foregoing, the photographs are not protected by the First Amendment.

Petitioners' petition for a protective order must be denied.

ORDER OF COURT

June 1, 1989, the preliminary objections of defendant, Brian R. Zeger, are denied. The petition for a protective order filed by petitioners, Markell DeLoatch and Public Opinion, is denied.

STRAIT V. MCKELVEY OIL COMPANY, INC., C.P., Fulton County Branch, No. 89-1987-C

*Implied Warranty of Fitness - Breach of Warranty Measure of Damages*

1. When there is no express warranty, one arises by implication when the buyer makes known the purpose for the goods and the buyer relies on seller's judgement to select the goods.
2. Where a fuel oil dealer was aware of buyer's needs for a furnace, they are liable for supplying buyer with a poorly manufactured mode.
3. When there has been a breach of warranty of goods sold, the buyer may return the goods and recover damages consisting of the purchase money paid.

*Jill A. McCracken, Esq.,* Counsel for Plaintiff
*Richard J. Green, Jr., Esq.,* Counsel for Defendant

KAYE, J.: September 15, 1989:

This case arises from the sale of a "tri-fuel" furnace by defendant to plaintiff in the summer of 1984. Plaintiff contacted Rodney Morton, her nephew, who was then employed as a salesman by McKelvey Oil Company, Inc. ("Defendant"). Plaintiff was informed that there were two types of furnaces available for her home, an oil furnace or a tri-fuel furnace that burned wood or coal, but automatically switched over to oil after the wood or coal fuel was consumed.

Although plaintiff was made aware that an oil furnace would cost approximately $1,000.00 less than a tri-fuel furnace, she informed her nephew that she wanted a tri-fuel furnace because there was a large quantity of wood on her property which she could utilize to keep her oil bill down and therefore, in the long run, the tri-fuel furnace would be the more economical choice. Although plaintiff wanted a tri-fuel furnace, she did not specify the brand of tri-fuel furnace to be purchased. That decision was left to the defendant.

In August of 1984, the defendant installed an Oneida brand tri-fuel furnace in plaintiff's home. The cost of the furnace, plus parts and labor, came to $3,015.33. Plaintiff paid this amount to defendant in September, 1984. Plaintiff began experiencing problems with the furnace soon after it was installed. The thermostat had to be removed, repaired and replaced even as the furnace itself was being installed. The air blower made great amounts of noise and had to be repaired on two occasions. The re-set button, which enabled the furnace to automatically switch from coal or wood to oil, jammed, thereby leaving the house without heat. On another occasion the house became extremely hot. Plaintiff tried to extinguish the fire in the furnace but could not. After the repairman was called, it was determined that the fire would not go out, even with the door of the furnace completely closed, because no insulation had been placed around the door of the furnace. Because of this, a draft was created, and the furnace overheated. Finally, at the end of the heating season it was discovered that paint was peeling off the furnace in various spots. All of these problems occurred during 1984-1985, the initial heating season for the furnace.

At the beginning of the second winter of operation, the furnace again would not work properly. It was discovered that the control box of the furnace was broken and had to be removed and repaired. The control box was missing for one week, during which time the furnace had to be operated solely on oil. Plaintiff also testified that the only other time that winter that exclusively oil was used to heat her home was for one other additional period of one week when plaintiff was ill.

On another occasion, the moveable grates in the furnace jammed and could not be moved. Upon inspection by a repairman from McKelvey Oil, it was discovered that the grates and the frames surrounding the grates had warped and had to be replaced. In



addition to the warped grates, it was discovered that the fire bricks which surround the fire in the furnace had cracked and were falling out. Finally, in March 1986, the new grates which had been installed also jammed. Plaintiff testified that because it was so near the end of the heating season and because the furnace only occasionally ran, she set it to run on oil for the remainder of the season to avoid further problems.

In the spring of 1986, plaintiff contacted Jeanne McKelvey, vice-president of defendant, and told her that she was dissatisfied with the furnace and asked what could be done. Mrs. McKelvey told the plaintiff that she would check into the problem and get back to her. Plaintiff never heard from defendant again although she made repeated telephone calls to the business and left messages for Mrs. McKelvey.

In April of 1986, plaintiff filed a complaint with the Bureau of Consumer Protection in Harrisburg, Pennsylvania. In response to this complaint, Mrs. McKelvey wrote a letter to the Bureau on defendant's belief that this furnace was "poorly made" and had many manufacturing defects. In addition, she also pointed out the many repairs that had been made to the furnace. (See Plaintiff's Exhibit #3).

At the time of the preparation of this opinion, we have only a partial transcript of the trial of this case, and we thus do not have a verbatim transcript of the testimony of defendant's vice-president. However, it is our recollection that the witness largely attempted to disavow the representations in the letter which expressly stated, *inter al.,*

> "It is our belief that the furnace was poorly made, and some evidence of that is that insulation had never been placed on the front panel, which he (the service manager) had to remedy on a later call. Paint is peeling off the furnace and there are cracked fire bricks in the flue after only a short period of use. In addition he (the service manager) has had to make many trips to replace the thermostat, work on the blower, replace the control box, and replace a defective grate. The service manager has called and talked to many representatives of Oneida Heater Company, Inc. many times trying to resolve all the difficulties with this particular unit. We have tried to resolve all the difficulties with this particular unit. We have tried to service

the furnace to the best of our ability, but feel it was poorly constructed and has many defects in manufacturing, particularly for a brand new unit ...most of her problems are due to a poorly-made furnace."

[Letter of Jeanne W. McKelvey to Bureau of Consumer Protection, dated May 21, 1986 (Plaintiff's Exhibit #3-emphasis added)].

It is extremely distressing to find that such a strong statement would be made by defendant to a state investigative agency at a time when it appeared the manufacturer of the furnace would be liable for the defective furnace but, following the manufacturer's bankruptcy, when the seller (defendant) was being looked to for liability, it would be claimed that the statements were not accurate, and were made only to help a regular customer. (That is our recollection, without benefit of the transcript, of the thrust of the testimony at trial). The manufacturer's bankruptcy did not change the condition of the furnace, but rather who would be required to ante up with the funds for the resultant losses sustained by plaintiff. We find defendant's letter to be tantamount to an admissison of the condition plaintiff claimed the furnace to be in, and to provide a basis for a verdict for plaintiff.

In late summer of 1986, having received no response from defendant, plaintiff contacted Mr. Robert Hess and requested an estimate for another tri-fuel furnace. As a result of this contact, Mr. Hess removed the old furnace and installed a new tri-fuel furnace. Mr. Hess was able to reuse the oil tank, the 3/8 inch copper tubing and the 8 inch and 7 inch pipes. Everything else attached to the defendant-installed furnace was useless. The old tru-fuel furnace was placed in plaintiff's back yard and a tarp was placed over it to protect it from the weather. Plaintiff ultimately was able to contact Mrs. McKelvey several weeks after the old furnace was removed. She asked her to send someone out to remove the old furnace from her back yard and refund her purchase price. Mrs. McKelvey refused and this suit followed.

A nonjury trial was held on June 9, 1988. On August 5, 1988, this Court issued a verdict for the plaintiff in the amount of $2,800.61 plus costs, representing the cost of the old furnace minus the parts reused in the new tri-fuel furnace. Defendant filed post-verdict motions which are now before this Court.

The first issue before this Court is whether the verdict is against the evidence or the weight of the evidence required to establish a breach of an implied warranty of fitness for a particular purpose. [1] 13 P.S. §2315 provides in pertinent part:

> Where the seller at the time of contracting has reason to know:
>
> (1) Any particular purpose for which the goods are required; and
> (2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods;
> there is ... an implied warranty that the goods shall be fit for such purpose.

In the case at bar, plaintiff was in need of a new furnace. She testified at trial that after discussions with her nephew, Rodney Morton, a representative of defendant, she made it clear that she wanted a tri-fuel furnace. She was aware that such a furnace would cost her approximately $1,000.00 more than a standard oil-burning furnace. However, she informed her nephew that she had a large quantity of wood on her property and she believed that over time a tri-fuel furnace would be more economical.

When there is no express warranty between a seller and a buyer of goods, one arises by implication when the buyer makes known to the seller the particular purpose of which the goods are required and it appeared that the buyer relied upon the seller's skill or judgment in selecting those goods. *Shute v. Levin*, 66 Pa. Super. 67 (1917); see also *Bernosky v. Sasack,* 64 Lack. Jur. 37 (1964); *Fort Mason Coal Mining Co. v. Nobel,* 17 Fay. L. J. 47 (1954).

It is clear from the evidence of this case that the plaintiff wanted a furnace that would burn wood or coal and yet, automatically switch to oil when the coal/wood fire died down. [N.T. June 9, 1988 pp.4-5]. Defendant knew of this particular use which plaintiff had in mind. In fact, when defendant's agent, Rodney Morton, tried to talk his aunt into a less expensive furnace, she declined and gave very specific reasons why she wanted the type of furnace that she did (i.e., to burn the readily available wood that was located on her property). In addition, plaintiff made it clear that she did not care what particular brand of tri-fuel furnace she had installed in her home, but rather merely that she wanted a tri-fuel furnace and would rely upon defendant to select a good one for her. [N.T. June 9, 1988, pp. 5-6.].

It is not necessary to specify with mechanical precision or to detail the defects in order to establish a breach of warranty of fitness for a particular purpose. *Hall Bros. v. Turbo Machine Co.,* 79 Montg. 309 (1963).[2] However, in the case at bar, we note that the defects in the tri-fuel furnace were specified rather clearly. These problems over a two-year period included a jammed re-set button which prevented automatic switching from one type of fuel to another, through the problem of lack of insulation which prevented plaintiff from snuffing out the fire, to warped and jammed grates which hindered the removal of ashes from the furnace.

Plaintiff offered sufficient evidence at trial to establish a breach of implied warranty of fitness for a particular purpose.

Defendant's second post-trial motion asserts that plaintiff failed to establish by evidence the proper measure of damages. In support of this motion, defendant refers to 13 Pa.C.S.A. §2714. Section 2714 provides in pertinent part:

> (b) Measure of Damages for breach of warranty.--The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

However, as pointed out by plaintiff, this measure of damages is not the exclusive measure. 13 P.S. §2714, Comment 3. When there has been a breach of warranty of goods sold, the purchaser may

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[1] At trial, plaintiff brought suit under both implied warranty of merchantability, 13 P.S. §2314 and implied warranty of fitness for a particular purpose, 13 P.S. §2315. Defendant has made no claim in his post-verdict motions regarding the claim of a breach of implied warranty of merchantability under 13 P.S. §2314. As such, this argument is waived for failure to raise it in post-verdict motions. *Commonwealth v. Gravely,* 486 Pa. 194, 404 A.2d 1296 (1979).

[2] This Opinion also appears at 76 York 114 (1963).

return or offer to return the goods and sue to recover damages which resulted. His measure of damages will be the amount of the purchase money paid. *Byrne v. Elfreth,* 41 Pa. Super. 572 (1910); see also *Stanley Drug Co. v. Smith, Kline & French Laboratories,* 313 Pa. 368, 170 A.2d 274 (1934); *Walters v. Garson,* 24 Fay.L.J. 99 (1962).

In the case at bar, evidence was presented that the cost to the plaintiff of the furnace which defendant installed was $3,015.33. Evidence was also presented by plaintiff that in replacing the tri-fuel furnace that defendant installed, plaintiff was able to reuse the oil tank ($160.27), the ¾ inch copper tubing ($12.80), the 7 inch pipe ($14.35) and the 8 inch pipe ($27.30). Defendant was notified that the furnace which it sold to plaintiff had been removed, was placed in plaintiff's back yard and that it could be picked up by defendant at any time.

It is clear that plaintiff sought rescission of the contract. In doing so, plaintiff contacted defendant seeking to return the furnace. Defendant refused to accept the return of the furnace. In calculating damages to the plaintiff, we have allowed set-off to the defendant for parts which have been reused by plaintiff in her new furnace. Therefore, plaintiff has proceeded in accordance with the law and properly established her damages. We find no merit in this post-trial motion of the defendant.

Defendant's final post-trial motion asserts that plaintiff failed to establish by any evidence that the problems she encountered with the furnace caused the damages claimed. We believe that the Court adequately considered this an issue when it addressed defendant's first post-trial motion. Suffice it to say that plaintiff purchased the furnace in issue with the specific intent of being able to heat her home by wood or coal and then automatically switch over to oil when needed. Plaintiff has not only shown that the furnace did not perform as she expected it to perform or as promised by defendant, but it also is obvious from the evidence plaintiff presented, that the furnace operated in a faulty manner since its installation, and that defendant failed to correct the deficiencies so as to provide plaintiff with a functional heating system. For these reasons, we will deny defendant's post-trial motions.

IN THE COURT OF COMMON PLEAS
OF THE 39th JUDICIAL
DISTRICT OF PENNSYLVANIA
FRANKLIN COUNTY BRANCH

Arthur G. Bruaw, Jr., : Civil Action - Law
: No. A.D. 1990 - 6
vs.
:
Heirs and Assigns of John Napper and Martha Napper, a/k/a Martha M. Napper,
Defendant
: Action to Quiet Title

TO: Heirs and Assigns of John Napper and Martha Napper, a/k/a Martha M. Napper —

You are notified that the plaintiff has commenced an action to quiet title against you which you are required to defend. You are required to plead to the Complaint within twenty (20) days after the service has been completed by publication. The action concerns the land here described:

ALL THAT CERTAIN lot, tract, or parcel of land and premises lying and being situate in the Borough of Chambersburg, Franklin County, Pennsylvania, on South Main Street, bounded and described as follows:

ON the East by South Main Street, on the West by an alley, on the North by E.C. Barnes, Inc., on the South by Thomas L. Hill and Jim W. Hill, and being 32 feet in width and 256 feet in depth.

NOTICE

If you wish to defend against the claims set forth in the above-mentioned Complaint, you must take action within twenty (20) days after service of the Complaint and notice has been completed by publication, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the Court without further notice for and money claimed in the Complaint or for any other claims or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Reference Service of
Franklin - Fulton Counties
Court House
157 Lincoln Way East
Chambersburg, PA 17201

Telephone No. - Chambersburg
(717) 264-4125, Ext. 213

Attorney for Plaintiff
Graham & Graham
3 North Second Street
Chambersburg, PA 17201

1/12/90



LEGAL NOTICES, cont.

ORDER OF COURT

NOW, September 15, 1989, defendant's post-trial motions are DENIED.

MENTZER, ET AL., VS. STRAYER, ET AL., C.P., Franklin County Branch, No. A.D. 1989-118

*Landlord - Tenant Act - Notice to Quit - Date to Vacate*

1. A notice to quit is not fatally defective where the calculated date for removal was only 28 days but the notice sets forth removal within 30 days.
2. To deprive a landlord the right to terminate a month-to-month, tenancy due to the fact that the stated date for tenants' vacation did not fall 30 days after notice was served, and did not fall at the end of the next term is unduly technical.

*J. McDowell Sharpe, Esq.,* Counsel for Plaintiffs
*Jonathan D. Fleming, Esq.,* Counsel for Defendants

KELLER, P.J., July 28, 1989:

On April 5, 1989 plaintiffs, Gary L. Mentzer and his wife Becky D. Mentzer (hereinafter referred to as Landlords) filed an action in ejectment against their tenants, John Strayer and Beverly Dale, (hereinafter referred to as Tenants). The complaint consisted of two counts. Count I seeks a judgment in ejectment against the Tenants. Count II demands judgment for rent due and payable, late charges and damages to the leased premises.

On May 1, 1989, Tenants filed preliminary objections in the nature of a petition raising questions of jurisdiction and motions to strike for non-conformity to the Landlord and Tenant and Act/to the parties' lease. The matter was listed for the June Argument Court. Briefs were exchanged and oral arguments were heard on June 1, 1989. This matter is now ripe for disposition.

This litigation arises from the Landlords' leasing of their real estate at 1565 Falling Spring Road, Guilford Township, Pennsylva-