

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

**Alan K. Vance,
Defendant Below, Petitioner**

vs) **No. 11-0689** (Kanawha County 08-C-3055)

**John D. Smallridge Jr. as
Successor Trustee under the
Last Will and Testament of
Horace H. Smallridge, deceased,
Plaintiff Below, Respondent**

FILED
June 22, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

The petitioner, Alan K. Vance, by counsel Mark W. Kelley, appeals the order of the Circuit Court of Kanawha County entered March 21, 2011, granting judgment as a matter of law in favor of the respondent, John D. Smallridge Jr., Successor Trustee, on certain claims and awarding the respondent attorney's fees and costs. The respondent filed a response by his counsel, John R. Hoblitzell. The petitioner filed a reply.

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 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.

In 1998, the petitioner, represented by counsel, entered into a ten-year lease with the respondent. The lease involved two parcels of land that the petitioner intended to use for the purpose of operating a dry cleaning business. The petitioner ran the dry cleaning business in this space for approximately ten years. At the end of the lease period, the petitioner began to vacate the premises. The respondent indicates that once the awning was removed from the front of the business, he noticed that there had been damage done to the facade. Further, the respondent noticed that there was a dumpster filling up with "ductwork, insulation, wiring, piping and other items that caused [respondent] to believe that [p]etitioner was removing fixed assets of the building and was otherwise permanently damaging the Smallridge Building in the course of dismantling his business." The respondent brought suit and set forth six causes of action, including three breach of contract counts for wrongful removal of fixtures and property of the lessor, failure to maintain the leased premises, and failure to pay rent. The Complaint also asserted counts for attorney's fees, negligence, and wrongful conversion.

At trial, the circuit court directed a verdict for the respondent in the amount of \$16,527.60, which included \$1,802.60 in past due rent, \$9,725.00 in late fees, \$3,600.00 for physical damage to the tile floor, and \$1,400.00 in physical damage to the front exterior wall of the leased premises. The circuit court ruled that the standard for punitive damages sought by the respondent in his wrongful conversion claim was not met and the respondent withdrew his negligence and wrongful conversion claims. The case was submitted to the jury on one breach of contract issue as to whether the petitioner had removed a heating and cooling system from the property. The jury returned a verdict on this issue in favor of the petitioner.

Following trial, the respondent moved for recovery of attorney's fees and costs based upon a provision of the lease. A hearing was held on the issue and the circuit court heard arguments from the petitioner that the lease clause allowing for attorney's fees and costs was unconscionable and should not be enforced. The circuit court found that the lease provision providing for such fees and costs was valid and enforceable and awarded the respondent attorney's fees and costs in the amount of \$113,151.73.¹ The circuit court found that the requested fees and costs were reasonable under the lodestar calculation of *Casteel v. Consolidated Coal Co.*, 181 W.Va. 501, 383 S.E.2d 305 (1989), and considering the factors set forth in *Aetna Casualty and Insurance Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

The petitioner was also taxed by the circuit court with jury costs in the amount of \$1,346.44. The petitioner moved the circuit court to remove the jury costs imposed upon him and argued that imposition of such costs was improper since the jury returned a verdict for him on the sole issue submitted to it for determination. The circuit court denied this motion.

The petitioner initially argues that the circuit court erred in awarding the respondent attorney's fees and costs in this matter because the contractual provision relied upon by the respondent is unconscionable and unenforceable. The petitioner argues that the provision is one-sided, only allowing the respondent to recover fees from the petitioner, thus making it unenforceable. In Syllabus Point 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986), we stated: "Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." The circuit court heard these arguments made by the respondent but rejected them and found that the contract clause in question was "valid and enforceable." The respondent argues that the lease was an arms-length transaction and that both the petitioner and the respondent are experienced businessmen. Both parties were represented by counsel at the time of the creation of the lease. The Court has reviewed this issue and concludes that under the facts and circumstances of the present case, there was no error in the circuit court's ruling.

The petitioner's next two arguments deal with the damages awarded by the circuit court as a matter of law. This Court has recognized the following standard of review:

"The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is

¹ Of this amount, \$108,742.00 are attorney's fees and \$4,409.73 are costs.

de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.” Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Syl. Pt. 5, *Smith v. First Community Bancshares, Inc.*, 212 W.Va. 809, 575 S.E.2d 419 (2002).

The petitioner argues that the circuit court erred in awarding the respondent late fees for past due rent because the provision in the lease providing for such late fees is void as a penalty. The petitioner further argues that any claim for such damages is barred by the doctrine of laches.

The respondent responds that the lease provides for a twenty-five dollar per day liquidated damage if the rent was late. United Bank trust officer Emilie Love, who administers the trust and collects the rent, testified at trial to the total number of days that the petitioner’s rent payments were late from August 2007 through October 2008, and the corresponding total late fees owed by the petitioner. Her testimony as to such calculations was uncontested at trial. After hearing this evidence, the circuit court ruled as a matter of law that the respondent was entitled to \$9,725.00 in late fees on the past due rent pursuant to Paragraph 19 of the lease. The respondent argues that this is reasonable and valid liquidated damage compensation for the loss of the use of the money owed and is not a penalty.

As for the defense of laches, respondent argues that it is unavailable to the petitioner as he failed to raise this affirmative defense in his answer. The Court’s review of the answer filed by the petitioner indicates that laches was not raised as a specific defense. After reviewing the issue and considering the arguments of the parties, the Court finds no error in the circuit court’s decision granting judgment as a matter of law on this issue.

The petitioner next challenges the circuit court’s judgment as a matter of law for the respondent in the amount of \$3,600.00 for damage to the tile floor and \$1,400.00 for damage to the front exterior wall. When the dry cleaning machinery was removed, the petitioner indicates that the bolts that held the machinery to the tile floor could not be completely removed and were cut off at floor level. The damage to the front exterior wall was based upon the awning that had been placed there by the petitioner. The respondent asserted that the holes left by the removal of the awning and the damage to the floor violated the terms of the lease.

The petitioner argues that the lease provided for him to run a dry cleaning business. This required that the machines be bolted to the floor. He argues that he was not required to restore the property to its original condition in order to return it to the respondent in good repair when the alterations were made under the authority of the lease.

The respondent argues that the circuit court’s award for damage to the tile floor and for damage to the exterior wall of the building was proper because it was based upon three lease provisions that specifically and explicitly prohibited damages to the leased premises, regardless of the use permitted in the lease. The respondent further contends that despite the petitioner’s

arguments, there is no authority in West Virginia permitting damage to be done and to go unrepaired in direct violation of specific lease provisions to the contrary. The respondent notes that the damages were established at trial by the respondent's expert and the amounts of the damages were undisputed. The Court concludes that there was no error in the circuit court's decision to enter judgment as a matter of law on these issues.

The petitioner last argues that the circuit court erred when it permitted jury costs to be assessed against the petitioner when he was the prevailing party on the only issue submitted to the jury. After trial, the circuit clerk issued a Taxation of Costs indicating that the respondent was the prevailing party and assessing the petitioner jury costs of \$1,346.44. The petitioner filed a motion with the circuit court asking the court to remove the costs as the petitioner won the only issue submitted to the jury. The circuit court denied the motion.

Rule 54(d) of the West Virginia Rules of Civil Procedure provides that "[e]xcept when express provision therefor is made either in a statute of this State or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" The petitioner argues that when the case is reviewed, as a whole, that it cannot be said that the respondent was the prevailing party.

The respondent responds that given the circuit court's award of judgment as a matter of law at trial in the amount of \$16,527.60 and his post-trial award of attorney's fees and costs, the circuit court did not err in denying the petitioner's motion to change the assessment of the costs and it was proper to consider the respondent as the "prevailing party." The Court having reviewed this issue concludes that there was no error in the imposition of jury costs upon the petitioner.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin