

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Kristian E. Warner and Joyce
Warner, Defendants Below,
Petitioners**

FILED
May 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) **No. 11-0483** (Monongalia County 08-C-557)

**Landau Building Company,
Plaintiff Below, Respondent**

MEMORANDUM DECISION

Petitioners, Kristian and Joyce Warner, by counsel Edward R. Kohout, appeal the order of the circuit court of Monongalia County entered March 14, 2011, granting judgment in favor of Respondent Landau Building Company following a bench trial. Landau Building Company (“Landau”) by counsel Peter T. DeMasters has filed a response.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The underlying subject of this appeal is Landau’s mechanic’s lien and breach of contract action against the petitioners based upon renovation work performed by Landau on the home of the petitioners. Prior to the work which is the subject of the present case, the parties had a commercial relationship in which, in 2006, respondent Landau contracted with Augusta Apartments, LLC (of which petitioner Kristian Warner was one of four members) to build the Augusta Apartments near West Virginia University.

In December of 2006 or January of 2007, at the same time this commercial relationship was occurring, petitioner Kristian Warner was having renovations done to his personal residence located at Lakeside Estates in Morgantown. When the petitioners’ contractor abandoned the job, Landau and petitioner Kristian Warner entered into an oral agreement in which Landau would finish the work on the petitioners’ home. Petitioner Kristian Warner asserts that he told Landau that he could only pay \$30,000 for this work. This is disputed by Landau which indicates that Warner was made aware throughout the process that the cost of the project would be between \$90,000 and \$100,000.

In January of 2007, after obtaining bids from subcontractors, Respondent Landau began working on the Warner home. Landau contends that it periodically invoiced the petitioners as the work was being performed. The circuit court noted that the first invoice, dated March 30, 2007, was for \$29,928.46 and that attached thereto was a Job Cost Report that showed the estimate of the work to be performed by Landau and its subcontractors as \$93,175.

On May 24, 2007, the petitioners made a \$30,000 payment to Landau in regard to the work done on the home. When Respondent Landau finished the work on the Warner home it presented the petitioners with a bill for \$110,838.51. Petitioner Kristian Warner indicated that he did not receive the bill. Landau indicated that its agent John O'Brien tried to talk to Warner several times about receiving payment, to no avail.

On March 3, 2008, Landau filed a mechanic's lien against the petitioners' home in the amount of \$72,337.75. After the lien was filed, the circuit court found that Landau received two more invoices from subcontractors totaling \$11,131.89.

Eight days before trial, the petitioners disclosed Don Dempsey as an expert in construction matters. Landau filed a motion to strike Mr. Dempsey due to the late disclosure. After a hearing, the circuit court refused to allow Dempsey to opine as an expert as to the reasonableness of the respondent's invoices, limiting him to testimony as a fact witness due to the lateness of his disclosure.

The circuit court held a bench trial at which Respondent Landau presented invoices showing the amount of work done on the Warner home. Petitioners asserted that the work consisted mainly of trim and finish work. Finding that the parties entered into a valid oral contract and that the petitioners were aware that the work would cost between \$90,000 and \$100,000, the circuit court entered a judgment of \$79,377.68 for Landau.

“In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.’ Syllabus Point 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).” Syllabus, *State ex rel. Radcliff v. Davidson*, 225 W.Va. 80, 689 S.E.2d 808 (2010).

The petitioners first argue that there was no “meeting of the minds” and therefore the circuit court erred in finding that there was a valid oral contract. Landau presented testimony that supports the circuit court's findings. Given the facts and circumstances of the present case as presented, we conclude that the circuit court did not err in reaching its finding of a valid oral contract.

Next, the petitioners argue that the circuit court abused its discretion in refusing to allow the petitioners' proposed expert Don Dempsey to testify as an expert regarding the reasonableness of

Landau's invoices. The circuit court declined to allow such testimony due to the lateness of the disclosure of same. This Court finds no abuse of discretion in the circuit court's decision.

Finally, the petitioners set forth an assignment of error that the circuit court's findings of fact are clearly erroneous and against the weight of the evidence. This assignment of error was not supported with specific argument. As a result, this Court declines to further address the issue.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISQUALIFIED:

Justice Brent D. Benjamin