IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CATHERINE VAUGHN, JOHN VAUGHN and COUNTRYWIDE HOME LOANS, INC.,	)	
Plaintiffs,	)	**CIVIL ACTION NUMBER**
v.	)	**97C-10-254-JOH**
PETER RISPOLI, BARBARA BRODOWAY and NOLTE & BRODOWAY, P.A.,	)	
Defendants.	)	

Submitted: March 20, 2001
Decided: August 30, 2001

MEMORANDUM OPINION

Upon Motion of Plaintiff Catherine and John Vaughn for New Trial as to Defendant Barbara Brodoway and Motion for New Trial on Damages or, in the Alternative, an Addition as to Defendant Peter Rispoli - DENIED
Upon Motion of Plaintiff Countrywide Home Loans, Inc., for New Trial - DENIED

Leo John Ramunno, Esq., of Wilmington, Delaware, attorney for plaintiffs Catherine and John Vaughn

Todd L. Goodman, Esq., of Potter, Anderson & Corroon, LLP, attorney for plaintiff Countrywide Home Loans, Inc.

David S. Shamers, Esq., of Wilmington, Delaware, attorney for defendant Peter Rispoli

Mason E. Turner, Jr., Esq., of Prickett, Jones & Elliott, attorney for defendant Barbara Brodoway and Nolte & Brodoway, P.A.

HERLIHY, Judge

Plaintiffs Catherine and John Vaughn and Countrywide Home Loans, Inc., [collectively "plaintiffs"] have moved for a new trial and in one case for additur. The trial involved a dispute over the sale of a new home. The Vaughns were the purchasers and Countrywide the mortgagee. While a number of defendants had originally been sued, only two, the seller, Peter Rispoli, and the settling attorney, Barbara Brodoway, remained.

The jury had a twenty-question special verdict form encompassing a number of claims, defenses and potential damages. It deliberated for about two days and found the seller, Rispoli, liable and awarded the Vaughns compensatory and punitive damages. It also found the settling attorney, Brodoway, negligent in her dealings with Countrywide but found Countrywide 59 percent contributorily negligent. All other claims were rejected, including that Brodoway had committed legal malpractice in her representation of the Vaughns. The jury awarded the plaintiffs other damages in addition to the award against Rispoli to the Vaughns.

Plaintiffs' basic challenges to these verdicts are that the damage awards are insufficient, the verdicts are against the great weight of the evidence, the Brodoway verdicts involving the Vaughns and Countrywide are inconsistent, the Court erred in not submitting one damage claim to the jury and it erred in admitting one document.

FACTUAL BACKGROUND

Rispoli bought a property in 1995 at 125 Wellington Way near Middletown. He, with some friends, were going to build a home for investment purposes. They ran into some difficulties with New Castle County because of the

proposed builder, a personal friend, Anthony Casale,[1] had some difficulties with the County. The County permitted Rispoli, however, to build the house for himself. He later changed his mind and built it for resale and had friends do various trade work. Rispoli even brought Casale back into the picture. Casale did the foundation and concrete work, which is his trade. Rispoli asked Casale to do additional work and get other trades' people to do work on the house.

In the Fall of 1996, Rispoli contacted Larry Lee of Patterson-Schwartz[2] to list the house and sell it as is. Work on the house slowed in late 1996 and early 1997. The Vaughns first saw the house in February 1997. They visited and inspected the house several times prior to signing a sales contract. Mr. Vaughn described it as in "rough stages" with much work to be done. He had also been in contact with Lee, the listing agent.

On March 16, 1997, the Vaughns signed a sales contract for $174,500 and Rispoli signed it the next day.[3] The contract called for the construction of a large deck. It was undisputed that as of that time, the house needed a lot of work. The settlement date in the contract was to have been May 29, 1997. There also was a mortgage

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[1]Who later became a defendant in the case.

[2]Defendants who settled out before trial.

[3]The contract was not a new home contract.

contingency. The Vaughns were moving out of their house in Claymont, but it appears they were not in full agreement that they should buy this particular house.

The house was not finished on May 29th. Casale told Mr. Vaughn more time was needed and, based on his inspections, Mr. Vaughn agreed and the settlement was postponed until June 6th. Lee, however, never sought to get this extension reduced to writing between the Vaughns and Rispoli. Mr. Vaughn inspected the property after the 29th but observed that nothing had been done. He saw that the driveway was still incomplete and significant work was needed in the interior. He was aware the sales contract provided they could inspect the house and notify Rispoli of any defects giving him the option to correct them.[4] While aware of these rights, the Vaughns never exercised them.

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[4]

> **SELLERS [sic] DUTIES. If Buyer provided timely written notice of a defect, then Seller shall notify Buyer within 3 business days of Seller's receipt of Buyer's notice as to whether Seller (a) intends to correct the major defect(s) at Seller's sole cost prior to settlement, (b) refuses to correct any of the major defects, or (c) offers to negotiate with Buyer about the major defects with the negotiations to be completed within 7 business days. If the negotiations are not completed in the time specified above or Seller fails to provide written notification then this shall mean that Seller has refused to correct the defect.**
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> **BUYER's DUTIES. If Seller does not elect to correct the defect or a negotiated agreement to correct major defects is not agreed to, then Buyer must notify Seller within 3 business days of receiving Seller's notice, or the expiration of Seller's notice period, of whether Buyer will (a) accept Property with the defect and no reduction of price or (b) declare the Agreement null and void and all deposit money will be returned to Buyer. Buyer's failure to provide timely**

written notice shall mean Buyer has accepted Property with the defect and with no abatement of price.

Sales Contract (March, 1997) at ¶20.

Mr. Vaughn spoke to Casale about the lack of progress. Casale, according to him, said it would be taken care of. As June 6th approached, however, Casale asked for more time to finish the work. The Vaughns agreed and a new settlement date of June 11th was set. Again, however, Lee did not obtain a written extension executed by Rispoli and the Vaughns and apparently made no effort to do so.

Mr. Vaughn testified that he spoke to Brodoway about both settlement postponements telling her both times the house was incomplete. He said Brodoway said she was familiar with the contract. It is unclear exactly when these conversations took place. Brodoway testified she was notified of both postponements. There was no testimony that anything else resulted form these conversations.[5]

The Vaughns visited the property on June 6th. Hay and grass seed had been put down. Mr. Vaughn said Casale told him additional landscaping would be done. In this period, Casale and Mr. Vaughn reached a "side-agreement" whereby the Vaughns would build the deck and Casale would pay them $850. There was no document in evidence regarding this, nor is there any evidence Rispoli agreed. Mr. Vaughn also discussed some landscaping to be done. He assured Casale certain landscaping requirements were in his contract with Rispoli. In fact, however, there were none. This, too, was not reduced to writing. Since Mr. Vaughn believed Casale was the builder and in contact with Rispoli, Mr. Vaughn never discussed these matters with Rispoli. During his visits, Mr. Vaughn noted that many things were incomplete.

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[5] ***See, infra*, at 28.**

Neither between May 29th and June 6th nor June 6th and June 11th or at Brodoway's office on the 11th did he ever express to her, however, his concerns about the incomplete condition of the home.

Mrs. Vaughn testified that when visiting the house between the 6th and 11th, there was "tons" of activity. She saw a worker inside each room. She said she and her husband wanted to close and were pressing to be able to do so. In addition to these inspections, the Vaughns were aware they had a contractual right to a formal pre-settlement inspection. They were to arrange it and apparently one was arranged for June 10th. Mr. Vaughn was to meet Ross Weiner, another Patterson-Schwartz agent, at the property to do it. Weiner showed up but Mr. Vaughn did not. At this point in time, a rapidly increasing, cascade of events and telephone calls occurred. The testimony about all that was, at times, confusing but more often very contradictory.

Mrs. Vaughn said Weiner called their house on the 10th and left a message saying he was at the Rispoli property and wanted to know where the Vaughns were. Mr. Vaughn testified he had returned a call from Countrywide wherein he was informed there was no certificate of occupancy [CO]. Since there was no CO, he was told, there was no release of mortgage money. The result in his mind, he testified, was that an inspection was not needed since there was no CO. Weiner called Mr. Rispoli and he relayed to Weiner no inspection was necessary since there was no CO and no funds would be dispersed. Lee called Mr. Vaughn later on the 10th and said there was a CO and he would see him at settlement. When Lee testified, however, he said, he knew that, as of this point, there was no CO. Mr. Vaughn testified that later, around

7:30 to 8:00 p.m., he spoke to Laura Ventresca, Brodoway's real estate paralegal whom, he said, told him there was a CO. She recalled no such call, but if it did occur, she would have said nothing about a CO since she only sees it after the settlement. It is not anything she handles before a settlement. This is the last call on June 10th about which there was any testimony.

Brodoway testified she was involved in 24 telephone calls on June 11th prior to the settlement. She handles an average of twenty settlements per month and real estate is her primary area of practice. Her responsibilities to her clients, she said, are to (1) insure there is free and clear title; (2) prepare the papers, review them, get them executed and record those that need to be recorded; and (3) explain all documents, including the mortgage papers, to the buyers.

The first of the 24 calls was from Mrs. Vaughn. This was the first time these two had ever been in contact with each other. Mrs. Vaughn relayed a call with Countrywide from June 10th that since the driveway was not finished, there could be no settlement. Brodoway said such incompleteness was not unusual for new construction. Mrs. Vaughn, she said, nevertheless wanted to proceed with settlement but Countrywide was dragging its heels.

Brodoway contacted Countrywide. The first person she spoke to confirmed what Mrs. Vaughn had said. She received a call thereafter from Countrywide representative, Hany Kraponik. She asked him what Countrywide needed to proceed with settlement. He mentioned several things, including a letter from the builder that the driveway would be completed. Kraponik also said there was no

CO. Brodoway told the jury that this was the first time she heard that. She also said a CO is not a title issue but many lenders will not authorize disbursement of funds without it. She said the builder or seller usually brings it to settlement.

Brodoway first called Lee after learning no CO existed. Unable to reach him, she reached Casale instead. He confirmed there was none because, he said, on June 10th the New Castle County inspector had flagged the absence of a handrail. Casale told her it had been fixed. He assured Brodoway an inspection was to be made on the 11th or 12th and that a CO would be issued thereafter.

Brodoway then called Rispoli. He would not accept postponing settlement for a day or two as he was leaving on a three-week honeymoon. If postponed, he said, settlement would have to wait until early July. Brodoway explored other options. One was for him to grant a power of attorney to someone, which he rejected. She asked about a "paper" settlement (no funds disbursed). Rispoli rejected that saying he would sign no papers unless he received his check. Brodoway testified that she told Rispoli he needed to bring the CO to settlement.

Her next conversation was with Mrs. Vaughn on the telephone. The testimony from the two about this conversation differed significantly. Brodoway's version is that she called to bring her up to date. She testified that during this conversation, she told Mrs. Vaughn there was no CO. Without it, they could not move in and Countrywide was unlikely to authorize disbursement of funds. She reported that Rispoli was being uncooperative; that he would not agree to executing a power of attorney, would not agree to a paper settlement and was inflexible about his schedule.

She asked Mrs. Vaughn if the realtors had obtained written extensions of the settlement date. Apparently, she learned, no written extensions existed. As a result, she advised Mrs. Vaughn that she and her husband were "out of contract" and they could walk away. Mrs. Vaughn rejected this option as time was a factor to them, she told Brodoway, because she wanted the house and their current house was sold with a June 30th settlement date. When Brodoway suggested contacting their realtor to try to get an extension, Mrs. Vaughn said there was no realtor involved in the transaction, that it was a sale to a friend and could not be postponed.

Brodoway then suggested settling on their current house as planned on June 30th and put their belongings in storage until settlement when Rispoli returned in July. Brodoway reported Mrs. Vaughn said she had no relatives in the area and no place to live after June 30th unless settlement on the Rispoli house proceeded on the 11th. Brodoway said she would see what she could do.

Mrs. Vaughn, when testifying, said that at no time during this conversation or any other they had later, did Brodoway mention the lack of a CO. She told the jury that Brodoway did not tell her of the consequences of not having one. She said if she had known none existed, she never would have gone to settlement. Brodoway, she testified, never discussed with her the option of walking away from the contract. She admitted, however, that Brodoway asked if there were relatives with whom they could move in. She told Brodoway there was not. While she denied Brodoway told her they were "out of contract," she testified that Lee told her they were.

After speaking to Mrs. Vaughn, Brodoway telephoned Kraponik at Countrywide. They discussed there being no CO, that the deficiency involved the lack of a handrail, that it would be fixed and an inspection would occur on June 12th. She reported her conversations with Rispoli and Mrs. Vaughn. Kraponik asked if she could get the three preliminary inspections and fax them to him. They discussed, but did not resolve at that time, possibly escrowing money for the driveway.

Brodoway next called Casale who said he would fax her the three preliminary inspection reports. He confirmed the CO problem was minor, the inspection would be on June 12th but, he said, he may not get the paper CO for several more days. Shortly thereafter, she received faxes of two of the three inspections. When she called Casale about that, he said the third was a tag at the house and promised to retrieve it.

She forwarded the two faxes to Kraponik. She then called him and assured him she had been told that all pre-CO inspections were complete. She told him she had received a letter about the driveway[6] which Countrywide has requested. Kraponik said he would have to check with a supervisor about proceeding with the settlement without a CO.

Brodoway testified she next called Mrs. Vaughn and reported to her that she was "cautiously optimistic" that Countrywide would approve proceeding with settlement without a CO. She told Mrs. Vaughn she had faxed two of the three

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[6]Brodoway Exhibit 4.

inspection reports to Countrywide and that Kraponik said he would check with a supervisor about the CO situation. Brodoway related to the jury that she informed Mrs. Vaughn of her conversation with Casale, that there would be an inspection the next day. However, she again told Mrs. Vaughn they could not move in without it. In a prophetic statement, Brodoway said she told Mrs. Vaughn if Casale did not come through, there could be major problems. Mrs. Vaughn, according to Brodoway, said she was not concerned about being unable to move in right away. They were planning to put in carpet to which Brodoway responded they could do that but still not move in.

Mrs. Vaughn's version of this conversation is in one respect the same as Brodoway's. She recalls Brodoway saying she was cautiously optimistic. But, she said Brodoway mentioned Rispoli's rejection of executing a power of attorney. She said Brodoway asked again about relatives but denies that the subject of no CO ever was discussed.

After this conversation, Kraponik called Brodoway. He had spoken to a supervisor and wanted her to put some things in writing. She explained that Casale was the source of the information in the letter. She prepared it and sent it off stating:

> **Dear Harry:**
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> **This letter is to confirm that the two inspections that I faxed to you earlier today and the inspection that is at the property and which I will have in hand by settlement today are all the inspections performed on this property and are necessary for the Certificate of Occupancy. If you want me to fax you a copy of the latter inspection when I receive it today, please let me know. I will receive the actual Certificate of Occupancy in the next few days from New Castle County.**

Please let me know if there is anything further you need from me.[7]

Kraponik called again. Countrywide approved a $4,000 escrow for the driveway and wanted it reflected on the settlement sheet, which it was. There was, at this time, no final approval from Countrywide to proceed with settlement. Brodoway then called Mrs. Vaughn and said it was not final yet, but it was looking good. She asked her to get to her office at 2:15 p.m. Mrs. Vaughn recalls being asked to come at 2:15 p.m. But, she reports, Brodoway said, "It's a go." Shortly thereafter Mr. Vaughn arrived back home. When told of Brodoway's latest call, he is reported to have said, "Wow, she got us a CO." What Brodoway did not know was that the Vaughns had argued earlier that morning, he had left and that Mrs. Vaughn was not reporting these conversations to him, at least, up to this last one.

Kraponik then called Brodoway and said to proceed without the CO. The mortgage package was coming by courier. Countrywide "wired" the money to Brodoway's account. Kraponik knew Rispoli had rejected a paper settlement and Countrywide did not instruct Brodoway to withhold disbursement of funds. Among the papers Countrywide sent her were "Specific Closing Instructions."[8] **Among those instructions was one that said its "final" decision was contingent on a CO.**

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[7] **Countrywide's Exhibit 6.**

[8] **Countrywide's Exhibit 4B.**

Brodoway testified that in her view, Kraponik's verbal instruction to proceed without the CO overrode this closing instruction. Further, she said, why else would it have wired the money with no prohibition on disbursement unless she could proceed without the CO. She also said it is not unusual for mortgage companies to waive conditions.

Also sent with Countrywide's closing package was a "Satisfactory Completion Certificate." It was prepared by a representative of the Delaware Appraisal Group.[9] The Certificate stated the Rispoli property was appraised on March 27, 1997 and the appraisal was subject to satisfactory completion. On June 6, 1997, a final inspection was performed and the following is stated:

> **I certify that I have reinspected subject property, the requirements or conditions set forth in the appraisal report have been met, and any required repairs or completion items have been done in a workmanlike manner.**
>
> **Itemized below are substantial changes from the data in the appraisal report, and these changes |_| do |_x| do not adversely affect any property ratings or final estimate of value in the report:**
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> **On the day of final inspection, the subject property was 100% complete. The only item not completed was the driveway needed to be paved. There is rough stone down. It is not uncommon for builders in New Castle County to not have the driveway paved prior to settlement, due mostly to the weather. We have had alot [sic] of rain in the past few**

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[9]One of the original defendants in the case but which had settled prior to trial.

weeks. It is estimated that the cost to complete the driveway would be $4,000.[10]

Settlement finally started around 2:30 p.m. on the 11th. At the beginning, the Vaughns, Rispoli, Lee and Weiner were there. Brodoway said Countrywide was allowing the settlement to proceed without the CO. Mr. Vaughn said he was expecting a check from Casale, but he was not there yet. Brodoway called him. She mentioned the check due and he said he had a copy of the third inspection.

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[10]Countrywide Exhibit 9; Brodoway Exhibit 1.

Mr. Vaughn testified that Brodoway did not discuss with him and his wife the options of not settling or settling. He also said he did not say much during the entire time he was in Brodoway's office. He offered several explanations. One was that he was still angry with his wife from an argument earlier in the day about the decision to buy this particular house. Another reason was that he was angry with Casale's lack of completion. Still another explanation for his silence was that he was aware from earlier calls that there was no CO. He assumed, therefore, that since Brodoway was their lawyer and proceeding with settlement that all problems had been cured, particularly those relating to the CO and lack of completion. Despite his lingering significant concerns about lack of completion, he still chose to remain silent. He testified the only completion problem Brodoway mentioned was the lack of a handrail.[11]

Lee said there was little conversation at the settlement about the absence of a CO. All knew, however, that there was none. When speaking to Mrs. Vaughn earlier in the day about being "out of contract," he told her Rispoli wanted it sold before his honeymoon or there would be no contract. If this happened, he said, he told Mrs. Vaughn that Rispoli would resell quickly and at a higher price.

Countrywide's mortgage package did not arrive until around 3:30 p.m. or later. In the meantime, Brodoway reviewed the settlement sheet with Rispoli and the Vaughns. All signed it. For some reason, the papers Countrywide sent only listed Mrs.

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[11]Although the settlement sheet he signed reflects an escrow to finish the driveway.

Vaughn as the borrower and mortgagor. She was the only person needing to sign them. During her direct testimony, Mrs. Vaughn said Brodoway discussed how to put Mr. Vaughn's name on the property.

Casale finally arrived. He did not have the $850 check which he was supposed to bring but he did bring the third inspection report.[12] Brodoway testified Casale told the Vaughns he would get the CO. Casale denied he said this. He said Brodoway had to know the house was incomplete because no one had the keys at settlement. One reason was that work was still being done. Certain checks were withheld from various persons working on the house since the work was incomplete. Some of that was reflected on the settlement sheet.[13] Brodoway recalled Casale asking her not to release these checks to the subcontractors. He wanted to see if their work was done. Later, after the settlement was done and all had left, he called her and said to release all but two checks.

At some point, after Casale arrived at Brodoway's office, the two of them met privately. They discussed when the CO would be issued. Brodoway wanted Casale to commit in writing when it would be delivered. She wrote out a statement for him to sign leaving the due date blank initially. He said June 20th and that was put in writing:

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[12]Brodoway Exhibit 3.

[13]Vaughn Exhibit 2.

I, Anthony Casale, verify that New Castle County will issue a Certificate of Occupancy on 125 Wellington Drive, Grand View Farms no later than June 20, 1997.[14]

Brodoway never communicated this date to the Vaughns. Nor did she even communicate this date to Countrywide. She did not send this paper or a copy of it to Countrywide or give a copy to the Vaughns. Mrs. Vaughn testified she told Brodoway that they were moving in on June 14th, but Brodoway denied that was said. If it had, she testified, she would have said they could not. The record is undisputed that the CO was not issued on the 20th and has never been issued.

George Brancati, Esquire, testified for the Vaughns as a standard of care expert. He has been handling real estate matters since 1972 and performs about seven settlements per month. He testified Brodoway violated the standard of care of a settling attorney. He based his opinion on Mrs. Vaughn's deposition in which she testified, apparently, that she was never told there was no CO. This, of course, was consistent with her trial testimony. He said that a settlement can occur if there is no CO but the buyer(s) must be aware of the ramifications. One is that they could not move in. Based on what Mrs. Vaughn said about not being told there was no CO, she was not fully informed or aware of the consequences. An attorney can close without the CO, he said, if there is authority to do so from the client, the lender and the title insurance company. All this, he said, should be in writing. Settling attorneys can only advise, he said. As

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[14]Vaughn Exhibit 10.

long as the client is fully informed of the consequences of proceeding without a CO and wants to proceed, the attorney should proceed.

Since Brancati had mentioned that the lender should consent in writing to proceeding without a CO, Countrywide was permitted to ask certain questions. The Court overruled Brodoway's objections to that happening. In response to one of Countrywide's questions, Brancati described the lender as an "interested party" in a real estate transaction. Since Countrywide's written closing instructions required a CO before funds were disbursed, Brodoway, he said, needed to get a written waiver to proceed without it. That, of course, was not done.

During Countrywide's cross-examination of Brodoway about her actions and duties, she was asked why the advice and warnings had gone to Mrs. Vaughn and not also to Mr. Vaughn. The only person she spoke to, Brodoway said, before the settlement was Mrs. Vaughn. At settlement, she testified when being questioned by the Vaughns' counsel, Mr. Vaughn signed the settlement sheet but only Mrs. Vaughn's name should have been on it. She testified that she could not redo the mortgage, note and other papers from Countrywide which were in Mrs. Vaughn's name only.

On redirect examination, Brodoway's counsel offered to introduce the full mortgage packet. Countrywide objected based on it mentioning purchase money insurance. The Court asked Countrywide's counsel if he wanted time to review the proffered documents to see what parts he may want deleted. The offer was not followed up. Counsel for the Vaughns offered no argument. After no one asked for time to

review or offered any suggestion for redaction, the Court admitted the full package over Countrywide's objections.

There were no further significant events at settlement. The record is clear that when the Vaughns left Brodoway's office on the 11th, they did not have keys to the house they had just bought. Mrs. Vaughn went to the house the next day without a key and no one was there. She observed the driveway was still incomplete and was able to determine some promised appliances were not there. Brodoway recalled getting a call from Mrs. Vaughn who was upset about the condition of the driveway. Mr. Vaughn called Brodoway on the 14th and inquired about some costs on the settlement sheet and not yet getting the check from Casale and that certain appliances were not at the house. According to her, he said nothing about the lack of keys or moving in that day. When Brodoway spoke to Casale around this time, and responding to her questions, he replied that the County inspector never showed up and rain had prevented installation of the driveway.

Five or six days later, the Vaughns finally got keys. After getting inside, Mrs. Vaughn called her husband in an outrage. He later inspected the property with

her. Calls to various people were made. The Vaughns wrote Brodoway about their concerns itemizing things which needed to be done.[15]

Brodoway said she was "dumbfounded" by the letter. She had no idea so many things were incomplete. When Mrs. Vaughn telephoned her on June 19th, Brodoway testified she asked her why they had not told her of these things on June 11th. Mrs. Vaughn replied that she and her husband did not know and explained that there had been no walk through on June 10th. That was due, she told Brodoway, to the lender's call on the 10th that there was no CO and there would be no disbursement on the 11th. Brodoway told the jury that this call on the 19th was the first she learned there was no walk-through. She again questioned Mrs. Vaughn why she had not said anything to her about it before settlement. The two of them discussed efforts to contact Casale. Brodoway promised to call him, too. She tried many times, she testified, but he never returned her calls. On June 23rd, she was told the Vaughns had new counsel.

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[15]There are two versions of this letter. One was introduced by the Vaughns. Vaughn Exhibit 4. The other is Brodoway's Exhibit 2. The Vaughns' version is more strongly stated than the one from Brodoway's file. In her version, the Vaughns express appreciation for what she had done at settlement and for rooting for them to come "out of this at least satisfied to some degree." This language does not appear in the version the Vaughns offered to the jury as the letter they sent to Brodoway. In both letters, they ask her not to disburse any escrowed or withheld money.

County Chief Supervisor of Inspections James Smedley inspected the house at 125 Wellington Road on July 22, 1997. It was not a formal CO inspection. He prepared a report of his inspection, which is described as "cursory in nature."[16] Though limited, he provided a lengthy list of code violations. Among the 42 items lists are the handrail deficiencies. The list contains a number of major defects. Because of them, the County issued a stop work order.

Those defects were graphically shown in a walk-through video of the house shown to the jury.[17] Over the defendants' objections, the Court admitted still photographs showing many defects and problems.[18] The videos and pictures were taken in June 1997.

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[16]Vaughn Exhibit 6.

[17]Vaughn Exhibits 3, 12.

[18]Vaughn Exhibits 5A-K.

To show how much it would cost to get the house to meet County Code requirements, the Vaughns presented Mark Fenimore. He is self-employed in remodeling and making additions to residences. He inspected the house on August 7, 1997 and had with him the County's July 22nd report. He submitted an estimate of repairs totaling $67,545.[19] Some of his estimates included items not needed to meet CO standards but were cosmetic items in the kitchen for things involving the cabinets and the island ($775). These items were not listed in the July County report.

The single largest repair item he listed was for $23,000 to remove all the exterior bricks, install a paper wrap and reinstall all the "brick work."[20] This estimate was premised on the following notation on the County's report:

> ***Outside***
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> *** * ***
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> **6. Tar paper behind brick work at one unfinished sill was missing. This leads me to believe that perhaps this violation may involve the whole dwelling. Further, investigation will be necessary.[21]**

Fenimore, however, did not test any other areas of the exterior to determine if the lack of tar paper existed anywhere else than this one location noted by the County. He

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[19]**Vaughn Exhibit 7.**

[20]***Id.***

[21]**Vaughn Exhibit 6.**

assumed the lack of a vapor barrier was throughout the house leading to his $23,000 estimate.

Another major component of his estimate was the cost of raising the headroom on the entire second floor from 6' 6" to the 6' 8" required by the County Building Code. Fenimore's notation for this was premised on another statement in the County's July inspection report:

> ***Second Floor***
>
> *** * ***
>
> **8. Headroom (6'6") insufficient. 6'8" Required by Code.[22]**

The trouble with Fenimore's estimate was that the headroom violation was in one small area at the top of the stairway. The estimate for correcting this very limited problem offered by Countrywide was $300.

Fenimore also estimated $1,350 to purchase and install a dishwasher and an oven/range. This was not, of course, something that would be found in the County's inspection or a Code requirement. He gave estimates for making some improvements or corrections in bathroom(s); again none of this was needed to meet the County Code.

As mentioned earlier, Countrywide presented its own witness, Larry Casula, to give estimates to correct deficiencies in the house. He builds new homes and renovates homes in New Castle County. He inspected the property in October 1998 and

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[22] ***Id.***

had available, too, the County's July 1997 inspection report. He confirmed all the Code violations the County found, but he found more. His total estimate was $73,150.[23]

Casula found significant problems in the foundation. At places, for instance, the foundation wall extended beyond the footing. There were many other problems in the basement, such as an uneven floor and footing problems. He engaged an engineer to check the basement floor. He determined structural repairs were needed in the basement and for a column in the garage. The estimated cost of these repairs was $8,575.

Casula broke down his report in several other respects. The County's 1997 report had listed defects in numbered fashion under broader categories such as exterior, first floor, etc. Casula used the same method in presenting his estimates whereby those estimates corresponded to the categories and item number the County listed. Also, Casula estimated $25,000 to pull the bricks, put in tar paper (vapor barrier) and replace the bricks. As with Fenimore, however, he had not tested or examined beyond the one area around the window which was noted in the County's report. On this exhibit someone crossed out the $25,000 figure and hand wrote "$3,000." His total estimate for work needed to bring the exterior of the house up to Code and get a CO was $32,700. Here again, someone wrote "$14,350" next to his typed $32,700. Casula gave a total estimate of $50,950 to do the work listed in the County's 1997 inspection report.

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[23]Countrywide Exhibit 2.

Casula went on to list other estimates matching the County's report. He also noted a "Finish List" covering areas outside and inside the house. Some or all of the items, however, could be waived on the CO if the owners also waived them. The total of this "Finish List" was $13,625, including $2,500 for trash removal. His "Finish List," the work needed to meet the engineer's report and work needed to comply with County Code requirements, totaled $73,150.

In the County's July 22, 1997 inspection report, it is noted that "grading is not complete."[24] One of the County inspectors who went to the property on that date, Joseph Albruzzesi, testified at trial. When testifying about what that meant, he said to determine what was incomplete, he would need to examine the original grading plan.[25] He would need to see it to conclude what had been done or not done. He did not, however, nor did any other County inspector.[26] What he did address, to a large extent,

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[24]Vaughn Exhibit 6.

[25]It was never made known during the trial whether there was such a plan.

[26]Nor was it made known whether any effort was made to look for the plan.

was that the yard around the house was mostly dirt and grass would be needed to prevent erosion.[27]

The videos shown the jury showed the poor condition of the yard. Mr. Vaughn testified that he also had an understanding or an agreement about additional landscaping which would be put in. His testimony about this was, in part, vague. On direct, he said he was told landscaping was part of the sales contract but he was not directed to any portion of the contract. Nor was he asked who had said this to him. During Brodoway's cross-examination, he attributed some of this understanding to statements Casale made to him. There was no document introduced reflecting an agreement between the Vaughns and either Casale or Rispoli concerning landscaping.

As part of the Vaughns' damage claims, however, they presented a witness who testified about the cost of various items of landscaping. The witness was Paul Layaou who runs a landscaping business, has worked with builders and claims to know CO grading requirements. He inspected the property on July 15, 1997. Layaou gave an estimate of just shy of $12,000 to prepare the lot, lay sod for the front and side yards and prepare, lay top soil and seed the back yard. Apparently, this was his estimate to bring the grading up to CO standards. Casale, on the other hand, estimated a cost or $1,250 to complete the grading in order to meet County Code requirements.

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[27]One matter which this witness was clear about was that he told Brodoway it was inappropriate to go to closing without a CO. The Court denied her motion for a mistrial and gave a cautionary instruction to the jury.

One of the items he also estimated was the cost of finishing the driveway. That would be $7,600, he said. This estimate included a set of steps but the cost of that was not broken out. Nor was it clear whether the steps were needed for the CO or were in some plan or written agreement. While Layaou had been asked in 1997 to estimate doing landscaping, which may reflect the alleged agreement between Vaughn and Casale, he was not asked about that during his testimony.

Based on all of this liability and damage evidence, the jury was given a twenty-question, special verdict form covering a number of claims. It was informed in the instructions that Patterson-Schwartz, Larry Lee, Ross Weiner, Tony Casale and Delaware Appraisal Group, Inc., had originally been sued. All had settled,[28] the jury was told, but, of course, no amount was mentioned. The jury was instructed to (1) not speculate about the amount of any settlement, but (2) award full and fair compensation. The Vaughns had numerous claims against Rispoli. The jury found that he had breached his contract with them and awarded the Vaughns $16,675 in damages. It also found that he had committed common law and statutory fraud and awarded $45,896.29 in damages covering past due interest payments and taxes due which Countrywide had paid. It also awarded $41,175 to complete the work needed to get the CO. Finally, it awarded the Vaughns $30,000 in punitive damages against Rispoli. But, the jury found Brodoway had not committed legal malpractice in her representation of the Vaughns

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[28]These settlements came about in whole or in part as a result of mediation of all the plaintiffs and all the defendants. The Court appreciates the efforts of former Judge Bifferato in conducting this mediation. It is now a matter of record that the settlement was for $110,000.

nor did it find she had committed common law or statutory fraud in connection with her dealings with the Vaughns.

As to Countrywide, however, the jury found Brodoway had been negligent in her dealings with it. But, it also found Countrywide to have been 59 percent contributorily negligent in those dealings. It absolved her of Countrywide's claim she had committed negligent misrepresentation. The damage award noted above of $87.071.29 was to the Vaughns and Countrywide.

PARTIES' CLAIMS

The Vaughns argue that the verdict of no legal malpractice is against the great weight of the evidence. Particularly, they point to Mr. Vaughn's testimony that he was never told there was no CO. Since Brodoway was representing both Vaughns, she should have told him, too. They contend Brodoway was obligated to tell them of the statement Casale signed indicating there would be a CO issued by June 20, 1997. They also assert the verdicts finding no legal malpractice by Brodoway involving them but negligence by her to Countrywide are inconsistent.

The damages awarded, the Vaughns contend, are inadequate, pointing to the witnesses' testimony. They ask for a new trial on damages or, in the alternative, for additur as to the Rispoli compensatory and punitive damage awards. In addition, they dispute this Court's decision to not allow a damage claim for "past due" mortgage principal. In this vein, they say the jury should have awarded past due late charges. Finally, the Vaughns claim the Court erred by admitting Brodoway Exhibit 5 which is the complete mortgage package Countrywide sent to Brodoway. Their complaint is

that it mentions insurance. Countrywide joins in the Vaughns' claims. It characterizes the evidence about Mrs. Vaughn being the only signatory on its papers as a surprise defense of Brodoway's legal duties running only to her not Mr. Vaughn.

Brodoway responds by arguing that the verdict in her favor for no legal malpractice was not against the great weight of the evidence. She denies shifting her defense to the effect she only represented Mrs. Vaughn. That avenue, she contends, was opened up by Countrywide on its cross-examination and is due to its papers listing Mrs. Vaughn as the sole obligor/mortgagor. She does not claim, she says, that she shifted her defense. There was also, she asserts, no expert testimony she had a separate duty to Mr. Vaughn.

Brodoway contends the award of damages to bring the house up to County Code were adequate. She points to the confusing damages testimony. Since settling defendants anted up $110,000, the plaintiffs would have to prove more in the way of damages in order to expose her to liability, even if the jury found she committed legal malpractice.

Rispoli adopts these arguments insomuch as they relate to him. He points to the confusing and contradictory evidence over the cost to repair the vapor barrier and to raise the ceiling on the second floor.

APPLICABLE STANDARD

A jury's verdict is presumed to be correct.[29] It will not be disturbed unless it is against the great weight of the evidence.[30] Further, the Court will not set aside a verdict as insufficient unless it is clear that it was the result of passion, prejudice, partiality or corruption or it is clear the jury disregarded the evidence or the rules of law.[31] An award of damages should not be disturbed unless it is so grossly disproportionate to the injuries suffered as to shock the conscience of the Court.[32]

DISCUSSION

While the factual record is substantial, the arguments advanced for a new trial are few. Much of that record revolves around the claims against Brodoway and the verdicts on those claims. The other arguments relate to the issue of damages sought and awarded.

Verdicts Involving the Vaughns

The jury found that Brodoway had not committed legal malpractice in her representation of the Vaughns. Brancati set the duty parameters for the Vaughns of

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[29] ***Lacey v. Beck*, Del.Super., 161 A.2d 579, 580 (1960).**

[30] ***James v. Glazer*, Del.Supr., 570 A.2d 1150, 1156 (1990).**

[31] ***Storey v. Castner*, Del.Supr., 314 A.2d 187, 193 (1973).**

[32] ***Young v. Frase*, Del.Supr., 702 A.2d 1234, 1237 (1997).**

a real estate attorney handling a closing without a CO. An attorney can proceed with closing under those circumstances, if several conditions are met. The client(s), lender and title company must consent in writing. The buyer(s)/client(s) must understand the ramifications, particularly that the property cannot be occupied. It is important that the buyer and lending company know there is no CO.

Brancati testified that Brodoway violated these standards. He said he based his opinion on Mrs. Vaughn's deposition. In that, she said she was unaware there was no CO at settlement. If the jury believed the trial testimony of Mrs. Vaughn, which was the same, and the trial testimony of Mr. Vaughn, it would be in a position to find malpractice had occurred.

But, what the Vaughns were told or not told was, of course, very much contested. Mrs. Vaughn said Brodoway never told her there was no CO. This would have been during their various phone conversations preceding settlement on the morning of June 11th and at closing. Mr. Vaughn said Brodoway never told him there was no CO. Mr. and Mrs. Vaughn said each had been told the day before there was no CO. While they knew that without a CO they could not move in, they told the jury Brodoway never told them of this consequence.

Brodoway, of course, disputed this testimony. She said she repeatedly told Mrs. Vaughn during their telephone conversations there was no CO. She explained her efforts to get it. She testified she explained the consequences of not having one and the options available to the Vaughns. Those options included a paper settlement or postponing settlement until Rispoli returned from his honeymoon. She inquired about

remaining in their current house or temporarily living with others and putting things in storage. Brodoway said she discussed the problems of "being out of contract," namely, no written settlement date extensions.[33] She called Rispoli to explore a paper settlement or postponement of settlement. He rejected both and there was no dispute he had rejected both after inquiry from Brodoway. Even Mrs. Vaughn said Brodoway asked her about postponing settlement on her current residence and about moving in with relatives. This testimony, of course, lent great credence to Brodoway's version of her conversations with Mrs. Vaughn.

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[33]Brancati never testified that the applicable standard of care required Brodoway to insure that written, executed extensions were obtained. This meant that the Vaughns and Rispoli were "out of contract" (as Brodoway put it) limiting the options for the Vaughns on June 11th. Since Rispoli insisted on a full, not paper, settlement (that is, to get paid) on June 11th, his legal position was enhanced since no written extension existed to go beyond May 29, 1997. Brodoway testified that she advised Mrs. Vaughn that without such a written extension and with Rispoli's demand for a full settlement, he could walk away from the contract unless the Vaughns went ahead. Brancati never said Brodoway committed legal malpractice by not insuring written extensions were obtained by someone, the Vaughns or Lee or anyone else. So whatever predicament which arose due to lack of written extensions was not an allegation of malpractice offered to the jury.

Brodoway said she mentioned to the Vaughns at the closing in her office that there was no CO. Lee said there was a discussion at the settlement table with the Vaughns present that there was no CO. Casale told the Vaughns there was no CO but stated he would get it and that he would be no stranger to them.

There were, therefore, two contradictory versions of the telephone conversations between Brodoway and Mrs. Vaughn and what was said or not said at settlement. In one version, if the jury believed Mrs. Vaughn and the standard of practice which Brancati offered, it could have found that Brodoway had committed legal malpractice.[34] The other version, of course, was that Brodoway had adequately met all applicable standards. She had informed the Vaughns that there was no CO. She had told Mrs. Vaughn of her various options, proceeding, not proceeding, delaying, etc. She recommended against settling until after Rispoli returned from his honeymoon. The Vaughns rejected that. If believed, as apparently it was, there was ample evidence to show that the Vaughns wanted to proceed with settlement despite these cautions.

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[34]The jury, of course, was free to reject Brancati's opinion even though essentially uncontradicted. *Longoria v. State*, Del.Supr., 168 A.2d 695, 704 (1961).

The jury is the trier of fact; it determines the credibility of the witnesses.[35] It also has the right to accept a portion of a witness' testimony and reject other portions.[36] The jury determined which version of the events to believe and to find no malpractice had occurred. There was more than sufficient evidence to support that determination. The Court, therefore, would be overstepping its bounds and improperly interfering with the jury's role and verdict to declare it as against the great weight of the evidence. The verdict is amply supported by the version of the events the jury chose to believe.

In addition to this great weight argument, the Vaughns raise others seeking to overturn the verdict. First, they accuse Brodoway of raising a surprise defense at trial, namely, that she only represented Mrs. Vaughn. This argument is disingenuous. She did not initiate questioning about whom she represented. Countrywide did. Second, Mr. Vaughn was at the settlement table, had contacted Brodoway earlier about postponement and even signed the settlement agreement. He had also signed the sales contract. Third, the whole issue arose only because Countrywide mistakenly forwarded paperwork, such as the mortgage and note, with only Mrs. Vaughn's name on them. Brodoway did not contend this error meant she no longer represented Mr. Vaughn.

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[35] ***Williams v. State*, Del.Supr., 539 A.2d 164, 168 (1988).**

[36] ***Pryor v. State*, Del.Supr., 453 A.2d 98, 100 (1982).**

Fourth, Brancati was not asked, nor did he testify, that Brodoway had violated any separate standard of representation in her dealings with Mr. Vaughn. Nor did he tell the jury there was any such separate standard. His opinion was that a representation violation had occurred as it related to both Vaughns. He never said one duty was owed to Mrs. Vaughn and another to Mr. Vaughn. The same duties were owed to both. The Vaughns' argument that Brodoway raised the issue of separate representation is not supported by the record nor was there any evidence that a separate duty was owed but not fulfilled. Finally, the Vaughns did not ask for an instruction to the jury that a separate duty was owed and breached. The Court's instructions were that her duties flowed to both.

This issue was spawned by Countrywide's cross-examination of Brodoway. In redirect examination, Brodoway's counsel offered the mortgage package[37] Countrywide had sent to her. It was offered to show how it happened that Mrs. Vaughn was the only signatory on a number of documents. Her signature appears on various pages and her initial appear on a number of them.

Among the documents were the mortgage which Countrywide had previously put in evidence.[38] Also included were the specific closing instructions which it had previously put into evidence.[39] Countrywide offered no explanation to the jury why it had made this mistake. Brodoway explained that she told the Vaughns she had

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[37]Brodoway Exhibit 5.

[38]Countrywide Exhibit 4A.

no power to change Countrywide's papers. No one disputed that. She also said she told the Vaughns what would be needed to get Mr. Vaughn's name on all the necessary documents. There was no dispute that the Vaughns knew of the mistake. There was no evidence either that Brodoway violated any standard of misrepresentation under these circumstances either to the Vaughns or Mrs. Vaughn or Mr. Vaughn. It is mere bootstrap to now contend that Brodoway injected a new defense at trial. All of this merely explained what happened at settlement. Plaintiffs' argument is without merit.

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[39]**Countrywide Exhibit 4B.**

Two other arguments have been advanced because of the introduction of Country's full mortgage package. Countrywide objects and argues error warranting a new trial because portions of the document mentioned purchase mortgage insurance. This argument fails for several reasons. One, Countrywide made its initial objection to the introduction of this document on this same ground. But, it did not accept this Court's invitation to review it and offer portions to be redacted. Two, Countrywide cites to no specific allegedly offending language in the documents. It only refers to purchase mortgage insurance. While mentioning insurance might be improper in certain circumstances,[40] there is no showing how anyone was prejudiced by any purchase mortgage insurance language in the mortgage packet. Besides, property and mortgage insurance are set out in the mortgage itself which Countrywide had separately introduced.[41] Countrywide's renewed objection lacks merit.

The Vaughns also seek a new trial based on the admission of the mortgage packet. They did not object to Countrywide introducing the mortgage. Nor did they object when Brodoway offered the packet in rebuttal. Instead, their objection relates back to a motion *in limine* the plaintiffs filed on the eve of trial. In that motion, the plaintiffs sought to exclude any documentary evidence which Brodoway may seek to

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[40] ***Pinkett v. Brittingham*, Del.Supr., 567 A.2d 858 (1990).**

[41] **Countrywide Exhibit 4A.**

introduce. Their contention was based on Brodoway's failure to more specifically identify her proposed exhibits beyond listing documents in her client file.

During the pretrial conference in this case, the Court ordered all parties to specifically identify all exhibits they intended to use at trial and set a deadline for that identification. Plaintiffs complain that Brodoway did not provide such identification prior to the deadline or at any other time. But, at trial, they did not object to the first four exhibits Brodoway offered. All of them came from her file. Also, they had introduced two of the documents contained in the file, the mortgage and the specific closing instructions. Both of those documents listed only Mrs. Vaughn as the mortgagor/obligor. In short, this belated objection is without merit. If there were any genuine concern about purchase mortgage insurance, Countrywide was offered the opportunity to ask for redaction but it did not do so. There is no basis to award a new trial on this argument.

The Vaughns next argue that Brodoway committed legal malpractice when she failed to tell them of Casale's agreement to provide the CO by June 20th. The record is undisputed that Brodoway did not tell them of the agreement. Further, for reasons never explained, she left the room where the Vaughns and Rispoli were to converse with Casale and to get him to sign the statement about the CO.[42] Brodoway implied to the jury that if the Vaughns had said they were moving in prior to the 20th,

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[42]Vaughn Exhibits 8 and 10.

such as on June 14th, she would have mentioned the Casale written statement or something to the effect they could not move in yet.

While it might have been preferable that she did mention it, nevertheless, the Vaughns' argument on this point fails. Brancati never mentioned or opined that Brodoway violated a duty of representation to the Vaughns by not mentioning the Casale agreement. In short, there was no expert opinion regarding what the standards of representation were in this specific situation. Sometimes an attorney's malpractice can be so obvious ordinary lay people can decide malpractice occurred.[43] In most instances, however, expert opinion is needed to show legal malpractice occurred.[44] The professional duty owed to the Vaughns in this narrow instance is not one within common lay experience. It required expert testimony but none was offered. In addition, the jury's overall finding of no malpractice indicates it accepted Brodoway's testimony that she told Mrs. Vaughn there was no CO. Further, its verdict shows it accepted the testimony of Brodoway and others that she told both Vaughns at closing that there was no CO.

That being so, it was imperative that the Vaughns present expert testimony about Brodoway's duty. There is no doubt Brancati was a competent expert

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[43] ***Degnars v. Kimmel, Weiss & Carter***, **Del.Super., C.A.No. 95C-10-245, Vaughn, J. (March 17, 1999);** ***see, e.g., Pusey v. Reed***, **Del.Super., 258 A.2d 460 (1969) (where an appeal was not taken within the statutorily prescribed time).**

[44] ***Alston v. Hudson***, **Del.Supr., No. 160, 1997, Veasey, C. J. (August 22, 1997) (ORDER).**

witness[45] to offer that testimony in the event he thought any duty existed and were asked about it. But he was not. The jury had no basis, therefore, to find malpractice on this narrow claim.

But, the Vaughns also argue that Brodoway's failure to mention the Casale agreement constitutes common law and statutory fraud. The jury was instructed it could find Brodoway was liable for either or both. It did not. Since an element common to both causes of action is an intent to induce reliance, the Vaughns' argument fails. First, as noted, Brodoway generally mentioned there was no CO. Second, while it is uncontradicted she never mentioned the side agreement with Casale, there was no evidence her failure to disclose it was done with intent to induce reliance by the Vaughns.

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[45] ***Brett v. Berkowitz*, Del.Supr., 706 A.2d 509, 517-18 (1998).**

The jury's verdict also shows it rejected Mrs. Vaughn's testimony that she said at closing there had been no walk through. The settlement sheet had an escrow for driveway completion. This was consistent with her conversations with Countrywide and the appraisal report forwarded to her. That report reflecting a June 6th inspection - supposedly - listed the driveway as incomplete.[46] The only incomplete items which Brodoway said she was made aware of were the handrail and the driveway. Since she was aware of them and took steps to try to get them completed, the jury had additional evidence to accept her version of the events.

In conclusion, the Court finds that the jury's verdicts on the Vaughns' claims potentially subjecting Brodoway to a damage award are not against the great weight of the evidence. There was ample evidence to support each such verdict.

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[46]The videos and still photographs belie this and explain why the appraisal company settled.

The jury did find, however, that Rispoli had breached his contract with the Vaughns, committed common law fraud and committed statutory fraud. As to the breach, it awarded the Vaughns $16,675 in damages. They attack that award as inadequate. They seek a new trial on damages or, in the alternative, additur. The Court will not disturb this award unless it is shocked by its inadequacy or determines it is contrary to the evidence.[47] The jury also awarded damages of $41,175 as the cost to bring the house up to County Code to get a CO. The Vaughns attack that award as inadequate. This award was made to the Vaughns and Countrywide and will be discussed later.[48]

The only contract in evidence which could have been breached is the sales agreement.[49] By contract, certain additional items were to be done, which were:

> **All standard fixtures, builders grade vinyl in kitchen and bathrooms, driveway to be paved, approximately 40 x 12' deck to be completed.[50]**

The contract was on the standard New Castle County Board of Realtors' form for residential properties. While this was a new house, the contract does not clearly reflect that. The Court is unsure whether there is a separate form for newly constructed residences. If not, as this case ringingly demonstrates, there should be. If

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[47] ***Mills v. Telenczak*, Del.Supr., 345 A.2d 424, 426 (1975).**

[48] ***Infra* at 41-44.**

[49] **Vaughn Exhibit 1.**

[50] ***Id.* at Sec. 6.**

there were in 1997, Lee had the obligation to use it. This and his numerous other defalcations underscore his need to settle this case.

To establish their claim for breach of contract damages, the Vaughns presented Fenimore and Layaou. The Vaughns point to their testimony to argue the inadequacy of the damage award for breach of contract. Fenimore offered some testimony about the cost of items which could be classified as contractually required. But, most of his estimate related to items needed for the CO.

The jury had much reason to question Fenimore's CO estimates. For instance, he listed $23,000 to remove all the exterior brickwork, install tar paper and replace the bricks. He did not, however, undertake the necessary tests to determine whether that major work and expense was necessary. The County had noted only one area around one window where there was a problem. Another major gaffe in his estimate was the $12,400 needed to raise the entire second floor ceiling. It turned out the area to be raised was only at the top of the stairs, and Countrywide's damages' witness said the cost would be $300.

While just these two items relate to the CO damage claims, they illustrate why the jury would be skeptical of any of Fenimore's cost estimates. That is not all, however. The Vaughns' presentation on damages was, at times, also confusing and unclear. They presented Fenimore's estimate of $67,545 at trial. Despite the example problems cited above, their post-trial motion blissfully repeats that total as support for the inadequacy of the Rispoli damage award as well as the award for CO needs. In addition, Fenimore's total includes other CO-related estimates, including bringing

plumbing up to Code ($1,070), bringing HVAC up to Code ($2,200) and bringing electric up to Code ($1,200). These items, alone, totaled $4,470. Since encompassed within the CO damages, the breach of contract damages would be that much less, too.

Of course, there were items which Rispoli was contractually obligated to provide. But, the cost of meeting those obligations was presented by a witness whose testimony was very flawed. Such flaws legitimately could cause the jury to question all of his estimates. Most of those estimates, however, were for items such as work around the fireplace, kitchen cabinets, cost of appliances, etc., which are not CO-related and costing in the hundreds of dollars, not thousands.

As part of their damage claim, Mr. Vaughn testified about an alleged agreement he had with Casale to provide additional landscaping over that required by the County. No writing, however, was introduced. The details of the apparent agreement were never provided. Most importantly, there was no evidence Rispoli was a party to any such agreement, whether oral or in writing.

As a follow up to Mr. Vaughn's landscaping testimony, the Vaughns presented Layaou to give his estimates to complete the work. He estimated $11,760 to grade, seed and sod. Countrywide's expert estimated to comply with the County Code $1,250 would be needed.

A completed driveway was clearly required on the Vaughn/Rispoli contract. Layaou gave the Vaughns an estimate of $4,794 to complete it. This estimate was not given to the jury, but the jury had evidence that $4,000 would be needed to complete it. Countrywide's expert did not mention anything about the driveway to the

jury. His report[51] has no expenses listed for the driveway. As noted earlier, that expert, Casula, in large part tracked the County's 1997 inspection report in estimating expenses. Separately, he lists a "Finish List." His estimate for those items is $13,625. The items listed are arguably ones which Rispoli was contractually obligated to do.

[51]**Countrywide Exhibit 2.**

The jury had this exhibit. It heard testimony and had documents which showed that, at a minimum, the only remaining items were an incomplete driveway and a missing handrail. The handrail was a CO matter. Fenimore's report,[52] as previously noted, listed items within the realm of things Rispoli was contractually obligated to provide. The jury was not obligated to accept everything nor even his estimates. Various items, Casula's Finish List and a few non-CO-related items on Fenimore's list easily support the award of $16,675. If the breach award is inadequate, it reflects, if anything, a failure of proof.

Finally, for perfectly understandable reasons, about a week or so after closing, neither Casale nor Rispoli were allowed in the house. Whether the Vaughns could or should have done anything to mitigate their breach damages was an issue. The issue of mitigation was submitted to the jury.

Finally, in a broad sweep, the Vaughns complain about two other damage issues. One is the Court's decision to bar a claim for lost rental income. The Court's decision was based on several factors, not the least of which was the speculative nature of the claim. The Vaughns have advanced no new argument or pointed to any evidence which would prompt the Court to revisit it earlier ruling.

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[52] **Vaughn Exhibit 7.**

Their second complaint is that the $30,000 punitive damage award against Rispoli is inadequate. Punitive damages are just that, to punish for particularly reprehensible conduct.[53] An element for the jury's consideration of such damages is the defendant's financial condition.[54] The Court concurs that Rispoli's conduct in connection with the house's construction and closing was reprehensible; mild, however, compared to Casale's. Rispoli does not, post-trial, argue otherwise. He is, however, a letter carrier. But, the Vaughns never explored the detail of his salary or other financial condition. The Court sees no reason to disturb the jury's award of $30,000 in punitive damages.

Verdicts Involving Countrywide

While Brodoway was absolved of liability to the Vaughns for malpractice, she was found negligent in her dealings with Countrywide. The jury, however, found Countrywide 59 percent contributorily negligent. Countrywide and the Vaughns argue these verdicts are inconsistent. Countrywide, however, merely adopts the Vaughns argument without more. It does not separately contend that the verdicts involving it and Brodoway should be overturned.

The focus of the claimed inconsistency is, therefore, how the jury could find Brodoway negligent in her dealings with Countrywide but free of malpractice as far as the Vaughns. First and foremost, the standards of negligence differed. One, the

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[53] ***Jardel v. Hughes*, 523 A.2d 518, 528-29 (1987).**

[54] ***Gannett v. Kanaga*, Del.Supr., 750 A.2d 1174, 1189-09 (2000).**

malpractice needed expert testimony, the other did not. Brancati said a lender is an "interested party" at closing but the lender is not the client.

Secondly, while disputed, the versions of whether Brodoway reviewed the lack of a CO and various options with the Vaughns was presented by those witnesses who actually spoke to each other. There was a more clear cut factual dispute to resolve on which hinged whether malpractice had occurred. The person to whom Brodoway spoke at Countrywide did not testify.

Thirdly, at Countrywide' request, Brodoway had written a letter to it prior to closing saying she would receive the CO "in the next few days."[55] Based on this and other things, it sent the money and mortgage package. She, however, never told Countrywide her side agreement with Casale about the CO by June 20.

These are separate issues and evidence with separate duties and standards of care. To find Brodoway negligent on them but not of malpractice is not inconsistent.

Damages

The Court has already discussed the Vaughns' argument about their own damage claims involving Rispoli.[56] Other damages were assessable and the jury awarded some of them. These damages are recoverable by both plaintiffs, however, and both contend they are inadequate or that other elements of damages should have been awarded.

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[55]Countrywide Exhibit 6.

[56]*Supra* at 35-40.

For the Vaughns and Countrywide, the jury awarded $44,301.55 in past due interest, $1.595.24 in taxes paid by Countrywide and $41,175 to bring the house up to County Code to get the CO. The jury chose not to award the plaintiffs anything for late charges on the mortgage.

The plaintiffs assert two primary arguments concerning damages. The first is that the award for Code compliance is inadequate. The second is that the Court erred in not allowing the jury to consider an award for the amount due on the note/mortgage. In that regard, they raise a companion argument that the jury erred in not awarding late charges on the mortgage.[57]

The plaintiffs' argument about the Code compliance damages is broad-brushed. They reargue the estimates offered by their damage witnesses. The Court has already reviewed in detail the conflicts, discrepancies and deficiencies in that evidence. The jury had estimates for a variety of things, some of it significantly conflicting in cost from the plaintiffs' own witnesses, which were supposedly needed to bring the house into compliance. Another difficulty the jury had was that the plaintiffs did not present a complete County inspection report. The one which was put into evidence said the

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[57]The late charges as of the time of trial were $2,359.60. This figure came from a Countrywide witness who also gave the two figures the jury did award for unpaid interest and taxes which had been paid.

inspection was "cursory."[58] Countrywide's own witness also said the Vaughns and the County could waive some of the CO deficiencies.

The verbal descriptions, the two videos and still photos presented to the jury clearly demonstrated substantial work was needed on this house. But, the asserted inadequacy of the damages awarded was in large part self-inflicted. The jury was given only a "cursory" inspection report. The damage testimony contained significant flaws. For example, the Vaughns' and Countrywide's primary damage experts each offered large estimates to remove all the bricks, put on tar paper and replace the bricks. Neither expert did what they should have done to verify that the vapor barrier was missing from all over the house. When their estimates for this particular repair, $25,000 and $23,000, are deducted from their totals, the damage estimates are significantly reduced. As noted earlier, their error in this regard provides the basis for the jury to question the rest of their estimates.

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[58] **Vaughn Exhibit 6.**

There were other discrepancies in the plaintiffs' damages evidence. In large part, therefore, the self-inflicted wound here is failure of proof. The jury was left in the position to do that which it is empowered to do, namely, to reject portions of a witness' testimony and accept others and harmonize.[59] Based on the problems in the plaintiffs' own testimony, the Court cannot say the award of $41,175 to achieve CO compliance is inadequate.

At trial, the plaintiffs objected to the Court now allowing them to get the principal on the note/mortgage. The problem with their argument then, and now, is in large part due to their alignment as plaintiffs. The Vaughns, specifically Mrs. Vaughn - the sole obligor - is not a defendant in an action by Countrywide for that principal. Countrywide has never sought foreclosure. The Court sees no reason to now change its prior ruling on this damage claim. If these damages are not recoverable, the jury's zero award for past-due late charges is but a logical extension.

CONCLUSION

For the reasons stated herein, the motion for new trial and/or additur of plaintiffs Catherine and John Vaughn is DENIED and the motion for new trial of plaintiff Countrywide Home Loans, Inc., is DENIED.

IT IS SO ORDERED.

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[59] ***Delaware Tire Center v. Fox*, Del.Super., 401 A.2d 97, 100 (1979).**

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