## IN THE SUPERIOR COURT OF DELAWARE

#### IN AND FOR NEW CASTLE COUNTY

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)	C.A. No. N10C-03-204 WCC
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)	TRIAL BY JURY OF
)	TWELVE DEMANDED

Submitted: November 25, 2013 Decided: February 19, 2014

### On Plaintiff's Motion for New Trial - GRANTED

#### **ORDER**

Louis J. Rizzo, Jr., Esquire, Reger Rizzo & Darnall LLP, 1001 N. Jefferson Street, Suite 202, Wilmington, DE 19801. Attorney for Plaintiff.

Daniel P. Bennett, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, 1220 North Market Street, Suite 300, Wilmington, DE 19801. Attorney for Defendant Residential Construction Services.

# CARPENTER, J.

Upon consideration of the Plaintiff's Motion for New Trial, supplements thereto, and Defendant Residential Construction Services ("RCS") response in opposition thereto, it appears to the Court that:

- 1. Plaintiff filed the underlying Motion for New Trial on February 6, 2013, arguing that under Superior Court Civil Rule 59, Plaintiff was entitled to a new trial due to the identification of material evidence which, Plaintiff contends, would probably change the outcome of the trial.
- 2. The underlying trial involved a dispute as to who loosened the gas fitting on Plaintiff's stove, which undisputedly caused the fire at Plaintiff's residence. Plaintiff requested RCS's records in an attempt to ascertain who from their company, if anyone, was at Plaintiff's residence just prior to the fire. The file produced by RCS, in response to a motion for spoliation of evidence, did not contain the names of employees or contractors/subcontractors nor payments made thereto in relation to the work at Plaintiff's house.
- 3. However, RCS's bookkeeper, Ms. Joseph, testified at trial that certain financial files, which would have identified the names of individuals who worked at Plaintiff's residence, were still in RCS's possession and were never produced in discovery. Those files, according to RCS's bookkeeper, would have identified who worked at the home on which dates; information clearly material to the issue at trial.

- 4. Further, RCS's principal, Mr. Bowen, testified at trial that he believed a subcontractor named "Josh" worked on the stove at Plaintiff's house.
- 5. In response to Plaintiff's Motion, this Court ordered RCS to produce all documents, including but not limited to all financial documents and employee pay records relating to the work at Plaintiff's house. The Court stayed the Motion and allowed Plaintiff an opportunity to analyze the documents and file a supplemental memorandum to their Motion.
- 6. Plaintiff supplemented his Motion on May 15, 2013. Therein Plaintiff states that he has obtained the full name of "Josh," Josh Nelson, and related paychecks made to him. Specifically, Plaintiff found, within the newly-produced documents, a paycheck to Mr. Nelson during the March 2009 timeframe; around the time of the fire. Although RCS contends this payment was made for work done on other properties, this is not entirely clear from the records produced.
- 7. Therefore, on August 23, 2013, the Court again stayed the Motion and allowed Plaintiff time to interview/depose Mr. Nelson. The Court stated that

It is clear to the Court this is the one key piece of evidence that perhaps would have a bearing on the trial. Candidly if Josh indicates that he did not work at the home just prior to the fire or has no recollection of doing so, there would be no basis for a new trial. On the other hand, if Josh indicates that he did, that evidence would have been critical in the presentation of the plaintiff's case and in fairness, would warrant a new trial.<sup>1</sup>

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<sup>&</sup>lt;sup>1</sup> Mendez v. Residential Const. Servs., No. 10C-03-204, at 2 (Del. Super. Aug. 23, 2013).

- 8. Plaintiff conducted a deposition of Mr. Nelson on October 28, 2013 and filed a supplemental letter with the Court explaining Mr. Nelson's testimony. Among other damaging information, Mr. Nelson testified that he was in Plaintiff's home the day before the fire performing work for RCS. RCS, by letter to this Court, countered Mr. Nelson's testimony arguing insufficient recollection, bias, improper motives, reliability, and other evidentiary objections to the sufficiency of Mr. Nelson's testimony.
- 9. While the Court cannot judge the credibility of Mr. Nelson or the strength of his allegations, as stated in its August 23, 2013 letter, since Mr. Nelson has indicated that he performed work at Plaintiff's house just prior to the fire his testimony is material to the issue of who is liable for the fire which occurred.<sup>2</sup> As also noted in the August 23rd letter, the Court found RCS displayed a lack of candor in the discovery process and it was RCS's actions which warranted Plaintiff's post-trial inquiry into Mr. Nelson.
- 10. In general, "[a]pplications for new trial because of new evidence are not favored and are subject to the closest scrutiny." For a motion for new trial to be granted, the movant must show that the evidence:
  - (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial, or could not have been discovered before the trial by the exercise of due diligence; (3) is material to an issue in the case; (4) is not merely cumulative to the original evidence, and; (5) does not merely tend to impeach or contradict the evidence given at the original trial.<sup>4</sup>

<sup>&</sup>lt;sup>2</sup> This remains true even though Mr. Nelson did not testify that he touched the stove or saw anyone else touch the stove, as argued by RCS. Pl.'s Nov. 22, 2013 letter. A reasonable jury, if they believe Mr. Nelson's testimony that he was performing work for RCS at the home the day before the fire, could use such testimony, coupled with the undisputed fact that the gas fitting was physically loosened by someone prior to the fire, to find RCS liable.

<sup>&</sup>lt;sup>3</sup> Tarbutton v. Norby, 1999 WL 33117216, at \*2 (Del. Super. Jan. 13, 1999).

<sup>4</sup> *Id*.

11. Here, Mr. Nelson's testimony, if found credible (which is not within this Court's current scope of inquiry) would probably change the result in a new trial. Mr. Nelson testified at his deposition that he, as an agent for RCS, was at Plaintiff's residence the day before the fire, working on the home. RCS's arguments against Mr. Nelson's reliability or credibility are ones more appropriately made at trial. Further, this evidence was not found until after trial due to the lack of candor of RCS, who had full custody and control of the documents relating to Mr. Nelson's involvement. Mr. Nelson's testimony, despite RCS's credibility arguments, is material to whether RCS was performing work before the fire and whether they can be held liable therefore. And lastly, Mr. Nelson's testimony, although it involves some contradiction of the testimony of RCS's principal, does much more than merely contradict; it adds additional material facts about work performed by RCS at Plaintiff's home just prior to the fire.

12. Accordingly, for the aforementioned reasons, Plaintiff's Motion for New Trial is hereby **GRANTED.** 

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.