

December 16, 2011 --

A \$362,500 award was entered in favor of Campbell Law PC clients on December 15, 2011 against Terminix International. The arbitrator's full opinion is reproduced below. Commentary and photos have been inserted to identify some of the current and former Terminix officials who admitted under exam by Campbell Law attorneys that Terminix defrauded this Church of God preacher and his wife. To varying degrees, Jim Maloch, Mike Steed, and Tim Bruce should be commended for "coming clean" and taking their oath to God seriously. They prove the rule that it is never too late to start doing the right thing – even when it means telling on yourself.

Campbell Law PC, A Purpose Filled Practice, regularly represents clergy and churches who have been victimized by sharp business practices. The firm assists victims of wrongdoing by pest control companies across America. Claims are currently pending from Georgia to the California coast and a lot of places in between.

In the past four arbitrations Campbell Law has tried to a finish, arbitrators have awarded what they stated were the maximum punitive damages allowed by law. In jury trials against pest control companies in the past seven years, punitive damages have been the norm. Awards have ranged from hundreds of thousands to three million in punitive damages.

RANDALL and AMY SARGEANT vs. TERMINIX INTERNATIONAL COMPANY LIMITED L.P., a limited partnership; TERMINIX INTERNATIONAL, INC.

AWARD AND OPINION OF ARBITRATOR

I, THE UNDERSIGNED [Robert D. Stroud], having been appointed as ARBITRATOR by the Circuit Court of Jackson County, Arkansas, Civil Division, in an Order dated March 25, 2011, and in accordance with the arbitration agreement entered into by the above-named parties and having duly heard the matter at the hearing held from September 27th to 29th, 2011, and having read, and considered the proof, allegations, exhibits, briefs, and arguments of the parties, hereby find as follows:

I. INTRODUCTION

Randall and Amy Sargeant presented clear and convincing evidence that Terminix failed to provide a complete chemical barrier under, around, and inside the foundation of their Newport, Arkansas home. The extensive damage to the house would not have

occurred otherwise. This incomplete treatment occurred at least as long ago as 1986, and perhaps longer. In 2003, Terminix admitted in an Arkansas Plant Board investigation that it had never applied a complete termite barrier at the home and agreed to bring the service up to standard. Rather than repair the damage, the family who owned the home at the time and lenient state regulators agreed to let Terminix brace the damage and apply an incomplete treatment, known as a spot treatment, to the exterior of the home.



Pictured: Arkansas Plant Board Director Darryl Little. Mr. Little did not play an active role in the litigation. CLPC commentary.

Two additional treatments were done between 2004 and 2007 by a Terminix franchisee for what would have probably been ongoing infestations according to its managers, but Terminix never received the records, or has destroyed or lost the records relating to those services if they ever had them. The only relevance of the failure to do a complete treatment is that the ongoing termite infestation was not stopped or repaired adequately before the Sargeants bought the house. The failure of Terminix to do a complete treatment at a remote time does not give the Sargeants a cause of action for that failure; it only sets the stage for their cause of action.

In 2007, the Sargeants bought the home in question based on Terminix's knowingly false assurances that the home was and had been protected from termite attack since 1986, and that a prior claim and associated repairs had left the home with no visible termite damage. The Terminix official who made the false statements admitted that they should not have been made and that the Sargeants should have been told that the home

failed to meet state and company standards associated with preventing termite and rot damage in the past and into the future. He could not explain why his inspection resulted in the false representations and at the hearing Terminix offered no evidence in mitigation or explanation. In addition, state regulators discontinued their investigation of the Sargeants' complaint because the Sargeants filed a lawsuit.

II. FINDINGS OF FACT

Terminix certified on three different pre-sale inspection forms presented to the Sargeants for their closing in 2007 that the home was free of termite and fungus damage or conditions that promoted either. Terminix also expressly represented to the Sargeants that termite damage had existed in the home before, but it was not present at the time of purchase in 2007 because Terminix paid for repair of that damage in 2004. Terminix further certified that it had performed all necessary services to apply a preventive treatment forming the basis of its termite protection guarantee for the home in 1986, and that it was transferring the existing contract and guaranty from 1986 to the Sargeants.

All of the foregoing representations Terminix made to the Sargeants were false. The Terminix documents presented to the Sargeants for their closing must be construed together. Terminix issued an invoice to the Sargeants for inspecting and reporting the condition of the home, and for transferring the home's existing termite contract. The four documents presented to the Sargeants consisted of the following; (1) Terminix Termite Protection Plan February 21, 2007; (2) Wood Destroying Insect Inspection Report ("WDIIR") February 21, 2007; (3) Terminix Real Estate Inspection Report for Real Estate Transfers February 21, 2007; and (4) Terminix Survey of Conditions Favorable to

Termite and Pest Infestations February 21, 2007. ("The 4 Documents")

In 2003 and 2004 Terminix issued an inspection report and contract to Mr. and Mrs. Elliot Sides according to an invoice for those services. Terminix has lost or destroyed these records, if it ever had them. Shortly after Mr. and Mrs. Sides closed escrow on the home, they found termite damage and began presenting claims to Terminix. Terminix investigated and hired a contractor, *limbo* Eddington, to brace termite and rot/fungus damage.

In 2007, the home was not free of termite and fungus damage and some damage present in 2004 was still there in 2007. The damage was not replaced pursuant to Terminix's admitted duty under Arkansas Plant Board regulations, nor was it adequately repaired as Terminix represented in the disclosures it made to the Sargeants. The Batesville Branch serving the Sargeants' home submitted a claim report to the home office on February 14, 2008, after the Sargeants uncovered a small amount of damage and Terminix denied responsibility reporting, "DAMAGE UNREPAIRED FROM PREVIOUS CLAIM IN 2004." The presence of the damage should have been disclosed to the Sargeants.

Witnesses who testified at the hearing admit the damage should have been fully disclosed and that the Sargeants should have been told that the home did not qualify for a termite damage replacement guarantee because there were conditions at the home (including unrepaired damage) that meant it may not be possible to prevent termite damage. Johnny Bell, the Plant Board investigator who testified, verified the damage was visible upon inspection and that it should have been disclosed.

Mr. Bell testified that his 2010 investigation revealed 75% of the wood substructure in the crawl space was extensively damaged by termites or rot. In other words, 100% of the accessible areas of the crawl space showed wood weakened by termite and rot damage that was merely braced with prior "repairs." A large box of the damaged wood was presented as evidence along with extensive photographs. Most of the damage was visible to the naked eye and could be discovered by examination with fingers. Much of it could be crumbled in the palm of your hand and some pieces crumbled during gentle handling at the hearing. Until presented with this evidence at his deposition, the Terminix Service Manager who handled the claim in 2003-04 for Terminix, Tim Bruce, testified that all damaged wood in the crawl was replaced as required by Arkansas law.



The center joist was so damaged it would crumble in your hand and could be discovered with your eyes closed. Confronted with evidence that Campbell Law attorneys squeezed into the low crawl space and had photos and samples of wood, Terminix Service Manager Tim Bruce confessed As the Arbitrator states in his findings of fact, The damage "could be discovered by examination with fingers."

Bruce now runs General Pest Control. CLPC Commentary.

Upon presentation of some of the evidence displayed at the hearing, Mr. Bruce admitted that the 2004 termite damaged wood was not replaced, but rather Terminix hired Mr. Eddington to brace the damaged wood and leave it in place.

Plant Board regulations require replacement of wood damaged by "termites" or "decay fungi (rot)". Bracing alone does not comply. Mr. Eddington testified that he was instructed by Terminix to leave the damaged wood in the crawl space, and to brace, prop up, or cover up damaged wood rather than replace it. Eddington told Tim Bruce that the scabbing and bracing techniques Terminix instructed him to use were only a temporary fix. Eddington testified he would have had to "replace every board under there [in the crawl space]." While this may be hyperbole, the Eddington testimony has basic credibility on the issue concerning the amount of damage and the need to replace it.

The Arkansas Plant Board regulations require replacement of weakened wood, not bracing. Tim Bruce testified under examination by claimants' counsel that he was aware of the extent of damage. Having a background in residential contracting and having inspected the home along with the company's licensed contractor Eddington, Bruce admitted that he instructed the contractor to brace the floors because he thought it would be too dangerous to replace the damaged wood.

I find Eddington's testimony about the Terminix requirement that he not adequately replace and repair damaged wood credible. Extensively damaged wood in the crawl space was left there at Terminix's instruction. The wood in the crawl space was inadequately braced rather than adequately repaired in 2004.

Plant Board regulations required that substandard conditions be brought up to standard every year. The damaged wood was never replaced. Terminix offered no evidence to explain why it failed to meet the standards. Terminix had this knowledge. I find that it intentionally withheld it at a time when it knew a buyer-in this case the

Sargeants-were going to rely on the Terminix representations in buying the house.

Terminix's technical specialist, regulatory compliance officer and trainer, Jim Maloch, testified that the failure to meet state and internal standards should have been disclosed and that all damaged wood should have been replaced, not repaired, and all of this should have been disclosed to the Sargeants before they decided to buy the home in 2007.



CLPC Commentary:

Terminix International's Jim Maloch admitted Terminix violated the law and failed to treat the Sargeants as the company should.

The evidence tends to show that Terminix never provided a preventive treatment that was up to Plant Board standards in the initial year of contracting or any other year. Mr. Bell testified that Substandard Conditions relating to treatment existed in 2003 and still existed at the home when he inspected on November 8, 2010. Mr. Bruce's testimony was in conflict with Mr. Bell's. Mr. Bruce testified that Terminix records indicated it treated the brick veneer and ground slabs Mr. Bell reported as requiring treatment in 2010 to bring the property up to standard.

Mr. Bell was cross examined by Terminix regarding his recent findings at the home and he stood by his testimony that those areas Terminix claims to have treated still required treatment. I find his testimony credible. The evidence supports the inference that

Terminix never provided a complete conventional termite treatment to the home at any point. It is clear that the extent and amount of damage to the Sargeant house has taken decades to develop and would not have developed if a complete treatment had been done. Again, however, I am not finding that the 1986-or earlier-failure gives the Sargeants a cause of action.

Terminix also failed annually to fix the substandard condition that all the damaged wood weakened by termite infestation and rot must be replaced on an annual basis. Branch Manager Mike Steed admitted that the pay structure discouraged him from spending money to fulfill his regulatory duty to replace the wood, or do a re-treatment for that matter. He admitted the branch budget was charged for half of all claim expenses so replacing the damaged wood at the Sargeant home or doing a full retreatment would deprive him of a bonus.



Terminix Branch Manager Mike Steed admits the Terminix International compensation system for branch officials deprives them of bonuses if they correct deficient termite vaccinations or pay to repair damages that result from leaving bad treatments in place. Steed quit Terminix and "spilled the beans" during his testimony against his former employer.

Campbell Law Commentary.

Notwithstanding the evidence presented about the Sargeant house, the evidence submitted does not prove to this Arbitrator that Terminix had a consistent and systematic pattern of failing to meet minimum standards for termite treatment throughout Arkansas,

nor do I find that Terminix has a policy of fraudulently inducing people to buy termite-riddled homes. But that is what happened in this case.

It was clear from the inspection leading to The 4 Documents submitted to the Sargeants for their purchase in 2007 that the previous damage existed and had not been properly replaced and repaired. Terminix knew this. Failure to disclose this fraudulently induced the Sargeants to buy a house and a Terminix contract.

The tort of fraud or deceit consists of five elements that the plaintiff must prove by a preponderance of the evidence: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Medlock v. Burden*, 321 Ark. 269, 273, 900 S.W.2d 552, 555 (1995); *Ultracuts Ltd. v. WalMart Stores, Inc.*, 343 Ark. 224, 234, 33 S.W.3d 128, 135 (2000); *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 580, 66 S.W.3d 568, 577 (2002). I find that the Sargeants have met their burden of proof for fraud.

III. DISCUSSION OF DAMAGES

Amy Sargeant testified that she and her husband purchased the house for about \$89,000 in 2007. The testimony that she and her husband had at least 30-50 thousand dollars invested in improvements to the property, including materials and sweat equity. This is not supported by objective evidence. She further testified that the home was worth no more than salvage value plus the value of the land, \$7,500 and \$10,000, respectively, for a total of \$17,500. This testimony is sufficiently supported. A landowner is qualified

to testify about the value of his or her property, but their testimony is considered controverted and subject to bias. *Coffelt v. Arkansas State Highway Comm 'n*, 285 Ark. 314, 318, 686 S.W.2d 786, 788 (1985). There was no other proof by Terminix to establish the value at a different amount, moreover; I find the amounts testified to by Amy Sargeant reasonable under the circumstances.

There is adequate proof to support this finding: as a result of Terminix's fraud the Sargeants bought a house for \$89,000 and got something worth \$17,500. They did, however, make improvements to the house when they knew or should have known the house still had termite damage. The actual amount of money and time they spent for the improvements they made is offset by the value of the housing they had while they lived there and by the rental value of it now, as it is currently bringing in enough to cover the debt service.

Based on advice of their real estate agent, the Sargeants disclosed this litigation with Terminix to all prospective buyers. Sales offers were contingent upon the buyers getting their own termite and general inspections. If the inspections revealed problems that were unacceptable, the buyers could back-out. That happened twice. One buyer proposed after the inspections that the Sargeants replace all damaged wood in the crawl space as a condition of a reduced asking price. The Sargeants could not afford to make those repairs because Mr. Eddington told them it would cost at least \$60,000. Termite companies refused to issue a new contract.

After several months of attempting to sell their home, the Sargeants reached the conclusion it was not readily marketable in its condition and the inability to get a termite

bond. Mr. Eddington testified that given the amount it would take to repair the damage correctly, it would not make economic sense to put that kind of money into the home. He testified the work needed at the home amounted to taking all the brick off the home and pulling out all of the flooring system and some of the walls on a room-by-room basis. Mr. Bell testified that because a lawsuit was filed, the Plant Board will take no action against Terminix related to its wrongful conduct at the Sargeants' home. The Sargeants have no redress through the Plant Board for Terminix to be required to replace the extensive damaged wood, or to bring other conditions up to standard so that another company could place it under bond. There will be no criminal or civil penalties or actions against licenses or any other measures that might have a deterrent effect against future similar misconduct. Mr. Bell testified that absent the lawsuit his inspection report would have been turned into a Notice of Violation of the Minimum Treatment Standards.

Mr. Bell testified that his inspection revealed that treatment at the home remained substandard in November 2010. Terminix saw the extensive termite damage at the Sargeants' home itself in 2004 and knew it left the damage in place and performed only a temporary fix. Yet it falsely stated in its 2007 pre-purchase documents to the Sargeants that no visible termite damage was present. The work done by Terminix after the Sargeants bought the house continued to disclose previously unrepaired damage. Ultimately, Terminix quit making repairs. There is no dispute in the record that Terminix owed the Sargeants a duty to disclose the pre-existing termite damage. Mr. Bell confirmed that the disclosure of the damage was required and that Terminix's prior history with the Plant Board, through retired

inspector Harold Conklin regarding the 2003 Report of Substandard Conditions, provided no valid waiver of the regulatory requirement to replace, not brace, the damaged wood.



Example of a damaged floor joist Terminix did not disclose and refused to repair.
CLPC Commentary.

Terminix cannot rely on contract exclusions and disclaimers in its 2007 contract procured by fraud. *Environmental Systems, Inc. v. Rexham Corp.*, 624 So.2d 1379, 1382 (Ala. 1993) ("A contract, the making of which was induced by deceitful methods or crafty device, is nothing more than a scrap of paper"). Compare *Blankenship v. USA Truck, Inc.*, 601 F.3d 852,859 (8th Cir. 2010) (quoting *Allen v. Overturf*, 234 Ark. 612, 615-616, 353 S.W.2d 343,345 (Ark. 1962) (where a contract is procured by fraud, "the validity of the contract is not assailed, but its very existence is destroyed.")).

Testimony that Elliot Sides permitted inadequate repairs does not relieve Terminix of its duty to give complete, accurate information to the Sargeants. Jim Maloch and Terminix managers agree with Mr. Bell that acquiescence in substandard work and compliance with law by one permissive regulator does not immunize Terminix from its duty or its obligation of full disclosure to subsequent owners.

The Sargeants had a statutory right to termite protection services meeting the minimum Plant Board standards, including complete chemical application,

"replacement" of termite-and-fungus-damaged wood, and correction of clearance and moisture problems in the crawl space. Neither does lax Plant Board enforcement leave Terminix immune from its duty of full disclosure. I find that waiver was not proven.

IV. DAMAGES

General Arkansas damages law upholds the underlying principle that the injured party should be made whole. *Young v. Barbera*, 366 Ark. 120, 126,233 S.W.3d 651, 655 (Ark. 2006) (holding that "a court **must** attempt to place the plaintiff in the position he would have been in if the wrong had not occurred.") (emphasis added). Further, damages need not be proven with precision. As long as, "it is reasonably certain that some loss has occurred, it is enough that they can be stated only approximately." *Bank of America, NA. v. CD. Smith Motor Co., Inc.*, 353 Ark. 228, 245, 106 S.W.3d 425,434 (Ark. 2003) (citation omitted). This Arbitrator, during the hearing, was concerned about the measure and proof of damages. That concern was based on an incomplete analysis of the wrong which had been done; upon further reflection, this case is not one where a property was damaged by a tortfeasor and the questions arise about whether the damage was temporary or permanent.



Attorneys Ray Bronner and Tom Campbell slept only one and one-half hours the night the Arbitrator expressed concern and presented a ten page trial memo the next morning citing the relevant law which helped the arbitrator to reach the correct result.

The lawyers drove seven hours home to Alabama at the end of the next day.
Hard work for good clients pays off.
CLPC Commentary.

Rather, this case is about the damage incurred by the Sargeants as a result of being fraudulently induced to buy a property worth less than it appeared to be, based on the misrepresentation. Here, the Sargeants would not have bought the house had its true condition been made known. So the measure of damages is the difference between what they bargained for and what they actually got. On actual damages, I find that the Plaintiffs will be made whole by a damage award of \$72,500.00.



Pastor and Amy Sargeant's Newport Arkansas home. It is now leased to the Church of God pastor who replaced Pastor Randall Sargeant.
CLPC Commentary.

Plaintiffs have no redress other than in this arbitration. The Plant Board representative testified that it stepped out of this dispute once the litigation was filed. Terminix has no threat of any penalties of any kind from the Plant Board and therefore the only deterrence that may be imposed will come out of this arbitration. The evidence supports imposition of a punitive damages award. Plaintiff argues that punitive damage caps do not apply due to A.C.A. § 16-55-208. That statute does not supplant the due process clause of the U. S. Constitution. The relationship between actual damages and punitive damages is a significant factor in assessing the constitutional limit of punitive damages. I follow the dictum of the U. S. Supreme Court that it will be a rare case where more than a 10 to 1 punitive-to-actual damage ratio will be appropriate. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). In *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. 1 (1991), the court found that a ratio of 4 to 1 might be "close to the line." I am also constrained by *State Farm v. Campbell*, 583 U.S. 408 (2003), to imposing punitive damages for only that act done to the Sargeants in this case, because I do not find that Plaintiffs have proven that the acts of Terminix here are part of a statewide or nationwide policy by Terminix to commit fraud. I find that punitive damages in the amount of \$290,000.00 will be adequate to deter Terminix from the kind of conduct engaged in here.

V. AWARD

I find in favor of the Claimants/Plaintiffs and against the Respondents/Defendants.

I **AWARD** compensatory damages **in** the amount of:

\$ 72,500.00.

I **AWARD** punitive damages **in** the amount of:

\$ 290,000.00.

IT IS SO ORDERED.

Robert D. Stroud, Arbitrator