March 9, 2007

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Re: ***Thomas and Mary Ann Nelson v. W. Hull & Family Home Improvements and W. Hull & Family, Inc.***
C.A. No.: 2005-08-136

Date Submitted: February 9, 2007
Date Decided: March 9, 2007

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place on Monday, January 29, 2007 and Tuesday, January 30, 2007 in the Court of Common Pleas, New Castle County, State of Delaware. The Court concluded the matter with an *in camera* inspection and requested counsel to submit their closing statements and applicable law to the Court in writing within ten (10) days. Following the receipt of closing statements the Court reserved decision. This is the Court's Final Decision and Order.

I. PROCEDURAL POSTURE

On Plaintiffs' claims, the only question before the Court is whether Plaintiffs have proven by a preponderance of the evidence as plead in the instant complaint that they are entitled to Twenty Six Thousand Four Hundred and Ninety-Seven Dollars ($26,497.00) as damages plus incidental and unsequential damages plus pre and post judgment interest at the legal rate pursuant to 6 *Del.C.* §2301 et seq. for breach of contract, negligent performance, or breach of the

implied warranty of good quality and workmanship. *See*: Plaintiff's Closing Statement dated February 9, 2007. On Defendants' counter-claim, the only question before the Court is whether Defendants have proven by a preponderance of the evidence that they are entitled to Thirty-Eight Thousand One Hundred and Twelve Dollars ($38,112.00) as damages for breach of contract and/or unjust enrichment.

Plaintiffs contend that the parties were contractually bound by the provisions of two separate home construction proposals and that Defendants' actions did not meet either the terms of the proposals or objective standards of workmanship. Defendants deny that they have breached either the terms of the proposals or any objective standards of workmanship; countering instead in their counter-claim that Plaintiffs made changes to the original proposals that resulted in additional costs for which Plaintiffs are liable under either a contract or an unjust enrichment theory.

Counsel filed closing arguments pursuant to a Brief Order executed by the Court. The matter is now ripe for decision.

II. THE FACTS

Nearly two full days of detailed testimony were presented at trial, and after considering all the sworn testimony and documenting evidence the Court finds the relevant facts as follows:[1]

[1] The Court received into evidence the following items: Plaintiffs' Exhibit No.: 1 (Defendants' Exhibit No.: 1) – a copy of the April 15, 2002 Proposal; Plaintiffs' Exhibit No.: 2 (Defendants' Exhibit No.: 2) – a copy of the October 11, 2002 Proposal; Plaintiffs' Exhibit No.: 3 – Blueprints from Lee Smith Architects detailing the proposed construction; Plaintiffs' Exhibit No.: 4 – Photographs 1 through 53 showing the work performed on the Plaintiffs' house; Plaintiffs' Exhibit No.: 5 – a copy of a letter dated November 4, 2003 from Thomas Nelson to Wayne Hull of W. Hull & Family Home Improvements detailing deficiencies with the work; Plaintiffs' Exhibit No.: 9 – copies of invoices from Bradco Supply Corp. for windows; Plaintiffs' Exhibit No.: 10 – a copy of Wayne Hull's "Customer Owes" worksheet; Plaintiffs' Exhibit No.: 11 – copies of sample satin paint invoices; Plaintiffs' Exhibit No.: 14 – a copy of a February 17, 2003 invoice from Hosking Hardwood Flooring for $4,766.52; Plaintiffs' Exhibit No.: 15 – a copy of a February 25, 2003 invoice from Hosking Hardwood Flooring for $477.00; Plaintiffs' Exhibit No.: 16 – a copy of a July 28, 2003 invoice from Delaware County Supply for $100.17; Plaintiffs' Exhibit No.: 17 (Defendants' Exhibit No.: 10) – a copy of an April 7, 2003 invoice from Brosius-Eliason Co. to Hull & Family Home Improvements evidencing a $810.00 payment; Plaintiffs' Exhibit No.: 18 – a copy of a September 15, 2003 Invoice from Custom Porcelain for $99.00; Defendants' Exhibit No.: 3 – a copy of a May 14, 2002 New Castle County

It is undisputed that the parties entered into two written contracts; the April 15, 2002 Proposal and the October 11, 2002 Proposal (the "Proposals"). These proposals each contained language requiring the Defendants to "furnish materials and labor necessary for the completion of" the projects identified in the proposals. They further provided:

> All work to be completed in a substantial workmanlike manner according to specifications submitted, per standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate.[2]

The October 11, 2002 proposal memorialized work that had already been done; this work had been done without any prior written agreement between the parties regarding what would be

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Department of Land Use decision granting a variance; Defendants' Exhibit No.: 4 – a copy of an August 27, 2002 plumbing permit application; Defendants' Exhibit No.: 5 – a copy of plans for 2401 E. Mall dated August 27, 2002; Defendants' Exhibit No.: 6 – a copy of an August 27, 2002 HVAC permit application; Defendants' Exhibit No.: 7 – a copy of a New Castle County Department of Land Use permit issued May 20, 2002; Defendants' Exhibit No.: 8 – photos taken from a May 19, 2006 inspection of the Nelson home; Defendants' Exhibit No.: 9 – a copy of check dated March 1, 2003 from Nelsons to Steve Desmond for $3150.00; Defendants' Exhibit No.: 11 – a December 6, 2003 receipt from Lowes for evidencing a $203.61 payment for wood staining materials; Defendants' Exhibit No.: 12 – a copy of an August 19, 2002 invoice from J&L Building Materials, Inc. to W. Hull & Family Home Improvements for various wood materials; Defendants' Exhibit No.: 13 – receipts from MABPaints to W. Hull and Family Home Improvements from March 4, 2003 to April 17, 2003; Defendants' Exhibit No.: 14 – a copy of a May 2, 2003 receipt from Bradco Supply Corp. to W. Hull & Family Home Improvements for window trim; Defendants' Exhibit No.: 15 – a copy of an August 1, 2002 invoice from Bradco Supply Corp. to W. Hull & Family Home Improvements for various materials; Defendants' Exhibit No.: 16 – a copy of an August 16, 2002 receipt from Bradco Supply Corp. to W. Hull & Family Home Improvements for $1,309.00; Defendants' Exhibit No.: 17 – a copy of an August 30, 2002 receipt from Bradco Supply Corp. to W. Hull & Family Home Improvements for $1,530.82; Defendants' Exhibit No.: 18 – a copy of an August 30, 2002 invoice from Bradco Supply Corp. to W. Hull & Family Home Improvements for building materials; Defendants' Exhibit No.: 19 – a copy of an September 25, 2002 receipt from Bradco Supply Corp. to W. Hull & Family Home Improvements for $3,499.66; Defendants' Exhibit No.: 20 – a receipt from Louisiana-Pacific Corp. to W. Hull & Family Home Improvements; Defendants' Exhibit No.: 21 – a February 1, 2003 receipt from The Home Depot for $249.77; Defendants' Exhibit No.: 22 – an August 26, 2002 receipt from Lowe's for $643.79; Defendants' Exhibit No.: 23 – a February 9, 2003 receipt from The Home Depot for $69.91; Defendants' Exhibit No.: 24 – a June 25, 2003 invoice from Shone Lumber to Wayne Hull; Defendants' Exhibit No.: 25 – a copy of a January 2, 2003 receipt from Shone Lumber to Wayne Hull; Defendants' Exhibit No.: 26 – a copy of a January 2, 2003 receipt from Shone Lumber to Wayne Hull; Defendants' Exhibit No.: 27 – a copy of a January 30, 2003 receipt from Shone Lumber to Wayne Hull; Defendants' Exhibit No.: 28 – receipts dated July 10-11, 2003 from Shone Lumber to Wayne Hull; Defendants' Exhibit No.: 29 – an August 16, 2002 receipt from Rental Service Corporation to Wayne Hull; Defendants' Exhibit No.: 30 – a copy of a flyer for the ACRA House and Garden Tour dated May 15, 2005; Defendants' Exhibit No.: 31 – C-shaped wood; Defendants' Exhibit No.: 32 – wood trim; Defendants' Exhibit No.: 33 – clamshell trim; Defendants' Exhibit No.: 34 – ceramic tiles; Defendants' Exhibit No.: 35 – report from Preferred Inspections, Inc. regarding the Nelson home; Defendants' Exhibit No.: 36 – a copy of a report dated September 7, 2006 from Pollock Construction, Inc. regarding the Nelson home; Defendants' Exhibit No.: 37 – floor board; Defendants' Exhibit No.: 38 – pressboard floor; Defendants' Exhibit No.: 39 – light oak floor; Defendants' Exhibit No.: 40 – molding; Defendants' Exhibit No.: 41 – smaller molding; Defendants' Exhibit No.: 42 – Defendants Answers to Second Set of Interrogatories.

[2] Plaintiffs' Exhibits Nos.: 1 and 2.

done or how much would be paid. The original contract provided that the trim moldings for all doors, windows, and base moldings would be clamshell, and made no provision for either No. 1 or No. 2 pine. Thomas Nelson ("Nelson") had no expectation that he would be required to direct the work done on the proposals, and Wayne Hull ("Hull") as owner of Defendant W. Hull & Family Home Improvements never asked him to provide such direction or management, or to oversee that sub-contractor work.

Thomas Nelson testified at trial. He and his wife ("the Nelsons") desired a second story addition to their home located at 2401 E. Mall St., Wilmington DE. Although the Nelsons hired Wayne Hull to perform the majority of the addition, they also hired two other sub-contractors whom they knew previously from prior work. Wayne Hull originally agreed to be paid $130,000.00 for his entire portion of the job. In May 2002, shortly before work began on the addition, the Nelsons relocated to their second house in Ocean Pines, Maryland. Although the Nelsons were originally informed by defendants that the work would be finished in November 2002, the job ultimately lasted until April 2003. After being dissatisfied with several items, Nelson showed Hull the perceived defects for which he also took photographs.[3]

Although the contract provided for a floating floor system, the Plaintiffs at some point during construction decided to have "nail-down wood floors" installed. Nelson testified that the original proposal provided that Hull would both purchase and install the wood for the floors. However, when Hull told the Nelsons that he would be unable to get the wood for the price originally estimated, the Nelsons purchased the wood themselves from an online vendor with the expectation that Hull would subsequently reimburse them for the costs of the flooring.

Nelson testified that he paid Defendants for the electrical work at issue in the litigation. The electrical work was performed by Steve Desmond. On the other hand, Nelsons contracted

[3] Plaintiffs' Exhibit No.: 4.

with Sobieski Plumbing to do the plumbing work for the proposed addition, and paid Sobieski directly, not through the Nelsons. Although the original proposals only provided for electrical work to be done on the second floor, Steve Desmond performed electrical work on the first floor and basement sometime between July and August of 2002, ripping out sections of wall and ceiling. Nelson was unaware of this until after it had been done. Nelson wrote Desmond a check,[4] but believed that the money was only to cover additional costs rather than to cover work specified in the proposals.

After Nelson noticed some weather damage to the front door, he put on one coat of varnish. Although Nelson was capable of sanding out defects and applying varnish, he performed no other work on the door until over a year later.

Kristopher Calistro ("Calistro"), a general contractor, was a fact witness who gave testimony at trial. Calistro surmised that the wooden floors were cupped either because they had been nailed improperly or because the wood had not been left out sufficiently long to acclimate to the temperature and humidity of the house. He estimated that it would cost $5,000 to replace the floors. Calistro estimated that he would charge $470.00 for the retaping and retouching of the first floor bedroom. He observed that the front door was out of plumb and had not had a layer of finish applied to it. He recommended replacing the door, which would cost $1500 for the door and $800 for installation. Regarding the cracking grout in the bathroom, Calistro said that cement board should have been used for the subflooring instead of plywood. The grout cracking problem would persist because the plywood did not offer enough support to the tiles. Therefore, Calistro recommended redoing the floor entirely with cement board subflooring, for a total cost of $3500.00. Calistro said that the second floor square windows were at different heights, requiring the complete removal and resetting of one of the windows and additional

[4] Defendants' Exhibit No.: 9.

repairs to the exterior for a total cost of $1,100.00. Calistro testified that he would charge $950 in labor for various "touching-up" paint jobs around the lower level of the house. Calistro would charge a total of $100.00 to retrim the stairs. He noted that the stair posts didn't match the railing or stairs, and would cost $100.00 to repair. Regarding the drywall that was torn out of the basement, Calistro estimated that the ceiling in the large room would cost $500.00, the ceiling under the stairs would cost $150.00, and the wall would cost $100.00. He testified that five doors in the second story addition needed to be reset for a total cost of $1,000.00.

Brian Scanlan ("Scanlan") testified at trial. At the time of the construction he was employed by Sobieski Plumbing ("Sobieski"), which was in turn under direct contract with the Nelsons to furnish heating and plumbing to the addition. Scanlan said that Sobieski reported directly to the Nelsons, and was paid directly by them. Sobieski was responsible for setting the tub in the upstairs bathroom.

Michael Marshall ("Marshall") testified at trial. He was employed by W. Hull & Family Home Improvements to work on the Nelson home. Marshall testified that Nelson had made several changes to the original proposals, both as to materials and style.

Gyle Tatom ("Tatom") testified at trial. He was employed by W. Hull & Family Home Improvements to work on bathroom tiles in the Nelson home. Tatom testified that Nelson was dissatisfied with the appearance of the grout in the rough-edged tiles, and told Tatom to dig out some of the grout to give it a straight-line appearance. Tatom told him that this could expose the grout to moisture which could in turn lead to crumbling, but Nelson told him to dig it out anyway. After the foundation contractor cut an electrical wire, Nelson asked Tatom to install new electrical wiring even though this was not in the original contract.

Clayton Ridings ("Ridings") was admitted as a fact witness and testified at trial. He performed a visual inspection of the house and made suggestions for remedying problems.[5] Regarding the crumbling grout in the upstairs bathroom, Ridings said that the problem could be fixed by scraping out and redoing the grout at a cost of approximately $500. He also said that cement board rather than luan board was normally used as a sub-flooring for ceramic tile in a water area, but didn't know whether this might have caused the grout problems. Ridings said that the defect in the front door seemed to have been caused by the manufacturer, but admitted that Defendants as purchasers of the door were responsible for correcting the defect.

Robert Pollock ("Pollock") was admitted as a fact witness and testified at trial. He also performed an inspection of the Nelson residence and made suggestions. Pollock testified that the misalignment of the front door seemed to be caused by the manufacturer, although the adjustments made by the installer may have contributed to the problem. Regarding the drywall that was removed by the electrician, Pollock testified that electricians generally leave such work to be remedied by the general contractor. Pollock testified from his report that the larger ceiling area would cost $200 to repair, while the smaller ceiling area would cost $50. Regarding the ceramic tile bathroom floor, he also testified that luan plywood board like the kind Defendants ultimately used as the subflooring did not possess the same rigidity characteristics as other available sub-flooring materials such as cement board, but said that luan board was suitable.

Wayne Knotts ("Knotts") testified at trial. He testified that he performed work on the Nelson's home as a subcontractor for Defendants. Nelson had asked him about using an acid wash to clear away excess grout in the upstairs bathroom, but Knotts suggested using a light ash instead.

[5] Defendants' Exhibit No.: 35.

Mary Ann Nelson testified at trial. She said that she and her husband purchased the flooring because Hull had insufficient cash to make the purchase himself. Her prior deposition testimony indicated the Nelsons had also done this because they knew the nail-down flooring was more labor-intensive than the originally-planned floating floor and they wanted to accommodate Hull so that they could move back into their house as soon as possible. However, she said at trial that she and her husband did not agree with Hull that they would bear the ultimate cost of the floor.

Wayne Hull testified at trial. He testified that at the time of the first proposal, he anticipated that there would be some water damage to the Nelson's roof, but that as work actually progressed it became clear that the damage was more extensive. He told Nelson that the damaged areas would need to be replaced, but that no written change order was drawn up. He confirmed that the second proposal included some work that had already been done. Hull said that even before he contracted with the Nelsons, Nelson had already picked other contractors to work on the foundation and plumbing. Hull told Nelson that he didn't want to be responsible for supervising these other contractors, but that he had ultimately had no choice but to oversee Knotts' work since Nelson was never around to supervise.

Hull stated that Nelson had observed him making several adjustments to the front door and had ultimately said its alignment was satisfactory. Hull put one coat of stain on the door, but did not put a protective coat on the door.

Hull listed a number of extra tasks he had to perform without receiving compensation, but admitted that he never reached an oral or written agreement about this work and had never billed the Nelsons for it.

It is undisputed that the wooden floors installed by Defendants are cupped, a fact that is confirmed by testimony, photographs[6], and the *in camera* inspection. Calistro testified that the cupping was due to improper installation and that the floors would need to be reinstalled. As an alternative explanation, Pollock and Ridings opined that the cupping could have resulted from moisture in the house or from the manufacturer.[7] They also testified that the cupping could be solved by sanding down the raised edges of the wood. Calistro testified that such sanding might solve the cupping problem, but would leave visible differences in the cut of the wood's grain.

The evidence is also clear that two adjacent windows installed on the second floor were hung at slightly different heights, that the drywall in the first floor bedroom needed to be re-taped and painted in spots, and that the stair posts did not match the stair railings either in size or style.

The evidence and testimony showed that two French doors on the second level did not close correctly, and that at least one of them needed to be reset. Pollock and Ridings surmised that this problem was caused by the manufacturer. Likewise, the front door was slightly out of plum, probably arising from a manufacturer defect.[8] The front door also had no exterior seal coating to protect it from the elements.

Although the April 15, 2002 Proposal provided that the electrical work for the addition was "to be run per code for all residential," Defendants were not responsible for the hiring or payment of the electrician who worked on the house. Rather, Plaintiffs chose the electrician and paid him directly. Although neither proposal mentioned the basement walls or ceiling, the electrician partially removed the basement ceiling during the course of installation.

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[6] Plaintiffs' Exhibit No.: 4.
[7] See Defendants' Exhibits Nos.: 35 and 36.
[8] *Id*.

Both Tom Nelson and Wayne Hull testified that they understood what was required by the proposals' provisions requiring all changes including extra costs to be made only through written orders. Wayne Hull never submitted an invoice or request for payment to the Nelsons for any claimed extra charges

III. <u>THE LAW</u>

The question of whether a contract has been formed essentially turns upon a determination of whether the parties intended to bind themselves contractually. *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986). A court determining intention does so from the overt acts and statements of the parties, not from the subjective mind of either party. *Id*. at 1097. The party first guilty of material breach of contract cannot complain if the other party subsequently refuses to perform. *Hudson v. D.V. Mason Contractors, Inc.*, 252 A.2d 166, 170 (Del. Super. 1969). In order to recover damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract. *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, Del. Super., 251 A.2d 571, 573 (1969). Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred. *Delaware Limousine Service, Inc. v. Royal Limousine Svc., Inc.*, 1991 Del. Super. LEXIS 130, at *8.

At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. *Lowe v. Bennett*, 1994 WL 750378, at *4 (Del Super.). Whether a breach is material and justifies non-performance is a matter of degree and is determined by weighing the consequences in light of the contract. *Eastern Electric & Heating v. Pike Creek Professional enter*, 1987 WL 9610, at *4 (Del. Super.). Notwithstanding a material failure to perform, the

complaining party may, nevertheless, recover the value of benefit conferred upon the other party. *Heitz v. Sayers*, 121 A. 225 (Del. Super. 1923).

The standard for whether or not the Defendants performed their work under the contract in a good and workmanlike manner is "whether they displayed that degree of skill or knowledge normally possessed by members of their profession or trade in good standing in similar communities." *Shipman v. Hudson*, 1993 WL 54469, at *3 (Del. Super.). Furthermore, a "good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished." *Del. Civ. Pattern Jury Instructions* § 19.18 (1998). Moreover, a "builder who has performed work under a construction contract is nevertheless entitled to recovery despite the owner's dissatisfaction, if the work done is such that a reasonable person would have been satisfied by it." *Shipman*, 1993 WL 54469, at *3. Under this rule, the owner's satisfaction is determined by objective criteria. *Id*.

The elements for unjust enrichment are (1) an enrichment, (2) an impoverishment, (3) a relationship between the enrichment and the impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1056 (Del. Super. 2001). However, since the courts developed unjust enrichment as a theory of recovery to remedy the absence of a formal contract, the existence of an express, enforceable contract that controls the parties' relationship will defeat an unjust enrichment claim. *Bakerman v. Sidney Frank Importing Co.*, 2006 WL 392 7242, at *18 (Del. Ch.).

IV. OPINION AND ORDER

At the outset it should be noted that, while plaintiffs separately hired and paid their own contractors to perform the electrical work, installation of the concrete foundation, and installation

of the bathroom tub, neither Plaintiffs nor Defendants has brought these other contractors into the litigation. No third-party complaints were filed by the Defendants. Nor were these contractors brought into this litigation as co-defendants by the Plaintiffs. Therefore, this Court makes no decision regarding the work and/or damage done by these independently hired parties.

Plaintiffs asserted three claims against Defendants in this litigation: (1) breach of contract, (2) negligence, and (3) breach of the implied warranty of good quality and workmanship. The Court will address these claims in the same order.

First, the Court finds that Plaintiffs have met their burden of proving their claim for breach of contract. Having considered all the evidence the Court finds that the front door, the second-floor square windows, the drywall on the first floor bedroom, the basement ceiling and wall, the French doors, the stair railing, the trim on the circular windows, and the trim on the stairs were not completed in a substantial workmanlike manner and, as such, all constitute a breach of the contract by a preponderance of the evidence. Although the misalignment problems in both the French doors and the front door may have been caused by the manufacturer, Defendants were still obligated under the contract to furnish these items according to a "substantial workmanlike" standard, and so remain contractually liable for the correction of these defects.

However, Plaintiffs have not met their burden of proving that Defendants breached any contractual provision by failing to use No. 1 pine to conform with the house's existing wood style. The contract provisions did not require No. 1 pine. Likewise, Plaintiffs have not met their burden of proving that Defendants were contractually liable for the reinstallation of and damage to the bathroom tub, nor have they proven that Defendants were liable for the damage to the basement ceilings caused by the electrician.

Second, the Court finds that Plaintiffs have met their burden of proving negligent performance of several of the Defendants' responsibilities. Although the Plaintiffs changed their plans for the design of the staircase, the evidence clearly demonstrates that the Defendants failed to properly measure and properly cut the stairs by a preponderance of the evidence. Moreover, while Plaintiffs have not met their evidentiary burden of proving that Defendants were negligent in using luan rather than cement board for the bathroom floor, they have proven that some of the grout was negligently installed. Although Plaintiffs requested some modifications in the installation of the grout, the Court finds the grout was still not installed in a workmanlike manner or properly. However, after comparing the No. 2 pine installed by the Defendants with the house's other wood trim, the Court does not find that the Defendants' use of No. 2 pine was negligent.

Third, regarding the wooden floors, the Court finds that Plaintiffs have met their burden of proving that Defendants breached the implied warranty of good quality and workmanship in installing the floors by a preponderance of the evidence. Although Defendants presented some evidence that the cupping of the floors might have resulted from moisture in the house of from the manufacturer, the Defendants were in sole possession and control of Plaintiff's residence from July 2002 until the wood floors were installed in or about February 2003. Nor did defendants call the manufacturer to report or inquire about a moisture or cupping problem. Therefore, given the pervasive nature of the cupping problem, Defendants have not presented sufficient evidence to rebut the evidence of improper installation. The Court's *in camera* inspection, as well as the documenting evidence presented at trial, namely the photos, clearly causes this Court to conclude the floors need to be totally replaced and installed – sanding is simply not a viable option.

Plaintiffs are therefore entitled to compensatory damages sufficient to correct or replace the substandard work. Plaintiffs are also entitled to be reimbursed for the cost of materials they purchased which Defendants were required to purchase under the two Proposals.

Although Defendants breached their contract by not covering the front door with a protective coating, Plaintiffs had a duty to mitigate further damage to the door. Therefore, they are entitled only to $1,000 worth of damage rather than the cost of replacing the door entirely. These damages are for stripping, restaining and placing polyurethane on the door. In addition, the Court finds by a preponderance of the evidence, only two doors on the second floor need to be reset. The Court also finds that Hull is not responsible for the drywall repair in the ceilings (large room and understairs) as well as the basement wall because it was work performed by a subcontractor directly employed by the Plaintiffs with no purity of contract, or supervisory authority, with the defendants.

In total, the Court finds that Plaintiffs have met their burden of proving the following damages by a preponderance of the evidence:

Cost of wood floors	$5,243.00
Set of stairs	$810.00
Cedar boards for kitchen	$100.00
Repair front door	$1000.00
Re-install wood floors	$6,000.00
Regrout bathroom floor	$500.00
Re-set second floor square windows	$1,000.00
Touch-up trim around re-set second-floor square window	$100.00
Re-tape drywall in first floor bedroom	$470.00
Paint first floor bedroom	$950.00
Re-set two (2) doors on second floor	$400.00
Replace stair railing	$100.00
Re-trim stairs	$100.00
Total:	$16,773.00

As to the following claims, the Court finds that they were not proven by a preponderance of evidence at trial: the repair of the tub; costs to retrim first floor windows; retrim second floor windows; and re-wire living room outlet. The Court has already addressed the issue of the No 1 vs. No 2 pine: It was simply not specified in the parties' original contract and proposals. In addition, Defendants are not liable for rewiring the living room outlet as Defendants bore no responsibility for this work under their contract proposals.

As to the issue of consequential and incidental damages plaintiff has suffered, the Court takes judicial notice that there is a 125 mile distance between Ardentown and Ocean Pines and the federal mileage rate is $.44 per mile. D.R.E. 201. Counsel for the Plaintiff shall file an affidavit within ten (10) calendar days setting forth the mileage costs incurred during the delayed time of the contract performance caused directly by defendants misfeasance in performing the contract timely, not because of rotting wood or extra repairs by defendants. Defendants' counsel shall have ten (10) days thereafter to file a counter-response.

Judgment must be entered against Defendants on their counterclaim for breach of contract as they have not met their burden of proving the extra charges by a preponderance of the evidence were supported by either an oral or a written agreement. On the other hand, because there *was* a clear written contract between the parties stating that all extra charges would be executed only upon written order, Defendants' unjust enrichment theory is an inappropriate remedy and must fail by failing to establish at trial their claim by a preponderance of the evidence. In addition, paper trail or factual evidence presented at trial supported these claims by a preponderance of the evidence even absent the work done outside the parties two (20) written proposals. Defendant did not present any evidence for receipt of labor hours, invoices, and were

completely speculative in nature as to the damages. Counsel shall file their affidavits on consequential damages as detailed above.

Therefore on Plaintiff's claims, judgment is entered for Plaintiffs and against Defendants in the amount of $16,773.00 plus pre- and post-judgment interest and costs. 6 *Del.C.* §2301 *et seq*. On Defendants' counterclaims judgment is entered for Plaintiffs as these claims clearly were not established at trial by a preponderance of the evidence.

IT IS SO ORDERED this 9th day of March, 2007.

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John K. Welch
Judge

cc: Rebecca A. Dutton, Case Processor
CCP, Civil Division