

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

**Joseph F. John
Plaintiff Below, Petitioner**

vs) No. 11-1185 (Preston County 09-C-225)

**Richard Ringer,
Defendant Below, Respondent**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, by counsel Peter D. Dinardi, appeals the judgment order of the Circuit Court of Preston County, entered July 11, 2011, following a jury verdict in favor of respondent on his counterclaim against petitioner. Respondent, by counsel William Brewer, 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.

This appeal involves the failed attempt of petitioner and respondent to build a subdivision on ten acres of land owned by petitioner. Petitioner bought the land and respondent used heavy equipment to remove topsoil and to bring in stone to create a roadway through the property. Respondent also prepared the foundation for the first home to be developed in the subdivision. There was conflicting testimony at trial as to the nature of the oral agreement between them including whether petitioner had agreed to pay respondent for his services. Petitioner sued respondent for failure to make payments on an end loader that petitioner had purchased and that respondent was buying from petitioner. Respondent filed a counterclaim seeking damages based upon unjust enrichment to petitioner due to the building of the road and the home foundation. Respondent also claimed the right to storage costs associated with keeping the topsoil removed from petitioner's property on respondent's family farm. The jury awarded damages to petitioner on his claim involving the end loader and awarded damages to respondent for his claim of unpaid services and for storage of the topsoil.

Petitioner argues that the circuit court erred in not giving a jury instruction based upon the statute of frauds. "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

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).

Petitioner contends that because there was no written contract, he was entitled to a jury instruction based upon the statute of frauds to allow the jury to decide the issue of whether the contract could not have been performed within one year, which is an exception to the statute of frauds requirement. “‘An oral contract under terms of which whole performance is possible within a year from date contract was entered into is not within statute of frauds.’ *Jones v. Shipley*, 122 W.Va. 65, 7 S.E.2d 346 (1940).” Syl.Pt. 1, *Thompson v. Stuckey*, 171 W.Va. 483, 300 S.E.2d 295 (1983). The circuit court refused to give an instruction on the statute of frauds because: “[respondent] is not claiming damages for breach of contract for failure to develop [the] subdivision or division of net profits. He’s only claiming damages he alleges for work that he performed on the subject real estate, namely 300 to 400 feet of road construction and related expenses. So, that work has been performed. He’s seeking reimbursement under a breach of contract or alternatively, unjust enrichment claim.”

The Court notes that the verdict form expressly provided the following special interrogatory which the jury answered in the affirmative: “[Petitioner] breached a contract with [respondent] for excavation work and road improvements or alternatively that [petitioner] has been unjustly enriched by [respondent’s] excavation work and road improvements.” The verdict form as set forth above allowed the jury to find liability under either theory without differentiating which theory was followed. As respondent asserts, petitioner does not argue any error in the verdict form. The Court finds no error under these facts and circumstances.

Petitioner next argues that the circuit court erred in allowing respondent’s father to testify when he was not listed on the witness list. Petitioner argues that he did not, therefore, have the opportunity to depose him.

This Court has recognized the following standard:

“‘The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.’ Syllabus Point 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995).”

Syl.Pt.9, *Smith v. First Community Bancshares, Inc.*, 212 W.Va. 809, 575 S.E.2d 419 (2002).

Respondent argues that a year prior to the trial of this case, respondent specifically identified respondent’s father as an individual who may have knowledge of the allegations set forth in petitioner’s complaint in response to discovery. Respondent further asserts that the petitioner was aware of respondent’s father as a potential witness yet chose not to depose him

during discovery. In addition, respondent indicates that he did not intend to call his father as a witness but that his father's testimony became necessary as a result of arguments made by petitioner at the close of evidence. Petitioner argued that respondent did not have the right to claim storage expenses as he did not own the land where the topsoil was stored. The land was owned by respondent's father. The circuit court allowed respondent's father to testify for the limited purpose of indicating that respondent had authority to allow the storage of topsoil on the property in question. The Court finds no abuse of discretion in allowing the limited testimony of respondent's father.

Petitioner argues that the jury could not have considered all the evidence in this case when it took less than ninety minutes to deliberate following a trial that lasted a day and a half. Further, the jury returned with a question for the trial court as to whether petitioner had title to the end loader. Petitioner argues that the first exhibit entered into evidence was the title to the end loader. Petitioner argues it is obvious that the jury did not consider the exhibits or the evidence and that this constitutes jury misconduct. Respondent argues that petitioner is attempting to impeach the jury's verdict based upon the jury's deliberation process. "A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syl. Pt. 1, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981)." Syl. Pt. 2, *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996). The Court finds no merit in petitioner's argument.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: September 7, 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