IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

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No. 32611

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RITA K. HERROD AND JENNIFER A. HERROD,
Plaintiffs Below, Appellants

v.

FIRST REPUBLIC MORTGAGE CORPORATION, INC., DBA FIRST SECURITY MORTGAGE CORPORATION, A CORPORATION; WASHTENAW MORTGAGE COMPANY, A CORPORATION; CHASE MANHATTAN MORTGAGE CORPORATION, A CORPORATION; EARL YOUNG; CRADDOCKS LAST STAND, INC., A CORPORATION; DARLEEN WESTFALL; WEST VIRGINIA REAL ESTATE APPRAISER LICENSING AND CERTIFICATION BOARD; AND FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
The Honorable James C. Stucky, Judge
Civil Action No. 01-C-2907

AFFIRMED IN PART, REVERSED IN PART

Submitted: September 14, 2005
Filed: December 1, 2005

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CHIEF JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE BENJAMIN, deeming himself disqualified, did not participate in the decision of this case.

JUDGE JOHN S. HRKO, sitting by temporary assignment.

JUSTICE DAVIS and JUSTICE MAYNARD concur, in part, and dissent, in part, and reserve the right to file separate opinions.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

4. Where unconscionability is asserted under West Virginia Code § 46A-2-121 (1996) (Repl. Vol. 1999), the existence of questions of fact regarding whether the bargaining power was grossly unequal and thereby rendered the transactions between the plaintiffs and defendants unconscionable precludes the resolution of such claims through

summary judgment. Only when there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law based on the undisputed factual circumstances and resolved through summary judgment.

Albright, Chief Justice:

Appellants Rita Herrod and Jennifer Herrrod (collectively referred to as the "Herrods") seek relief from an adverse summary judgment ruling issued by the Circuit Court of Kanawha County in connection with an illegal and predatory lending practices action they filed against Appellee Washtenaw Mortgage Co. ("Washtenaw").[1] Upon our full review of the record before us and consideration of the arguments of counsel, we determine that summary judgment was improperly granted with regard to some of the claims asserted by Appellants due to the existence of certain issues of fact that remain to be determined. Accordingly, the decision of the lower court is affirmed, in part, reversed, in part, and this matter is remanded for further proceedings consistent with the holdings of this opinion.

I. Factual and Procedural Background

The Herrods, who are mother and daughter, reside in a home located in Clarksburg, West Virginia, that Mrs. Herrod purchased in July 1994 for the amount of $22,000.[2] In April of 1999, the Herrods refinanced the home with a construction loan from

[1]Washtenaw is the only remaining defendant of the various individuals and businesses that were sued by the Herrods after settlement and dismissals as a result of previous summary judgment rulings.

[2]Although Mrs. Herrod originally purchased the home for her daughter, she moved into the home to live with Jennifer Herrod and her four grandchildren in September 1998.

a local bank. The loan amount of $51,484.67[3] was initially applied to pay off the first mortgage and the remainder was used for improvements to the home.

In March 2000, while working at Heilig-Myers as a Credit Manager, Jennifer Herrod was approached by Earl Young, a loan broker for First Security Mortgage Corporation ("First Security")[4] while he was handing out business cards for First Security. When Ms. Herrod decided to respond to Mr. Young's solicitation, he represented that he would search for a home loan on her behalf that carried a lower interest rate than her existing loan.[5]

On April 5, 2000, Bob Cress, who was Mr. Young's boss and the vice-president of First Security, came to the Herrod residence to collect information germane to the loan application. Based upon Mr. Cress's inspection of the home on that date, he informed the Herrods that their home was worth between $118,000 and $138,000. The figure of $138,000 was placed on the loan application with regard to the estimated value of

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[3]The initial annual percentage rate for the fifteen-year adjustable rate loan was 7.820%.

[4]Ms. Herrod was familiar with Mr. Young, as he was a process server for Heilig- Myers.

[5]Ms. Herrod decided to contact Mr. Young when she learned that the interest rate on her mortgage was about to increase to 9.125%. *See supra* note 3.

the home. During this litigation, the Herrods testified that their personal estimate of the subject home's worth at the time was $70,000.[6]

During that April 5, 2000, meeting at their home, the Herrods completed a handwritten loan application.[7] Although Rita Herrod volunteered to Mr. Young that she would not be employed a month from the estimated loan closing date, she testified that Mr. Young assured her that their future income was of no consequence to the issuance of the loan.[8] Appellants maintain that when Messrs. Young and Cress left their home, they did not leave any documents with the Herrods. The record in this case, however, contains various lending documents that bear their signatures.[9] The Herrods do not disclaim the authenticity

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[6]This valuation was purportedly based on a prior appraisal performed in connection with refinancing they procured in 1999 to perform certain home improvements.

[7]At the loan closing, this application was typed.

[8]During her deposition, Mrs. Herrod was questioned regarding disclosures she made about her employment situation:

> Q. At the time you filled out the application, where were you working?
> A. Actually, I was on a severance package from Byard Mercer Pharmacy.
> Q. So your employment had already terminated?
> A. Correct, and I told Mr. Young that, and he said that it didn't matter. All that mattered was today, and as long as I was still getting a paycheck, that that's all that mattered.

[9]Those documents include a Retention Agreement; a Disclosure Statement; a Mortgage Loan Origination Agreement; a Good Faith Estimate; and a Truth-in-Lending (continued...)

of the signatures on those forms, just that "they were totally unaware of what the documents were" since they allege they were not given copies of the signed documents when the brokers departed.

Following the home visit, the loan brokers prepared an appraisal request form on which Mr. Young provided two figures suggesting alternative values of $118,000 and $137,000 for the Herrod home. The form was transmitted by facsimile to Mr. Jack Weaver who worked for a real estate appraisal company known as Craddock's Last Stand in Parkersburg, West Virginia. Purportedly, there was an arrangement between Mr. Weaver and First Security whereby Mr. Weaver would provide inflated appraisals in connection with loans being pursued by First Security.[10] When the appraisal report came back, the Herrod home was valued at $118,000.[11]

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[9](...continued)
Disclosure Statement. The first three documents were signed on April 5, 2000, and the last two were mailed to the Herrods on April 6, 2000. and signed in advance of the closing that took place on April 24, 2000.

[10]The arrangement purportedly involved the use of two figures on the appraisal request form; one being a "deal breaker" and the other a so-called "Christmas figure." Mr. Weaver would instruct one of his appraisers to inspect the property and then someone in the home office would complete the report by providing the comparables necessary to obtain the value sought by the loan broker.

[11]Later when the Herrods tried to place their home on the market, they were told by a local realtor that the home could not sell for more than $70,000 to $75,000.

On April 24, 2000, the Herrods went to First Security's office in Clarksburg, West Virginia, to close the loan. At the closing, Mr. Young told the Herrods that the lower appraisal amount ($118,000, rather than the hoped for $137,000) required them to reduce their broker fees to "have enough room to do the loan." In actuality, the loan documents indicate that more than $10,000 in fees[12] were paid in connection with the loan issued by Washtenaw to the Herrods. These fees included a $3,052 payment from Washtenaw to First Security for obtaining the Herrods' signature on a higher interest rate loan. This payment, which Appellants characterize as a "kickback," was in the form of a yield spread premium, which is ostensibly paid to the broker by the lender for the purpose of enabling the borrower to avoid higher up front fees at the closing. *See generally Culpepper v. Inland Mortgage Corp.*, 132 F.3d 692 (11th Cir. 1998) (discussing operation of yield spread premiums). The cost to the borrower for this arrangement is payment of a higher interest rate on the loan they obtain instead of the lower rate for which they qualified.

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[12]The fee breakdown is as follows:

Loan origination fee (First Security)	$ 4,000
Underwriting fee (Washtenaw)	$ 250
Broker fee (First Security)	$ 2,600
Processing fee (First Security)	$ 290
Service set up fee (Washtenaw)	$ 100
Administrative fee (First Security)	$ 75
Yield spread premium (Washtenaw)	$ 3,052
Settlement/closing fee (Midwest Title)	$ 125
Total	$10,492

The promissory note the Herrods executed at closing provided for monthly payments of $759.56[13] for a thirty-year loan term and carried a 9% annualized interest rate. With the loan proceeds, the Herrods refinanced their previous mortgage; paid off credit card debt;[14] and received $9,936.25 in cash. As part of the closing costs, the Herrods paid $419.83 to Washtenaw and $6,965 to First Security. On or after the closing, Washtenaw paid $3,304 to First Security.[15]

Seven weeks after the closing, Federal National Mortgage Association ("Fannie Mae") purchased the Herrods' loan with Washtenaw. After a civil action was initiated by the Herrods on September 27, 2001, and Fannie Mae became aware of the fact that the fees Washtenaw charged the Herrods exceeded the 5% cap they place on the loans they purchase,[16] it sold the loan to Chase Manhattan Mortgage.[17] During the pendency of

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[13]The Herrods testified that the loan from Washtenaw reduced the interest rate on their mortgage payment and also reduced their monthly payments by $500 or $600.

[14]The complaint provides figures indicating that proceeds from the Washtenaw loan were used to pay off $23,211 in credit card debt and $1600 was repaid to a 401(K) plan.

[15]This amount was not part of the loan proceeds.

[16]This 5% fee cap policy was announced by Fannie Mae on April 11, 2000.

[17]*See infra* note 19. While we do not rely on the entry of a stipulated order of dismissal on October 27, 2004, after the entry of the summary judgment ruling under consideration wherein Appellants dismissed any claims they had against Chase Manhattan Mortgage, we note for clarification purposes only that Washtenaw repurchased the loan at issue from Chase Manhattan Mortgage, who was the servicer of the loan, after Fannie Mae learned that the loan terms were in violation of its corporate policy with regard to fee (continued...)

this civil action, Rita Herrod testified[18] before the United States Senate Committee on Banking, Housing, and Urban Affairs concerning her loan experience with respect to the issue of the abusive use of yield spread premiums and predatory lending practices.

Through the complaint they filed against First Security, Washtenaw, Chase Manhattan Mortgage,[19] Earl Young Craddock's Last Stand, Darleen Westfall,[20] and West Virginia Real Estate Appraiser Licensing and Certification Board, the Herrods asserted various claims allegedly grounded in illegal and predatory lending practices. Following discovery, Washtenaw filed a motion for summary judgment upon which the trial court heard argument on December 4, 2003. At the end of the hearing, the circuit court granted summary judgment to Washtenaw on various claims asserted against them in the second amended complaint.[21] The Herrods did not appeal the granting of summary judgment as to

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[17](...continued)
charging.

[18]On January 8, 2002, Rita Herrod testified to the Senate Committee that if Mr. Young had not taken a kickback through the use of the yield spread premium, she would have obtained a loan interest rate of 8.5% or lower. She further opined: "I do not think it was worth $10,000 [in fees] to get a loan that is worse than what I had."

[19]Chase Manhattan Mortgage was the servicer for the loan when it was owned by Fannie Mae. After suit was filed, Chase purchased the loan from Fannie Mae for repurchase by Washtenaw.

[20]Ms. Westfall was an appraiser employed by Craddock's Last Stand.

[21]Those claims include allegations concerning the non-registration by First Security as a credit services organization; breach by Washtenaw of a fiduciary duty to the (continued...)

those claims, which were memorialized in a January 21, 2004, order. At end of the summary judgment hearing, the trial court directed counsel for the Herrods and Washtenaw to submit proposed findings of fact and conclusions of law on the remaining claims. On June 23, 2004, the trial court granted summary judgment to Washtenaw on the remaining claims asserted by the Herrods. It is from that second summary judgment ruling that the Herrods seek relief.

II. Standard of Review

As this Court stated in syllabus point one of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), "[a] circuit court's entry of summary judgment is reviewed *de novo*." In syllabus point three of *Aetna Casualty & Surety Co. v. Federal Insurance Company*, 148 W.Va. 160, 133 S.E.2d 770 (1963), this Court explained: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." We further elucidated in syllabus point two of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995): "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party,

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[21](...continued)
Herrods; engagement by Washtenaw in the unauthorized practice of law; engagement by Washtenaw in fraud and conspiracy with regard to the appraisal of the Herrods' home; various claims grounded in dishonesty, misrepresentation, and breach of professional standards; acceptance of fee contingent upon predetermined conclusion; and failure to supervise appraisers.

such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Just as is required by the lower court, this Court must "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter*, 192 W.Va. at 192, 451 S.E.2d at 758. With these standards in mind, we proceed to determine whether the grant of summary judgement to Washtenaw was precipitous under the facts of this case.

III. Discussion

A. Unconscionability

In granting summary judgment to Washtenaw on the remaining claims through the June 23**,** 2004, order, the trial court ruled that Washtenaw was entitled to judgment on the Herrods' claim that the loan was illegal on grounds of unconscionability. In making this ruling, the trial court cited *Hager v. American General Finance, Inc.*, 37 F.Supp.2d 778 (S.D. W.Va. 1999) for the proposition that "[u]nconscionability claims asserted under W.Va. Code § 46A-2-121 can be disposed of on summary judgment." *Hager* does recognize that the statutory claim of unconscionability in West Virginia "is a question of law to be determined based on the factual circumstances of the case" and consequently can be determined at the summary judgment stage. 37 F.Supp.2d at 787. But *Hager* equally stands for the proposition that where there are questions of fact regarding "whether the parties'

bargaining power was grossly unequal so as to render the transactions between the plaintiffs and defendants unconscionable," summary judgment is improper. *Id.*

In *Hager*, the district court looked to the unsophisticated and uneducated nature of the plaintiffs to determine that, upon examination of the evidence presented in the light most favorable to the plaintiffs, genuine issues of fact precluded resolution of the unconscionability claim through summary judgment. Explaining the considerations relevant to such a claim, the district court opined:

> A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, and the existence of meaningful alternatives available to the plaintiffs. A bargain may be unconscionable if there is "gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party. . . ." Gross inadequacy in bargaining power may exist where consumers are totally ignorant of the implications of what they are signing, . . . or where the parties involved in the transaction include a national corporate lender on one side and unsophisticated, uneducated consumers on the other,. . . .

Hager, 37 F.Supp.2d at 786-87 (citations omitted). The *Hager* plaintiffs' lack of sophistication, lack of education, and the allegation that they did not understand what they were signing all combined to convince the appellate court that questions of fact remained as to whether the credit transactions at issue were unconscionable. 37 F.Supp.2d at 787.

The facts of this case, as presented by Appellants, arguably involve at least one unsophisticated and relatively uneducated plaintiff, given that Mrs. Herrod dropped out of school after the tenth grade.[22] Appellants aver that although Jennifer Herrod worked in the collections department of Heilig-Myers, she was not familiar with mortgage transactions and she was unaware of the details of the loan terms. The Herrods maintain the closing was a rushed ordeal with little or no explanation offered as to the various documents handed to them for signing. Purportedly, the closing agent was late to the lunch hour closing;[23] was new to the position; and knew very little about the papers she handed to the Herrods to sign.

In *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854 (1998), this Court emphasized how critical the facts of each case are in determining whether a particular transaction or agreement is unconscionable. After acknowledging that the West Virginia Consumer Credit and Protection Act[24] fails to define the term "unconscionable," we referenced our previous reliance on the definition provided in the

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[22]Our review of the record, however, indicates that Mrs. Herrod did obtain her G.E.D.

[23]The closing was held on Jennifer Herrod's lunch hour. Appellants suggest that the hurried nature of the closing is demonstrated by the fact that some of the documents signed indicate that the closing occurred in Parkersburg, when in fact the closing took place in the Clarksburg office of First Security.

[24]*See* W.Va. Code §§ 46A-2-101 to 2-139 (Repl. Vol. 1999).

Uniform Consumer Credit Code based on the identical language of the provisions. *Arnold*, *id.* at 235, 511 S.E.2d at 860.

> The drafters of the Uniform Consumer Credit Code explained that the principle of unconscionability "is one of the prevention of oppression and unfair surprise and not the disturbance of reasonable allocation of risks or reasonable advantage because of superior bargaining power or position." *See* Uniform Consumer Credit Code, § 5.108 comment 3, 7A U.L.A. 170 (1974). The drafters stated:
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> > The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract.
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> Id. The drafters explained further that "*[t]he particular facts involved in each case are of utmost importance* since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." Id.

204 W.Va. at 235, 511 S.E.2d at 860 (emphasis supplied).

Accordingly, we hold that where unconscionability is asserted under West Virginia Code § 46A-2-121, the existence of questions of fact regarding whether the bargaining power was grossly unequal and thereby rendered the transactions between the plaintiffs and defendants unconscionable precludes the resolution of such claims through summary judgment. Only when there are no factual disputes in existence can an

unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law based on the undisputed factual circumstances and resolved through summary judgment. *See Mallory v. Mortgage America, Inc.*, 67 F.Supp.2d 601, 612 (S.D. W.Va. 1999) (stating that "[u]nconscionability claims should but rarely be determined based on the pleadings alone with no opportunity for the parties to present relevant evidence of the circumstances surrounding the consummation of the contractual relationship").

In ruling against the Herrods on their claim of unconscionability, the trial court found, *inter alia*, that "[t]he Herrods have produced no evidence that the fees paid to First Security were 'excessive'" and also that "[t]he Herrods have produced no evidence that Ms. Westfall's appraisal of the Herrods' residence was somehow fraudulent or that she somehow misrepresented the true market value of the Herrods' residence." Our review of the record indicates that the Herrods have introduced sufficient evidence on each of these issues to present questions of fact. The record contains the loan agreements which, on their face, demonstrate fees that amount to more than 10.5 % of the loan amount.[25] As evidence of the alleged excessive nature of the fees charged in connection with their loan, Appellants refer

[25]While the yield spread premium is not directly paid by the consumer, the consumer does incur additional costs throughout the life of the loan because of the increased percentage rate at which the loan is granted. As Appellants' expert, Kevin P. Byers, explained in his report: "Actual compensation paid to broker First Security on the Herrod loan . . . includes $6,600 [broker fee and loan origination fee] in fees alone, all of which were financed into the loan. The yield spread added $3,304 in additional fees to First Security, paid by the Herrods through a higher note rate, bringing total compensation to $9,904.00, or roughly 10.5% of the loan amount. . . ."

to the fact that up-front fees in excess of 8% of the total loan amount are indicia of a "high cost" loan under federal law.[26] Further evidence upon which Appellants rely to prove the excessiveness of the fees is the buy-back of the loan that occurred when Fannie Mae discovered that the fees charged by Washtenaw were in violation of its corporate policy.[27] In the report of Appellants' expert, Mr. Kevin P. Byers, that is a part of the record,[28] he discusses how the proximity of the loan at issue to the passage of the West Virginia

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[26]*See* 15 U.S.C. § 1602(aa)(1)(B) (2000) (recognizing that loan is covered by federal Home Ownership and Equity Protection Act where up-front finance charges exceed 8% of "total loan amount"). Effective July 1, 2000, West Virginia enacted its own predatory lending law which prohibits the charging of cumulative loan fees in excess of 6% of the loan amount, including any yield spread premium. *See* W.Va. Code § 31-17-8(m)(4) (2002) (Repl. Vol. 2003).

[27]While Washtenaw takes the position that the record only contains this evidence by virtue of a consent decree that post-dates the entry of the summary judgment ruling at issue, the report of Appellants' expert, Mr. Kevin P. Byers, which is a part of the record considered by the trial court because it is attached as an exhibit to the findings of fact and conclusions of law expressly required by the trial court, clearly sets forth the factual basis for the loan buy back by explaining the adoption of the Fannie Mae policy on April 11, 2000, regarding excessive fees. *See Haga v. King Coal Chevrolet Co.*, 151 W.Va. 125, 132, 150 S.E.2d 599, 603 (1966) (holding that upon motion for summary judgment all exhibits and affidavits and other matters submitted by both parties should be considered). Furthermore, the affidavits submitted in support of Fannie Mae's motion for summary judgment clearly document the selling of the loan by Fannie Mae following the filing of the Herrods' lawsuit. Because the non-moving party is entitled to inferences from the evidence on a motion for summary judgment, the evidence clearly suggests that the buy back was initiated by Fannie Mae because of the excessive fees charged to the Herrods. *See Cavender v. Fouty*, 195 W.Va. 94, 464 S.E.2d 736 (1995) (recognizing that non-movant is entitled to benefit of inferences on summary judgment motion).

[28]*See supra* note 27.

Predatory Lending Law[29] suggests opportunistic fee charging.[30] While we note that this evidence of allegedly excessive fees could not be used to establish a claim under the West Virginia Predatory Lending Law that did not take effect until after the loan transaction at issue transpired, such evidence can properly be considered in connection with Appellants' claim of unconscionability.[31]

As to the trial court's finding that the record is devoid of evidence demonstrating that the appraisal performed by Ms. Westfall was either fraudulent or that she misrepresented the true market value of the Herrods' home, we find evidence that clearly suggests an inflated appraisal of the home. When the Herrods were having trouble meeting their mortgage payments, they attempted to place their home on the market and learned that it was only likely to be listed in the $70,000 to $75,000 range. The deposition testimony of the Herrods indicates that they discovered that their house was worth at least $20,000 less than the amount for which it was mortgaged. In addition, Mrs. Herrod testified that two of

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[29]*See supra* note 26.

[30]Mr. Byers states: "The opportunistic and excessive nature of the First Security charges appear that much more egregious in light of the timing of the Herrod closing given that First Security would be prohibited by state law from such profiteering at the expense of borrowers within nine weeks of the closing." In his report, Mr. Byers also concludes that the loan was a "predatory loan" based on the fees charged under the guidelines established by Fannie Mae.

[31]The trial court appears to have placed undue emphasis on the lack of a law in effect at the time of the closing that capped mortgage broker fees.

the four comparables used in the appraisal performed by Ms. Westfall were homes in Bridgeport, where the real estate market is purportedly higher than in Clarksburg.[32] The record also contains documentation that Ms. Westfall entered into a consent decree with the Licensing and Certification Board of the West Virginia Real Estate Appraiser based on the Board's finding of reasonable cause to believe she had deviated from "generally accepted standards of professional appraisal practices as they relate to geographic competency in connection with the valuation of certain real property."[33] When all of these factors are viewed together and the permissible inferences from such evidence considered, we would be hard pressed not to find error with the trial court's finding that the appraisal prepared in connection with the Herrod residence by Ms. Westfall was an accurate reflection of the market value of such home.

Upon our review of the record, we are compelled to conclude that genuine issues of material fact preclude an award of summary judgment to Washtenaw on the Herrods' claim that the loan at issue is unconscionable. Given that these claims are highly

[32]Ms. Westfall testified to the use of the non-Clarksburg comparables in performing the appraisal and further acknowledged that some of the homes used for comparison purposes had square footage amounts much larger than the Herrods' home.

[33]Through the decree that was signed on July 3, 2002, Ms. Westfall agreed to pay the $500 costs of the investigation; take a 15 hour course on the sales comparison approach; and to abide by the rules of the Board as well as applicable state laws. The decree indicates that Ms. Westfall does not admit to having deviated from generally accepted appraisal practices.

fact dependent and that the record, when viewed in the light most favorable to the Herrods, clearly presents issues of fact concerning the "gross inadequacy in bargaining power" and the "existence of meaningful alternatives available to the plaintiffs," we reverse and remand on this issue of unconscionability. *Hager*, 37 F.Supp.2d at 786-87.

B. Credit Services Organization

The trial court concluded that Washtenaw was entitled to summary judgment on the Herrods' claim that First Securities failed to comply with the credit services organizations ("CSO") provision of the West Virginia Consumer Credit and Protection Act (the "Act").[34] Under West Virginia Code § 31-17-8(k), it is provided that

> [n]o licensee shall charge a borrower or receive from a borrower money or other valuable consideration as compensation before completing performance of all services the licensee has agreed to perform for the borrower unless the licensee also registers and complies with all requirements set forth for credit service organizations in article six-c [§§ 46A-6C-1 et seq.], chapter forth-six-a of this code. . . .

In *Brown v. MortgageStar, Inc.*, 194 F.Supp.2d 473 (S.D. W.Va. 2002), the district court held that the CSO provisions of the Act will only apply to a mortgage broker if that mortgage broker charges or receives money from the borrower before completing performance of all services that the mortgage broker has agreed to perform for that borrower. *Id.* at 476, n.4. The district court further determined that where the broker fee is paid at the

[34]*See* W.Va. Code § 46A-6C-1 to -12.

loan closing, the CSO provisions are inapplicable. *Id.* Applying *Brown* , the trial court concluded that because First Securities did not collect a fee from the Herrods prior to the loan closing it was not required to comply with the CSO provisions of the Act.

The Herrods were seeking to rely on the Act to hold Washtenaw liable for the alleged failure of First Security to provide the Herrods with a copy of a broker agreement setting forth their fees and a right to cancel the agreement.[35] The trial court ruled that even if First Security was required to comply with the CSO provisions of the Act, "there is no legal duty or obligation which requires Washtenaw to ensure First Security's compliance with the CSO Provisions of the WVCCPA [the Act]." We agree. Because there is no basis for imposing liability on Washtenaw under this theory, we affirm the trial court's grant of summary judgment on this issue.

[35]In the summary judgment ruling at issue, the trial court expressly found that the Herrods signed various disclosure documents in which "First Security disclosed all aspects of the proposed loan transactions, including First Security's role as a broker, its services, and its compensation." As indicated previously, the Herrods appear to complain about the fact that they were allegedly not provided with copies upon signing some of these documents. Because some of the documents were mailed to the Herrods, *see infra* note 9, they obviously had possession of several of the documents they signed.

C. Fraud

On this issue, the trial court granted summary judgment to Washtenaw based upon its conclusion that the "Herrods have produced no eviden[ce] to support any allegation that Washtenaw induced any fraudulent act or acts by one or more of the other defendants in this civil action." The trial court further found that "[t]here could not have been any fraudulent act committed by Washtenaw upon which the Herrods relied in entering into the loan which is at issue is this civil action because the Herrods did not have any contact with Washtenaw until after the loan closing."

While the Herrods assert abundant evidence of fraud with regard to this case, all of the factual assertions they refer to involve the actions of Mr. Young and First Securities. The alleged fraudulent representations all pertain to Mr. Young's statement that he would get them the best rate he could and that he cut his fees to do the loan at the time of the signing. The Herrods maintain that they would not have signed the loan if they had known they were not getting the best rate possible. None of these allegations of fraud in the inducement involve Washtenaw. Consequently, we find no error with regard to the trial court's dismissal of the Herrods' claim predicated on fraud as against Washtenaw.

D. Unfair and Deceptive Acts and Practices

Through their complaint Appellants sought to have the use of a yield spread premium declared illegal as an unfair and deceptive act or practice under the Act. Finding no provision in the Act addressing the use of such yield spread premiums, the trial court determined that such a claim would have to be asserted under federal law under the Real Estate Settlement Procedures Act ("RESPA"). *See* 12 U.S.C. § 2607 (2000). Then the court ruled that to the extent the Herrods were asserting such a claim, it was time-barred by the one-year statute of limitations that applies to claims brought under RESPA. The trial court similarly found that Appellants' assertion of a claim for allegedly not receiving a good faith estimate of settlement costs was a claim under federal law and one for which there is no private right of action. *See* 12 U.S.C. § 2604(c) (2000); *Collins v. FMHA-USDA*, 105 F.3d 1366 (11th Cir. 1997).

In defense of their claim, Appellants argue that they did not pursue federal claims but sought to have such procedures declared illegal under our state consumer credit and protection act. The prohibited conduct that is set forth in the CSO provisions of the Act clearly does not extend to or prohibit the use of yield spread premiums as it is currently written. *See* W.Va. Code § 46A-6C-3. And as the trial court found, even if First Securities was required to comply with the CSO provisions of the Act that identify illegal charges, "there is no legal duty or obligation which requires Washtenaw to ensure First Security's

compliance with the CSO Provisions of the WVCCPA [the Act]." Finding no language in the Act which makes the use of yield spread premiums illegal or which would impose liability for a broker's violation of the Act on a lender, we must agree with the trial court that summary judgment is warranted on this claim for unfair and deceptive practices.

E. Joint Venture, Agency or Conspiracy

The Herrods contend that Washtenaw had an agreement with First Security with regard to obtaining loans like the one which the Herrods signed that involved the use of the yield spread premium as a so-called kickback to reward the broker for obtaining the loan. The trial court granted summary judgment to Washtenaw on this count, finding that there was no evidence that it was "involved in any joint venture, conspiracy and/or agency with any of the other defendants in this civil action." Appellants argue that "the question of whether or not a joint venture exists is to be answered by the jury" and further that "'[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) (quoting *Lasry v. Lederman*,305 P.2d 663 (Cal. 1957)).

While we agree that the evidence in the record on this issue is inferential at best, the Appellants' expert does set forth various theories in his report as to how the loans were approved and the involvement of other parties. The Herrods allege that there was an

arrangement between Washtenaw and First Security with regard to the exchange of loan information and terms that was instrumental in the securement of the loan at issue.[36] Through these allegations of joint venture, agency, and conspiracy, the Herrods seek to impose liability on Washtenaw for any wrongdoing that they are able to prove against First Security.

In the report prepared by Appellants' expert witness that is part of the record, Mr. Byers opines that "a close inspection of the underwriting documents in the Washtenaw document file indicate that First Security worked hand-in-glove with them on the processing and approval of the Herrod loan from very early in the application process." He explains further:

> Washtenaw's own internal documents show a submission date to Washtenaw by First Security of April 20, 2000, yet the Desktop Underwriter system notes on April 19, 2000 that Washtenaw submitted the loan package for approval by Fannie Mae. In my opinion, First Security worked with their own version of Desktop Underwriter, or one supplied by Washtenaw, and pulled the Herrod credit reports through this system. At some point, however, either First Security processed the Herrod

[36]Appellants contend that First Security would enter information into their computer regarding the prospective borrowers that would simultaneously be transmitted to Washtenaw and that the software being utilized would in turn provide disclosures reflecting the terms of the loan that Washtenaw would be willing to originate. The Herrods maintain that Wastenaw provided First Security with lender rate sheets and underwriting standards so that it could immediately discern and convey the loan terms to borrowers. Appellants suggest that this pattern of operation, along with the use of a "kickback" in the form of the yield spread premium, evidences a close relationship between First Security and Washtenaw.

> loan application through Desktop Underwriter in Washtenaw's name and using their lender identification in Fannie Mae's system, or Washtenaw was involved in the processing of the Herrod loan much earlier than their internal underwriting documents indicate. Given Earl Young's deposition testimony that 90% of First Security's Fannie Mae loans were brokered to Washtenaw, it is highly likely they processed the loan in Washtenaw's name.

He continues:

> The implications of this processing for the Herrods gets back to the April 6, 2000 Good Faith Estimate mailed by Earl Young of First Security, and the very specific yield spread premium noted on this form. I mentioned earlier that Mr. Young would need a lender rate sheet to calculate such a specific yield spread, and the Desktop Underwriter processing by First Security through Washtenaw would be a logical extension of an April 6, 2000 yield spread pricing based on rate sheets provided to First Security by Washtenaw. While this may be a good business arrangement to close deals and maximize profit for the broker and lender, for the Herrods it meant the pricing fix was in long before they ever had any idea they were approved for a loan.

While this report of Appellants' expert appears to be the sole evidence of an arrangement between First Security and Washtenaw with regard to loan approval, we conclude that it should be up to a jury to determine whether there is sufficient evidence of a joint venture, agency, or conspiracy between these parties.

Based on the foregoing, the decision of the Circuit Court of Kanawha County as to the granting of summary judgment to Washtenaw is affirmed as to the counts pertaining

to credit services organization, fraud, and unfair or deceptive practices or acts, but reversed as to the counts pertaining to unconscionability and joint venture or conspiracy.

Affirmed, in part; Reversed, in part.