

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

**Walter H. Primas, Jr.
and Lois J. Williams,
Plaintiffs Below, Respondents**

FILED

June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 101570 (Clay County 08-C-34)

**Jeremy Cottrell, Dawn Cottrell,
Wayne Lynch, and Judy Lynch,
Defendants Below, Petitioners**

MEMORANDUM DECISION

Petitioners, Jeremy Cottrell, Dawn Cottrell, Wayne Lynch and Judy Lynch, appeal the circuit court's order denying their post-trial motions following a jury verdict awarding compensatory and punitive damages to respondents Walter Primas and Lois Williams in this suit involving misrepresentation regarding free natural gas associated with the real property in question. Petitioners also appeal the circuit court's order granting attorney's fees to respondents. Respondents have filed their response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

Respondents, who were residents of Maryland, purchased real property located in Clay County, West Virginia, for \$500,000 from petitioners, the property's joint owners. Respondents assert that petitioner Wayne Lynch represented that the property carried the right to free natural gas, a representation they relied upon in concluding that the property was worth \$500,000.

Respondents had a title search done to ensure that petitioners could provide clear title to the property. Respondents indicate that they did not ask the title attorney to investigate the free gas issue because they relied upon the assurances of free natural gas. After the closing, respondents were advised by representatives of Mountaineer Gas Company that they would not be receiving free natural gas and that the prior owners, petitioners, had not been legitimately receiving free gas. Respondents state that although there was a visible gas meter on the property, they later learned that petitioners were using a hookup that was not visible to bypass the gas meter in order to improperly obtain free gas.

Respondents filed suit against petitioners alleging misrepresentation regarding the free gas issue. The case proceeded to trial. The jury answered “yes” to the following questions on the verdict form: whether defendants falsely represented to the plaintiffs that the property conveyed was vested with free natural gas and whether the plaintiffs relied on that representation when purchasing the property. The jury awarded compensatory damages of \$10,000 and punitive damages¹ of \$20,000. The circuit court denied petitioners’ post-trial motion challenging the validity of the verdict, particularly the punitive damages award. The circuit court granted respondents’ post-trial motion for attorney’s fees and expenses in the amount of \$22,255.41.

Independent Investigation Doctrine

Petitioners argue that the circuit court erred in refusing to give their proffered jury instruction on the independent investigation doctrine because they contended that respondents had undertaken an independent investigation as to the issue of free natural gas. In refusing to give the instruction, the circuit court indicated its belief that respondents had not undertaken such independent investigation, thus making the doctrine unavailable as a defense.

“The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E. 2d 374 (1995). “It will be presumed that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the

¹ Punitive damages were only awarded against petitioners Jeremy Cottrell and Wayne Lynch as the circuit court directed a verdict for petitioners Dawn Cottrell and Judy Lynch on the punitive damages issue.

instructions were prejudicially erroneous or that the instructions refused were correct and should have been given.’ Syllabus Point 1, *State v. Turner*, 137 W.Va. 122, 70 S.E.2d 249 (1952).” Syl. Pt. 1, *Moran v. Atha Trucking, Inc.*, 208 W.Va. 379, 540 S.E. 2d 903 (1997).

In the present case, the circuit court declined to give petitioners’ instruction number 3, which stated that “[o]ne cannot rely blindly upon a representation without suitable investigation and reasonable basis” based upon its conclusion that respondents did not undertake such an independent investigation. This Court has recognized that “[o]ne to whom a representation has been made as an inducement to enter into a contract has a right to rely upon it as true *quoad* the maker, without making inquiry or investigation to determine the truth thereof.’ Syl. Pt. 2, *Staker v. Reese*, 82 W.Va. 764, 97 S.E. 641 (1918).” Syl. Pt. 8, *Kidd v. Mull*, 215 W.Va. 151, 595 S.E. 2d 308 (2004). “‘Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.’ Syl. Pt. 5, *Jones v. McComas*, 92 W.Va. 596, 115 S.E. 456 (1922).” *Id.* at Syl. Pt. 7.

Petitioners argue that respondents did undertake such independent investigation because they had a title search performed and physically observed the gas lines on the subject property. Respondents argue that a title search and witnessing the presence of a gas meter on the property do not constitute an independent investigation of the free natural gas issue. The circuit court rejected petitioners’ arguments that such actions by the respondents constituted an independent investigation for the purposes of the independent investigation doctrine. After careful consideration of the record and arguments of counsel, the Court concludes that the circuit court did not err in its conclusion that respondents did not undertake an independent investigation of the free gas issue and, consequently, the circuit court did not err in refusing to give the petitioners’ proffered instruction as to independent investigation doctrine.

Punitive Damages Award

Petitioners argue that the circuit court erred in allowing the jury to consider the issue of punitive damages because there was no evidence of either fraud or vexatious conduct. Petitioners argue that the circuit court also erred in denying their post-trial motions challenging the propriety of the award of punitive damages.

“When this Court, or a trial court, reviews an award of punitive damages, the court must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damage award under *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895) and its progeny. If a punitive damage award was justified, the court must then examine the amount of the award pursuant to the aggravating and mitigating criteria set out in *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E. 2d 897 (1991), and the compensatory/punitive damage ratio established in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E. 2d 870 (1992)” Syl. Pt. 6, *Perrine v. E.I. du Pont de Nemours and Co.*, 225 W.Va. 482, 694 S.E. 2d 815 (2010).

In denying the post-trial challenge to the punitive damages award, the circuit court concluded that the jury was properly instructed on the standard for imposition of punitive damages. Further, the circuit court also recognized that the jury answered special interrogatories on the verdict form and found that petitioners had falsely represented to respondents that the property was vested with free natural gas and that respondents had relied upon this misrepresentation when making their decision to purchase the property for \$500,000. The circuit court determined that the conduct in question supported the imposition of punitive damages by the jury. The circuit court then conducted a *Garnes* review and concluded that the punitive damages award was appropriate after considering the required factors. Finally, the circuit court found that the \$20,000 punitive damages award was reasonably related to the \$10, 000 compensatory damages award. After considering the record and the arguments of the parties, this Court concludes that there was no error in the award of punitive damages in this case.

Attorney’s Fees Award

Petitioners argue that the circuit court abused its discretion in awarding attorney’s fees to respondents based upon their contention that there is no evidence that petitioners engaged in any bad faith or vexatious, wanton or oppressive actions during the course of, or leading up to, the litigation of the underlying complaint. Petitioners argue that the circuit court improperly relied upon the jury’s award of punitive damages to conclude that petitioners Wayne Lynch and Jeremy Cottrell acted in bad faith, vexatiously and wantonly, thereby warranting an award of attorney’s fees.

This Court has recognized that “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorneys’ fees as “costs” without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for

oppressive reasons.” Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E. 2d 246 (1986). After a review of the record and the arguments of the parties, the Court concludes that there is no error in the circuit court’s imposition of attorney’s fees under the particular facts and circumstances of this case.

Other Issues

Petitioners raise other issues, including the arguments that the circuit court erred in failing to grant their motion for a directed verdict at the close of respondents’ case, that the circuit court erred in failing to instruct the jury with respect to the elements of a negligent misrepresentation cause of action, and that the circuit court erred by permitting the respondents to pursue a fraud cause of action under the guise of a negligent misrepresentation cause of action. The Court has reviewed all issues raised and finds no merit in these arguments.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh