

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

**Burch Roofing and Construction, Inc.,
Plaintiff Below, Petitioner**

vs.) No. 11-0922 (Monongalia County 10-C-592)

**Mark Poh and Anna Liew,
Defendants/Third-Party Plaintiffs
Below, Respondents**

FILED

**March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Monongalia County, wherein the circuit court awarded judgment to the respondents in the amount of \$15,000.00, plus pre- and post-judgment interest for petitioner's breach of a construction contract. The appeal was timely perfected by counsel, Edward R. Kohout, with petitioner's appendix accompanying the petition. The respondents have filed a response by counsel, Robert D. Berryman.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix 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 appendix 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.

On July 13, 2010, the parties herein entered into a written contract for petitioner to perform construction work on respondents' home for the sum of \$19,500.00. Respondents had a friend, Norman George, assist during contract negotiations because of the respondents' concerns that their English was not sufficient to communicate their requests to petitioner. Among other various improvements and repairs called for in the contract, petitioner was also required to construct a roof over the respondents' patio. In July of 2010, respondents made two payments to petitioner totaling \$15,000.00 for materials and labor. Once petitioner began construction, Mr. George stopped by the property approximately five or six times, and eventually a disagreement arose between petitioner and Mr. George concerning the manner in which the work was being completed. This disagreement eventually necessitated a meeting between the parties in order to determine how to proceed. After refusing to alter a design for the roof, petitioner disassembled the materials and left the site. Thereafter petitioner filed suit

against respondents for breach of contract, claiming he had been prevented from performing. After a bench trial, the circuit court awarded judgment to the respondents, finding that petitioner breached the contract in question by failing to perform.

On appeal, petitioner argues that the circuit court erred in its finding that petitioner voluntarily abandoned the work site and was not prevented from performing the contract and that this finding was clearly erroneous. Petitioner argues that his performance of the contract at issue was interfered with by respondents' agent, Norman George, and he further alleges that Mr. George negotiated the contract on respondents' behalf and later served as building supervisor while the construction work was being completed. According to petitioner, the respondents allowed Mr. George to interject himself into the work in violation of this Court's holding that a party to a contract cannot interfere with the performance of another party. *Pipemasters, Inc. v. Putnam County Comm'n.*, 218 W.Va. 512, 625 S.E.2d 274 (2005). Petitioner argues that he had substantially performed the contract, but the overwhelming evidence showed that Mr. Norman interfered with and harassed petitioner, and told him to take down the work performed and leave the property because he felt it was unsafe. According to petitioner, the circuit court disregarded most of the testimony and ruled in respondents' favor simply because petitioner did as he was requested and tore down the roof. Petitioner further alleges that the circuit court erred in failing to address case law on prevention of performance in its final order.

In response, respondents argue that petitioner has presented no evidence to support his assignments of error, and that the circuit court made reference to the testimony of three different witnesses to support the finding that petitioner voluntarily abandoned the worksite. Further, the circuit court did not need to address any case law concerning prevention of performance because it found that petitioner voluntarily abandoned the site. As such, the circuit court's finding was not clearly erroneous, and the correct legal standard concerning breach of contract was applied. Additionally, the respondents put forth their own assignment of error, alleging that the circuit court erred in failing to enter judgment in their favor in regard to their third-party complaint against David Burch. Despite its finding that petitioner had breached the contract at issue by failing to complete the agreed upon work and also causing damage to respondents' property by removing the work that had been done, the circuit court failed to enter judgment for the respondents against the third-party defendant. As such, respondents argue that these rulings are inconsistent, and request that the circuit court's ruling be corrected to include judgment against third-party defendant David Burch and in favor of respondents.

“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 National Bank*, 198 W.Va. 329, 480 S.E.2d 538 (1996).” Syl. Pt. 1, *Young v. Bellofram Corp.*, 227 W.Va. 53, 705 S.E.2d 560 (2010). The issues in this matter turn on a lone factual determination concerning the decision to remove the materials from the property. Petitioner alleges that he was instructed to take down these materials and cease performance, while respondents allege that petitioner himself made this decision, despite ongoing efforts to achieve a resolution to the conflict. The entire basis for petitioner’s alleged assignment of error is that he was prevented from performing the contract at issue by the direction to take down the materials and leave the premises, and he argues that the circuit court’s finding on his voluntary abandonment of the work site is clearly erroneous because of the alleged direction from Mr. George.

However, upon review of the record, it is clear that the circuit court considered the testimony of at least three witnesses that stated that Mr. George did not instruct petitioner to take down the materials, and that it was petitioner’s own decision to cease working on respondents’ property. This Court has held that “[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.’ *Michael D.C. v. Wanda L.C.*, 201 W.Va. 381, 388, 497 S.E.2d 531, 538 (1997); *accord Gum v. Dudley*, 202 W.Va. 477, 484, 505 S.E.2d 391, 398 (1997).” *Webb v. W.Va. Bd. of Med.*, 212 W.Va. 149, 156, 569 S.E.2d 225, 232 (2002). Because it was in the best position to assess the credibility of the witnesses below, this Court refuses to disturb the circuit court’s ruling on this issue. We therefore hold that it was not clearly erroneous for the circuit court to find that petitioner made the decision to remove all of the work that had been performed on the subject roof. Further, because the circuit court found that petitioner voluntarily ceased performance, there was no need to address case law on prevention of performance.

As to the respondents’ alleged assignment of error, we further decline to disturb the circuit court’s ruling regarding a lack of judgment entered against the third-party defendant below. Respondents argue that the circuit court found that “the Plaintiff/Third Party Defendant [did] not complete the work agreed upon,” but failed to enter judgment against the third-party defendant. As such, they argue that the circuit court’s final order contains internal inconsistencies because of the finding of breach of contract but a lack of a related judgment. The appendix shows that third-party defendant David Burch is the president of Petitioner Burch Roofing and Construction, Inc. Upon our review of the proceedings below, it is apparent that in the conclusion of law to which respondents cite, the circuit court was referring to the plaintiff and the third-party defendant, in his capacity as president, as a single entity. That finding states that “Plaintiff/Third Party Defendant breached the contract with the Defendants,” and the circuit court’s order accordingly required the petitioner to satisfy

the related damages. As such, there is no internal inconsistency in the final order, as respondents allege.

For the foregoing reasons, we affirm the circuit court's trial/judgment opinion order.

Affirmed.

ISSUED: March 12, 2012

CONCURRED IN BY:

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

NOT PARTICIPATING:

Justice Margaret L. Workman