims asserted against McQuade (actual fraud, constructive fraud, and detrimental reliance) were fraud-based claims and required Petitioners to sufficiently allege that they justifiably relied on the alleged misrepresentations of McQuade. *See Horan v. Turnpike Ford, Inc.*, 189 W.Va. 621, 625, 433 S.E.2d 559, 563 (1993) (an essential element of fraud is that the plaintiff relied on the alleged fraudulent act and was justified in relying on it); *West Virginia v. Moore*, 895 F. Supp. 864, 873 (S.D. W.Va. 1995) (claim for constructive fraud requires that plaintiff relied upon the alleged fraudulent conduct); *Hatfield v. Health Management Associates of West Virginia*, 233 W.Va. 259, 266, 672 S.E.2d 395, 402 (2008) (detrimental reliance requires, among other things, reasonable reliance).

In this case, Petitioners never alleged that they saw McQuade’s appraisals before they purchased their properties. It is axiomatic that if Petitioners never saw the appraisals, they could not have relied on them. Moreover, because the appraisals were done for United Bank in connection with its financing of the purchases, they were only done *after* each Petitioner agreed to purchase their property. Given that the Petitioners agreed to purchase property before any

appraisals were done, each Petitioner clearly did not rely on the appraisals in making the decision to purchase property.

Because Petitioners' claims for fraud, constructive fraud, and negligent misrepresentation against McQuade were not supported by essential factual allegations showing the element of reliance, those claims were deficient and were properly dismissed. *Fass v. Newsco Well Service, Ltd.*, 177 W.Va. 50, 53, 350 S.E.2d 562, 564 (1986); *Sticklin v. Kittle*, 168 W.Va. 147, 164, 287 S.E.2d 148, 157-58 (1981).⁶

Finally, Petitioners' concession that this case "is not about a dispute over value" (Petitioners' Brief at 15) precludes any fraud claim against McQuade. McQuade's alleged liability is based on appraisals that purportedly misstated the value of the properties. If there is no dispute about the value of the properties, then there is no basis for any claim against McQuade.

B. Petitioners' Claim For Negligence Failed to State a Claim Against McQuade Because McQuade Owed No Duty to Petitioners⁷

"The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." Syllabus Point 4, *Conley v. Stollings*, 223 W.Va. 762, 679 S.E.2d 594 (2009).

⁶ As previously noted, Petitioners Mike and Vivian Hollandsworth, Jan Jerge, James Carroll, Jr., and Jim and Shayna Mackey all purchased their properties *before* the Schonberger appraisal. (A.R. 88). Because the Schonberger appraisal is the lynchpin of the alleged fraud, the fact that these purchases preceded the Schonberger appraisal further negates the element of reliance as to them. Moreover, McQuade did not even appraise the Mackeys' property, and therefore they did not rely on any appraisal by McQuade. (A.R. 86).

⁷ It is doubtful that Petitioners have assigned error to the dismissal of any claims against McQuade other than the fraud claims. Nevertheless, McQuade will briefly address the deficiencies in the non-fraud claims.

In this case, there are no facts alleged to support imposing a duty on McQuade, and there is no law that supports such a duty. The allegations are that McQuade was hired by United Bank, not Petitioners. There are no allegations of any contact or communication between any Petitioner and McQuade. Therefore, the negligence claim fails as a matter of law.

C. The Civil Conspiracy Claim Failed to State a Claim Against McQuade Because There Were No Allegations of Concerted Action by McQuade, and Because There Are No Other Viable Claims Against McQuade.

Petitioners asserted a claim against McQuade for civil conspiracy. This claim was deficient for several reasons.

First, a civil conspiracy requires concerted action. *Dixon v. American Industrial Leasing Co.*, 162 W.Va. 832, 834, 253 S.E.2d 150, 152 (1979). There must be a “common plan” among the conspirators. *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255, 269 (2009). The Second Amended Complaint is devoid of any allegations of concerted action by McQuade, or that it shared a common plan with anyone. For example, the allegations make clear that McQuade did not know about the “confidential rebates” given to the Petitioners. Instead, McQuade simply was given the purchase contracts, which did not mention the rebates. Nor were there any allegations that McQuade knew that Schonberger allegedly had not purchased her property from Mountain America.

Second, the conspiracy claim is not a “stand-alone cause of action.” *Dunn*, 225 W.Va. at 57, 689 S.E.2d at 269. Because it cannot stand alone, there must be some other viable claim. As already explained, none of the claims against McQuade can survive a motion to dismiss. Therefore, the conspiracy claim fails as a matter of law.

D. The Emotional Distress Claim Failed to Allege Essential Facts and Therefore Was Properly Dismissed.

There are four elements of a claim for intentional infliction of emotional distress/tort of outrage: (a) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (b) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain that emotional distress would result from his conduct; (c) that the actions of the defendant caused the plaintiff to suffer emotional distress; and (d) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it. *Chhapparwal v. West Virginia Univ. Hospitals, Inc.*, 2009 U.S. Dist. LEXIS 82469, at *22 (N.D. W.Va. Sept. 9, 2009) (citing *Travis v. Alcon Industries, Inc.*, 202 W.Va. 369, 375, 504 S.E.2d 419, 425 (1998)). It is for the trial court to determine whether the defendant's conduct is so outrageous and extreme so as to constitute the intentional infliction of emotional distress. Syllabus Point 4, *Travis v. Alcon Industries, Inc.*, 202 W.Va. 369, 378, 504 S.E.2d 419, 428 ("Whether conduct may reasonably be considered outrageous is a legal question....").

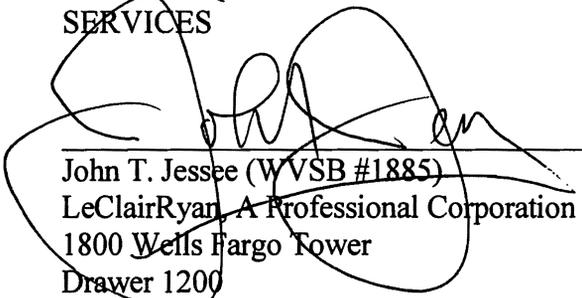
To establish extreme and outrageous conduct, Petitioners were required to allege more than conduct that is unreasonable, unkind or unfair; the conduct must truly offend community notions of acceptable conduct. *Travis*, 202 W.Va. at 375, 504 S.E.2d at 425. It is not enough that the defendant acted with an intent that is tortious or even criminal, or that he intended to inflict emotional distress, or even that his conduct is characterized by malice or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort. *Id.* Instead, the conduct must go beyond all bounds of decency, and be regarded as atrocious and utterly intolerable in a civilized community. *Id.*

In this case, as a matter of law McQuade's alleged conduct is not so extreme and outrageous so as to go exceed the bounds of decency so as to be utterly intolerable in a civilized community. McQuade prepared appraisals. Petitioners alleged that the appraisals were prepared incorrectly. Even if done intentionally (which McQuade denies), this would not rise to the level of outrageous conduct. Because the Court must make the determination whether the alleged conduct is outrageous, and because there are no factual allegations showing that McQuade's alleged conduct is outrageous, the intentional infliction and outrage claim fails as a matter of law.

CONCLUSION

The Circuit Court properly granted McQuade's Motion to Dismiss because all of the asserted claims are barred by the statute of limitations. In addition, all of the claims were inadequate as a matter of law for failure to plead essential facts. Therefore, for the foregoing reasons, the Circuit Court's Order dated February 27, 2014 should be affirmed.

STAN MCQUADE AND THELMA
MCQUADE, INDIVIDUALLY AND
D/B/A MCQUADE APPRAISAL
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

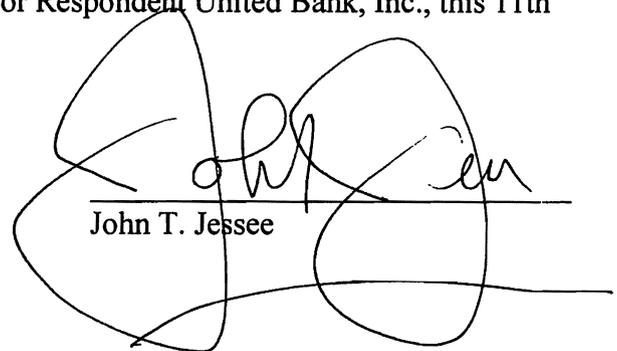
CHARLES J. EVANS and)
CYNTHIA B. EVANS, et al.)
)
Plaintiffs Below, Petitioners)
v.)
)
UNITED BANK, INC., a West Virginia)
Corporation, STAN McQUADE,)
Individually, THELMA MCQUADE, and)
d/b/a McQUADE APPRAISAL SERVICES)
)
Defendants Below, Respondents)

No. 14-0291

Appeal from a Final Order
of the Circuit Court of
Monroe County (09-C-94)

CERTIFICATE OF SERVICE

I, John T. Jessee, hereby certify that a true copy of the foregoing Brief of Respondents was mailed, postage prepaid, to John H. Bryan, Esquire, P. O. Box 366, Union, West Virginia 24983, counsel for Petitioners; and C. William Davis, Esquire, Richardson & Davis, PLLC, P. O. Box 1778, Bluefield, West Virginia 24701, counsel for Respondent United Bank, Inc., this 11th day of August, 2014.



John T. Jessee