

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

**Charles T. Miller Jr.,
Plaintiff Below, Petitioner**

vs) No. 11-1184 (Logan County 08-C-84)

**Michael C. Miller,
Defendant Below, Respondent**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner's appeal, by counsel Robert M. Williams, arises from the Circuit Court of Logan County, wherein the circuit court granted respondent judgment on his counterclaim following a three-day trial by order entered on August 9, 2011. Pro se Respondent Michael C. Miller, with assistance from counsel Traci L. Wiley, 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 civil action below was initiated upon petitioner's allegations that respondent caused changes to certain land adjacent to petitioner's property, and that these changes resulted in interference with the land's drainage and caused damage to petitioner's property. According to the record, petitioner filed his first amended complaint in August of 2008, and filed his fourth amended complaint in August of 2010. During the proceedings, respondent filed a counterclaim against petitioner, alleging that certain excavation petitioner performed caused slips on his property. Respondent sought attorney's fees for his defense of petitioner's claims. Following a three-day bench trial, the circuit court found that petitioner failed to establish his causes of action, and that there "were no negligent acts attributable to [Respondent] Michael C. Miller." Additionally, the circuit court found in respondent's favor on his counterclaim. The circuit court found that petitioner had trespassed on respondent's property to remove dirt, which caused damage to the property, and further that respondent was entitled to attorney's fees because petitioner's action was baseless. As such, the circuit court awarded respondent \$6,450 in damages and attorney's fees.

On appeal, petitioner alleges that the circuit court applied the incorrect standard in awarding respondent attorney's fees, and further that the circuit court erred in awarding respondent judgment on his counterclaims. In support, petitioner argues that there was no

showing that he acted in bad faith, vexatiously, wantonly, or for oppressive reasons, and that the circuit court made none of the findings required to award attorney's fees as outlined in *Midkiff v. Huntington Nat'l Bank W.Va.*, 204 W.Va. 18, 511 S.E.2d 129 (1998). Petitioner argues that he had a legitimate and bona fide dispute regarding changes made to respondent's property that caused damage to his own property, and because he acted in good faith on his claims, an award of attorney's fees was not justified.

Respondent argues that the circuit court found petitioner had a complete lack of evidence to support his claims and notes how incredible it found the claims in light of the evidence. According to respondent, the circuit court found that petitioner had no evidence in support of the claims because it was a geographical impossibility for respondent's work to have caused any damage to petitioner's property. Because petitioner's claims were obviously frivolous, respondent argues that it was proper for the circuit court to award him attorney's fees.

“This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).” Syl. Pt. 1, *State v. Smith*, 225 W.Va. 706, 696 S.E.2d 8 (2010). Upon our review, the Court finds no error in the circuit court's award of attorney's fees to respondent. We have previously held that “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees . . . without express statutory authorization [] when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” Syl. Pt. 3, in part, *Sally–Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).” Syl. Pt. 3, *State ex rel. Hicks v. Bailey*, 227 W.Va. 448, 711 S.E.2d 270 (2011). While petitioner argues that the circuit court applied an erroneous standard in making this decision, the Court declines to find such error. Instead, it appears that the circuit court simply failed to include the language “bad faith, vexatiously, wantonly or for oppressive reasons” in its order. However, it is clear that the circuit court found petitioner's actions met this standard, as evidenced by several findings related to the petitioner's total lack of evidence to support his claims.

In its “Judgment Order,” the circuit court noted that petitioner pursued a “frivolous action” against respondent for which “there was no basis . . . from an evidentiary standpoint.” The circuit court also noted that further evidence in support of this finding was “the continued insistence by the [petitioner] that he would produce contractors who would testify they worked for [respondent]. . . .” However, according to the circuit court, those contractors testified that they never worked for respondent. We have previously held that “as the frivolousness of a claim or defense increases, the likelihood that it is being advanced for improper purposes increases.” *Daily Gazette Co. v. Canady*, 175 W.Va. 249, 253, 332 S.E.2d 262, 266 (1985). Based upon the extended procedural history and multiple amended complaints in this matter, it appears that the circuit court inferred petitioner's improper motive from the protracted nature of the case and the apparent lack of a valid basis for the action, thus we find no error in the circuit court's decision to award respondent attorney's fees.

Petitioner next alleges that that judgment for respondent on his counterclaim was error because respondent failed to present sufficient evidence to satisfy his burden of proof that he was

entitled to an award for damages for the excavation of his property and the cost of any repairs. Petitioner argues that respondent did not provide specifics as to where the excavation occurred, how much tonnage was excavated, or the location of the alleged slippage. According to petitioner, the only evidence presented was respondent's own self-serving testimony. Petitioner also argues that respondent failed to demonstrate the amount of money owed on the erroneously awarded attorney's fees. In response, respondent argues that he presented evidence in the form of testimony as to the cost of the repairs to the hillside that petitioner excavated. As the finder of fact, the circuit court chose to accept respondent's account as to the cost of repairs. According to respondent, the circuit court had the discretion to make this credibility determination and sufficient evidence was therefore presented.

Upon our review, the Court finds no error in the circuit court's decision to find in respondent's favor on his counterclaims. According to the circuit court, respondent established that petitioner trespassed on his property, removed dirt therefrom, and damaged respondent in the amount of \$3,450. The record shows that respondent satisfied his burden of proof on this claim by presenting evidence in regard to the total cost to repair the hillside that petitioner excavated, which the respondent notes he identified for the circuit court during a viewing of the property. Further, the circuit court was presented with sufficient evidence as to the attorney's fees petitioner incurred in defending this action. For these reasons, the Court finds no error in the circuit court's rulings for respondent on his counterclaims.

For the foregoing reasons, we find no error in the decision of the circuit court, and the "Judgment Order" is hereby affirmed.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

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