

PITTSBURGH LEGAL JOURNAL

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PLJ

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Opinions deemed appropriate for publication are not disqualified because of the identity, profession or community status of the litigant. The guide to publication is the helpfulness of the opinion to practitioners in the particular area of law. All opinions submitted to the PLJ are reviewed for publication and will only be disqualified or altered by Order of Court.

OPINIONS

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**Joni Van Arsdale v.
Waldron Electric Heating, LLC**

Consumer Protection Law—Unfair Trade Practices—Treble Damages and Counsel Fees

1. During winter months, Defendant quoted Plaintiff a “trip charge” (\$89) to come to her home to look at her malfunctioning furnace; upon arrival, Defendant quoted a higher figure (\$433) to “diagnose” the issue; and a still higher figure (\$1,400) for actual repair.

2. Defendant and his technician attempted to frighten Plaintiff by telling her pipes would freeze if she did not authorize these charges and actions.

3. Plaintiff later learned that the needed replacement part cost approximately \$40. Defendant charged Plaintiff \$839 for the part and related labor (approximately two hours plus travel time).

4. Defendant violated the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-2(4)(xv) and (xvi).

5. Remedy for violation is treble damages plus reasonable counsel fees.

(Margaret P. Joy)

Clayton S. Morrow for Plaintiff.

Gregory A. Castelli for Defendant.

No. AR 08-3302. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**MEMORANDUM IN SUPPORT OF ORDER
AND ORDER OF COURT**

Friedman, J., March 20, 2009—The captioned action was brought by Plaintiff, initially acting *pro se*, to recover excessive charges wrongfully made for a repair to her furnace.

The credible (and virtually undisputed) evidence showed the following:

1. Plaintiff returned home from work in the early evening of February 19, 2008 and discovered her house was cold because her furnace had gone off.

2. After unsuccessful attempts on her own to troubleshoot the problem, she called Defendant, based on its ad in the Yellow Pages.

3. Tom Waldron, the principal of Defendant, handled the call because it was “after hours,” when calls to Defendant’s place of business were forwarded to him.

4. Mr. Waldron told Plaintiff that there would be a charge of \$89 to have someone come and look at the problem.

5. Mr. Waldron referred the call to Ralph Miller, Defendant’s HVAC technician.

6. Mr. Miller called Plaintiff and also told her that the charge for him to come that night to look at the problem would be \$89.

7. When Mr. Miller arrived at Plaintiff’s residence, he looked at the furnace to be sure the switch was turned on.

8. Mr. Miller then told her that if she wanted a diagnosis of the problem, the extra charge would be \$433, and that the \$89 was just the trip charge.

9. Plaintiff asked Mr. Miller to return the next day because the charge for work during regular hours was less than the \$433 after-hours charge.

10. Mr. Miller told Plaintiff her pipes would freeze if she waited until morning, intending to frighten Plaintiff into agreeing to the price of \$433 for diagnosis.

11. Plaintiff was indeed frightened at the thought of the

pipes freezing, even though she had space heaters in every room and had earlier indicated to Mr. Miller and Mr. Waldron that she thought the house would be warm enough until morning.

12. Plaintiff, in a panic, agreed to the charge of \$433 to diagnose the problem even though both Mr. Waldron and Mr. Miller had led her to reasonably believe that diagnosis was already covered by the \$89; Mr. Miller presented her with a charge card slip already filled out for the \$89 and \$433.

13. Mr. Miller then checked the furnace, probably as he has described in his testimony, doing various safety checks first.

14. Within 10-15 minutes he found the problem – a small but important part (the igniter) was visibly damaged and needed to be replaced.

15. Mr. Miller pulled out a book with a list of prices for various parts and showed her that putting a new igniter was to be billed at \$1,400.

16. Again, Plaintiff was extremely upset about the cost and at first refused to pay it.

17. Mr. Miller consulted with Mr. Waldron and eventually lowered the price to \$839.

18. She discussed the cost with Mr. Miller and by phone with Mr. Waldron and with her brother; Mr. Waldron tried to frighten Plaintiff into having Defendant do the work by warning her the pipes would freeze and burst.

19. Mr. Waldron had also been on the phone with Mr. Miller during this period; Mr. Waldron had authorized a price for the repair of \$839, which was said to be the daytime or regular hours price with an additional reduction for a \$100 coupon.

20. After Plaintiff got off the phone with her brother (who had no useful advice for her), Plaintiff agreed to have the work done for \$839 and signed a work order to this effect.

21. After all the work had been completed she initialed the charge of \$839 added to the same credit card slip she signed earlier, and also initialed the new total charge of \$1,361.00. For a second time, Plaintiff signed the work order, which had then been revised to reflect that the work was done and that the new grand total was \$1,361.00.

22. After all the work had been completed, Mr. Miller handed Plaintiff a typed Emergency Work Authorization Form with the request that she sign and date it, which she did.

23. Mr. Miller had handwritten a separate statement on the back of the typed Emergency Work Authorization Form and asked Plaintiff to sign and date that as well; she refused.

24. The statement on the back of the Emergency Work Authorization Form, as handwritten by Mr. Miller, said “Due to temp. in the teens. House will become unlivable.”

25. Plaintiff refused to sign that statement, which was incorrect and not consistent with her view of the “livability” of the house; Mr. Miller then added a note below the statement, “Customer refused to sign.”

26. Mr. Miller then left; the furnace worked and the house got warm.

27. Within the next day or two, Plaintiff investigated the cost of the igniter on the internet and found it was around \$40; she complained about this to Mr. Waldron who said he probably paid half of that.

28. The total time Mr. Miller spent at her house was no more than two hours, based on Defendant’s evidence that he arrived around 9:00 p.m., that his travel time was around 45 minutes, and that he left around 11:00 p.m.

29. Defendant pays Mr. Miller \$45/hour for overtime.

30. Both Mr. Miller and Mr. Waldron claim they told Plaintiff in the *first* phone conversation each had with her that there would be the \$89 trip charge *plus* an additional charge for testing and repair. The Court does not find them

credible on this point (or on many others). Rather, the Court believes that Mr. Waldron, on behalf of Defendant, intentionally led Plaintiff to believe that \$89 was the charge to “look at” the problem, with the expectation that Plaintiff would not call other furnace repair companies merely to try to get the problem diagnosed for less than \$89. Defendant would then count on Mr. Miller to impose and succeed in collecting the \$433 extra since Mr. Miller has a reassuring manner.

31. Defendant’s charge of \$433 extra to diagnose a problem with a furnace is unreasonable on its face, being the equivalent of almost 10 hours of overtime pay for Mr. Miller; even if we assume that a *reasonable* markup for Mr. Miller’s labor was as high as three times the hourly rate, that would be only \$135 more for the diagnosis, not the \$433 Defendant charged Plaintiff.

32. There was no relevant evidence presented to show that the rates Defendant charged Plaintiff were at all reasonable.

33. The evidence given by Mr. Waldron to justify his overhead was neither credible nor particularly relevant, even though Plaintiff’s objection to relevancy was overruled and the testimony regarding overhead was allowed.

34. Similarly there was no evidence, credible or otherwise, to show that the charge for the igniter and its installation, \$839, was at all reasonable; the only justification Mr. Waldron gave for this was that our capitalistic system allows him to charge whatever he wants so long as the customer agrees.

35. Plaintiff elicited testimony from Mr. Miller that the low end of the range starts around \$300 and that Defendant’s charges for replacing the igniter were “on the high end.” (Videotape testimony of Ralph Miller, 3-13-09, tape time 11:45 – 11:48.) The Court believes him about the \$300 being in the range but not that it was at the *low* end and not that Defendant’s was in industry range at all. The Court believes Mr. Miller is somewhat embarrassed by his association with Defendant (and is not merely discontent with the excessive overtime he was called upon to do) and was trying to make himself appear to be a better person by making Mr. Waldron seem not so bad. As a result, we believe \$300 is probably in the middle of the industry range, *not* the low end.

36. We believe Plaintiff when *she* says she did not consider the cold temperature in her house an “emergency,” but in calculating the fair value of Defendant’s work, we have assumed that an after-hours premium *would* apply.

37. The fair value of the furnace work done, since it was done satisfactorily, is no more than \$389.00 (\$300 repair charge + \$89 trip charge).

38. The total overcharge Defendant inflicted on Plaintiff is \$972 (\$1,361 less \$389).

39. Plaintiff rightfully rejected the contract to diagnose and repair her furnace for the price of \$1,361.00.

40. Mr. Waldron, on behalf of Defendant, wrongfully refused to honor her rejection of the contract, saying she had waived the right to reject by signing the Emergency Authorization Form.

CONCLUSIONS OF LAW

1. The Consumer Protection Law was designed to protect persons in the shoes of Plaintiff from persons such as Mr. Waldron and companies such as Defendant.

2. Defendant did not comply with the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-2(4)(xv) and (xxi).

3. Plaintiff is entitled to treble damages plus reasonable counsel fees, 73 P.S. §201-9.2.

4. Since Defendant’s charges were *prima facie* unreasonable, it was Defendant, not Plaintiff, who had the burden of

adducing evidence that they were in accordance with the usual charges in the industry.

5. Plaintiff properly rejected the contract for diagnosis and for repair and is therefore entitled to damages in the amount of \$1,272.00 (\$1,361 less the \$89 trip charge).

6. Plaintiff should return a new and unused igniter identical to that Defendant installed to Defendant, at which time Defendant must pay Plaintiff the rejected contract amount of \$1,272, plus the additional amount of exemplary damages of \$2,544, a total of \$3,816, plus reasonable attorneys fees in an amount to be determined in accordance with the Order filed herewith.

7. After a review of the items called for in the Order, we will make our determination regarding counsel fees and will then enter a final Decision in both aspects of this case.¹

BY THE COURT:
/s/Friedman, J.

Dated: March 20, 2009

ORDER OF COURT

AND NOW, to-wit, this 20th day of March 2009, the Court having concluded that Plaintiffs are entitled to the reasonable amount of counsel fees incurred, it is hereby ORDERED as follows:

1. Plaintiffs’ counsel shall file a detailed affidavit setting forth the time spent, by whom, for what and the hourly rates charged.

2. Defendant may then file a counter-affidavit, or detailed objections to certain items or may accept the amount claimed without waiving its right to contest the award of any counsel fees.

3. The Court will decide the reasonable amount of attorneys’ fees based on the affidavit and the response.

Once the matter of the amount of counsel fees has been resolved, the Court will enter its Decision under Pa. R.C.P. 1038, which governs the proceeding.²

BY THE COURT:
/s/Friedman, J.

¹ Until the Decision is filed, there is no need to file post-verdict motions. See Pa. R.C.P. 227.1(c)(2) and 1038.

² See also, Pa. R.C.P. 227.1(c)(2).

Steven Bogan and Environmental Containment Systems, LLC v. Pre-Owned Auto Center of Indiana, PA, Inc.

*Unfair Trade Practices and Consumer Protection Law—
“Bait and Switch”—Exemplary Damages and Counsel Fees*

1. Individual plaintiff Bogan purchased a tractor from Defendants through eBay, for purpose of mowing his residential lawn.

2. Tractor was advertised as “like NEW” and “everything works perfectly.”

3. Defendants knew that tractor was not in good shape when it was listed for sale, and had no truthful basis for representing otherwise.

4. Defendant Denise Midkiff intentionally inserted incor-

rect serial numbers in the bill of sale, thereby participating in the fraud of the other defendants.

5. This was a consumer transaction, subject to UTP/CPL when “bait and switch” fraud was committed.

6. Proper remedy is return of purchase price, reimbursement for travel costs, exemplary damages and reasonable counsel fees.

7. LLC Plaintiff purchased a compressor from Defendants, through eBay.

8. Compressor was not as described, in terms of model year or hours of prior use.

9. Rejection of the compressor was timely even though 30 days after delivery, since buyer was occupied dealing with the defective tractor transactions and fraudulent conduct of Defendants in that transaction.

10. Since court does not find clear and convincing evidence of an intentionally fraudulent “bait and switch,” no exemplary damages will be awarded.

(Margaret P. Joy)

Arthur D. Feldman for Plaintiffs.

Geoffrey D. Kugler for Defendants.

No. GD 07-123. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER AND ORDER OF COURT

INTRODUCTION

Friedman, J., March 20, 2009—The captioned matter involves claims related to two purchases of goods. The first purchase was made by the individual Plaintiff Steven Bogan (“Bogan”) who bought a tractor from the Defendants. The tractor purchase gives rise to Counts I through IV of the Complaint, each of which are against all of the Defendants. Those Counts are: (I) Breach of Contract; (II) “Rightful Rejection,” seeking refund of the purchase price; (III) Fraud; and (IV) Unfair Trade Practices and Consumer Protection Law (“UTP/CPL,” 73 P.S. §201-1 *et seq.*).

The second purchase, an air compressor, was made by Plaintiff Environmental Containment Systems, LLC (hereinafter, “the LLC”). That transaction gives rise to Counts V through VII of the Complaint, each of which are also against all of the Defendants. Those Counts are: (V) Breach of Contract; (VI) “Rightful Rejection;” and (VII) Fraud.

Both purchases were based on descriptions posted on eBay by the Defendant Pre-Owned Auto Center of Indiana, PA, Inc., t/d/b/a Auto Centers of Homer City and t/d/b/a Auto Center Sales (“Auto Centers”), which acted through Defendants John and Denise Midkiff, its owners and officers, and Defendant Tony DeFrancesco (“DeFrancesco”), its employee. All Defendants were represented by the same attorney.

Bogan’s purchase, a small New Holland tractor he wanted for mowing the 2½ acre lawn at his home, was made through the eBay auction system, and therefore some of the eBay rules, as posted, would apply to that transaction.

The LLC’s purchase, an Ingersoll-Rand compressor intended to be part of its rental equipment inventory, was made after a different eBay auction did not bring the minimum price sought. DeFrancesco contacted Bogan, who had bid on the compressor. DeFrancesco and Bogan negotiated a price for the LLC’s purchase of the compressor. The deal

made sense because Bogan, who was a member of the LLC along with his wife, had to send a truck from Connecticut where he lived and where his business was located, to Homer City, Pennsylvania, where Defendants’ place of business was, to pick up the tractor. The eBay rules would not necessarily apply to this second transaction, but the eBay description is still critical and is what the LLC relied on and what Auto Centers, through DeFrancesco, had promised to deliver.

We conclude for the reasons outlined below that Bogan is entitled to an award under the UTP/CPL against all the Defendants and that the LLC is entitled to an award for Breach of Contract against Auto Centers, only.

I. The UTP/CPL Claim of Mr. Bogan

When the tractor and the compressor arrived at the LLC’s warehouse, Bogan tested the tractor, which had been advertised as “like NEW,” “with [only] 164 original hours” on it, and “Everything works perfectly.” (See Pl. Ex. 1, p. 3 for the full description.)

The tractor would not start, so Bogan had a mechanic who worked for the LLC try to fix it. That effort took roughly six hours. Once the starting problem was dealt with, Bogan rode the tractor and immediately observed that the clutch was slipping. Bogan then called Mr. DeFrancesco and told him about the problems. Mr. DeFrancesco agreed to honor the warranty that had been part of the eBay offer. (See Pl. Ex. 1, in the fine print at the top of p. 6.) It was arranged that Bogan would deliver the tractor to Defendants’ business location in Homer City and that Auto Centers would give his driver a certified check for the refund of the \$18,500 purchase price.

The tractor was returned to Defendants’ business location on October 3, 2006. (The auction had closed on September 17, 2006; the tractor was picked up about 10 days later and arrived in Connecticut late on September 27, 2006. Bogan first looked at it on September 28, 2006.) Mr. Midkiff, President and a shareholder with his wife, Defendant Denise Midkiff, of Auto Centers, examined the tractor and saw that it had six hours of additional running time on it¹ and that it was dusty and concluded that it had been abused by the purchaser and refused to honor his employee’s promise to honor the warranty described on eBay. Bogan and Midkiff discussed their dispute by telephone and Midkiff told Bogan that the clutch was not slipping. Bogan agreed to get the opinion of a nearby New Holland dealership, Maple Mountain Equipment, regarding the clutch.

The dealership personnel examined the tractor and agreed that the clutch was slipping as Bogan had claimed. Bogan then spoke to Midkiff by phone and confirmed his September 28th rejection of the tractor. Bogan’s driver left the dealership and went to his other delivery or pickup assignments; Mr. Midkiff left the tractor at the dealership where it has remained through the date of the trial.

At this time, October 3, 2006, according to the credible evidence, Mr. Midkiff knew there had been a problem with algae in the fuel line because he had sent it to Maple Mountain Equipment in July 2006 to diagnose and repair such a problem. Mr. Midkiff also had authorized DeFrancesco to auction the tractor on eBay. Mr. Midkiff nevertheless refused to honor the unequivocal warranty regarding the condition of the tractor even after the slipping clutch was confirmed by the Maple Mountain Equipment dealership. We note that it was Mr. Midkiff who made Bogan aware of that dealership.

DeFrancesco did not attend the trial and his absence was not explained by any of the other Defendants who, since he is a *party*, could have compelled his attendance and his testimony were it favorable to any of them. We therefore draw

the permissible inference that it would have been unfavorable to Defendants. The evidence showed that DeFrancesco had lost his license to sell used cars as a result of a consumer fraud investigation by the Pennsylvania Attorney General. (Videotape testimony of Denise Midkiff, 3-12-09, tape time between 12:10 and 2:17, and of John Midkiff, 3-12-09, tape time between 4:40 and 4:42.) We also found both Mr. Midkiff and Mrs. Midkiff not to be credible during much of their testimony on other issues. The net result is that we believe the following:

1. Mr. Midkiff knew the tractor was not in good shape at all when he directed Mr. DeFrancesco to sell it on eBay.
2. DeFrancesco described the tractor as being like new and working perfectly, either on his own initiative, knowing he had no truthful basis for such a representation, or on the basis of what Mr. Midkiff told him, again with no truthful basis.
3. Mrs. Midkiff participated in the fraud regarding the sale of the tractor by inserting incorrect serial numbers in the Bill of Sale, changing them only when Bogan's office staff advised Auto Centers of the mistake. Based on her demeanor on the stand, we do not believe this was merely a mistake. We believe it was an intentional act designed to trip up a buyer less savvy than Bogan.² We note that this same "mistake" was committed with the compressor bought by the LLC.

We conclude that all the Defendants violated Section 201-2(4)vii, ix, and xiv of the UTP/CPL, which are as follows:

(vii) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

...

(ix) Advertising goods or services with intent not to sell them as advertised;

...

(xiv) Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made...

We do not accept Defendants' contention that the purchase of the tractor was not a consumer transaction. Bogan testified very credibly that the way he and his wife were paid by the LLC was that all monies that were their personal income were paid out of an "S" account. The checks that went to Auto Centers with the LLC address at the top, were separately accounted for as being income to Bogan. Therefore, despite Defendants' contention that the LLC was the purchaser, the credible evidence showed that Bogan was the purchaser of the tractor, that it was purchased for his personal use (mowing his very large lawn), and that it was not related to the LLC's business in any way (the LLC rented sandblasting equipment not tractors or lawn-mowing equipment). (See videotape testimony of Steven Bogan, 3-11-09, tape time between 10:45 and 10:50, and Plaintiffs' Exhibit 4.)

There is no requirement, in the law or logic, that a fraudulent seller be made aware that he is dealing with a "consumer" at the time he commits a fraud. It is the *fact* that the purchaser was a consumer that controls. Here the Defendants all participated knowingly in different parts of a fraudulent

transaction with a consumer and got caught. Their attempts to retain the fruits of their deceit, the \$18,500 purchase price, after the consumer, Bogan, timely rejected the tractor, warrants both exemplary damages and an award of reasonable counsel fees for this portion of the captioned action.

II. The "Bait and Switch" Claim of the LLC.

This claim does not involve a consumer transaction. Rather, the claims by the LLC are Breach of Contract, Rightful Rejection, and common-law Fraud (in the nature of "bait and switch").

The LLC bought an Ingersoll-Rand Air Compressor that had undisputedly been described as a year 2000 Model with 412 hours of use, at a purchase price of \$5,000.00. What it received was undisputedly a 1998 Model with 646 hours of use.³

The problem here is different from that involving the tractor. Here, the LLC, through one of its members, Mr. Bogan, did not promptly examine the compressor which had arrived at the same time as the tractor. Because the Defendants created such difficulties with the tractor, Mr. Bogan, on behalf of the LLC, did not get around to inspecting the compressor until approximately 30 days after its delivery. By that time his relationship with the seller had completely deteriorated. He felt, with reason, that the air compressor issue would get no better treatment from Defendants than the tractor issue had. He therefore did not expressly reject the compressor and demand a refund *prior* to seeking legal counsel. Instead he assumed, not unreasonably, that Defendants had intentionally defrauded the LLC with regards to the air compressor just as they had defrauded him personally and that it would be as futile to expect them to honor their obligations to the LLC as it was to get them to honor their obligations to Mr. Bogan.

Nevertheless, the LLC, through current counsel, had made demand for a refund of the air compressor payment as early as November 16, 2006 (Plaintiff Exhibit 13).⁴ We conclude that there was a timely rejection of the air compressor in the overall circumstances of the disputes between the parties. The LLC filed the instant action, along with Mr. Bogan, on January 4, 2007.⁵

Mr. Midkiff testified at trial that he would have returned the \$5,000 last year if the LLC had returned the air compressor. He never relayed such willingness to the LLC or any of its members or employees, nor did he cause any of his own employees or co-defendants to do so. We conclude that his testimony at trial about this supposed willingness is untruthful. However, we do not find that his conduct, however dilatory and vexatious it may have been, is sufficient to ratify any possible fraud by his employee, DeFrancesco.

Unlike the transaction with the tractor, we cannot say that the clear and convincing evidence shows that the air compressor transaction was an intentionally fraudulent "bait and switch." We therefore conclude only that Defendant Auto Centers breached its contract with the LLC and that the LLC rejected the incorrect item within a reasonable period of time in the circumstances. The LLC is entitled to the return of its purchase price, \$5,000, provided it returns the compressor to Defendant Auto Centers, at said Defendant's cost.

CONCLUSION

Mr. Bogan is entitled to the return of the purchase price for the tractor in the amount of \$18,500, plus the undisputed cost of the trips to pick up and return the tractor, \$600 each way. (Videotape testimony of Steven Bogan, 3-11-09, tape time between 11:13 and 11:25.) Mr. Bogan is also entitled to exemplary damages under the UTP/CPL. We believe an appropriate amount that would deter Defendants from such

conduct in the future is \$37,000, twice the purchase price. The total damages awardable to Mr. Bogan is therefore \$68,100. He is also entitled to the portion of his attorneys fees that are attributable to his personal claim only.

In order to determine the reasonable amount of attorneys' fees required to prosecute the claim of Mr. Bogan, we have entered an Order in accordance with our usual practice. After a review of the items called for in the Order, we will make our determination regarding counsel fees and will then enter a final Decision in both aspects of this case.⁶

The LLC is entitled to a refund of the contract price for the compressor of \$5,000, from Auto Centers, only. Auto Center may pick up the compressor at the LLC's place of business after the \$5,000 has been paid, unless the parties make different arrangements for their mutual convenience.

BY THE COURT:
/s/Friedman, J.

Dated: March 20, 2009

ORDER OF COURT

AND NOW, to-wit, this 20th day of March 2009, the Court having concluded that Bogan is are entitled to the reasonable amount of counsel fees he incurred under the Unfair Trade Practices and Consumer Protection Law, it is hereby ORDERED as follows:

1. Plaintiffs' counsel shall file a detailed affidavit setting forth the time spent, by whom, for what, and the hourly rates charged.
2. Defendant may then file a counter-affidavit, or detailed objections to certain items or may accept the amount claimed without waiving its right to contest the award of any counsel fees.
3. The Court will decide the proper amount of reasonable counsel fees based upon the affidavit and the response thereto.
4. Once the matter of the amount of counsel fees has been resolved, the Court will enter its Decision under Pa. R.C.P. 1038, which governs the proceedings.⁷

BY THE COURT:
/s/Friedman, J.

¹ There is a meter on the tractor that shows the hours it has been used.

² In the event of a complaint from an unsophisticated buyer, the serial number discrepancy would be a possible reason to refuse to honor the warranty.

³ There are meters on air compressors which tell how many hours they have run. The expected useful life of the models in question is 8,000 hours.

⁴ None of the Defendants made any response to those demands.

⁵ Defendants' Preliminary Objections to venue were overruled by the Honorable Eugene B. Strassburger III, Administrative Judge; their remaining Preliminary Objections were overruled by the Honorable Christine A. Ward, who also permitted Defendants to file a Motion to Sever the two claims for trial, a motion which does not appear on the docket.

⁶ Until the Decision is filed, there is no need to file post-verdict motions. See Pa. R.C.P. 227.1(c)(2) and 1038.

⁷ See also, Pa. R.C.P. 227.1(c)(2)

Orlando Gonzales v. Housing Authority of the City of Pittsburgh

Termination of Public Housing Lease

The Hearing Officer erred in terminating appellant's lease because the Notice of Termination alleged he was disturbing other tenants, and there was no evidence to support that allegation. The Hearing Officer based termination on other grounds, finding that appellant disturbed authority staff. The court found that staff was not protected from this conduct, only from unsafe or unsanitary conduct.

(Lynn E. MacBeth)

Jason C. Hague for Orlando Gonzales.
Clare Ann Fitzgerald for Housing Authority of the City of Pittsburgh.

No. SA 08-1200. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER AND ORDER OF COURT

Friedman, J., April 29, 2009—The Housing Authority of the City of Pittsburgh ("Housing Authority") has attempted to terminate the lease of Mr. Gonzales. The reason stated in the Notice of Termination was that Mr. Gonzales was disturbing other tenants of the building, thereby violating Section 9.N of the Lease.¹

Mr. Gonzales was eligible for the public housing at issue because he is disabled, having a mental impairment due to a brain injury suffered in an accident.

The hearing officer seems to have conducted a fair and impartial hearing as revealed by the transcript. However, her decision to deny Mr. Gonzales's grievance and uphold the termination of his Lease was not based on his being disruptive towards the other tenants, the grounds given by the Authority. The hearing officer correctly pointed out that there was no such evidence of record. Rather, the hearing officer found that Mr. Gonzales disturbs the staff, who the Authority says are protected as well by 9.N.

We conclude that the conduct said to be directed at the staff is not a justification for terminating Appellant's lease. Staff would be protected by 9.N only from unsafe or unsanitary conduct, not even alleged here. The staff is actually "protected" by section 9.K.2 of the Lease, which states:

Any *criminal* activity that threatens the health, safety, or right to peaceful enjoyment of the Premises by members of the Household, Guests, or other Tenants or employees of HACP, or persons residing in the immediate vicinity of the Premises.

(Emphasis added.)

According to the HUD regulations supplied by counsel, 24 CFR §945.105, the public housing at issue has, as one of its purposes, providing persons such as Mr. Gonzales with a place to live. We can take judicial notice that persons with a mental impairment would be expected to give the staff some difficulties. The Lease itself supports this by referring to criminal activity that would threaten the staff as a basis for termination.

The things Mr. Gonzales did that were disturbing were staring, visiting the management office, sending stuffed toys and balloons to one staff member who had been kind to him, leaving a large number of phone messages over a weekend, complaining about a security guard, and expressing his opinion that some members of the staff were out to get him

because of complaints he had made.

All of this could be bothersome, but none of this are valid grounds for evicting Appellant from a building expressly designated for people just like him.

We note that much of the testimony regarding the staff was inadmissible hearsay, to which some of the objections were sustained. However, even if all that hearsay were accepted as true, it does not make out either *criminal* activity (§9.K.2) or unsafe or unsanitary activity (§9.N).

Since the grounds for termination cited by the hearing officer are not proper in the circumstances the appeal must be granted. See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: April 29, 2009

ORDER OF COURT

AND NOW, to-wit, this 29th day of April 2009, for the reasons set forth in the attached Memorandum in Support of Order, it is hereby ORDERED that the captioned appeal is SUSTAINED and the Housing Authority is directed to reinstate Appellant's lease forthwith.

BY THE COURT:
/s/Friedman, J.

¹ A copy of the Lease itself is not of Record, but a copy was attached to the Authority's brief.

Dale Zegarelli v. Frank Capo, Robert Linder, and Robert Linder Services, Inc.

Attorneys' Fees—42 Pa. C.S. §2503—Fraud

1. Attorneys' fees were awarded for party who was granted a compulsory nonsuit, but not in the full amount. The court balanced the general rule that fees are not recoverable against the purpose of §2503 allowing attorneys' fees as a sanction for vexatious prosecution.

2. Plaintiff's action against the remaining defendant alleged fraud in the purchase of a laundromat that did not prove to be as profitable as defendant represented. The jury only awarded plaintiff a portion of the purchase price, and plaintiff appealed.

3. The court found that the jury's award reflected economic justice in a capitalist system by punishing defendant for fraud but not rewarding plaintiff for his possible over-enthusiasm after he bought the business.

(Lynn E. MacBeth)

Karen Hassinger for Plaintiff.

Joshua A. Lyons for Robert Linder and Robert Linder Services, Inc.

Bruce W. Blissman for Frank Capo.

No. GD 04-28368. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

INTRODUCTION

Friedman, J., April 29, 2009—Dale Zegarelli bought a laundromat business from Frank Capo. The business did not

produce the income that Capo had told Zegarelli it generated for him. As a result, this action was instituted, charging Capo with fraud.

Zegarelli also charged Robert Linder and his accounting business, Robert Linder Services, Inc., with fraud based on Linder's alleged participation in Capo's fraud.

Zegarelli's Second Amended Complaint also contained a Count in Constructive Trust. Plaintiff did not pursue this claim at trial and it is therefore believed to be moot.

The Second Amended Complaint also included a Count in Unjust Enrichment as well as a claim for punitive damages, both of which were stricken by Order of the Honorable Ronald W. Folino of this Court.

We granted a compulsory nonsuit in favor of Linder and his corporation. (Trial Transcript, pp. 315-334.) No one complains of this decision. The case against Capo was permitted to go to the jury, which awarded Zegarelli \$47,500. He had asked for the return of the full \$75,000 he had paid Capo.

Linder and his corporation later filed a Motion for Attorney Fees Pursuant to 42 Pa. C.S. §2503. A portion of their attorney fees (\$2,500) was imposed upon Plaintiff and his attorney "as a sanction for Plaintiff's vexatious prosecution of the action against [the Linder Defendants] which was virtually without merit."

After correcting some errors related to his initial attempt to appeal in July 2008, Capo perfected his appeal on or about October 20, 2008 and the Linder Defendants filed a Notice of Cross-Appeal on October 28, 2008. The Cross-Appeal involves the issue of attorney fees only.

The Linder Defendants had not filed an earlier Notice of Cross-Appeal in July 2008, nor was Capo's appeal of July 2008 quashed. Rather, on October 6, 2008, the Pennsylvania Superior Court issued an Order essentially directing Capo to take action to perfect his appeal by October 20, 2008, which he appears to have done. We therefore believe that the Linder Defendants' Cross-Appeal is untimely and should be denied or quashed. In the event the Linder Defendants' Cross-Appeal is to be decided on its merits, we will discuss it very briefly first, before proceeding to Capo's bases for appeal.

DISCUSSION

A. The Linder Defendants' Cross-Appeal is without merit.

The Linder Defendants object that such a small portion of their attorney fees were awarded. We exercised our discretion and tried to balance the purposes of the general rule (that counsel fees are not recoverable) with the purpose of §2503. This did not strike us as a case where one party's conduct was so outrageous vis-à-vis the other that the full amount of counsel fees should be awarded. Here, because Linder was present when Zegarelli was making his inquiry of Capo and because a document Capo later provided had been prepared by Linder, Zegarelli concluded, hastily and without sufficient proof beyond his own intuition, that Linder had joined in and abetted Capo's fraudulent conduct. Zegarelli was either mistaken or unable to assemble the proofs for his contention. We did not believe that Zegarelli himself acted in bad faith in bringing his suit.

However, we felt his attorney should have realized earlier in her handling of the case that she could not prove what her client's intuition told him. We therefore awarded an amount which we felt would prevent both Zegarelli and his attorney from making such errors in any future litigation they might be involved in.

B. Capo's Appeal is without merit.

We now turn to Capo's Appeal. He raises six issues in his Statement of Matters Complained of on Appeal; we have re-

stated them as follows:

1. That Zegarelli agreed to buy the Laundromat before Capo made the misrepresentations asserted, and therefore cannot now claim to have relied on them.
2. That there was no clear and convincing evidence that Zegarelli incurred damages.
3. That the Court let Zegarelli prove a representation made by telephone when that was not pled by Zegarelli "as part of his claim for fraudulent misrepresentation."
4. That the Court "erred and/or abused its discretion in permitting Plaintiff [to] introduce into evidence Plaintiff's Exhibit 1 as the same was not timely provided within Plaintiff's pretrial statement." (Plaintiff's Exhibit 1 was a document created by Zegarelli during the events at issue, based on Capo's answers to questions Zegarelli had concerning the deal.)
5. That there was insufficient evidence to establish by the clear and convincing standard that Capo "made a fraudulent misrepresentation upon which the Plaintiff reasonably relied...in purchasing the Laundromat."
6. That we failed to properly instruct the jury on the measure of damages.

We will discuss these as three topics: (1) the sufficiency of the evidence of fraud, (2) the exercise of discretion regarding the admission of evidence such as the telephonic representations and Plaintiff Exhibit 1 and (3) the proper measure of damages.

1. There was sufficient evidence to make out the claim of fraud by Capo.

The burden of proof for a claim of fraud is proof by clear and convincing evidence. The elements of a cause of action for fraud have been set forth by the Pennsylvania Supreme Court as follows:

- (1) A representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it was true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and,
- (6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 489, 729 A.2d 555 (1999), citing Restatement (Second) of Torts §525.

There was evidence that the jury could have believed that would prove the following scenario by the "clear and convincing" standard. The jury could have concluded that Zegarelli was somewhat naïve and that Capo recognized this and took advantage of him. Capo first made oral representations to Zegarelli, who wrote them down in what later became Plaintiff's Exhibit 1. Capo also gave Zegarelli a document in response to Zegarelli's request for proof of the "financial reports" in "black and white" to verify the figures

Capo had given him orally. (Transcript of Jury Trial of December 4-7, 2007, hereinafter, "TT", pp. 81-82.) That document was actually a "*pro forma*," which is not at all the same as a financial statement. Capo knew that the *pro forma* did not accurately reflect the Laundromat's income and expenses, even though it included the phrase "Statement of Income/Expenses," and he also knew that Zegarelli did not know what "*pro forma*" meant and would therefore believe the figures were accurate and current and would rely on them. Capo also told Zegarelli that his accountant (Linder) would be at their upcoming meeting to answer any questions. The jury could also have concluded that Capo then arranged for Linder to be at the meeting place when Zegarelli arrived.

All the elements of fraud were made out by the direct testimony of Zegarelli (TT, pp. 76-143). The jury could and apparently did believe him. They also clearly rejected Capo's version of events.

Capo's contention that Zegarelli had agreed to buy the business before Capo had made any representations is largely based on the fact that a deal had been reached once before, but Zegarelli backed out. He later changed his mind and re-opened negotiations. This argument by Capo was clearly rejected by the jury. There was evidence from which the jury could conclude that the ultimate agreement to buy did not occur until after Capo's various misrepresentations had been made and relied upon by Zegarelli to his detriment. Capo's earlier misrepresentations did not disappear during the interval before negotiations re-commenced, nor did Capo correct them. They remained part of what Capo communicated to Zegarelli, intending him to rely on them.

There was sufficient evidence which, if believed, made out the fraud claim by clear and convincing evidence.

2. There was no abuse of discretion regarding the admission of evidence.

Capo complains of two abuses of discretion, (1) the admission of evidence regarding Zegarelli's telephone conversation with Capo which Capo says should have been barred because it was not pled in the Second Amended Complaint, and (2) the admission of Plaintiff Exhibit 1, which Capo says should have been barred because it was not listed on Zegarelli's Pre-Trial Statement.

As for the telephone conversation, it is well-settled that the Rules of Court bar the pleading of *evidence*. It would have been an abuse of our discretion to bar such unpleadable evidence on the ground that it was not pled. Furthermore, our review of the transcript does not reveal any objection by Capo's counsel.

As for the handwritten document prepared by Zegarelli, it, too, was properly admitted into evidence. Capo's sole basis for attacking Plaintiff's Exhibit 1, which is a five-page handwritten document prepared by Plaintiff and consisting of a list of questions, a schematic of the Laundromat, and financial information, is that it was not on Zegarelli's Pretrial Statement. This issue was discussed on the record at pages 41-44 and 82-98 of the Trial Transcript. Zegarelli had prepared much of the document based on Capo's oral representations to him before entering into the purchase of the Laundromat. The Court concluded that dealing with those summaries would not pose a problem for counsel. There was no abuse of discretion and Capo suffered no harm and was not "surprised" simply because Zegarelli's contemporaneous notes were not listed on the Pretrial Statement.

3. The Court properly charged the jury on the measure of damages.

We admit having had difficulty initially with the charge

on damages. The charge conference is found at TT, pp. 365-407. The Court and counsel spent most of the charge conference on two topics, the measure of damages and the definition and scope of "as-is." Capo maintained that the sole measure of damages, even for fraud, was the difference in value between what was purchased and what was received. We essentially overruled him on this point and indicated we would try to draft our instructions to conform to the Pennsylvania Supreme Court's ruling in *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285 A.2d 451 (1971), especially as it clarified or overruled the case relied on by Capo, *Neumann v. Corn Exchange National Bank & Trust*, 356 Pa. 442, 51 A.2d 759 (1947). At TT, pp. 402-403, we read to counsel what we proposed to say regarding the measure of damages as a result of our earlier discussion. No further objection to this language was made. The actual charge on this point is at TT, pp. 438-439. No objection was made to this language either. We believe any objections to the language used to carry out the Court's ruling has been waived. The ruling itself is what is at issue on appeal. *Scaife* controls and was complied with.¹

The measure of damages that Capo puts forth would apply if this were a mere Breach of Contract case. This is a fraud case and the jury expressly stated in its verdict that its award was based on Capo's fraud.

Even by Capo's measure, there was evidence that what Zegarelli paid for the business, \$75,000, yielded him no value and that Capo's fraud caused Zegarelli to invest additional monies in cosmetic changes to the rented location which were also lost.

The jury's award reflects a real sense of economic justice in a capitalist system – it punished Capo for his fraud but did not reward Zegarelli for his possible over-enthusiasm after he bought the business.

CONCLUSION

The jury's verdict against Capo was based on sufficient evidence and its award reflected a common-sense understanding of justice and responsibility. The award neither over-punished Capo nor over-rewarded Zegarelli.

The Court's award to the Linder Defendants of attorney fees as sanctions was in an appropriate amount in the circumstances. There was no abuse of discretion.

BY THE COURT:
/s/Friedman, J.

Dated: April 29, 2009

**William R. Bishop, Jr. v.
Ted Kaczorowski a/k/a
Thaddeus Kaczorowski and
Mona Kaczorowski a/k/a
Mona Singer Kaczorowski**

Mortgage Foreclosure—Attorneys' Fees—Damages

1. In mortgage foreclosure action, the amount due the mortgagee was at issue.

2. Mortgagor, surviving wife, alleged that in a dispute between mortgagee and a bank claiming priority over plaintiff mortgagee, the sum of \$35,000 was paid to plaintiff, and that defendant wife should be given credit for that amount, but the court found that the amount had already been credited.

3. Attorneys' fees earned after execution of the Mortgage and Note are not properly included in the amount due unless specifically recited in the documents.

(Lynn E. MacBeth)

John H. Auld, II for Plaintiff.

Avrum Levicoff for Defendants.

Nos. GD 05-008328 and GD 05-011024. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM ORDER

O'Reilly J., April 29, 2009—This matter involves a Mortgage Foreclosure instituted by the Mortgagee, William Bishop ("Bishop") against the mortgagor, Mona Kaczorowski ("Kaczorowski"). Bishop has also filed suit on the Note, at Docket No. GD05-11024 for \$35,000, executed by Kaczorowski concurrent with the Mortgage. The Docket Number for the Mortgage is GD05-8328. They were consolidated on August 11, 2008. The Mortgage and Note were to secure attorneys fees rendered, and to be rendered, by Bishop, who was, and had been, an attorney representing Kaczorowski on various matters. Both Ted and Mona Kaczorowski originally executed the Mortgage and Note on April 18, 2001. They paid on it for about a year and a half, but then stopped in November, 2002. Ted Kaczorowski, a co-obligee on the Mortgage and Note, died on December 30, 2005, leaving Mona as the Defendant.

I heard the matter non-jury on March 18, 2009, after which counsel filed excellent and able briefs limited to the amount due Bishop under the Mortgage and Note. Kaczorowski had defended the case on the basis that her signatures on the documents had been forged. After hearing testimony on this issue, including an expert witness called by Bishop, I ruled from the bench in favor of Bishop on that issue, and found the Mortgage and Note to bear the authentic signatures of Kaczorowski. Accordingly, the only issue left for me to decide is the amount due under those documents.

The evidence developed was that the Mortgage and Note were executed at a time when Kaczorowski owed \$17,000 to Bishop for past legal services. There was a need for legal services in the future, and in order to secure the prior bill, and the future services to be rendered, the Mortgage and Note were made for \$35,000. Thereafter, Bishop continued to provide legal services to Kaczorowski, and added them to the \$17,000 already billed, and within the scope of the \$35,000 Mortgage and Note. As noted above, Kaczorowski made some payments against this obligation, and Bishop provided a running total via billing software used in his office.

Ted Kaczorowski died on December 30, 2005, but he and his surviving spouse had not paid since October 28, 2002. Bishop had already filed suit on August 6, 2005, prior to that death, and after December 30, 2005, it continued against Mona. As noted, Mona has unsuccessfully claimed a forgery of her signature. After the suit was filed, Kaczorowski filed for the protection of bankruptcy, which was ultimately denied, and relief from the stay was granted, and this suit proceeded.

In addition to the forgery defense, Mona contends that whatever she may owe is diminished by *both* what was paid for legal services after the Mortgage and Note was signed, as well as what Bishop received under a bizarre set of circumstances when a lending institution achieved a superior position to him after it loaned money to Kaczorowski.

As to the latter circumstance, Mona sought to re-finance the realty with Deutsch Bank, which property was already

subject to the Bishop Mortgage. Said bank did so re-finance, and after doing so learned that the Bishop Mortgage held a superior position, but a recordation error appeared to subordinate Bishop to Deutsch Bank. Bishop protested, but it appears no lawsuit was filed. Deutsch Bank settled the claim, by paying \$35,000 to Bishop. Mona contends she should get credit for that \$35,000. That payment occurred on November 6, 2006.

As to the former issue, Mona relies on *Weiss v. Tulloch*, 961 A.2d 862 (Pa.Super. 2008) for the proposition that unless specifically recited in the document, a Mortgage may not be used to secure an open account, and the only obligation is for the face amount in the documents, less payments made, and such other charges as are permitted by the documents. The facts in *Tulloch* are quite similar to those here and it would seem that attorney's fees earned after execution of the Mortgage and Note are not properly included in the amount due. The Superior Court specifically found that "...neither the Note nor the Mortgage indicated the Mortgage covered future advances...i.e. future attorney's fees. Therefore, construing the Mortgage to secure fees incurred after the initial twenty thousand was legal error."

It is clear that after execution of Mortgage and Note, Kaczorowski paid \$5,200 during the period April 20, 2001, to October 28, 2002. The evidence does not reflect how those payments were applied as between principal and interest, but the documents by their terms require a monthly payment of \$500 a month until paid in full at an interest rate of 6%. Had the terms been observed it would have produced a Mortgage and Note for a term of approximately 70 months. When Kaczorowski stopped paying in November, 2002, Bishop could have accelerated the debt, and sued forthwith. Bishop did not. However, his forbearance did not amount to a waiver of his right to do so, which he ultimately exercised on August 6, 2005 when the suits herein were commenced. In his complaint, Bishop seeks the face amount of the Mortgage, plus interest of \$8,556 calculated to March 31, 2005, and attorney's fees of \$2,500.

The evidence showed that after Bishop filed suit, Kaczorowski filed for the protection of bankruptcy. Bishop retained a bankruptcy specialist as an attorney, and ultimately the stay of bankruptcy was lifted, and this trial before me occurred. At the same time, the interest due on the Mortgage and Note continued to run at the 6% rate. The \$35,000 from Deutsch Bank was paid on November 7, 2006, and Kaczorowski got a credit for that payment.

At that time only \$5,200 had been paid on the debt, and it had been accruing interest at 6% since May, 2001. A traditional amortization schedule was not prepared or printed, but the \$5,200 had done little to retire the debt.

After I had concluded the trial, I asked Counsel to give me their calculations as to what they believe is due. Neither gave me a complete response. Kaczorowski emphasized the Deutsch Bank settlement, and minimized the expense incurred by Bishop to enforce the debt, which began *before* the Deutsch Bank settlement.

Bishop has provided a detailed claim, but continues to include the bill for services rendered after the date of the mortgage in contravention of *Tulloch*. The record contains Bishop's Exhibit 9, and Kaczorowski Exhibit B, both of which contain calculations of expenditures, and receipts in regard to this case. It contains the on-going charges for legal services after the date of the Mortgage and Note.

As noted, I have found the signature of Mona to be valid and the Mortgage and Note enforceable. I further find that Mona is responsible for all the costs incurred by Bishop in collecting on this debt, and that included counsel fees of \$14,137.51 to bring and prosecute this action, counsel fees to

the bankruptcy specialist of \$4,333.75, and \$7,914 for expenses in validating the signature, including the handwriting expert, plus \$714.50 for Bishop's cost to insure the realty after Kaczorowski stopped paying. I further find, under *Tulloch*, that the ongoing attorney fees charged after the Mortgage and Note were signed are not properly included. But, I cannot make the calculation for principal and interest due. I, therefore, direct counsel to re-calculate the amounts due under the Mortgage without regard to those ongoing fees and submit them to me within 7 days. I recognize that Kaczorowski may oppose the fees that I have found due, and he is free to do so, but in a separate section in his response to the Order.

Once I receive a final calculation, I will evaluate it, and enter an appropriate verdict.

BY THE COURT:

/s/O'Reilly, J.

Date: April 29, 2009

In re: Appeal of Steven Hennigan

Civil Service—Denial of Application

The reason for denial of appellant's firefighter application was the expiration of his driver's license at the time his application was considered, despite the reinstatement of his license. The city based the denial on language in the application requiring a valid license. The court found that the language on the application was not authoritative, and there was no proof that any regulation or law required the license. The court reversed the denial of the application.

(Lynn E. MacBeth)

Michele T. Wild for Steven Hennigan.

Wendy Kobee for City of Pittsburgh.

No. SA 08-954. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER AND ORDER OF COURT

Friedman, J., June 5, 2009—Steven Hennigan appeals from a decision of the City of Pittsburgh Civil Service Commission affirming the denial of his application to become a firefighter.

The sole reason for the denial was the undisputed fact that he had let his driver's license expire and so did not have a valid driver's license at the time his application was considered. It also seems undisputed that this was easily correctable and was in fact corrected prior to his receiving notice of the disqualification.

The City's position has two prongs, (1) that the *application* is very clear that "A current, valid Class C Pennsylvania Motor Vehicle Operator's License must be presented at the time of filing application or prior to the start of employment processing. A valid driver's license must be maintained throughout employment;" and (2) that giving Hennigan the job would be unfair to other applicants who did have a current driver's license.

It is unclear whether any particular City regulation *requires* the statement on the application that the City relies upon. It is undisputed that the relevant statute, Firemen's Civil Service Act, 53 P.S. §23493, contains no such requirement.

Furthermore, Hennigan's brief points out that there is no such requirement in Section 3(23493) of the City of

Pittsburgh Firemen's Civil Service statute which is said to list the requirements Hennigan had to meet. The City's brief, filed about a month later, does not contradict this. Rather, the City relies solely on the notation on the application.

In the absence of a written policy or regulation, the appeal must be granted. The mere placing of a statement on an application is irrelevant on the pertinent issue of "just cause" unless the Fire Chief and Department of Personnel had previously made and recorded the determination in an appropriate manner.

The supposed non-compliance with a statement on the application, without more, is not "just cause" for rejecting the applicant. The Commission did not have any valid basis for upholding the disqualification of Hennigan. His appeal is granted and he is eligible to join the next firefighter's class for employment without requiring him to begin the process anew.

See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: June 5, 2009

ORDER OF COURT

AND NOW, to-wit, this 5th day of June 2009, Steven Hennigan's captioned appeal from the decision of the City of Pittsburgh Civil Service Commission is hereby GRANTED for the reasons set forth in the accompanying Memorandum in Support of Order, and the Commission is directed to cause Mr. Hennigan to be listed as eligible to join the next firefighter's class for employment without requiring him to begin the application process anew.

BY THE COURT:
/s/Friedman, J.

CAPSULE SUMMARY

Melissa King v. Anthony Aliucci

Contempt—Support

1. The parties were married in May of 1996 and had two children before they separated. A divorce was filed in May of 2007. The parties entered into a settlement agreement in September of 2007 requiring the husband to pay alimony to the wife in the amount of \$9,000 per month for ten years and child support for the two children until both children entered college. A divorce was finalized in January of 2008 and two weeks later, the husband ceased paying his alimony and child support, alleging that he lost his job in May of 2007.

2. A hearing was held in August of 2008 at which time the hearing officer determined that the husband was aware of his employment circumstances when he entered into the property settlement agreement and did pay from September of 2007 until January of 2008. It was determined that he had very few expenses and enjoyed a high standard of living and that he could, therefore, meet his obligations, not proven otherwise. The hearing officer recommended that the husband be incarcerated if he did not make certain payments.

3. At a compliance review held in December of 2008, the court again rejected the husband's claim that he had no ability to pay and ordered him to pay \$15,000 toward his arrears, an amount he paid within one hour. He then text messaged the wife alleging that he had "hockey bags full" of cash, but that she would never see any more money. He made no further payments.

4. A second compliance review hearing was held in May of 2009; however, the wife asked for an expedited contempt hearing as a result of the husband being scheduled for sentencing and imprisonment on federal fraud charges to which he pled guilty. A contempt hearing was expedited and held in February of 2009, at which time the husband was directed to pay ten percent of his outstanding arrearage, that ten percent being \$13,334, an amount he paid within one day. The husband appealed this determination indicating that he was without the ability to pay and demanded the money back. He alleged that he had borrowed the initial \$15,000 from his brother, but offered no corroborating evidence or testimony to support this.

5. The standard of review in this matter is narrow and the husband must show that there was an error of law, an abuse of discretion, findings not supported by the record, or a capricious disbelief of credible evidence. The husband's argument was that his fraudulent acts and criminal proceedings caused his earnings to diminish.

6. The court determined that the husband's circumstances were of his own making and that the property settlement agreement was entered into after his employment loss and was actually complied with until the divorce decree was entered. His purge conditions were met immediately and he continued to exhibit a high standard of living, even driving a BMW automobile that he claimed had been repossessed. The husband continued to be employed, but did not make any payments from his income. His testimony was contradictory, vague, and unsupported by documentation or other testimony. It was determined that he was able to meet the purge conditions and, in fact, did.

(Christine Gale)

Robb D. Bunde for Plaintiff/Wife.

John A. Adamczyk for Defendant/Husband.

No. FD 06-6464-004. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

Hens-Greco, J., May 5, 2009.