

renewing her lease and that she would vacate the premises at the end of her lease term, July 31, 2004 (Plaintiff's Exhibit 3). The plaintiff vacated the unit by July 31, 2004, as agreed. The plaintiff provided the defendant with a written notice of her forwarding address (Plaintiff's Exhibit 4).

On August 1, 2004, after the plaintiff had vacated the unit, the defendant's property managers inspected the unit and completed the right side of Defendant's Exhibit A. The defendant's property managers noted that the carpet, windows, ceiling fan, bathtub and toilet were dirty and that the drip pans on the stove were missing. Joint Exhibits A-1 through 6 are pictures the property managers took on August 1, 2004, showing the condition of the apartment after the plaintiff moved out. The defendant's property managers deducted \$200.00 from the plaintiff's security deposit and refunded \$50.00 to the plaintiff.

The plaintiff has filed this lawsuit against the defendant seeking the return of her security deposit along with statutory damages and attorney fees. The plaintiff alleges that the defendant wrongfully withheld a portion of her security deposit in violation of ORC §5321.16.

It is a fundamental principle of law that the party alleging facts has the burden of proving those allegations. **Ohio Fuel Supply Co. v. Shilling** (1920), 101 Ohio St. 106. That proof must be by a preponderance of the evidence. **Re Walker's Estate** (1954), 161 Ohio St. 564. In a case involving the withholding of a security deposit, it is the landlord's burden to prove that it was justified in withholding the security deposit. **Zeallear v. F & W Properties** (July 25, 2000), Franklin App. No. 99AP-1215, unreported.

The defendant has not proved by the preponderance of the evidence that it was justified in withholding the plaintiff's security deposit for the dirty carpet, windows and ceiling fan. The

defendant has not proved that the condition of those items was anything other than ordinary wear and tear.

Similarly, the defendant has not proved by the preponderance of the evidence that it was justified in withholding the plaintiff's security deposit for the bathtub and toilet. Joint Exhibits A-3 (top), A-4 (top), A-5 and A-6 are pictures of the bathroom taken on August 1, 2004. Those pictures show the bathtub and toilet reasonably clean with what appears to be rust stains. The defendant's property managers testified at trial that the stains were not rust, but were urine. The property managers testified that they believed the plaintiff had intentionally urinated on the toilet, in the bathtub and on the bathtub faucet before vacating the apartment.

The defendant's property managers testified that they were sure when they inspected the apartment on August 1, 2004, that the stains were urine. However, when they filled out Defendant's Exhibit A on August 15, 2004, they wrote only that the toilet and bathtub were dirty. On cross-examination, the property managers could not give a credible explanation for writing that the bathroom fixtures were only "dirty" when they believed them to be intentionally urine stained. The discrepancy between the property managers' testimony and their written move-out inspection report, in addition to other discrepancies in their testimony, casts serious doubt on the credibility of the property managers' testimony.

The plaintiff and her mother are credible that they cleaned the apartment thoroughly before the plaintiff vacated the unit. They are credible that the bathroom stains are rust stains because of the age of the fixtures.

Joint Exhibit A-4 (bottom) clearly shows that the drip pans were missing from the stove on August 1, 2004, when the pictures were taken. However, the plaintiff and her mother were credible

in their testimony that the drip pans were missing from the stove when the plaintiff moved into the apartment six months earlier. The defendant has not proved by the preponderance of the evidence that the plaintiff took or lost the drip pans or in any other way damaged the stove beyond ordinary wear and tear. As a result, the defendant has not proved by the preponderance of the evidence that it was justified in withholding a portion of the plaintiff's security deposit to cover the drip pans.

The defendant has not proved by the preponderance of the evidence that it was justified in withholding any portion of the plaintiff's security deposit. Accordingly, the plaintiff has proved by the preponderance of the evidence that the defendant wrongfully withheld \$200.00 of the plaintiff's security deposit.

Pursuant to ORC §5321.16, the plaintiff is entitled to double the amount wrongfully withheld and reasonable attorney fees. The award of double damages and attorney fees are mandatory. *Smith v. Padgett* (1987), 32 Ohio St.3d 344. Accordingly, the plaintiff is entitled to recover from the defendant \$400.00 plus reasonable attorney fees, to be determined at a later hearing.

The parties and counsel are reminded that this is not a final Magistrate's Decision for purposes of Civil Rule 53(E). This magistrate will issue a final decision after the attorney fee hearing, unless the parties reach a settlement of this case before that date.

NOTICE OF ATTORNEY FEE HEARING

This matter is scheduled for hearing on the issue of the plaintiff's reasonable attorney fees on **Wednesday, March 2, 2005, at 1:30 p.m.**, in Courtroom 11-C.

February 11, 2005


MAGISTRATE DAVID S. JUMP

Copies:

ANDREW J RUZICHO II ESQ
611 E WEBER RD STE 102
COLUMBUS OH 43211
ATTORNEY FOR PLAINTIFF

HOLLY REGOLI ESQ
P O BOX 184
PICKERINGTON OH 43147
ATTORNEY FOR DEFENDANT

DSJ/law