IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY W. WAINAINA,	)	
	)	
Plaintiff-Below, Appellant,	)	
	)	
v.	)	C.A. No. N12A-07-013-WCC
	)	
BAYSHORE FORD TRUCK, INC.,	)	
	)	
Defendant-Below, Appellee.	)	

Submitted: June 26, 2013
Decided: October 10, 2013

Upon Appellee's Motion for Reargument – DENIED

ORDER

William P. Brady, Esquire, Woloshin, Lynch, Natalie & Gagne, P.A., 3200 Concord Pike, Wilmington, DE 19803. Attorney for Plaintiff-Below, Appellant.

Henry A. Heiman, Esquire and Susan E. Kaufman, Esquire, Cooch & Taylor, P.A., 1000 West Street, 10th Floor, The Brandywine Building, Wilmington, DE 19801. Attorneys for Defendant-Below, Appellee.

CARPENTER, J.

Upon consideration of the Defendant-Below/Appellee, Bayshore Ford Truck, Inc.'s ("Bayshore") Motion for Reargument, the Plaintiff-Below/Appellant Mary W. Wainaina's ("Wainaina") Response in Opposition to the Motion, and the record of this case, it appears to the Court that:

1. Bayshore has moved for reargument of the Court's May 31, 2013 order remanding the matter to the Court of Common Pleas. On appeal from the Court of Common Pleas, this Court found that the lower court committed legal error in failing to consider Wainaina's testimony that she made payments, totaling $11,612.38, for the truck, which unbeknownst to her was no longer titled in her name, having been unilaterally retitled by her co-owner with the help of Bayshore. These payments, this Court found, were evidence of damages which should have been considered by the lower court. Since the lower-court's decision stated that Wainaina had presented "an extremely compelling case with respect to liability, *especially liability for fraud*"[1] and the only detriment was Wainaina's failure to prove damages, this Court remanded the matter for the court to reconsider the claims of Wainaina with the inclusion of her testimony of $11,612.38 in payments.

2. Bayshore now moves for reargument on the grounds that this Court incorrectly recited the standard of review, mischaracterized Wainaina as a *pro se*

[1] Tr. Op. at 10 (emphasis in original).

filer at the Court of Common Pleas, and improperly considered Wainaina's testimony as to damages without according due deference to the court below.

3. A motion for reargument will usually be denied unless the Court has "overlooked a controlling precedent or legal principles, or the court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[2] A motion for reargument should not be used as a tool to rehash the arguments already decided by the Court and the Court will not hear new arguments that the movant could have previously raised.[3] The movant, Bayshore, "has the burden of demonstrating newly discovered evidence, a change in the law, or manifest injustice."[4]

4. Bayshore's first argument, that the Court misstated the standard of review, is unpersuasive as the error in recitation was harmless. This Court, while looking to prior Superior Court precedent, mistakenly drew support from an appeal following the Court of Common Pleas' granting of a motion for summary judgment and quoted the review standard used. While erroneous, this recitation was harmless as it did not affect the Court's analysis. It is evident from the body of the order that this Court applied the correct sufficiency of the evidence, unless

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[2] *Defillipo v. Quarles*, 2010 WL 2636855, at *2 (Del. Super. June 30, 2010) (citing *Lamourine v. Mazda Motor of Am.*, 2007 WL 3379048, at *1 (Del. Super. Sept. 24, 2007)).
[3] *Brenner v. Village Green, Inc.*, 2000 WL 972649, at *1 (Del. Super. May 23, 2000).
[4] *Id.* (citing *E.I. duPont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 55 (Del. 1995)).

clearly erroneous, standard of review.[5] Accordingly, reargument would not be appropriate as there was no misapprehension of the law that would have changed the outcome.

5. Bayshore's second argument is also unpersuasive. Bayshore contends that this Court committed error in characterizing Wainaina as being *pro se* in the Court of Common Pleas proceeding. This Court's prior decision states that "Wainaina commenced a *pro se* action in the Court of Common Pleas." This statement is accurate. Wainaina was *pro se* when she commenced the action at the Court of Common Pleas. Although this Court did not explain that she later retained counsel who aided her in trial preparation and throughout the trial, the absence of such information is harmless as it had no effect on the Court's decision to remand. Accordingly, reargument would not be appropriate as there was no misapprehension of the facts that would have changed the outcome.

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[5] Accordingly, the standard of review would have been more aptly stated as:

> An appeal from a decision of the Court of Common Pleas for New Castle County, sitting without a jury, is upon both the law and the facts. In such appeal, the Superior Court has the authority to review the entire record and to make its own findings of fact in a proper case. However, in exercising that power of review, the Superior Court may not ignore the findings made by the Trial Judge. The Superior Court has the duty to review the sufficiency of the evidence and to test the propriety of the findings below. If such findings are sufficiently supported by the record and are the product of an orderly and logical deductive process, the Superior Court must accept them, even though independently it might have reached opposite conclusions. The Superior Court is only free to make findings of fact that contradict those of the Trial Judge when the record reveals that the findings below are clearly wrong and the Appellate Judge is convinced that a mistake has been made which, in justice, must be corrected. Findings of fact will be approved upon review when such findings are based on the exercise of the Trial Judge's judicial discretion in accepting or rejecting 'live' testimony. If there is sufficient evidence to support the findings of the Trial Judge, the Superior Court sitting in its appellate capacity must affirm, unless the findings are clearly wrong.

State v. Cagle, 332 A.2d 140, 142-43 (Del. 1974) (internal citations omitted).

6. Lastly, Bayshore contends that this Court was foreclosed from considering Wainaina's testimony about her payments on the truck because such was inadmissible and properly disregarded by the lower court. This argument must also fail. Wainaina was permitted by the court below to testify as to the payments she made on the truck and such testimony was on the record for both the lower court and this Court to consider.

7. Further, the lower-court's failure to consider such evidence was legal error. In support of Wainaina's claims of breach of contract and fraud, she needed to present evidence of damages by a preponderance of the evidence.[6] The lower court erroneously concluded that *only* because Wainaina failed to present evidence of the truck's repossession-sale price and it's effect on the loan's remaining balance, that she failed to prove damages by a preponderance of the evidence. However, the case before the Court of Common Pleas was not a debt action in which the remaining balance of Wainaina's loan from Chase Bank would have been relevant. This is a case alleging fraud and a breach of contract and the relevance of the loan balance, at best, is minimal. "The damages available for deceit…are generally limited to those which are the direct and proximate result of the false representation and which represent the 'loss-of-the-bargain' or actual

[6] *See Pouls v. Windmill Estates, LLC*, 2010 WL 2348648 (Del. Super. June 10, 2010) (stating that you must prove each element of a claim by the preponderance of the evidence); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) (stating that damages are a necessary element of a fraud claim); *VLIW Tech., LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003) (stating that damages are a necessary element of a breach of contract claim).

'out-of-pocket' loss."[7] Similarly, in a breach of contact claim "[t]he traditional measure of damage is that which is utilized in connection with the award of compensatory damage, whose purpose is to compensate a plaintiff for its proven actual loss by defendant's wrongful conduct. [T]o achieve that purpose, compensatory damages are measured by the plaintiffs' 'out-of-pocket' actual loss" arising from the breach.[8]

The truck was retitled to exclude Wainaina on February 16, 2007, the date of the fraud and breach, evidence of which the lower court found to be "extremely compelling." Wainaina testified that she continued to make payments for over a year thereafter, unaware of Bayshore's actions, until making her last payment in May of 2008. Therefore, if established by a preponderance of the evidence, the proper measure of damages would be the out-of-pocket losses Wainaina suffered in making payments, unaware of the fraudulent actions of her co-owner and Bayshore.

8. It is the province of the Court of Common Pleas to decide if Wainaina has introduced sufficient evidence to establish these damages and, if so, the proper amount. Therefore, it is proper to remand the case for that determination. The Court continues to find that the lower court used the wrong standard in

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[7] *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 499 (Del. 1982).
[8] *Goodyear v. Hickman*, 2006 WL 4129068, at *40 (Del. Com. Pl. Oct. 24, 2006).

determining fraud and breach damages and, therefore, legal error occurred. As stated in this Court's prior order, the lower-court's failure to consider Wainaina's testimony on her payments, or to discount that testimony simply because there was no evidence of the post-repossession sale, was legal error.

9. For the foregoing reasons, Bayshore's Motion for Reargument is **DENIED**.

10. On remand, if the Court of Common Pleas' comment that there was an "extremely compelling case with respect to liability, *especially liability for fraud*" is a finding that Wainaina's claims for fraud and/or breach have been established, then the court should calculate the damages Wainaina suffered therefrom in a manner consistent with this order.

IT IS SO ORDERED.

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