

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

---

Docket No. 1204 CD 2020

---

**RASHAD ARMSTRONG,**  
**Appellant,**

**V.**

**CITY OF PHILADELPHIA,**  
**Appellee**

---

**CEASEFIRE PENNSYLVANIA EDUCATION FUND, *et al.*,**  
**Appellee-Intervenors**

---

**APPELLEE’S ANSWER TO APPELLANT’S APPLICATION FOR  
REASONABLE ATTORNEY’S FEES**

---

Appellee the City of Philadelphia (“the City”) requests that this Court deny Appellant Rashad Armstrong’s (“Appellant” or “Armstrong”) Application for Attorney’s Fees. Appellant has no basis for seeking an award of fees for two reasons. First, Rule 2744 only permits an award of counsel fees if an “*appeal* is frivolous.” 210 Pa. Code § 2744 (emphasis added). Here, the City did not appeal, Appellant

did, so Rule 2744 does not apply. Second, the City’s defense of the Common Pleas Court’s decision does not come close to meeting any standard that would support an award of counsel fees. In the alternative, the City requests that the Court hold Appellant’s fee request in abeyance pending the outcome of the City’s forthcoming petition for allowance of appeal.

## **I. Background**

This case relates to the City’s enforcement of Philadelphia Code § 10-838a, an ordinance that requires a firearm owner to report a lost or stolen firearm within 24 hours after its loss or theft is discovered. § 10-838a. The City initially filed a Complaint against Armstrong on November 1, 2019 for violation of Section 10-838a, and sought a fine of \$2,000. Commonwealth Court Opinion at 2 (hereinafter, “Opinion”). Appellant subsequently filed a motion for a permanent injunction on December 16, 2019 to enjoin the City from enforcing the ordinance against him, arguing the ordinance was preempted by the Pennsylvania Uniform Firearm Act (UFA) § 6120(a). *Id.* at 3. After the motion was fully briefed by both sides, the trial court held in favor of the City and denied Appellant’s motion for permanent injunction on November 12, 2020. *Id.* Appellant filed a notice of appeal to this Court on November 13, 2020. *Id.*

After briefing and oral argument, this Court reversed and remanded the trial court’s ruling on February 14, 2022, with instructions to enter a permanent

injunction in favor of Appellant. Opinion at 22. In a concurring opinion, Senior Judge Leadbetter “urge[d] our Supreme Court to reconsider the breadth of the *Ortiz* doctrine and allow for local restrictions narrowly tailored to local necessities.” See Concurring Opinion by Senior Judge Leadbetter (hereinafter, “Concurring Opinion”). Appellant filed an Application for Attorney’s Fees (hereinafter, “App.”) two days later, asserting that the City’s conduct was “in bad faith, frivolous, obdurate, and vexatious.” App. ¶ 15. Not only does Appellant fail to provide any facts supporting this mischaracterization of the City’s conduct, there is also no basis for the this Court to award attorney’s fees in this matter under Rule 2744, as discussed in more detail below. Moreover, based on Senior Judge Leadbetter’s Concurring Opinion and the City’s sincere belief that its lost or stolen firearm ordinance is not preempted by UFA § 6120(a), the City intends to file a petition for allowance of appeal with the Pennsylvania Supreme Court no later than March 16, 2022.

## **II. Appellant Has No Legal Basis To Seek Attorney’s Fees**

### **A. Appellant is not entitled to attorney’s fees under Rule 2744**

Appellant bases his application for attorney’s fees on Rule of Appellate Procedure 2744. Rule 2744 provides that an appellate court may award a reasonable counsel fee and damages for delay “if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are

to be imposed is dilatory, obdurate or vexatious.” Pa. R.A.P. 2744. However, because the appeal in this matter *was taken by Armstrong, not the City*, Rule 2744 provides no basis for Armstrong to recover his attorney’s fees before the this Court. *See Gossman v. Lower Chanceford Twp. Bd. of Supervisors*, 469 A.2d 996, 999 (Pa. 1983). Rather, Rule 2744 is intended to provide a route for an *appellee* to recover reasonable attorney’s fees for defending a frivolous appeal.

Moreover, under Rule 2744, “[a]n appellate court has no power under any statute or rule to award counsel fees for proceedings below and can only award fees for vexatious or obdurate conduct through a frivolous appeal.” *Twp. of S. Strabane v. Piecknick*, 686 A.2d 1297, 1300 n.4 (Pa. 1996) (citing *Gossman*, 469 A.2d at 996). Despite this, Armstrong bases his claim for attorney’s fees on the City’s decision to bring the original Complaint against him in the trial court. *See App.* ¶ 7-8. He asserts that “this Court should award reasonable attorney’s fees incurred in connection with the City of Philadelphia’s conduct in instituting the underlying Complaint against him in the Philadelphia Court of Common Pleas.” *Id.* ¶ 8. Armstrong both misconstrues Rule 2744 and miscites *Township of South Strabane* by asserting that the Commonwealth Court “has jurisdiction to award attorney fees and costs *incurred before it*.” *App.* ¶ 23 (emphasis added). That is not true. An award under Rule 2744 “is inappropriate where counsel fees are sought for conduct that did not take place in the appellate court.” *Twp. of Lower Merion v. QED, Inc.*,

762 A.2d 779, 785 n.4 (Pa. Cmwlth. 2000). An appellate court may only award attorney fees and costs if they are incurred as a result of “vexatious or obdurate conduct through a frivolous appeal.” *Twp. of S. Strabane*, 686 A.2d at 1300, n.4.

The City, which prevailed below, did not take an appeal to this Court, and an appellate court cannot award attorney’s fees for conduct in proceedings below. Therefore, there is no basis under Rule 2744 to award Armstrong—the Appellant himself—any attorney’s fees for appellate proceedings that he instituted.

**B. The City has not acted in bad faith**

In addition to failing to meet the requirements of Rule 2744, Appellant’s allegations of “bad faith, frivolous, obdurate, and vexatious” conduct by the City are baseless. App ¶ 15. The City has not conducted this litigation at any level of the proceedings in a way that justifies an award of attorney’s fees to Appellant.

For the purposes of awarding attorney’s fees at the trial level, “[l]itigation is vexatious when suit is filed without sufficient grounds in either law or fact and if the suit served the sole purpose of causing annoyance. A lawsuit is commenced in bad faith when it is filed for purposes of fraud, dishonesty or corruption.” *Twp. of Lower Merion*, 762 A.2d at 782 (quoting *Thunberg v. Strause*, 682 A.2d 295 (Pa. 1996)). The City did not file its Complaint against Armstrong for purposes of fraud, dishonesty, corruption, or annoyance, but rather with the good faith intent of enforcing its own local ordinance and, if necessary, confirming its validity under

UFA § 6120(a) and related case law. The City’s view, as it has maintained throughout this litigation, is that *Ortiz* does not automatically invalidate Section 10-838a under UFA § 6120(a) because, among other things, the reporting requirement of Section 10-838a falls outside the scope of the four categories of regulation precluded by UFA § 6120(a)—namely, the “lawful ownership, possession, transfer, or transportation” of firearms. *Ortiz v. Commonwealth*, 681 A.2d 152, 155 (Pa. 1996). The interpretation of statutes and ordinances like Section 10-838a and UFA § 6120(a) often creates “understandable differences of opinion,” and the award of attorney’s fees is not appropriate when a litigation position, even if rejected on appeal, was, as here, “strong enough to convince the trial court.” *Twp. of Lower Merion*, 762 A.2d at 784.

Not only did the City prevail at the trial level, but this Court’s Concurring Opinion also acknowledged the City has taken a non-frivolous litigation position: “the policy issues argued by the City . . . call for a recognition that local conditions may well justify more severe restrictions than are necessary statewide. . . . I would urge our Supreme Court to reconsider the breadth of the *Ortiz* doctrine and allow for local restrictions narrowly tailored to local necessities.” Concurring Opinion at 1. In Pennsylvania, it is entirely permissible to maintain litigation that may ultimately seek the Supreme Court’s ruling on arguments that have been previously decided by this Court. *See, e.g., City of Phila. v. Gould*, 442 A.2d 1104, 1105 (Pa. 1982). Such

efforts are not frivolous or bad faith conduct, and do not warrant an award of counsel fees.

WHEREFORE, the City respectfully requests that this Court DENY Appellant's Application for Reasonable Attorney's Fees.

**III. In the Alternative, the City Moves to Stay Appellant's Application for Fees**

As noted above, the City intends to file a petition for allowance of appeal in this case with the Pennsylvania Supreme Court no later than March 16, 2022. This petition will be based, in part, on Senior Judge Leadbetter's concurring opinion and the City's sincere belief that its lost or stolen firearm ordinance is not preempted by UFA § 6120(a). The disposition of the petition and any subsequent appeal to the Pennsylvania Supreme Court may result in new developments that are material to the outcome of any application for fees by Appellant.

WHEREFORE, if this Court does not see fit to deny the Appellant's application for counsel fees at this time, the City respectfully moves this Court to stay the proceedings on Appellant's application until the City's forthcoming petition for allowance of appeal is either accepted or rejected by the Pennsylvania Supreme Court and, if accepted, then until the conclusion of the subsequent appeal. The City will take responsibility to inform the Court as soon as any of these events occur.

Respectfully submitted,

Dated: March 2, 2022

/s/ **David Newmann**

---

David Newmann (PA ID No. 82401)  
Jasmeet K. Ahuja (PA ID No. 322093)  
Caitlyn A. Mancuso (PA ID No. 329306)  
Hogan Lovells US LLP  
1735 Market Street, Floor 23  
Philadelphia, PA 19103  
Tel: (267) 675-4600  
Fax: (267) 675-4601  
david.newmann@hoganlovells.com  
jasmeet.ahuja@hoganlovells.com  
kate.mancuso@hoganlovells.com

*Attorneys for Appellee City of Philadelphia*



## **VERIFICATION**

Pursuant to Pa. R. App. P. 123(c), I, David Newmann, as counsel for Appellee the City of Philadelphia, verify and state that the statements made in the foregoing **Answer to Appellant's Request for Fees** are true and correct to the best of my knowledge, subject to the penalties of 18 Pa. C.S. § 4904.

Dated: March 2, 2022

/s/ **David Newmann**

David Newmann (PA ID No. 82401)  
Jasmeet K. Ahuja (PA ID No. 322093)  
Caitlyn A. Mancuso (PA ID No. 329306)  
Hogan Lovells US LLP  
1735 Market Street, Floor 23  
Philadelphia, PA 19103  
Tel: (267) 675-4600  
Fax: (267) 675-4601  
david.newmann@hoganlovells.com  
jasmeet.ahuja@hoganlovells.com  
kate.mancuso@hoganlovells.com

*Attorneys for Appellee City of Philadelphia*

## **CERTIFICATE OF SERVICE**

I, David Newmann, hereby certify that I caused to be served today, March 2, 2022, one copy of the foregoing **Answer to Appellant's Application for Reasonable Attorney's Fees** upon the person and in the manner indicated below:

Electronically, via PACFile:

Joshua Garett Prince  
Civil Rights Defense Firm, P.C.  
646 Lenape Road  
Bechtelsville, PA 19505  
Tel: (888) 202-9297 ext. 81114  
Fax: (610) 400-8439  
Joshua@civilrightsdefensefirm.com  
*Attorney for Appellant Rashad T. Armstrong*

Dated: March 2, 2022

/s/ **David Newmann**

David Newmann (PA ID No. 82401)  
Jasmeet K. Ahuja (PA ID No. 322093)  
Caitlyn A. Mancuso (PA ID No. 329306)  
Hogan Lovells US LLP  
1735 Market Street, Floor 23  
Philadelphia, PA 19103  
Tel: (267) 675-4600  
Fax: (267) 675-4601  
david.newmann@hoganlovells.com  
jasmeet.ahuja@hoganlovells.com  
kate.mancuso@hoganlovells.com

*Attorneys for Appellee City of Philadelphia*

## **CERTIFICATE OF COMPLIANCE**

I, David Newmann, hereby certify pursuant to Pa. R.A.P. 127 that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 2, 2022

/s/ **David Newmann**

David Newmann (PA ID No. 82401)  
Jasmeet K. Ahuja (PA ID No. 322093)  
Caitlyn A. Mancuso (PA ID No. 329306)  
Hogan Lovells US LLP  
1735 Market Street, Floor 23  
Philadelphia, PA 19103  
Tel: (267) 675-4600  
Fax: (267) 675-4601  
david.newmann@hoganlovells.com  
jasmeet.ahuja@hoganlovells.com  
kate.mancuso@hoganlovells.com

*Attorneys for Appellee City of Philadelphia*