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**Re:** ***Elizabeth I. Goodyear and Vicki L. Rollo v. John T. Hickman, J.T. Hickman Company, Inc. and John Fields***
**C.A. No.: 2002-04-123**

**Date Submitted: March 21, 2006**
**Date Decided: October 24, 2006**

**LETTER OPINION**

Dear Counsel:

Trial in the above captioned civil action took place on October 12, 2004, June 7, 2005, March 20, 2006 and March 21, 2006 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of evidence and testimony the Court reserved decision.

This is the Court's Final Decision and Order.

## I. PROCEDURAL POSTURE

On April 8, 2002 plaintiffs Elizabeth I. Goodyear and Vicki L. Rollo (the "plaintiffs") filed the instant civil complaint against J.T. Hickman Company, Inc., John Fields and John T. Hickman personally, alleging, *inter alia*, breach of contract (Count I); breach of warranty (Count II); violations of the Magnus and Moss Act (Count III); common law fraud (Count IV); and

consumer fraud (Count V). Plaintiff moved pursuant to Court of Common Pleas Civil Rule 56 for Summary Judgment against all defendants which was denied by Order dated April 16, 2003. In a separate Order dated September 3, 2003 this Court granted Defendant's Motion for Summary Judgment in favor of the individual defendants, John Fields and John T. Hickman. The sole remaining defendant in the instant civil action is J.T. Hickman Company, Inc., (the "defendant").

Counsel filed closing arguments pursuant to several supplemental briefing schedules issued by the Court.

## II. THE FACTS.

### (a) John T. Hickman's Testimony

At trial John T. Hickman presented testimony.[1] John T. Hickman ("Hickman") is the owner and president of J.T. Hickman Company, Inc. ("JTHC") since 1993. He employs several employees, including JoAnne Cilicato, who answers the phone; an employee who assists with his day-to-day operations, as well as an employee in the field who is basically a production manager whose duties are to prep the job, secure permits, order materials and schedule labor and jobs. Hickman also employs sales people.

JTHC also employs a sales person to meet new customers, and in the instant case, "sit down and go over the home remodeling job which is a sunroom in this case". JTHC also performs siding installation and installs replacement windows.

[1] The following exhibits were introduced into evidence on the first day of trial, October 12, 2004. Plaintiffs' Exhibit No.: 51 (Affidavit); Plaintiffs' Exhibit No. 32 (Stafford citing proposal); Plaintiffs' Exhibit No.: 11 (the Admiral plans); Plaintiffs' Exhibit No. 29 (the Malinowski affidavit); Plaintiffs' Exhibit No.: 39 (correspondence from Mr. Shachtman to Mr. Hickman); Plaintiffs' Exhibit No.: 40 (a facsimile to Mr. Flales): Plaintiffs' Exhibit No.: 50 (January 10, 2003 correspondence to Mr. Phifer); Plaintiffs' Exhibit No.: 63 (first core photographs); Plaintiffs' Exhibit No.: 64 (second core photograph). These were the Plaintiffs' exhibits. The defendant's exhibits which were either marked for identification or moved into evidence are Defendant's "A" for identification (building permit release form); Defendant's Exhibit No.: 7 (building permit release form received into evidence).

If a customer agrees to buy a sunroom following a sales presentation, JTHC presents a number of documents which are requested to be signed by the customer, referred to as a "formal contract" at trial.

Exhibit "C" was presented to Hickman which was the actual instant Formal Contract between JTHC and the plaintiffs, Elizabeth I. Goodyear and Vicki L. Rollo ("Goodyear and/or Rollo"). Hickman's employee, Gary Manco was responsible for estimating sales and was authorized on behalf of JTHC to enter into the formal agreement.

Exhibit No.: 8 was introduced into trial was a "assurance of lowest price certificate" which was given to plaintiffs.

Exhibit No.: 5 was introduced at trial and was a guarantee to the plaintiffs for their satisfaction or "money back". Exhibit No.: 5 had original signatures and outlined the conditions of the warranty in dispute at trial. Hickman presented testimony that normally a customer receives a copy of these specifications in their warranty. Exhibit No.: 7 was the "blue original" which was left with the customer and in this case, Goodyear and Rollo. It is referred to as a "blue original" Exhibit No.: 4 was introduced at trial and contained a different page on the back of it. Exhibit No.: 4, according to Hickman was a vinyl siding comparison sheet and the front side of Exhibit No.: 4 is allegedly identical to the guarantee.

With reference to Plaintiffs' Exhibit No.: 10, Hickman testified this is a "standard letter" from the JTHC, Inc. to customers for sunrooms. It outlines 28 steps to be taken during the performance of the contract. One of those steps was the "CAD drawings" which would be prepared during the contract process. Hickman provided specifications to Admiral who then prepared the CAD drawings. The CAD drawings are then required for submission to New Castle County for a permit.

During the time of the contract dispute in question John Fields was a sunroom mechanic and site supervisor. Hickman did not personally supervise the installation of the sunroom.

With regards to the Guarantee, the first step according to Hickman is that the salesman provides a copy of the Guarantee to the customer. Hickman testified at trial he has never had a claim filed on the Guarantee or had a customer dissatisfied to the point "we weren't handling the problem." If there was a problem with the work or Guarantee Hickman testified he would direct an experienced employee to "try to correct the problem" and he would also investigate in order to correct the problem. Hickman testified he has construction experience and a "construction background". In addition, Hickman presented testimony that John Fields was also experienced with sunroom installation and that Hickman "has been on job sites" with sunroom enclosures "ever since he was a young child". Hickman he has not constructed a sunroom in the last ten (10) years. In fact, Hickman testified that he has 'limited on-site experience in installing sunrooms" and has minimal time invested in the field actually supervising sunroom installation.

Hickman acknowledged at trial that Plaintiffs' made several telephone calls to his office about leaks in the sunroom and spoke with his secretary, JoAnne Cilicato for the past three or four years. The procedure of JTHC is that JoAnne takes the complaints and forwards them to Mr. Fields on his cell phone who then contact the customer. When she receives the complaint, JoAnne takes the name, address, phone number and places the same on a Word document or spreadsheet and then forwards it to Mr. Fields who "goes out in the field and tries to correct the problem".

Hickman agrees that when his company constructs a sunroom it is supposed to obtain the necessary permits from New Castle County. Once the permit is received from New Castle County a foundation and a necessary inspection of the footers is required to be conducted by New Castle County. Eventually, if there is any electrical work, an electrical inspection must also

take place through a formal inspection by New Castle County through a final inspection by New Castle County.

With reference to Exhibit No.: 53, Hickman acknowledged he participated in a Show Cause Hearing (the "hearing") before New Castle County. The hearing had to do with "construction being done on the Goodyear property without a permit being taken out." Hickman presented testimony at the hearing and a copy of the New Castle County decision was moved into evidence without objection by plaintiff. Hickman read in relevant part, the following language in the opinion;

> "At the hearing, the Department provided evidence that J.T. Hickman did not obtain a permit from the sunroom addition at this address. While the Department is in possession of a permit placard that allegedly covered this addition, a review of the placard reveals that it was falsified. The font type and location of some of the information on the permit was not the same as found on a permit issued by the Department."

Hickman acknowledged that he was aware that the homeowners/plaintiffs in the instant lawsuit alleged a fraudulent permit had been obtained as part of the plead Counts in the Complaint.

In additional, Hickman acknowledged that Malinowski was the employee of Hickman who was responsible for obtaining permits at the relevant time of the installation of the Goodyear and Rollo sunroom.

With reference to Exhibit No.: 29, paragraph 11 and 12, the second page of an affidavit was notarized by Hickman's counsel according to Hickman.

With reference to Exhibit No.: 5, the "Warranty Document", Hickman read into the record at trial paragraph no. 2 as follows:

> "For your protection, John T. Hickman Company, Inc. must be notified of your Complaint, in writing, by certified mail within thirty (30) days of the completion of the original installation."

Hickman did not open the mail at the time the Goodyear and Rollo contract was signed. His secretary JoAnne would have opened any mail from the plaintiffs complaining about the instant sunroom according to Hickman.

Hickman also acknowledged he signed an affidavit filed with the Civil Clerk in this action in April 2003, paragraph 15 with the Court which read as follows:

> "I at a loss to explain why New Castle County Land Use Department has no record of a permit having been obtained for the sunroom installation for the Goodyear-Rollo premises."

At trial, Hickman acknowledged that he didn't investigate whether a permit had ever been taken out by actually visiting New Castle County Land Use Department or talking to Mr. Malinowski personally notwithstanding he submitted the affidavit in this action.

With regards to paragraph 17 of the affidavit, Hickman read the language in the record which provided as follows:

> "I believe that I have done all that is reasonable in attempting to assure that an appropriate permit would be obtained prior to commencement of construction."

Hickman testified at trial that with regard to the factual basis for contesting the Goodyear/Rollo allegation they had been given a forged permit, he actually saw a copy of the placard of a permit that looked like an official permit to him.

With regard to paragraph 16 of his affidavit, Hickman also read the same into the record as follows:

> "I believe that I have done all that is reasonable in attempting to assure that an appropriate permit would be obtained prior to commencement of construction."

Hickman presented testimony at trial that he hired "an employee" that "pulls permits for jobs prior to beginning to work". It is their responsibility to "pull permits for work" that were

constructed to install. When Hickman signed the instant affidavit Hickman testified that he was relying on what his counsel informed him, as well as the fact that Hickman had a procedure "set up" and he had hired an employee who was responsible for pulling permits. Hickman testified that he also gave this employee a checkbook with monies to sign for the purposes of applying for permits and purchasing small miscellaneous items. Hickman testified that he had full confidence in this employee who was pulling permits and there was no reason for the employee not to pull permits.

Hickman conceded however that maybe Malinowski, who was the actual employee in question did not properly follow procedures in the instant case.

With regard to the procedures at New Castle County, Hickman testified that his employee fills out an application for the permit and pays $50.00. He also agreed that New Castle County may require a change in the plans before they approve the same and then they assign a permit number for every application. Once New Castle County has approved the plans it gives back the contractor a copy stamped with an approval stamp and the contractor receives a copy for their own records. Hickman acknowledged that he never found stamped approved plans for the sunroom in question and that there was a possibility that maybe the plaintiffs were correct and the permit was forged in the instant case.

With regard to Exhibit No.: 10, Hickman acknowledged it was a "Congratulation Letter" to a customer. At the bottom of the letter a list of key staff members of J.T. Hickman Company, Inc. is listed. One of those employees is JoAnne and she is described as a Customer Relations for JTHC and the employee who answers the phone in his office.

With regards to Certificates of Occupancy Hickman testified that it was his understanding that his company did not call in for the final inspection on the sunroom. Once JTHC received an order for a sunroom it then sends the applicable information such as room dimensions to

Admiral, the manufacturer of the sunroom. Admiral then produces "CAD drawings". Exhibit No.: 11 was introduced into evidence is such a CAD drawing for the Goodyear/Rollo sunroom. These documents are part of the permit application process.

Hickman was questioned about his sworn testimony at his deposition that took place in Mr. Shachtman's office on December 11, 2003. He acknowledged that the customers in this action, Goodyear/Rollo have paid all monies due under the contract "except $500.00". Hickman read into the record paragraph 4 of the warranty as follows:

> "If at the end of these ninety (90) days, J.T. Hickman Company is unable to reasonably satisfy your Complaint, you must replace our product(s) with another companies product(s) and make our product(s) available to J.T. Hickman Company or allow J.T. Hickman Company to its original condition."

With regards to a letter from counsel, Hickman acknowledged that plaintiffs have since tendered the remaining $500.00 on the contract and that, in part, would have satisfied qualifications number 1 of 6.

On cross-examination Hickman presented testimony as to Plaintiff's Exhibit No.: 5 and the qualification for a customer invoking the warranty as follows:

> "To qualify for this guarantee the following conditions must exist:
> 1) the job must be paid in full."

Hickman testified that the plaintiff's sunroom had not been paid in full since he never received the $500.00 from the plaintiffs. On January 10, 2003 he acknowledged receiving a letter with monies with reference to qualification number 2 for invoking the warranty. Hickman read into the record the warranty language as follows:

> "For your protection, John T. Hickman Company, Inc. must be notified of your complaint, in writing, by certified mail within thirty (30) days of the completion of the original installation."

Hickman presented testimony that the installation was complete in September 2001 and the last payment was September 18, 2001.

With regard to requirement number 3 of the warranty, Hickman provided testimony and read into the record as follows:

> "Guarantee covers defects in materials and/or workmanship on the window(s), door(s), siding or sunroom installed by J.T. Hickman Company, Inc. Defects in materials are correct according to product warranty."

Hickman testified he never received a notice or complaint in writing by certified may within thirty (30) days of the completion of the original installation.

Hickman also testified that with regard to Plaintiffs' Exhibit No.: 3, a letter from Mr. Shachtman dated March 5, 2002, that it was the first Notice of a problem with the sunroom. He claims this letter was outside the ninety (90) days to remedy to the complaint under requirement number 5 of the warranty which, Hickman read into the record:

> "If at the end of these ninety (90) days J.T. Hickman Company, Inc. is unable to reasonably satisfy your complaint you must replace our product with another company's product or make our product available to J.T. Hickman Company, Inc. or allow J.T. Hickman Company, Inc. to return your house to its original condition."

Hickman also testified that he was not allowed ninety (90) days following the written notice "an opportunity to correct the complaint". Hickman also testified the "qualification card" presented by a representative of J.T. Hickman Company, Inc. was signed. According to Hickman, the first signature was Terry Manco dated May 18, 2001 and the second was Elizabeth Goodyear and Vicki Rollo who signed the document.

With regard to Defense Exhibit No.: 6, the actual contract between the parties in the instant lawsuit. Hickman testified it did bear the signatures of Rollo and Goodyear and indicates the date of the acceptance of the contract was May 18, 2001 with a total contract price of

$27,000. Hickman agreed in the contract documents to tear out an old slab foundation and installing sunroom walls, projections, etc. 12x20 feet. The height of the walls was indicated at eight feet and the room was 13 x 21. There were also two sliding glass doors and Hickman agreed to rip out the concrete pad and install a new concrete pad that was 21 x 17, remove an aluminum awning and install a 20 x 12 sunroom with two sliding glass doors with an electrical package and ceiling fan. The height of the document according to the signed contract was eight feet and was checked on the upper left hand corner of the quadrant of the document.

With regard to Plaintiffs' Exhibit No.: 51, Hickman identified it as a decision of the Rule to Show Cause hearing held at New Castle County. In relevant part, Hickman read into the record that decision which, *inter alia*, his company "was surprised to find out the permit was not legitimate" and had subsequently fired the employee who was in charge of obtaining the permit.[2]

Hickman also presented testimony on cross-examination that he never received any warranty claims in the past from customers.

On re-direct examination, Hickman testified he has been President of the JTHC since 1993.

Hickman acknowledged that his employee Manco could have left with Goodyear and Rollo a separate customer copy of the warranty guarantee invocation documents because the same was used as part of a package of warranties. However, Hickman acknowledges that there is not a great deal of training given to Manco and other salespersons.

With regard to the Guarantee provided to Goodyear and Rollo, Gary Manco's signature appears on the back of the guarantee.

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[2] The decision also pointed out that J.T. Hickman was not able to produce a canceled check for the job or any other evidence that the permit had been issued. Hickman identified the fired employee as Malinowski who he had entrusted the responsibility of obtaining the permits.

**(b) Joseph Day, III Testimony**

Mr. Joseph Day, III ("Day") presented testimony at trial. Day manages the Permit Section in the Land Use Department of New Castle County and is the Land Use Administrator. Day has held that position for approximately one year and previously was employed by New Castle County as Assistant Land Use Administrator. With regards to obtaining permits for residential additions in New Castle County, Day testified that generally permits "are done on a walk-in basis for residential additions". Contractors are required "to come in for the permitting" unless the homeowner is actually performing the work themselves and they would then go through a pre-screening process. The customer then go through a "zoning review and the plans would be reviewed". If everything is in order the contractor would pay a fee and a permit would be issued. With regard to Plaintiffs' Exhibit No.: 51, paragraph 6, Day believed that after reviewing that document that the "placard" provided for the Goodyear/Rollo property at 26 Bellamy Drive had been falsified. At the time he provided his affidavit on February 25, 2003 the record of New Castle County Land Use indicated that there had never been an inspection of the foundation or a pre-slab inspection as the Goodyear/Rollo sunroom. If there had been an inspection by photograph, Day believed the photographs would have been in the permit file to document the same.

In paragraph 8 of his affidavit Day stated that the New Castle County Code requires the contractor allow the work to remain accessible and exposed for inspection to ensure that all codes are being met. Day's affidavit, as Plaintiffs' Exhibit No.: 51 was moved into evidence without objection.

On cross-examination Day testified that work that is exempt from permit acquisition requirement is set forth as subsection (c) of 603.012 of the County Building Code which requires a permit be obtained prior to the commencement of work. Day testified that there are exceptions

to that rule that provide in pertinent part that applications for permits for residential use in two-family dwellings and residential accessory structure may be made by the owner of the dwelling or a duly authorized agent when the owner is acting as the building contractor or if the owner intends to complete all the work himself.

Day also testified that the Land Use Department has established a policy of assessing a double permit fee in cases where permits should have not been obtained before the commencement of construction. When a contractor is given notice for a violation for commencing work without a permit Day testified a Rule to Show Cause may be issued by the Land Use Department. Day testified that it is a fair statement that the County Code contemplates situations where scheduling, inspections and getting permits may be out of sequence and they allow the owner/contractor to get the permit after the fact. The witness acknowledged that there is a remedy in these situations to correct the failure to get a permit.

Day recalls looking at the New Castle County Land Use records and determining that on July 25, 2001 a permit was issued by J.T. Hickman Company, Inc. for the Goodyear/Rollo sunroom.

Day also testified that he is familiar with a Building Permit Release Form. It is actually a check to make sure all the taxes are paid up to the date and accounting services are received. Day testified that the double permit fee assessed is to serve as a penalty for contractors avoiding initially getting the permit. The double permit fee is based upon the actual permit fee minus the zoning charge and minus the certificate of occupancy fee and would range from $50.00 to $100.00. The actual double permit fee would therefore range from $100.00 to $200.00.

**(c) Jeffrey Coon's Testimony**

Mr. Jeffrey Coon ("Coon") presented testimony at trial. Coon owns Stafford Siding Company which performs 'siding work, roofing work, additions, decks and general contracting".

Coon has been in the construction business for approximately 18 years. He identified Plaintiffs' Exhibit No.: 32 which was a proposal as to what it would cost his company to build an addition based upon the "specs of the patio enclosure at the Goodyear/Rollo property". Coon took measurements of what it cost "based upon size, the slider doors and windows".[3]

Coon offered testimony that the cost of replacing the sunroom at the Goodyear/Rollo residence on the existing pad would be $28,000.00. There would be an additional cost of $8,000.00 to finish the Unit as a new sunroom according to what Goodyear and Rollo wish to have installed.

On cross-examination, Coon testified that he is a licensed builder and has been a contractor for 18 years. Coon employs solely himself and "subs out work such as electrical, drain and plumbing". Coon was contacted by Skip Wample to provide the testimony. Coon has presented today the cost of producing and building a new sunroom.

Coon measured the core borings and used a tape measure at the Goodyear and Rollo residence. According to Coon, both of the core borings broke down towards the bottom two or three more inches and one piece was stuck in the bottom of the second core drilling and he "couldn't get it out". Coon presented testimony that it was basically stuck in the mud. According to Coon, the second core sample had a "piece on it" probably because there may be an inch or two that may be stuck in the bottom of the hole and he could not retrieve it. In his estimation, the boring was approximately six to seven inches of the concrete pad. For purposes of the record, the second core sample was approximately eight inches. Coon testified that drilled

[3] Mr. Shachtman proffered that these are the damages that plaintiff sustained in order to replace the sunroom.

the core samples two feet off the center of the pad and the location of the drill samples was provided to him.[4]

Coon further testified he found "only eight inches of concrete" in the location he was asked to drill. He did not check any footings. The New Castle County Code, according to Coon, requires the footings in a pad.[5]

On re-direct examination, Coon testified that normally New Castle County requires a vapor barrier below the stone concrete for drainage. This barrier prevents the concrete from cracking or freezing.[6, 7]

**(d) Vicki L. Rollo's testimony**

Ms. Vicki L. Rollo ("Rollo") was sworn and testified at trial. She resides at 26 W. Bellamy Drive, New Castle County for the past twenty years and is a plaintiff in the instant action. Rollo resides with Elizabeth I. Goodyear ("Goodyear"). Rollo began making final plans for building the sunroom and making savings for the last five years. Rollo estimated that it took 10 years to save the money for the sunroom. She is a computer room operator at Home Depot. Rollo desired a room mostly of glass and it had to be really well constructed. Rollo testified that she wanted an excellent product, "something like 3E windows." Rollo requested several vendors to come to the house, including Applebee, Patio Enclosure, as well as John T. Hickman.

Rollo met with Gary Manco of J. T. Hickman Company, Inc. and believed the selling points where J.T. Hickman Company, Inc did the job from beginning to end and "took care of

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[4] At this juncture, Mr. Shachtman noted that he was not proffering the witness as an expert witness but was describing the facts that he observed at the time he made the core samples.

[5] When questioned by Mr. Phifer, assuming the footers had been properly passed at inspection and there was eight inches of concrete that he observed in the pad, Coon testified that he would be able to build a new structure on top of the existing pad.

[6] If New Castle County found that no stone or vapor barrier was required he would say he would build the addition on the existing pad.

[7] Plaintiffs' Exhibit No.: 11, which was the Admiral's plan was moved into evidence without objection, as well as Plaintiffs' Exhibit No.: 29, the Malinowski affidavit. In addition, Plaintiffs' Exhibit No.: 39, Mr. Shachtman's letter to Mr. Hickman was moved into evidence without objection.

everything." This included the foundation. Rollo presented testimony that she had several meetings with Mr. Manco before signing the contract on May 18, 2001. Rollo explained the existing patio was there and you "needed to step down from the backdoor to the patio and she "did not want that for her sunroom". Rollo testified that she wanted to be able to walk right out to the sunroom without a step down. At the meeting Manco presented several documents for her signatures including Plaintiffs' Exhibit No.: 6, which was a contract.

With regards to Plaintiffs' Exhibit No.: 8 and Defendant's Exhibit No.: 4, Rollo presented testimony these were the actual Guarantees that she signed on the date Mr. Manco left with her on the evening of May 18, 2001. Her signature appears on the back of the document. Rollo testified that Mr. Manco did not leave her an original or a photocopy of the guarantee. Rollo said it was a "surprise to me" when she saw her signature and did not remember, in fact, signing the Guarantee. With regards to any discussion about the drainage system, Rollo testified that on her existing patio gutters drained into an underground drain system that had been installed in her side yard so that the water would drain off on the lawn.

On May 18, 2001 Rollo testified she received the CAD drawings which appear in Plaintiffs' Exhibit No.: 11. Rollo "probably saw them three weeks after the first meeting some time in June or perhaps June 14th." The ceiling height for the sunroom, according to the drawings, "was to be nine feet at the back wall and eight feet at the front wall". Rollo testified that the 9 foot height "was consistent with her understanding of what she was purchasing". The height was important to Rollo, she testified, because the roof is "supposed to be slanted because she has a relative that is very tall". Rollo testified she did not want her relative to have his head hit by the fans.

According to her conversations with JTHC and Gary Manco, Rollo believed that the existing walls would take ten (10) days from start to finish. Rollo was unaware that she was

being left "a different document then she had signed when Mr. Manco left" after the initial meeting. Rollo testified she paid everything due on the contract except $500.00.

Rollo also presented testimony that she video taped some of the job in progress which was then displayed to the Court.[8] Rollo provided testimony in detail of the progress where she observed at trial during the video playing. On July 30th at 7:15 the video showed siding being removed from the house. Rollo also narrated the testimony of the sequence of the footers being installed. Rollo testified she saw the concrete pad was poured eventually and the sunroom was constructed.

A copy of Plaintiffs' Exhibit No.: 28, which was a list of items she insisted on before Hickman left that she wanted be completed was entered on the record. John Field was on vacation and Rollo testified she gave the list to the JTHC employee named Dave Willis who assisted Mr. Field. This document detailed the problems she was having and Rollo wanted corrected before they left and completed the job. Rollo made "some complaints about leakage" and John Fields returned and brought another employee with him "who did caulking around the perimeter bottom of the sunroom". This JTHC employee, according to Rollo, took a screwdriver and made some holes in but that did not "cure the leaking". Rollo's recollection is that it rained September 4th and 5th and there was leakage in the sunroom.

**(e) <u>Roy Wample, Jr.'s Testimony</u>**

Mr. Roy Wample, Jr. ("Wample") was sworn and testified at trial.[9] He has 15 years experience "running his own construction business" and has additional experience working for

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[8] The Court reviewed the entire video tape.

[9] The following exhibits were introduced into evidence on the second day of trial, June 7, 2005. Plaintiff's Exhibit No.: 33 (Photographs); Plaintiff's Exhibit No.: 34 (drawing) ; Plaintiff's Exhibit No.:15 (building permit) ; Plaintiff's Exhibit No.: (handwritten notes) ; Plaintiff's Exhibits Nos.: 45 through 48 (Responses to Discovery) ; Plaintiff's Exhibit No.: 55 (photographs of the leaking) ; Plaintiff's Exhibit No.: 56 (photograph of Goodyear's nephew) ; Plaintiff's Exhibit No.: 5 (Letter from Shachtman to Phifer) ; Plaintiff's Exhibit No.: 62 (Supplemental Response) ; Plaintiff's Exhibit No.: 65 (first page of CAD drawing).

other contractors. Wample testified that he was "familiar with concrete slab work associated with building an addition onto a home". Wample went to the plaintiffs' home, took pictures, made drawings of his observations, and was shown the Admiral CAD drawings. Regarding Exhibit 11, Section A, Wample testified that whereas the CAD drawings described a cathedral ceiling whose lowest and highest points were eight and nine feet tall, respectively, his actual measurements at the Goodyear Rollo sunroom indicated that the ceiling as actually built was "fourteen inches short at the low end and six inches short at the high end". Wample opined that the CAD drawing in Section A gave the dimensions that the structure was required to be constructed. Wample testified that he took the photographs in Exhibit 33, and observed that whereas step flashing should only be used on a shingled roof, the roof in the picture had been sealed with step flashing and didn't have counter flash to cover the ends of the step flashing.

Wample testified that along with Jeff Kuhn performed two core drillings into the concrete slab of the Goodyear/Rollo sunroom. He found that there was no vapor barrier or stone beneath the concrete. Wample testified that without a vapor barrio or stone beneath the concrete, the clay consistency in the region can lead to water "coming up" through the concrete. This water, when it freezes, then can lead, according to Wample, to the eventual cracking of the concrete. Wample also testified that the core drillings revealed that there was an empty pocket underneath the concrete that could be the result of water erosion or the result of soil that had not been properly compacted prior to pouring the concrete. Regarding the photographs that JTHC had taken of the site prior to their monolithic pour, Wample testified that these photos showed that the form for pouring had been set up but that there was no sign that the construction site had been properly prepared with stone.

In observing, at the drawings of Exhibit 34 and the corresponding pictures of Exhibit 33, Wample testified that the step flashing had been exposed and according to his own experience

the step flashing had not been installed normally. Wample testified that the "wrong type of flashing had been installed which left potential for leaking". Looking at the top photograph on Page 1, Wample testified that the JTHC's attempts to prevent leaking by counterflashing the panels and walls together had not been successful because "they used very thin aluminum in a very wide piece of flashing". As a result, according to Wample, the aluminum "had quite a few ripples in it." Wample testified that JTHC had to "put quite a bit of caulking to stop the leaks in it." Wample testified that a minimum of caulk should be used because "it was a temporary solution that would break down over time."

After observing several photographs Wample testified the "same problem existed where the roof panels did not come out over the top of the wall". Wample testified that "the wall should have been lower and instead of the roof panels butting into the side of it, the roof panels should have overlapped it, so you would not have had to worry about trying to bend or make a large piece of flashing cover that complete area of the wall and the roof panel that keep it from leaking." Wample also testified that self-taping screws should have been used with a gasket on top of them to seal down to the aluminum without the need for caulk.[10]

In reference to the photograph on Page 4, Wample testified that the roof system was incorrectly built "in a way that that didn't allow drainage after a snowfall". Wample testified that had the roof properly overlapped the wall, "they would have been able to eliminate all that

[10] After observing the top picture on Page 3, Wample said the picture showed that the builders used old siding to put the sunroom onto the house, and tried to counterflash it. He said that they put the aluminum angle iron on the outside and then tried to cover up the edges of the siding instead of tying it in to the original house with the proper materials that you would use with vinyl siding. He said that the poor workmanship "did not stop the leaks at all" and had a poor cosmetic appearance. Regarding the bottom picture on Page 3 he pointed out the seams of the flashing didn't match up, which had a bad cosmetic effect. He then pointed out spots where, instead of flattening out the ripples in the aluminum, the builders just filled the ripples up with caulk. He said this was not a long-term solution.

flashing and caulk in the first place." This would have "helped eliminate leaking when it snowed".

Wample testified that because the sunroom's ceiling was lower than the CAD drawings, the only way to raise the height of the ceiling fan in the sunroom would be to replace the wall panels. Likewise, in order to put a proper stone and vapor barrier under the sunroom, Wample testified that "you would have to completely dismantle the sunroom to remove and replace the existing pad".

Wample testified further that to connect the foundations of a sunroom addition, a contractor would be required to drill holes into the original existing foundation. Sections of rebar should be tied into it, connected into that and laid on top of the new pad, so that when the new concrete is poured "it all locks together, so that you don't have any problem between frost or settlement." Wample also testified that there was "no sign that rebar had been used in this way to connect the house with the concrete pad".

Regarding the long-term effects of not using rebar to connect an addition to the house, Wample testified that where the soil was not compacted correctly, and where there was no underlying layer of stone, "there would be the possibility of the ground settling underneath the addition". Wample testified that Exhibit 11 indicated that the upper portion of the sunroom was attached to the house via number eight by half-inch screws that were fastened into a sort of C-channel that the roof panels were fastened. Wample testified that if this kind of attachment served a concrete pad with a roof, then there would be "some flexibility if the pad began to shift". However, Wample testified that if walls are put under the roof to form a three-season room, then the more rigid structure loses flexibility. Therefore, Wample concluded that upward or downward shifting of the concrete pad "would potentially tear the screws out or pull apart".

On cross-examination Wample testified that at the time he and Kuhn drilled for core samples in the patio, he observed hairline surface cracks in the concrete pad. According to Wample, the cracks were "around a foot in length" but he couldn't tell how deep they were. In relation to the twenty by twelve foot concrete pad, Wample testified he "oriented the drilling width-wise along the midline that was situated six feet from either side of the pad". Lengthwise, along this first midline, Wample oriented the drilling according to the other midline ten feet from either side of the pad. Wample then performed the drilling four feet on either side of this center point. The width of the core bearings was three inches. One sample was around eight inches deep and another sample was two or three inches shorter. According to Wample, Kuhn stuck his hand down one of the holes when trying to extricate the two-to-three inch piece that had broken off, and "realized that there was a little pocket underneath".

Regarding Plaintiff's Exhibit 6, Wample agreed that the document indicated that from the existing floor to the bottom of the soffit was ninety-six inches (eight feet). However, Wample also testified that the document did not give any determination of what the dimensions of the added room be. Wample testified that the measurement in Exhibit 6 indicated the height of where the fascia board was on the garage area, but "that this only indicated the starting point of the added room rather its final dimensions".

On re-direct Wample testified that he did not participate in the contract negotiations and would "not know of any changes that might have been made in the contract". Wample had never met Mr. Manco, the sales representative whose name was listed next to the measurements on the contract. Wample's understanding, from the homeowner's perspective, of what the measurements should have been was according to the drawing Section A, the interior of the ceiling should have been eight feet at the shortest side and nine feet at the tallest side. Wample identified the drawings from Exhibit 11 as the ones that had been faxed back to JTHC on May

30, 2001, after Hickman had put in the order to Admiral for the sunroom. Wample testified that if he were the contractor building the room, he would have used the CAD measurements to build the room "because the rooms are sent to the job pre-manufactured".

**(f) Elizabeth Goodyear's Testimony**

Elizabeth Goodyear ("Goodyear") was sworn and testified at trial. Goodyear testified that she resided at 26 West Bellamy, the property disputed in the lawsuit, and that she had resided there for twenty-one years. Goodyear testified that she discussed the dimensions of the sunroom with Mr. Manco and "had concerns about the height because she had a nephew who was six-foot four". In the current room her nephew could clear the ceiling fan under the sunroom by only one or two inches. Goodyear testified that she never had any discussion with the JTHC generally or with John Fields specifically about changing the dimensions or level of the floor pad. Nor did she and Rollo "ever agree to change the level of the ceiling or floor pad". Goodyear denied that she had requested any changes to the height in response to an operation she'd had on her knees. Goodyear testified that she requested that "the new pad come up to the backdoor, but was never informed by Mr. Fields or anyone else that this would have caused a lower ceiling height".

Goodyear testified that the first conversation she had with JTHC about the building permit was upon the destruction of her existing patio. After asking Fields "about it, Goodyear testified he gave it to her and instructed her to post in the window nearest the driveway. Goodyear confirmed in her testimony that the permit had been given to her by Fields rather than Malinowski.

After Goodyear discussed the proposed sunroom with Manco and signed the contract, she testified Manco "did the primary measurements on the existing patio," Goodyear testified Manco would have to get Malinowski to remeasure to make sure there "wouldn't be a problem with the

nine-foot to eight-foot." The first and only time she met Malinowski was when "the latter showed up on June 12, before the excavation". Goodyear later called a person identifying himself as John Hickman on August 13 to inquire "why it was taking so long to construct the room when, in her initial meeting with Manco, she had been told that construction would not take more than ten days if weather permitted". The person on the phone identified himself as Hickman who assured her "that the room would be done by the week of August 23". Goodyear testified that the room was not done by that date, in spite of the fact that the weather that summer was very dry.

Goodyear testified that while the work was being performed, her leg rehabilitation would take her away from the house for two hour periods, but that otherwise she was actually in her house observing the progress of the sunroom. Goodyear testified that while she was at home, she never saw anyone from Taylor Electric "or anyone else from the middle department" come by to perform an inspection of the electrical work. While the room was being done Goodyear testified she never saw a sticker on her breaker box "indicating that an inspection was done, although she did see one a couple of years later".

Goodyear testified that after the sunroom was completed "it had a leaking problem". She called JTHC and talked to JoAnne, a person named Dominic, Field, and Hickman. The problem was never corrected. Goodyear testified that she and/or Rollo called the JTHC a "total of approximately ten times", but the leaking was still not corrected and continued.

Goodyear identified Exhibit 55 as pictures taken of the sunroom and the leaking problem. Goodyear testified the pictures had been taken after she terminated her relationship with JTHC. She said that the photographs in Exhibits 55 and 56, and also the video shown on the first day of trial, accurately reflected the condition of her sunroom. She said that as of the current date, the leaking has not been corrected.

Goodyear testified that every time she called JTHC she was informed that Fields would call her. Although Fields did call her every time, Field did not actually come to the house each time. Goodyear testified that the one time Fields came out while she was there, "he asked for a piece of J-channel and tried to caulk around the base of the east extension wall JTHC had built (the one towards the pool), but that it still leaked". Goodyear testified said that Fields said that he would have to purchase more caulking, but that he never came back.

Goodyear testified that after the last time that Fields failed to appear when he said he would, she hired Wample as a general contractor to find out why JTHC couldn't fix the leaks. At some point after Wample came out, Wample informed Goodyear that he had reviewed the records at New Castle County and "that the permit she had posted in her window was a forgery". After that recommendation by Wample, Goodyear and Rollo were unwilling to let JTHC "do any further work in their home". According to Goodyear, "in the last four years she has been able to use the sunroom only as a thoroughfare to get to the backyard." According to Goodyear, her understanding was that by law she was not "permitted to use the room" at all.

Goodyear identified Exhibit 4 as a Satisfaction or Money Back Guarantee. Goodyear recognized the guarantee as the original, testifying that she remembered seeing the blue paper when Manco gave it to them. She said that the back of the Guarantee addressed Grant Sierra Thermowall Insulation and the guarantee "was the same as it appeared when she and Rollo received it, but that it said nothing regarding the steps to follow in enforcing a warranty". Goodyear testified that Exhibits 4 and 5 "were the same on the front, but were different on the backs". Goodyear identified the signatures of Rollo and herself on the back of Exhibit 5. Goodyear said that if she had seen the back side of Exhibit 5 before the lawsuit, "it was very quickly, as her signature was not even at the top part of the document but at the bottom".

Goodyear testified that JTHC "never told her of any steps to follow if she wanted to enforce the Guarantee".

Regarding Kuhn and Wample's testimony about the absence of stone beneath her foundation, Goodyear testified "that she didn't think the room would be secure and was probably going to tear it down". Goodyear would not retain the sunroom at the current height because she has tall people in her family and they "wouldn't be comfortable in there." Goodyear testified that she did not trust JTHC to make any repairs or changes to the house because "they couldn't take care of the problem when it happened back in 2001." Goodyear testified that she didn't think they could take care of the problem now.[11]

On cross-examination Goodyear testified that she had "never discussed raising the pad with Fields; rather, she said that their discussion merely addressed how the pad was supposed to come to the backdoor. "However, Goodyear testified that there was "never a discussion about any height of the room being shortened".

Goodyear identified Defendant's Exhibit 1 as being the same as Plaintiff's Exhibit 6—the contract between Goodyear, Rollo, and JTHC. Under the column that said "height," Goodyear identified the measurements written on the contract as being not a representation about what the agree-upon ceiling height would be, but rather the measurements that Manco had made at the time. Therefore, according to Goodyear, the measurement of ninety-six inches from the existing

[11] Exhibit 15 was entered into evidence without objection, identified by Goodyear as the building permit (dated 6/18/01) that Fields gave to her. Exhibit 31 was entered into evidence without objection, identified by Goodyear and Rollo's handwritten notes regarding requests for service calls to JTHC. Responses to Discovery were admitted without objection as Plaintiff's Exhibits Nos. 45 through 48. Photographs of the Leaking were admitted without objection as Plaintiff's Exhibit No. 55. In addition, the photograph of Goodyear's nephew was admitted without objection as Plaintiff's Exhibit 56. The letter from Mr. Shachtman to Mr. Phifer was admitted without objection as Plaintiff's Exhibit No. 58. Likewise, the Supplemental Response provided by defendants was admitted without objection into evidence as Plaintiff's Exhibit No. 62.

floor to the bottom of the fascia represented the existing condition. Goodyear testified that "there wasn't any discussion with Manco about attaching the ceiling to the fascia".

Goodyear said that she had worked for Avon for five years as a Utility processor, MAS.

Goodyear confirmed that the contractual price of the job was $27,000.00 and that she actually paid $26,500.000.[12] Goodyear conceded that there was no direct language in the contract that said to put in a pad that was level with the house. Rather, she testified she had a verbal agreement with Manco and Malinowski. She testified that Manco "agreed to it on May 18", but stated that he couldn't make it definite until he talked to Malinowski. When Malinowski came back with Manco on June 12, Goodyear testified that Malinowski stated that "it would not be a problem" and "they all agreed on the order change for the conventional wall". Goodyear testified she was given "no indication that, by increasing the pad height, she would lose ceiling height". She was testified she was given "no indication that the job would have to be re-priced to accommodate the same ceiling height, and had no expectation that this would have to be done".

Goodyear testified that prior to and at the time of contracting with JTHC to build the sunroom, the exit out to the awning and patio area had a step down of approximately four to six inches. In reference to Plaintiff's Exhibit 6/Defendant's Exhibit 1, Goodyear confirmed through her testimony that in the area labeled "existing conditions" the document indicated that she had approximately a ninety-six inch clearance.

Goodyear testified further that construction on the sunroom was completed on September 5, 2001. Goodyear admitted that she didn't make her last payment of $2,200.00 until September

[12] Goodyear also confirmed that she had knee surgery on July 5, 2001, subsequent to the signing of the contract. Goodyear testified that at the signing of the contract she was not incapacitated in any way, she was not on worker's compensation, and that she was working full time. Goodyear testified that she had been walking with a limp since she was thirteen, and that she had bracing on her leg when she was younger, but said that in her discussions with Manco she agreed that the patio was to come to the backdoor.

18. Goodyear held back $500.00 at that time because there were multiple things wrong--damage to the glider, damage to her fence, and the leaking room. Goodyear testified that when Field asked for the remaining money, she told him that she would hold it until things were done, and Field agreed.[13]

Goodyear reiterated through her testimony that the only indication the contract gives of the agreement to raise the level of the pad to the level of the adjoining house was where it listed number of steps as "n/a." Goodyear testified that she understood this notation to mean that there would be no step outside her door. She testified the only other proof was the oral agreement she had with Manco and Malinowski that the pad would be raised to the back door. Goodyear admitted that the written contract as presented before her did not indicate that the pad was to be raised to the level of the house.

Goodyear denied that Fields had ever come to the house and been told to leave, at least not while she had been present. Goodyear read into the record the following terms of the contract, found in Plaintiff's Exhibit 6:

> "I give permission to the Company to enter my property, and I agree to get permission for the Company to enter any neighboring properties, if necessary, so the Company can begin and/or complete its work according to this contract. I understand and both of us agree that if the Company is prevented from entering my property or any neighboring properties and cannot, therefore, complete its work, then the Company will have no further liability to me."

She said that as far as she was concerned, JTHC had from September 5 to January 9 to fix the problem, which they did not do.

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[13] Goodyear agreed that by September 18, the walls were up, the patio had been poured, the roof, windows and doors were done, fans had been put in, and a walkway was poured around the premises at no extra charge. In other words, the fans were at their permanent height even prior to her making the final payment. She admitted that, from the perspective of the contractor, the parties seemed to be in agreement about the way the structure had been built until it started leaking. She said that since neither she nor Rollo were tall, the height of the fans didn't seem like a problem.

In reference to Plaintiff's Exhibit 5, down below the registration card, Goodyear recognized her signature on the bottom portion, Goodyear testified that she and Rollo had executed the document in each other's company, but testified that she did not execute the above, customer's copy because she didn't have it in her files. Goodyear said she had no idea how her signature got on the bottom one.[14]

In reference to page 14 of her January 14, 2004 deposition, Goodyear confirmed that she had not sent any notice of claim of the warranty through certified mail, return receipt requested to JTHC. Goodyear confirmed that she "did not pay an additional price for the purchase of the warranty or guarantee that was associated with the construction of the sunroom". She read into the record pages 15 to 17, up to Line 12 of her deposition.

The defense re-read into the record item Number Two of the Guarantee Registration Card (concerning the certified mail and 30-day conditions of the complaint procedure) and then read into the record item number four: "J.T. Hickman Company, Inc. has ninety (90) days to remedy the complaint." The defense then read into the record item number five, which said that if at the end of these ninety (90) days, J.T. Hickman Company, Inc.

> "is unable to reasonably satisfy your complaint, you must replace our product(s) with another company's product(s) and make our product(s) available to J.T. Hickman Company, Inc. or allow J.T. Hickman Company, Inc. to return your house to its original condition."

Goodyear admitted that at the time her attorney sent the letter notifying the JTHC of her intention to rescind the contract of invoke the guarantee, she had already locked out JTHC.

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[14] Still in reference to Exhibit 5, Goodyear agreed that the job was to be paid in full as a precondition for the guarantee to exist. She said she tendered the remaining $500.00 after the lawsuit had already been initiated, when she was shown the agreement. She testified that she and Rollo signed the agreement but didn't retain a copy of it because Manco was the one separating the papers as they were signing them. She received the front part of the agreement but not the back part. It was only after the initiation of the lawsuit, after she became aware of the agreement, that she realized that she hadn't abided by one of the conditions and so tendered the $500.00. Regarding item two of the agreement, Goodyear said she hadn't made her complaint in writing, by certified mail, and within thirty days of the completion of the original installation because she didn't know of these procedures and would have followed them if the information had been available to her. She admitted that JTHC wasn't made aware of her intentions to invoke the guarantee until her lawyer sent out a demand letter.

In reference to Plaintiff's Exhibit 10, a letter from J.T. Hickman dated May 18, 2001, Goodyear confirmed that she "didn't have the CAD drawings at her disposal on May 18, when she signed the contract". Goodyear testified she signed the drawings. In reference to the second page of Plaintiff's Exhibit 11, Goodyear testified she recognized the document as the CAD drawings that Malinowski had brought to use and admitted that her signature was not anywhere on the document. However, Goodyear testified that she remembered signing the document because Malinowski said she had to sign off on the change order to construct the conventional wall.

Goodyear confirmed that JTHC had asked her to give permission to obtain a building permit to remedy the original, disputed permit. Goodyear admitted that she denied the request because, in light of the ceiling's wrong height, the lack of stone or vapor barrier, and the "garbage they had left behind before," she didn't feel comfortable letting them get a permit for something she "didn't feel was inspected."

On re-direct examination, Goodyear said that "there was nothing in the original contract regarding putting in a sidewalk or regarding the dirt that was excavated, but that both of these things were done". Goodyear testified that if JTHC had excavated her old patio they could have left the step coming down from the family room the way it was. Goodyear testified that JTHC built the pad to the height she wanted, and that neither she, Rollo, nor JTHC complained about the height of the pad—as far as she was concerned JTHC had complied with that part of the contract.

A CAD drawing was admitted into evidence without objection as Plaintiff's Exhibit 65. Goodyear identified this drawing as the one she was referring to in cross examination as the drawing she had initialed in a meeting with Manco and Malinowski, at the same time she signed

a change order for something completely different. She said her initials were her confirmation of the size of the walls that she and Manco had agreed to.

In reference to Plaintiff's Exhibits 4 and 5 (the two blue guarantee pages), Goodyear confirmed that Manco originally showed her this particular guarantee in their first meeting on May 18, 2001. Goodyear testified that later he left her with a blue page that said guarantee, and that she didn't have any reason to believe that the copy that he left wouldn't have on the back side the same information that she had originally been shown. Goodyear and/or Rollo "then put all the documents they had received in a folder". Then, five months later during their dispute over the quality of the work, she testified that there was nothing on the back of the guarantee in her possession that told her what steps to follow to enforce the guarantee. Whenever Goodyear made complaints to JTHC about the leaks in the room, JTHC sometimes sent Fields but never told her they "weren't going to act on her complaint because it wasn't in writing". Reading from the back side of the copy that JTHC kept, under the "conditions for obtaining performance," Goodyear testified she saw nothing in the requirements about sending a revocation of acceptance, although she said the "complaint was to be in writing".

Goodyear testified that her six-foot four nephew never visited her during the construction of the sunroom, nor did he come to her house before the end of the calendar year 2001. Goodyear confirmed that she and Rollo were five-foot three and four-foot eleven, respectively, and the fans were not an impediment to either of them. Goodyear didn't realize the ceiling was too low until Wample did his measurements.

Goodyear testified that, in the provision on the back of the contract that gave JTHC permission to enter the premises, "there was no language to the effect that she would have to keep letting them onto the property if they couldn't correct the problem after multiple visits". By the time Goodyear denied them permission, JTHC had "repeatedly just been trying to caulk the

leaking". After Goodyear had been told by Wample that the permit had been forged, she was not inclined to permit a company that had forged her permit to continue working on her premises.

(g) Christopher Reith's Testimony

Christopher Reith ("Reith") was sworn and testified at trial.[15] He is a professional engineer with Bachelor's and Master's degrees in civil engineering from the University of Delaware. He has been working as a registered professional engineer in the State of Delaware for approximately seventeen years. After *voir dire* he was qualified under D.R.E. Rule 702, without objection, as an expert.

Reith performed tests on the structural concrete application at 26 West Bellamy and prepared a detailed report of his findings. This report, a letter dated October 8, 2004, was admitted without objection as Defendants' Exhibit 1. His findings, as he recalled them and as they were set forth in the report, were as follows: he cored the floor slab, found that the concrete was thicker than required by the plans, but found no evidence of a vapor barrier or crushed stone at the location of the core. The soils that he found were considered to be well drained per the Code. Based on those findings and the intended use, no crushed stone was required under the slab per the Code, but a vapor barrier should have been present.

Referring to New Castle County Code § R506.2.2, Reith testified that to a reasonable degree of engineering probability that the structure "had sufficient integrity to merit passing inspection by the New Castle County Land Use Department".

On cross-examination Reith testified that, if stone were required, it would have been "improper to put it in some places under the slab and not others". Reith testified that crushed stone under a floor slab provides a capillary break to keep moisture from wicking up through the

[15] The following exhibits were introduced into evidence on the third day of trial, March 20, 2006. Defendants' Exhibit No.: 1 (Letter, dated October 8, 2004); Defendants' Exhibit No.:8 (pre-slab photographs); Defendants' Exhibit No.: 9 (Order Form); Defendants' Exhibit No.: 7 (Excerpt of the International Residential Code); Plaintiff's Exhibit No.: 53 (New Castle County Show Cause Decision).

soil under the concrete. Similarly, a vapor barrier stops water vapor transmission through the slab. If there is a wicking effect the water could freeze and expand in the concrete, Reith testified it would likely start at the top of the slab.

Reith classified the sand he found at 26 West Bellamy as "silty sand", but admitted that there was "nothing in his report verifying that the soil was sandy or silty".

On re-direct examination Reith testified that on his first visit to the site "he brought up a few pieces of gravel by reaching through the two existing core holes". Reith testified that based on the excavation photographs of the site, that it "would have been possible that the builders had filled the low perimeter with stone even if there were not stone present in the relatively higher center". This would account for the gravel found in one of the bore locations and the unevenness of finding gravel in other bore locations.

Reith testified that when he observed the Goodyear and Rollo construction, that he didn't "notice any evidence of wicking, cracking, discoloration, or water filtering up into the concrete surface". Even if there had been wicking, Reith testified that the problem "might be remedied by cleaning and sealing the pad, at a cost of between six hundred to a thousand dollars". Reith testified that if the pad had been in place since 2001 without showing evidence of settlement, cracking, or effervescence, "it probably isn't going to happen."

Reith further testified that "whereas the Code requires concrete to be three and a half inches thick, the core drillings indicate the slab was between six and a half to eight inches thick."

On Re-Cross Examination, Reith admitted that concrete serves a different purpose than stone, so that "it was not accepted engineering policy to simply substitute more concrete for drainage material".

Reith testified that he was provided copies of material delivery tickets from Hickman, but upon proffer by plaintiff's counsel that the defendants altered their documents including the

tickets, Reith testified he didn't know about any altered checks purporting to pay for the materials.

Reith admitted that he had not seen any photographs of "the prep work that showed stone". Regarding his testimony that the center was higher than the edges, Reith testified that based on the scale of the photograph the height difference was obviously several inches, but admitted that there were no rulers indicating height.

Regarding his theory that stone might have been poured around the outside but not as much in the center, Reith testified that at his own core location the thickness was eight and a quarter inches. He agreed that the plans called for four inches of stone. Therefore, if the center was even one to two inches higher, he allowed that there could or should have been two inches of stone. However, Reith reiterated that the only basis he had for believing that there was stone was based upon the delivery ticket. Reith also admitted that he did not test his theory by drilling any additional cores around the perimeter because he had already made a determination that stone was not required by the Code.

An excerpt from the International Residential Code was admitted into evidence as Defendant's Exhibit 7. Section R506.2.2 was read into evidence:

> "A 4-inch-thick (102 mm) base course consisting of clean graded sand, gravel, crushed stone or crushed blast-furnace slag passing a 2-inch (51 mm) sieve shall be placed on the prepared sub-grade when the slab is below grade. Exception: A base course is not required when the concrete slab is installed on well-drained or sand-gravel mixture soils classified as Group I according to the United Soil Classification System in accordance with Table R405.1."

**(h) <u>John Fields' Testimony</u>**

John Fields ("Fields") was sworn and testified at trial. He was employed by JTHC from July 2000 until April 2005 and was assigned to construct the sunroom at 26 West Bellamy in 2001. Fields was assigned to remove the existing pad at grade level, put in a new footed pad and

construct a studio sloped roof sunroom. Fields testified that he asked Goodyear if she would prefer the pad to be brought up to a level walking out of the house, and that she said yes as long as it would not interfere with the Code, height, ceiling fans and so forth.

Fields identified Malinowski as the superintendent in charge of pouring the concrete pad. Malinowski was responsible for obtaining the building permit and, to the best of Fields' knowledge, such a permit was obtained before work commenced.

Fields said that when he spoke with Goodyear about the ceiling height, the main concern was whether people would be hitting their heads on the ceiling fans. Fields confirmed that the plaintiffs had held back some money pending the repair of a damaged glider seat and fence. Fields didn't know if the glider ever got fixed.

After completion of construction Rollo and Goodyear contacted Fields about leaking issues, including a persistent leak that Fields said was "not uncommon." Fields testified he visited "three or four times for the leak, but didn't get it fixed". There was still an issue with the leak in December 2001. In mid-January Fields had to cancel a scheduled visit because of rain; called to reschedule but didn't hear back from the plaintiffs. Fields went by the house to try to reschedule but was told by Rollo that it was not a good time. He told Rollo to call him to let him know when would be a good time to come back, but instead got notification from an attorney two weeks later. He never refused to go back or provide service.

Fields testified that neither Rollo nor Goodyear ever complained about the height of the ceiling during the six to eight weeks while the addition was under construction. Nor did they complain to Fields, at any time prior to Fields' personal receipt of final payment.[16]

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[16] On cross-examination plaintiff's attorney impeached Fields with his affidavit of April 7, 2003, paragraph 8 in which he had said that it was Goodyear, not he, who had broached the issue of raising the concrete pad. Fields said he knew he was the one who had talked with her about the issue. Fields was unsure whether he or Malinowski had given the forged permit to the plaintiffs. He did not know the permit was forged until litigation had started. He said that inspections could not be done without a proper permit.

Fields identified Exhibit 6 as the contract for the job, and stated that he based his work off of the contract rather than off of any standard letter that JTHC might have sent to the customer detailing the steps to be followed. Fields did not try to look at plans approved by New Castle Count when he started the job, instead consulting the CAD drawings prepared by Admiral and signed off by the customer. Fields identified Exhibit 11 as the CAD drawings he had used for the job. Fields testified that he didn't make it a practice to look at the County approved plans to see if they required any modification, and that if he had it would have been possible for him to have seen that there were no County plans at the beginning of the project for lack of a permit.

Fields admitted that Exhibit 62, the check he had produced in response to a request for production, had been changed from the way the check had originally been written.

Fields also admitted that when he had talked to Goodyear about changing the concrete pad, there was no written change or addendum to the contract in spite of the contract's requirements that all changes be in writing. He said that such non-written changes were done all the time. Fields testified that Manco was the one who drafted the contract but that he never talked to Manco about the height. He said that whereas the contract showed specific heights, the CAD drawings did not show the specific height of the pad. He reaffirmed his deposition testimony that he had not discussed the height change with Malinowski, but said that Malinowski knew about it even though he was not present at the conversation.[17]

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[17] Fields said that the materials to build the walls came in standard heights that were then cut down. After litigation started he measured the sunroom's ceiling heights at different points and all of them were shorter than eight feet. He said he was not really sure offhand why he would have cut the walls down below eight feet. When asked if he was aware of a long list of Hickman Company projects for which a certificate of occupancy had never been obtained, Fields said he didn't know about it.
Fields never asked Goodyear or Rollo to measure the height of the ceiling to see if it complied with the contract, but said that Goodyear was "made aware that the ceiling was going to come down shorter when the height of the pad was being raised up."

Fields confirmed that he made approximately four house calls between September and December to fix the leaking, and that he did some caulking, re-caulking, and glazing. He said it wasn't until January that he was denied permission to continue.

Although he was the site supervisor, Fields "didn't have anything to do with inspections and didn't participate in any attempts to have the pre-slab approved". After litigation started Fields submitted another set of plans to the County that reflected the jobsite as actually built rather than the original heights of nine and eight feet.

Fields testified that later he participated in attempts to have the pre-slab approved by the County but couldn't recall whether he had told the County about the presence of absence of stone under the concrete. He believed he was the one who made the measurements and drawings that were given to the County, although he allowed that some of them might have come from Admiral.

On re-direct examination Fields testified he didn't know why Hickman stopped doing business with Admiral. Fields identified pre-slab photographs as pictures he had personally submitted for permit additions, and the photographs were then admitted without objection as Defendants' Exhibit 8.

In reference to Plaintiff's Exhibit 6, Fields testified that the Contract indicated a wall size and roof height of eight feet, and that in the event that the contract and CAD drawings differed, his practice was to build based on the contract. He said the purpose of the CAD drawings was to give the customers a layout of the room.

Fields had been in the Goodyear house but did not recall the ceiling height. He said he never showed the CADs to Rollo or Goodyear, and that the CADs were prepared after the execution of the contract.

Fields testified that in his conversation with Goodyear he had told her that bringing the pad up to the level of the house would result in a corresponding loss of ceiling height.

Fields said that to the best of his knowledge there was no legal basis or administrative ruling that the permit originally displayed was fraudulent, but stated that New Castle County did not recognize the original permit. When JTHC obtained a subsequent permit they had to pay a fine, but Fields said that obtaining a permit after the fact was not unheard of.

An order form for Admiral Sunrooms, dated May 5, 2001 and regarding the Goodyear project, was admitted into evidence without objection as Defendants' Exhibit 9. Fields testified that the form indicated a back wall height of eight-foot four inches and a front wall height of seven-foot six inches, while the second page indicated a six-inch step down from the existing house. He said that in order to get a wall height of eight-foot four inches, he would need to purchase a nine-foot piece and then cut it back to the final height while on-site.

On re-cross examination Fields testified he had never inquired into the height discrepancy between the CAD drawings and the contract, nor did he ask anybody—including the customer—which was the correct height. He confirmed that there was no indication that the customers saw the drawings in Defendants' Exhibit 9.[18]

**(i) Mark Spaciano's Testimony**

Mark Spaciano ("Spaciano") was sworn and testified at trial. Based upon voir dire and his testimony, he was deemed qualified under Rule 702 for the limited purpose as an expert for ordering generic sunroom materials and supplies. Spaciano testified that if a back wall dimension was eight-foot four inches, the unit size ordered would be nine feet tall, as normal industry practice is to round off to the next lineal foot to account for deviation. Based on the POA measurement in Defendant's Exhibit 9, Spaciano testified that all major sunroom

[18] The New Castle County Show Cause Decision was admitted without objection as Plaintiff's Exhibit 53.

manufacturers would automatically order a nine-foot projection wall. Spaciano testified that upon receipt of such an order form, a company would generate and send back CAD drawings to be approved. The dealer would get a sheet indicating the room's dimensions and the parts' dimensions in separate sections. Spaciano was not familiar with how such a sheet would be used in New Castle County. Spaciano testified that even if the installer wanted to submit the drawings to a governmental body for approval, a company like Admiral would not do the drawings with actual specs (instead of the next lineal foot) because that would go against the nature of their order form. He clarified that an order form was different from a CAD drawing; when an order form is submitted, the CAD drawing always shows the projection walls at the next lineal foot.

**(j) Richard Haslem's Testimony**

Richard Haslem ("Haslem") was sworn and testified at trial.[19] After *voir dire* he was admitted as a factual witness competent to offer testimony as to his opinion under D.R.E. Rule 602. Haslem had worked for JTHC for two years as a subcontractor. JTHC had him look at 26 West Bellamy an outside evaluator to see if the sunroom met the Admiral standards. Haslem investigated the nature and causes of the leaking and found that the sunroom itself had been installed properly. Regarding the first claimed leak source, Haslem testified that to prevent leaking at the side wall near the above ground pool he recommended digging down to the juncture of the conventional wall and the concrete pad, and then putting in stone in the area to make it more dry.

[19] The following exhibits were introduced into evidence on the fourth and last day of trial, March 21, 2006. Defendants' Exhibit No.: 10 (photographs); Defendants' Exhibit No.: 11 (inspection advice); Defendants' Exhibit No.: 12 (building inspection detail): Defendants' Exhibit No.:13 (Application for building permit); Defendants' Exhibit No.: 14 (Building Permit); Defendants' Exhibit No.: 14 (Letter from Phifer to Shachtman); Defendants' Exhibit No.:15 (Building Permit Letter); Defendants' Exhibit No.: 16 (Rule to Show Cause); Defendants' Exhibit No.: 17 (photograph of Hickman); Defendants' Exhibit No.:18 (Letter, dated August 13, 2003); Plaintiff's Exhibit No.: 66 (soil sample).

Haslem testified that second claimed leak source "he inspected was against the garage wall". Haslem said more could be done in that area and recommended that three layers of shingles on the garage roof be removed and additional metal flashing be put up and then reshingled. Haslem testified that the shingles were about an inch short of where they should have been on the overhang, and that it was possible that the water could have fed in through that area.

Another spot Haslem inspected was the flashing at the juncture of the house and the sunroom ceiling. Haslem testified that the flashing was "a little bit ripply" and needed to be removed and put back down in a way that reduced ripples. There was a need to "basically get back under where the problem was and re-caulk everything and inspect it to find out where the leak was coming from."

Regarding the claimed leak in the southwest corner of the sunroom, Haslem testified the area didn't look like it had been re-caulked and thought that caulking would have fixed the problem. Other than these observations he found nothing wrong with the construction.

Photographs that Haslem took at the time of his inspection were admitted without objection into evidence as Defendants' Exhibit 10. Photo sixteen showed the southwest corner and demonstrated a standard installation of the structure. Likewise, photo eighteen showed the southeast corner where the room attached to the garage and showed a standard installation with no apparent problems. Photo thirteen showed the height of the room as ninety-three inches at the high point against the house. Photo fourteen showed the corner where the garage intersects the existing home and shows a height of ninety-three inches. Photo ten showed the ripples on the roof that would lead to leaking, which Haslem identified as the "first place to open up and redo and check for problems." Photo eleven was another measurement picture that showed the lower corner of the sunroom to have a height of ninety inches. Photo twelve showed the other low

corner of the sunroom at the intersection of the garage and sunroom, with a height of approximately ninety inches. Photo seven showed the section of the roof where Haslem testified it would be helpful to provide proper overhang and put on another layer of counterflashing. Photo five showed the back of the conventional area of the room where a piece of siding had come off. Haslem testified the siding probably wasn't attached properly and ideally would have been Tyveked which would allow moisture to pass through while blocking air. He testified that if the siding were allowed to be "roughed off" it would mean continued water problems in the room. The photo also showed that the intersection of the house with the conventional wall portion of the sunroom had been caulked but that without siding the caulk still left a gap that would allow water to blow in.

When Haslem made his inspection in 2003, he estimated that the leak at the juncture of the house and sunroom ceiling would cost $125.00 to repair. For the leak along the house wall near the pool he recommended digging down approximately sixteen inches, making sure that the surface was dry and could be adhered to, and then putting in a rubber membrane. Haslem also recommended putting a stone base around it, which would have to be Tyvked, and then putting siding back on. In 2003 he estimated that this would cost $335.00 but guessed at the time of trial that it would now cost fifty percent more. He also estimated that the leak at the garage sunroom juncture, which would require counterflashing and reshingling, would have cost $175 in 2003 and roughly fifty percent more at the time of trial.[20]

Haslem's general evaluation of the sunroom's construction was that the sunroom itself had been built to standards, but had problems in the custom connections to the house and wall.

[20] Haslem testified that the plywood exposed by the torn off siding did not look bubbled at the time of his inspection, but that moisture combined with exposure to sun could cause future bubbling or separation of layers.

He said there were definitely some problems and things that could have been done better, but that they were repairable.

On cross-examination Haslem testified that he conducted his inspection sometime between June or July 2003, about two years after the work had been done. He said that the siding should not have detached during that time period, so it wasn't done in a workmanlike manner. He also said that Tyvek should have been put under the siding originally, so this was also not done in a workmanlike manner.[21]

Regarding photographs nine and ten, Haslem testified that the ripples in the metal were obvious and aesthetically bad, but that the metal might still be water tight. Haslem testified that filling the ripples with caulk was not the best solution for larger ripples like the ones in the photograph.

Haslem agreed that his ability to diagnose any leaking problems was impeded by the dry weather, since it would have been best to duplicate the situation in which the leaking occurred.

Looking at photograph ten, Haslem testified the lack of Tyvek or waterproofing at the leak spot was not up to New Castle County standards that that it wasn't done in a workmanlike manner. Haslem testified that if two or three caulking attempts did not fix a leaking problem, additional caulking would not be the solution.[22]

On re-direct examination Haslem testified that he was not aware of any New Castle County requirement that would require the outside wall to be Tyveked, nor was he aware of any

[21] Regarding the roof, he said that even with self-sealing gaskets his practice was to apply caulk as a quick, extra precaution. He said that the shingles on the abutting garage roof needed to be peeled back because the first, bottom layer had shingles that were too short. In spite of the metal that was put there, he said an overhang was necessary to allow water to drop off instead of merely rolling down the surface. Haslem said that step flashing should not have been used as counterflash, and that the counterflashing would have been better if a continuous piece of metal were used instead of smaller, individual pieces. The flashing was therefore not performed in a workmanlike manner.

[22] Haslem remembered having a discussion about stone but couldn't remember the details. He confirmed that putting stone beneath the concrete pad would first require the removal of both the sunroom and the pad. He said that material costs in construction had generally gone up fifty percent since 2003. He said fifty percent might be a little high depending on the nature of the project and the materials to be used.

requirement in the contract between the plaintiffs and JTHC that would require Hickman to Tyvek the back wall. Regarding the shingles that were too short, he also said that he had no knowledge that JTHC had put on the shingles or was contractually required to do so. He also said it was possible the rippled metal in the roof had been smoother when it was put down, and that the subsequent ripples might have been caused by heat expansion. Haslem testified that the difficulty of rolling out and bending a long piece of metal over an uneven surface made ripples almost inevitable.

On re-cross examination Haslem said that, hypothetically, if the contractor installed more caulk under the ripples than he did the rest of the aluminum, it would indicate that the contractor knew of the rippling. He agreed that the aesthetics of the metal could be important to the customer if the roof were visible from the ground. He also admitted that he didn't know what happened to the damaged siding, and that severe wind was just one possibility.[23]

**(k) John T. Hickman's Recalled Testimony**

John T. Hickman ("Hickman") was already sworn and testified at trial. Referring to Plaintiff's Exhibit 6, Hickman testified the contract indicated concrete pad dimensions of twenty by twelve by eight feet, and roof dimensions of twenty-one by thirteen by eight feet. The roof dimensions in relation to the pad dimensions indicated that the roof would overhang the walls by a foot. The dimensions also indicated that the height of the sunroom walls were intended to incorporate the house's existing conditions, which was also shown in the contract. Mid-way through, on the right-hand side, the contract showed that one of these existing conditions was a ceiling height of ninety-six inches. The contract, signed by Goodyear and Rollo, gave either buyer the right to rescind the transaction any time prior to midnight on the third business day

[23] On re-direct examination Haslem could not recall any indications that the ripples were present upon installation. He said he didn't recall whether the ripples had been there or not.

after the date of the of the transaction. The contract charged $27,000.00 for the provided services.

Referring to the back of the agreement, Hickman explained that the workmanship warranty stipulates that if JTHC made a mistake on a job and the customer finds it within a five-year period, JTHC is obligated to come back and correct the problem, provided that the customer allows access to the worksite. Hickman explained that the company's liability under the warranty could not exceed the contract price.

In reference to Defense Exhibit 9, the Admiral Sunrooms Enclosure Order Form, Hickman testified that the document's purpose was to provide the manufacturer with information and measurements related to a jobsite in order to generate a package from the manufacturer which would indicate building materials, drawings of the room, installer's layout information, and everything required to build a sunroom. The order form showed an existing back wall height of eight-foot four inches, another circled existing condition of seven feet, and seven-foot six listed in connection to a front wall of a sunroom to be built there. The existing condition language is critical to make sure that the builder has sufficient material to construct the addition and tie it properly into the existing structure. He said that the existing conditions of the building would affect or limit the potential wall and ceiling heights of a sunroom addition. In the Goodyear/Rollo residence, the sunroom would have to tie into the existing eight-foot four wall height. Once the order form goes to the manufacturer it comes back to the contractor as a package that includes a bill of the actual lineal footage materials required to build the room. Also included in the package are installer layouts, diagrams that show the requested heights and dimensions of the walls that are going to build the room.

During the construction period Hickman testified he received a call from Goodyear to complain about how much time the job was taking, but she did not express dissatisfaction about

the quality of the work or attempt to invoke the warranty. Hickman continued to receive payments on the room as scheduled, with the exception of the $500 withheld from the final payment for damage to a glider chair. Hickman did not authorize this withholding, nor did he ever refuse to service the completed Rollo/Goodyear sunroom. Subsequent to the completion of the sunroom, Hickman never personally received any complaints from Rollo or Goodyear.

Hickman testified that he did not become aware of any problems with the permit's authenticity until litigation had started. Hickman testified that it was not his practice to commence work without first obtaining a permit. At the time, Andrew Malinowski was the employee responsible for getting the permit on the Rollo/Goodyear residence. After he became aware of the permit's disputed authenticity, Hickman attempted to apply for another permit, but the plaintiffs did not grant him permission to do so.

**(l.) Joseph Caruso's Testimony**

Joseph Caruso ("Caruso"), a certified building and site inspector for the New Castle County Department of Land Use, was sworn and testified at trial. Caruso inspected 26 West Bellamy Drive on September 23, 2003 and gave the sunroom a "partial pass"—the sunroom passed the pre-slab and footing inspections, but noted some problems with leaking and flashing that had to be fixed before the entire structure could be certified. Caruso's Inspection Advice and his Building Inspection Detail were admitted into evidence without objection as Defendant's Exhibits Nos. 11 and 12, respectively.

Caruso testified that a certificate of occupancy ("C/O") could not be issued until the following problems were fixed: There was the step flashing on the left side of the roof adjoining the house was improperly caulked and could lead to future leaking. Some flashing on the peak was unfastened and leaking across the peak. The seal plate was leaking from improper grading in the rear of the sunroom. The siding that had come off needed to be repaired. Lastly, the

structure needed an electrical inspection. He said that the Rollo/Goodyear residence was properly permitted in August 2003, but that since then the original permit had expired and the structure was technically in violation. The permit could be extended for sixty or ninety days, at the option of a code official, by filling out an application, paying a fee, and explaining the reasons for extension. Caruso testified that extensions are usually granted and can be obtained twice.

An Application for Building Permit was admitted into evidence without objection as Defendants' Exhibit No. 13. Caruso testified that once a permit is issued it expires in either six months or a year. He said Exhibit 13 had been issued on August 22, 2003. The Building Permit itself, also issued August 22, 2003, was admitted into evidence without objection as Defendant's Exhibit No. 14.

Caruso testified that when he went out to the sunroom, the plaintiffs "expressed concern that the building was not the height for which they had contracted with JTHC". They showed him the "old, first drawings" that showed a height of eight feet rather than the actual height, which Caruso believed to be seven-foot ten inches. Caruso testified that their biggest complaint "was about the height, specifically the height of the peak where it came into the house, because it wasn't the same as the original documents they had". The plaintiffs also told Caruso that the plans the County approved for the 2003 permit were a little different than the plans they had signed earlier. Caruso couldn't recall them complaining about anything else, explaining that he found the other defects in the course of his inspection.

On cross-examination Caruso testified he didn't pass on the pre-slab or the footers at his inspection because they were covered up and he couldn't see if they had been done correctly or not. He also confirmed that the County inspection was concerned with whether or not the

structure conformed with the plans that had been submitted to the County, and that any discrepancy between those plans and an earlier contract were not the County's concern.

On re-direct Caruso testified that, subsequent to his inspection, the footers and pre-slab had passed County inspection. In passing on these things, the County accepted a third party inspection provided by Geotech, which is a normal procedure.

On re-cross Caruso testified that third party inspections still have to show that the property meets County requirements. Caruso testified that depending on the type of soil, the minimum County requirements for a pre-slab are four inches of stone, six millimeters of poly, and three and a half inches of concrete. Looking at Defendants' Exhibit 6, the report of the third party inspection, Caruso read that no crushed stone or poly barrier were observed at a depth of approximately twelve inches below the bottom of the slab. The report said that the soils below were generally medium dense, stiff based. He said that "medium dense stiff" would be the determination of the Geotech inspector, normally made simply by grabbing a handful of soil and feeling with one's hand whether the soil had good drainage characteristics. He said that he could sometimes make this determination himself but that he generally deferred to the expertise of a third party like Geotech.

Reading New Castle County Code Section 6.03.011(b), Caruso confirmed that a New Castle County Code inspector cannot waive a requirement of the Code, although a Code official could. Caruso testified that a man named George Haggerty was the only Code official at the county. However, Caruso testified that if something met the intent of the Code he would probably pass it. The intent of the Code for stone is to address drainage, while the intent regarding vapor barriers is for water seepage. If stone and a vapor barrier were left out, extra concrete would not take their place in terms of the Code's intent.

Caruso read aloud New Castle County Code Section 6.03.011(l):

> "Wherever there are practical difficulties involved in carrying out the provisions of this chapter, the Code official shall have the authority to grant modifications for individual cases upon application of the owners or owner's representative, provided the Code official shall first find that reasons make a strict letter of this chapter impractical, the modification is in compliance with the intent and purpose of this chapter, and if such modification does not lessen health, accessibility, life, fire, safety, public welfare, or structural requirements."

In light of this passage, Caruso admitted that he, not a Code official, had approved the pre-slab in September 2004. He also admitted that the application in this case was from the contractor rather than the property owners, and that he had not contacted the owners to see whether or not they joined in the request.

**(m) John T. Hickman's Recalled Testimony**

John T. Hickman ("Hickman"), having been previously sworn and still under oath, gave additional testimony. In reference to Defendants' Exhibit 1, he explained that the "Access to the Location" provision was put in the contract because without access to the property he would be unable to fix any problems.

Regarding Plaintiff's Exhibit 5, the qualifications that go with JTHC's workmanship guarantee, Hickman testified that the plaintiffs did not notify him of their complaint—and/or intent to invoke the warranty—in writing by certified mail within thirty days of completion of the original installation. In reference to the provision giving JTHC ninety days to remedy the complaint, Hickman said that this time period would be measured from the time that the company received written, certified notice of the complaint. The purpose of the certified notice requirement is to ensure that the company actually receives the complaint and to bring the

complaint directly to Hickman's attention. If a complaint were brought to his attention, Hickman said that he would become more involved in addressing it.[24]

Hickman identified Plaintiff's Exhibit 41 as a letter his attorney, Mr. Flail, had sent to plaintiffs' attorney, Mr. Shachtman. Hickman read the letter into the record, saying in relevant part:

> "My client [Hickman Company] will honor its warranty, a copy of the Qualifications for which is enclosed. Your clients have breached conditions 1 and 2, have not afforded Hickman the opportunity to cure in 4, and have not followed 5. When representatives of Hickman have attempted on several occasions to arrange to get into the premises without success, each time they were told it was not convenient or some similar excuse. The building permit was not falsified. At most, there was an inadvertent error. The building inspector was not confused. The specifications were followed, and we have pictures, prior to pouring, footings and foundation work, which were provided to the County."

Hickman never refused to service the plaintiffs' sunroom, either in his corporate or his personal capacity, nor to the best of his knowledge did any other employees of the company refuse to provide such service. He said he only found out about the disputed building permit during litigation and that it took a long time to get a second permit because Goodyear and Rollo would permit them to obtain one.

A letter dated July 1, 2003, sent from Hickman's lawyer (Mr. Phifer) to Shachtman was admitted into evidence over plaintiff's noted objection that the letter was irrelevant. It was labeled Defendants' Exhibit No. 14, not to be confused with the Building Permit that shared the same exhibit number. Hickman read the following passage into the record:

> "As I indicated, my clients want to do the right thing here. I again request that you grant us limited agency for the purpose of obtaining a remedial permit from the County and allow us to schedule an inspection. After that, if your clients still wish to raze the building, my clients will have no objection."

[24] Hickman said that his first notification that plaintiffs were unhappy with JTHC's work was when he received a letter addressed to him and dated March 5, 2002. Since the work was completed in September 2001, this letter arrived well over ninety days after the completion of work.

Another letter from Phifer to Shachtman, labeled Building Permit Letter, was admitted into evidence as Defendants' Exhibit No. 15. Plaintiff's objection of irrelevance was noted. Hickman said it was a letter requesting authority to obtain a building permit.

A "Rule to Show Cause" letter dated August 5, 2003 and drafted by inspections manager James H. Edwards was admitted into evidence without objection as Defendants' Exhibit No. 16. Hickman read into the record the following passage:

> "Finally, Mr. Phifer did provide the department with a letter requesting permission to obtain a permit for the work completed by his client. As of this date, no permit has been obtained and the department has not been provided with any correspondence indicating that the owners at 26 West Bellamy Drive will allow J.T. Hickman Company to obtain a permit."

A photograph of Hickman making measurements in the Goodyear/Rollo sunroom, taken sometime after litigation had started, was admitted into evidence without objection as Defendants' Exhibit No. 17.

A letter dated August 13, 2003, was admitted into evidence without objection as Defendants' Exhibit No. 18. Hickman said the import of the letter was that Shachtman had given JTHC permission to obtain a permit.

On cross-examination, Hickman read into the record a passage from Plaintiff's Exhibit 39, a letter sent from Shachtman to Hickman:

> "My clients felt that your company knew what it was doing when it posted the building permit. They recently round out that the permit was falsified. The permit which was posted was for an entirely different address. One impact this had was that since New Castle County was not properly on notice, the concrete pad was not inspected before it was covered up."

Hickman testified it was Malinowski's job to get the permit and he didn't recall ever asking Malinowski whether the permit was forged. Although Hickman had a person in charge of acquiring building permits before work commenced, he had no feedback procedure to verify whether the permit had been properly placed. Hickman also had "no written procedure" in a

document provided to his secretary indicating that if a certified letter came to his office, his secretary must bring it to him.

Hickman recognized Plaintiff's Exhibit 10 as a standard letter given to new sunroom customers. The letter identified JoAnne as the customer relations person. There was nothing in the letter that told customers to contact the Hickman directly if they had a problem. Hickman conceded that JoAnne was the one who would respond to complaints by assigning corrective work. Hickman agreed that the backside of the guarantee was the only place where customers were told that they were required to invoke the warranty through written complaint.

Hickman confirmed that a portion of the CAD drawings from Admiral are submitted to New Castle County

Hickman testified that to the extent that JTHC had to hire a lawyer to write letters seeking permission from the plaintiffs to get a valid permit, JTHC was adversely affected by the attorney fees.

**(n) Rebuttal Sworn Testimony of Elizabeth Goodyear**

For rebuttal Elizabeth Goodyear was sworn and gave testimony. Goodyear first discussed the nine-foot height of the ceiling and the level height of the pad with Gary Manco while discussing the contract. This was confirmed with Manco in May and with Malinowski in June. Goodyear denied that she had ever discussed a "change" with Fields. No one from JTHC ever suggested that she would have a lower ceiling if the pad were raised, nor was there a change order to that effect. It never occurred to her during construction that the ceiling height was too low.

Goodyear testified the nine- and eight-foot measurements in the CAD drawings were consistent with what she had discussed with Manco and Malinowski. Goodyear had never seen

Defendants' Exhibit 9 before litigation, and would have cancelled the contract had she received it because of the specified wall height.

Goodyear was present when Reith came to inspect her soil. He did not take any soil from her home nor did he ask her permission to do so. In response to the report that said that the soil was medium dense stiff, Goodyear testified that by digging up her yard she found a lot of clay and had not found any loose, silty material. Goodyear brought a soil sample from her yard that was admitted, with Defendants' objection, as Plaintiff's Exhibit No. 66.

Goodyear testified that when JTHC asked permission to obtain another permit, she and Rollo were reluctant to give permission because the foundation had already been poured, they didn't see how JTHC was going to be able to get inspections, and—in light of the forged permit—she wasn't comfortable having JTHC get another permit.

Goodyear testified that since her October 2004 testimony the leaks in the sunroom have been getting larger and the leaking has been getting worse. The coloring on the surface of the concrete has started to get white lines from where the water lays.

On re-cross examination Goodyear was handed the deposition of Fields and identified its length as eleven inches. She "guessed" that the bedrooms in her house had eight-foot ceilings, but said she never paid attention to whether the height of the patio structure was eight- or nine-feet while construction was going on. Goodyear interpreted the eight-foot measurement listed as an existing condition as referring to "the existing condition of the patio we already had out there."

Goodyear said she was not an expert on fixing the sunroom and admitted that she had not touched the sunroom since it had been put up, but had allowed the water damage to occur.

On re-direct examination Goodyear said that no damage had occurred to her residence other than with the sunroom. She said that she had ceiling fans in her house but that they didn't hang down and were more flush with the ceiling.

## THE LAW

In *Marco Prods. Corp. v. Mr. Mulch Del., Inc. v. David R. Babcock, 2005 Del. C.P. LEXIS 65, Welch, J. (Dec. 6, 2005)*, the Court interpreted basic contract law as follows:

> When there is a written contract, the plain language of a contract will be given its plain meaning. *Phillips Home Builders v. The Travelers Ins. Co.*, Del. Super., 700 A.2d 127, 129 (1997). 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.*, Del. Super. 252 A.2d 166, 170 (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 (April 5, 1991).
>
> At the same time, however, a party has a duty to mitigate once a material breach of contract occurs. *Lowe v. Bennett*, Del. Super., 1994 Del. Super. LEXIS 628, 1994 WL 750378 (December 29, 1994). 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 Elec. & Heating, Inc. v. Pike Creek Professional Ctr., 1987 Del. Super. LEXIS 1115, 1987 WL 9610 (April, 7, 1987). Notwithstanding a material failure to perform, the complaining party, may nevertheless, recover the value of benefit conferred upon the other party. *Heitz v. Sayers*, Del. Super., 32 Del. 207, 2 W.W. Harr. 207, 121 A. 225 (1923).
>
> Finally, if there is an ambiguity in the terms or drafting of the contract, that ambiguity will be resolved against the party who drafted the contract. *See. e.g., E.I. dupont de Nemours & Co. v. Shell Oil Co.*, Del. Super., 498 A.2d 1108 (1995).

**TITLE 6**
**Commerce and Trade**
**SUBTITLE II**

**§ 2511. Definitions.**

As used in this subchapter, unless the context otherwise requires:

(1) "Advertisement" means the attempt by publication, dissemination, solicitation or circulation to induce, directly or indirectly, any person to enter into any obligation or acquire any title or interest in, any merchandise.

(2) "Examination" means inspection, study or copying.

(3) "Lease" means any lease, offer to lease or attempt to lease any merchandise for any consideration.

(4) "Local telephone directory" means a telephone classified advertising directory or the business section of a telephone directory that is distributed free of charge to some or all telephone subscribers in a local area.

(5) "Local telephone number" means a telephone number that has the three number prefix(es) used by the telephone service company(ies) for telephones physically located within the area covered by the local telephone directory in which the number is listed. The term does not include long distance numbers or toll or toll free numbers listed in a local telephone directory.

(6) "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate or services.

(7) "Person" means an individual, corporation, government, or governmental subdivision or agency, statutory trust, business trust, estate, trust, partnership, unincorporated association, 2 or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(8) "Sale" means any sale, offer for sale or attempt to sell any merchandise for any consideration. (6 Del. C. 1953, § 2511; 55 Del. Laws, c. 46; 71 Del. Laws, c. 420, §§ 2, 3; 71 Del. Laws, c. 470, § 11; 73 Del. Laws, c. 329, § 35.)

**§ 2512. Purpose; construction.**

The purpose of this subchapter shall be to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State. It is the intent of the General Assembly that such practices be swiftly stopped and that this subchapter shall be liberally construed and applied to promote its underlying purposes and policies. (6 Del. C. 1953, § 2512; 55 Del. Laws, c. 46.)

**§ 2513. Unlawful practice.**

(a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with

intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice. It shall also be an unlawful practice to misrepresent the geographic location of a business or supplier which raises or sells flowers and/or ornamental plants by:

(1) Listing a local telephone number in a local telephone directory if:

a. Calls to the telephone number are routinely forwarded or otherwise transferred to a business location that is outside the calling area covered by the local telephone directory other than to counties contiguous to this State; and

b. The listing fails to identify the locality and state of the supplier's business; or

(2) Listing a fictitious business name or an assumed business name in a local telephone directory if:

a. The name misrepresents the supplier's geographic location; and

b. The listing fails to identify the locality and state of the supplier's business.

(b) This section shall not apply:

(1) To the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser; or

(2) To any advertisement or merchandising practice which is subject to and complies with the rules and regulations, of and the statutes administered by, the Federal Trade Commission; or

(3) To matters subject to the jurisdiction of the Public Service Commission, or of the Insurance Commissioner of this State. (6 Del. C. 1953, § 2513; 55 Del. Laws, c. 46; 69 Del. Laws, c. 203, § 23; 71 Del. Laws, c. 420, § 1; 71 Del. Laws, c. 470, §§ 12, 13.)

**§ 2514. Attorney General's investigative demand -- Things demanded.**

Whenever the Attorney General has reason to believe that a person has engaged in, is engaging in, or is about to engage in, any practice declared by this chapter to be unlawful, the Attorney General may, pursuant to an order of any Judge of the Superior Court or of the Chancellor or Vice-Chancellor, prior to the institution of a civil or criminal proceeding against such person, issue and cause to be served upon such person, an investigative demand requiring such person to:

(1) File a statement or report in writing under oath on such forms as the Attorney General may prescribe as to all the facts and

circumstances concerning the sale, lease or advertisement of merchandise by such person;
(2) Answer oral interrogatories under oath at such places and times as the Attorney General may reasonably specify as to all facts and circumstances concerning the sale, lease or advertisement of merchandise by such person; and
(3) Produce for examination the original or copy of any advertisement, merchandise or sample thereof, record, book, document, tabulation, map, chart, photograph, report, memorandum, communication, mechanical transcription, account, paper or computer record as the Attorney General may specify in the demand. (6 Del. C. 1953, § 2514; 55 Del. Laws, c. 46; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 470, §§ 7-10.)

**§ 2515. Attorney General's investigative demand -- Contents.**

Each Attorney General's investigative demand shall be in writing and shall:
(1) State the nature of the conduct constituting the alleged violation of this subchapter which is under investigation and the provision of law applicable thereto;
(2) Describe the class or classes of material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;
(3) Prescribe a return date which will provide a reasonable time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
(4) Identify the custodian to whom such material shall be made available or the official before whom such oral examination shall take place or with whom such written reports shall be filed. (6 Del. C. 1953, § 2515; 55 Del. Laws, c. 46.)

**§ 2516. Attorney General's investigative demand -- Limitations.**

No such demand shall:
(1) Contain any requirement which would be held to be unreasonable if contained in a subpoena issued by a court of this State in aid of a grand jury investigation of an alleged violation of this subchapter; or
(2) Require the production of any evidence which would be privileged from disclosure if demanded by a subpoena issued by a court of this State in aid of a grand jury investigation of an alleged violation of this subchapter. (6 Del. C. 1953, § 2516; 55 Del. Laws, c. 46.)

**§ 2517. Attorney General's investigative demand -- Issuance of protective order.**

(a) On motion promptly made by a person who receives such a demand from the Attorney General, the judge who authorized the issuance of the investigative demand, if available, and if not, another member of the judge's court, upon notice and good cause

shown, may make any order which is deemed appropriate and just to protect the person from an improper demand from the Attorney General.

(b) If the Attorney General determines that it would not be in the best interests of the investigation to disclose the evidence on which the Attorney General relied to establish the belief that unlawful conduct has occurred, is occurring or is about to occur, the Attorney General may request, and the court may examine, in camera, the evidence upon which the Attorney General relied in order to rule on such a motion. (6 Del. C. 1953, § 2517; 55 Del. Laws, c. 46; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 470, § 14.)

**§ 2518. Impounding evidence.**

Pursuant to an order of the Superior Court or the Court of Chancery, the Attorney General may impound the original or copy of any document or other material produced in accordance with § 2514 of this title, which material shall be retained in the possession of such custodian and under such circumstances as the Court may designate until the completion of all proceedings in connection with which the same is produced. (6 Del. C. 1953, § 2518; 55 Del. Laws, c. 46; 71 Del. Laws, c. 470, § 6.)

**§ 2519. Service of demand.**

Service of any demand by the Attorney General under § 2514 of this title shall be made personally within this State, if the person can be found therein; but if such service cannot be made, substituted service may be made in the following manner:

(1) Personal service outside of this State; or

(2) The mailing by registered mail to the last known place of business, residence or abode within or without this State of the person to whom such demand is directed; or

(3) As to any person other than a natural person, in the manner provided in § 321 or §§ 371 to 385 of Title 8 and in the manner provided in the procedural rules of the court authorizing the issuance of the demand; or

(4) Such service as the Court may direct in lieu of personal service within this State. (6 Del. C. 1953, § 2519; 55 Del. Laws, c. 46; 71 Del. Laws, c. 470, § 4.)

**§ 2520. Failure to respond; order; penalties.**

If any person fails to respond to any investigative demand issued by the Attorney General under § 2514 of this title, the Attorney General may, after due notice, apply to the court which authorized the issuance of the demand for an order, and the court, after a hearing on said application, may enter an order:

(1) Requiring said person to respond to the demand;

(2) Granting injunctive relief restraining any practice or act declared by this chapter to be unlawful;

(3) Vacating, annulling or suspending the corporate charter of a corporation created by or under the laws of this State or revoking

or suspending the certificate of authority to do business in this State of a foreign corporation, or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice;
(4) Adjudging such person in contempt of court; and
(5) Granting such other relief or imposing any other penalty or fine as may be determined by the court in its discretion to be appropriate to obtain compliance with the Attorney General's investigative demand. (6 Del. C. 1953, § 2520; 55 Del. Laws, c. 46; 71 Del. Laws, c. 470, § 5.)

**§ 2521. Cease and desist agreements.**

(a) At any time after it appears to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared by this chapter to be unlawful, the Attorney General may issue a cease and desist order pursuant to an agreement with the person who is alleged to have engaged in, is engaged in or is about to engage in an activity declared by this chapter to be unlawful. Each such agreement may provide for:
(1) The immediate discontinuance of each practice set forth in the agreement;
(2) Any such relief, remedies, penalties, fines or recoveries authorized by § 2517 of Title 29, §§ 2522-2526 of this title, and/or § 2533 of this title; and
(3) Any other action deemed by the Attorney General to be necessary to remedy such practice or practices.
(b) No legal action or proceeding shall be instituted or maintained by the Attorney General against any person who is the subject of an order issued pursuant to this section with respect to the specific activities covered by the order unless the agreement forming the basis of the order shall have been breached or violated by such person. (6 Del. C. 1953, § 2521; 55 Del. Laws, c. 46; 71 Del. Laws, c. 470, § 2.)

**§ 2522. Proceedings brought by the Attorney General.**

(a) Whenever it appears to the Attorney General that a person has engaged in, is engaging in or is about to engage in any practice declared by this subchapter to be unlawful, the Attorney General may institute an action in accordance with § 2517(c)(2) of Title 29 in order to enjoin such practices or any acts being done in furtherance thereof. The complaint shall state the nature of the conduct constituting a violation of this subchapter and the relief sought thereunder. Such action shall be brought in a court of competent jurisdiction in the county in which the alleged unlawful practice has been, is, or is about to be performed.
(b) If a court of competent jurisdiction finds that any person has willfully violated this subchapter, upon petition to the court by the Attorney General in the original complaint or made at any time following the court's finding of a willful violation, the person shall

forfeit and pay to the State a civil penalty of not more than $10,000 for each violation. For purposes of this subchapter, a willful violation occurs when the person committing the violation knew or should have known that the conduct was of the nature prohibited by this subchapter. (6 Del. C. 1953, § 2522; 55 Del. Laws, c. 46; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 470, § 3.)

**§ 2523. Restraining orders; injunctions.**

In actions filed under this subchapter, the Court of Chancery after a hearing may grant relief by issuing temporary restraining orders, preliminary or permanent injunctions, and such other relief as may be necessary to prevent any person from engaging in activities declared by this subchapter to be unlawful or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice declared to be unlawful by this subchapter. Unless otherwise specified in this subchapter, the procedure for all such proceedings shall be as provided in the Rules of Procedure of the Court of Chancery or as established by the usual practice and procedure in said Court. (6 Del. C. 1953, § 2523; 55 Del. Laws, c. 46.)

**§ 2524. Appointment of receiver; powers; damages; administration of estate; jurisdiction.**

(a) If it should appear to the Court of Chancery after a hearing, that a receiver should be appointed in cases of substantial and wilful violations of the provisions of this subchapter, the Court may appoint such receiver.

(b) The receiver shall have the power to sue for, collect, receive and take possession of all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, chooses in action, bills, notes and property of every description, acquired by means of any practice declared to be unlawful by this subchapter, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the Court.

(c) Any person who has suffered damages as a result of the use or employment of any such unlawful acts or practices and submits proof to the satisfaction of the Court that that person has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent of out-of-pocket losses.

(d) The receiver shall settle the estate and distribute the assets under the direction of the Court.

(e) The Court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required. (6 Del. C. 1953, § 2524; 55 Del. Laws, c. 46; 70 Del. Laws, c. 186, § 1.)

**§ 2525. Private cause of action; savings clause for private claims against persons who acquired property by unlawful practices.**

(a) A private cause of action shall be available to any victim of a violation of this subchapter. Such cause of action may be brought in any court of competent jurisdiction in this State without prior action by the Attorney General as provided for in this subchapter.

(b) Subject to an order of the Court terminating the business affairs of any person after receivership proceedings held pursuant to this subchapter, the provisions of this subchapter shall not bar any claim against any person who has acquired any money or property, real or personal, by means of any acts or practices declared by this subchapter to be unlawful. (6 Del. C. 1953, § 2525; 55 Del. Laws, c. 46; 74 Del. Laws, c. 113, §§ 1, 2.)

**§ 2526. Costs.**

In any action brought under the provisions of this subchapter in which any person is found to have engaged in, or be about to engage in, a practice declared by this subchapter to be unlawful, the Court may award costs to the Attorney General for the use of the State. (6 Del. C. 1953, § 2526; 55 Del. Laws, c. 46.)

**§ 2527. Consumer Protection Fund.**

(a) All money received by the State as a result of actions brought by the Attorney General pursuant to § 2517(c) of Title 29 or pursuant to the state or federal antitrust laws shall be credited by the State Treasurer to a fund to be known as the "Consumer Protection Fund."

(b) The Consumer Protection Fund will be a revolving fund and shall consist of funds transferred to the revolving fund pursuant to actions brought pursuant to § 2517(c) of Title 29 or an antitrust action, gifts or grants made to the revolving fund and funds awarded to the State or any agency thereof for the recovery of costs and attorney fees in a consumer fraud or an antitrust action; provided, however, that to the extent that such costs constitute reimbursement for expenses directly paid from constitutionally dedicated funds, such recoveries shall be transferred to the constitutionally dedicated fund.

(c) Money in the Consumer Protection Fund shall not exceed $300,000 in any fiscal year and shall be used solely for the payment of expenses incurred by the Attorney General in connection with its activities under § 2517(c) of Title 29, this chapter or the state or federal antitrust laws. At the end of any fiscal year, if the balance in the Consumer Protection Fund exceeds $300,000, the excess shall be withdrawn from the Consumer Protection Fund and deposited in the General Fund.

(d) The Attorney General is authorized to expend from the Consumer Protection Fund such moneys as are necessary for the payment of salaries, costs, expenses and charges incurred in the

preparation, institution and maintenance of consumer protection and antitrust actions under state or federal antitrust laws.

(e) When it is legally established that the State, or agencies thereof, public bodies of the State or individuals have a right to a portion of funds in the Consumer Protection Fund, the Attorney General is authorized to approve release of such funds to the appropriate fund, entity or recipient.

(f) From time to time as determined by the Delaware State Clearinghouse Committee, the Attorney General shall submit a detailed report to members of the Committee of revenues, expenditures and program measures for the fiscal period in question. Such report shall also be sufficiently descriptive in nature so as to be concise and informative. The Committee may cause the Attorney General to appear before the Committee and to answer such questions as the Committee may require. (64 Del. Laws, c. 303, § 1; 69 Del. Laws, c. 151, § 2; 69 Del. Laws, c. 203, §§ 13, 17-21.)

## OPINION AND ORDER

## I. DEFENDANT J.T. HICKMAN COMPANY, INC. (JTHC) BREACHED THE INSTANT CONTRACT FOR THE SUNROOM WITH PLAINTIFFS

The trial record indicates that on May 18, 2001 plaintiffs Goodyear and Rollo ("plaintiffs") met with Mr. Gary Manco ("Manco") of JTHC and discussed the instant proposal for the sunroom in question. (June TR 89). Plaintiffs and JTHC subsequently entered into a written contract after formal negotiations and signed the paperwork to install what has later been termed an Admiral Sunroom ("the sunroom"). (Oct. TR 136).

It is also clear based on the trial record that JTHC was required to comply with the applicable laws and regulations in the New Castle County Code. *See Koval v. Peoples*, Del. Super., 431 A.2d 1284, 1287-1288 (1981). BOCA is the requirement and condition of building contracts for work to be performed in this State unless the contract expressly provides for a different measure of performance. It is also clear to the Court that BOCA has been adopted by New Castle County and the instant contract a dispute for the sunroom requires foundation walls for plaintiffs' home was to be both water-proofed and damp-proofed. *See §1224.1 BOCA*; *Estal v. John E. Campanelli & Sons, Inc.*, 1993 W.L.189500, (Del. Super. 1993). *Accord Bougard v. Village Garden Homes, Inc.,* 2002 W.L. 32072790, (Del. Com. Pl. 2002).

After reviewing all submittals by counsel it is also clear that plaintiff has proven by a preponderance of evidence several violations of the BOCA and New Castle County Code and non-compliance with BOCA itself. Specifically, the Court finds based upon the trial record and sworn testimony and sworn testimony that JTHC did not obtain a valid building permit and submitted a falsified permit. The Court notes Hickman has not accepted responsibility of falsifying the permit; only submitting a falsified permit to New Castle County. The Court is hard

pressed to find a distinction. Although the Land Use Hearing subsequently held in which JTHC was an indispensable party did not specifically find JTCH actually falsified the permit, it is clear to the Court by a preponderance of evidence that JTHC was the contracting party that obtained and filed the falsified permit with New Castle County. JTHC cannot attribute this falsified permit to some unknown third party or New Castle County Land Use Agent or employee. JTHC has the responsibility to obtain a valid permit and failed to do so.

The Court notes JTHC's argument qt page 25 of its supplemental filing that the New Castle County Land Use hearing that JTHC or its agents did not "manufacture" a false permit. JTHC claims that the placard was merely "falsified". This Court does not find this argument persuasive. It was JTHC's obligation to pay for and obtain the necessary required permit and it failed to do so. It is JTHC's obligation not to file a "falsified permit".

It is also clear to the Court based upon the trial record by a preponderance of the evidence that JTHC failed to obtain the required inspections as required by the New Caste County Code; JTHC covered up its work without the necessary inspections; placed no stone barrier for drain damage in the concrete pad; did not install a vapor barrier and during the course and proceedings of the installation of the sunroom materials installed the wrong type of flashing at the sunroom site. Finally although plaintiffs bear some of the responsibility; JTHC has not obtained a certificate of occupancy.

In furtherance of these findings by a preponderance of the evidence, the Court notes the New Castle County Code (NCC Code) (PXT §06.03.012A requires a building permit be obtained from the New Castle County Land Use Department by a contractor who performs or proposes to perform the instant sunroom. Only in July 2003 did plaintiffs learn of the falsified placard submitted by JTHC.

At trial, Mr. Day provided testimony that a bona fide contractor is required to follow a prescreening; zoning review; review of the plans; pays its permit fee and subsequently is assigned a permit number during the application process for the installation of a structure such as the sunroom. (Oct. TR 93). It is also clear that JTHC was aware of these responsibilities; never formally inspected the footers; foundation and/or electrical work or obtained a certificate of occupancy.

At the formal New Castle County Land Use hearing JTHC was present and the Land Use Board found that JTHC did not obtain a permit for the instant sunroom. The Review Board found the placard was falsified and that the font and location of the information were not the same as found on a permit on NCC Land Use files. No subsequent appeal was filed by the JTHC. Nor was a hearing held on that matter as a result of an appeal from that administrative finding; it represented a final Order. *See, Betts v. Townsend, Inc.*, 765 A.2d 531, 534 (Del. Super., 2000).

During the course of the trial, the Court also finds by a preponderance of the evidence that the footers and preslab were never inspected as required by NCC Code §06.03.017A. This Code section requires that JTHC obtain an inspection and that "the construction shall remain accessible and exposed for inspection purposes until approved." *See also* §06.03.017F

It is also clear to the Court based upon the trial record the "IRC requires beneath the concrete pad for the instant sunroom that four inches of stone and a vapor barrier to be installed." *See R506.2.2* Base; *R506.2.2* Vapor Retarder. The video tape by plaintiff confirm the same. (Oct. TR 147). JTHC failed to install the same in violation of the applicable Code sections.

Jeffrey Coon ("Coon"), testified along with Roy Wample ("Wample") that they drilled two core samples "off the center of the room" and no stone was observed at the bottom of the drillings; but "just dirt and mud". (*See* Oct. TR 114, 115; June TR 51-53). Even defendant's

engineer, Christopher Reith ("Reith"), who examined the "Coon drillings" and drilled holes of his own and noted "no crushed stone or poly vapor was observed to a depth of approximately 12 inches below the bottom of the slab."

The Court must also conclude by a preponderance of the evidence following trial and sworn testimony that JTHC's failure to install a vapor barrier or stone in the concrete pad was a direct result of JTHC's failure to get necessary inspections. Without a valid permit on file an actual inspection by New Castle County never took place as required. The potential for land settling and the concrete pad dripping between the levels of the house is clearly a foreseeable result of JTHC's failure to install vapor barrier and crushed stone for drainage below the concrete pad. The Court so finds.

At trial, New Castle County Inspector Joseph Caruso ("Caruso"), with 30 years of inspector, provided testimony that a stone base would be required "probably 90 percent of the cases." (Caruso DEPO. TR 22). Caruso also noted, "normally you would need a stone base almost all of the time." (Caruso DEPO. TR 29). JTHC failed to install the same.

The Court must agrees with plaintiffs' version of the facts and finds by a preponderance of the evidence from the trial testimony from Caruso and Wample indicate that without the necessary crushed stone water would pick up through the floor and concrete pad and would subsequently expand during freezing conditions. This process could cause damage to the foundation. Reith also presented testimony at trial that the cure for lack of stone would be to seal the top of concrete pad; but on cross-examination he admitted that the sealing may reduce dampness at the top of the slab, it would not address the "wicking of moisture" into the bottom of the pad and the real or only way to resolve the issue would be to remove the pad, install stone and vapor barrier.

At trial, it was also clear to this Court credible testimony was presented by a preponderance of the evidence that Wample, Jeb Haslum, and Inspector Joseph Caruso found portions of the sunroom were not properly constructed. Wample, who owned a construction business for fifteen years as a general contractor and did flashing for many years indicated "inferior construction by defendants." (June TR 4). Wample and Haslum detailed that JTHC left aluminum flashing with ripples, and instead of flattening out the rippled aluminum, "it was just filled with caulk". (June TR 64). The Court finds because of the subsequent leaking this could be and should be regarded as more than a cosmetic defect and a breach of contract. *See e.g. Joseph T. Dashiell Builders v. Andrews*, 2002 WL 31819895 (Del. Super., 2002).

Finally, the Court concludes by a preponderance of the evidence in the trial record hat JTHC used the wrong kind of flashing and also violated IRC §703.8. Roy Wample, Jeb Haslem and New Castle County Inspector Joseph Caruso testified at trial the sunroom had not been constructed properly. "Photo #1" by Wample presented at trial shows JTHC used "step flashing" to seal the roof and "did not counter-flash" to cover the ends of the step flashing. (June TR 5). Wample and Haslem agreed at trial that JTHC left aluminum flashing with ripples and it did not set flat on the aluminum roof. (June TR 59).

As plaintiffs have pointed out in the trial record, courts have treated flashing defects to constitute a breach of contract. *See Joseph T. Dashrell Builders v. Andrews*, 2002 WL 31819895 *5 (Del. Supr., 2002). The facts at trial that JTHC attempted on numerous occasions to caulk over those areas without success indicates the construction was not workmanlike and constituted a breach of the contract. The sunroom immediately leaked on September 24, 2001, and subsequently leaked on September 4, 2002. Caulking failed to alleviate the leaking problems.

A more troubling issue before the Court is whether the sunroom dimensions, the ceilings were changed by JTHC. Each party offered their various conflicting views as to who was

responsible for the alleged difference in the height of the sunroom. However, looking at the totality of the circumstances; the documentary evidence; the trial exhibits as well as the credibility of all fact witnesses, the critical fact is that JTHC's CAD drawings (PX 11) show a 9 foot ceiling. Defendant has attempted to explain the 9 foot dimension through Mr. Mark Spaciona to testify the CAD drawing were merely for parts and their ordering.

The Court finds that if there was an original 8 foot ceiling in the CAD drawings that there would be no need for change in the drawings. The Court finds that Fields never checked for changes in the approved copy of the plans and no written change order was ever signed by the parties contrary to the contract documents. The Court also finds that Field was the person who allegedly provided the false placard to plaintiffs and allegedly altered the check to plaintiffs' counsel and who provided the New Castle County Land Use Department with hand drawn drawings two years later without consulting Admiral or the plaintiffs. While this issue is troubling and both parties have set forth their interpretation of the facts and trial record, the Court finds by a preponderance of evidence that it was JTHC who altered the contract without any formal change order as required by the contract. Even if the change was gratuitous as JTHC has argued, the contract required the amendment to be in writing. The transcript, trial testimony and evidence also indicated the plaintiff never formally agreed to any change and at the initial meeting plaintiffs told Manko that they wanted the sunroom at the same level as the back door. (June TR 97). Although there is some testimony that plaintiffs never objected as to the height before the alleged final completion of the job, the Court finds that this fact was not noticeable until the ceiling fans were put into finish in August or September. (June TR 131).

The Court also finds that an implied builder's warranty of good quality and workmanship in Delaware applies to the instant sunroom. *Counsel of Unit Owners of Breakwater House*

*Condominiums v. Simpler*, 603 A.2d 792, 795 (Del. Supr. 1992); *Accord Estal v. John E. Campanelli & Sons, Inc.*, 1993 W.L. 189500, (Del. Super., 1993).

Based upon the facts presented at trial and trial testimony, the Court is convinced by a preponderance of evidence that defendants lack the necessary degree of skill or knowledge possessed by members of their respective construction trade in good standing in similar communities to build the instant sunroom. Defendants failed to install stone or vapor barrier for drainage; the poor construction caused the sunroom to leak; and the subsequent failed remedial repairs with caulk failed to cure the leaking and drainage into the sunroom. The Court has also enumerated above the numerous violations of the applicable County and building codes that defendant failed to comply with by a preponderance of the evidence.[25]

The Court also must note JTHC's argument at pages 36 – 41 of its supplemental filing that it subsequently performed under the contract and therefore no breach occurred. The factual findings listed above by this Court contradict that argument and defendant's argument is not sustained in the trial record.

[25] The Court notes defendant's argument at page 11 of his Responsive Brief and the testimony of Richard Haslem ("Haslem") who presented testimony at trial that contradicts plaintiffs' witnesses and experts that the sunroom was not built in a workmanlike manner. Haslem presented testimony that "the sunroom was installed properly" and that the "room itself was standard installation" and that "it was tight… everything worked well." Haslem also offered testimony that severe winds could have caused conditions on the siding that had been installed by defendant to become dislodge because of the alleged "severe winds". However, no testimony was presented that such winds or weather conditions existed. The Court also notes that at least some of Haslem's testimony failed to contradict the findings referenced above in the Court's opinion.

**(a) PLAINTIFF INCURRED DAMAGES AS A RESULT OF THE BREACH.**

The general measures of damages to which plaintiffs are entitled to for the defective performance is the reasonable costs of requiring that the work conform to the terms of the contract. *See Justice v. Philips*, Del. Supr. 199 W.L. 166071, July 31, 1991, (Lee, J.) *citing Rave v. Fred Oakley Motors, Inc.*, TEX.App., 5 Dist., 646 S.W.2d 288, 291 (1983). The general measures of damages is the loss actually sustained as a result of the breach. *White v. Metropolitan Merchandise Mart*, Del. Supr. 107 A.2d 892, 894 (1954). "In a construction contract sounding in contractor toward the appropriate measure of damages, the cost of remedying the defects if the cost is not disproportionate to the probable loss in value." *See Counsel of Unit v. Freeman*, Del. Supr., 564 A.2d 357, 361 (1989); *see also, Restatement Second Contract §347*.

"The traditional measure of damage is that which is utilized in connection with the award of compensatory damage, whose purpose is to compensate a plaintiff for its proven actual loss by defendant's wrongful conduct. to achieve that purpose, compensatory damages are measured by the plaintiffs' 'out-of-pocket' actual loss. *See Wirt v. Matthews*, 2002 WL 31999360, Del. Com. Pl. (2002). The Court shall set forth in its Final Order attached thereto the proper amount of actual damages sustained by the plaintiffs in the instant action.

## II. J.T.HICKMAN COMPANY, INC. VIOLATED THE DELAWARE CONSUMER FRAUD ACT

JTHC conceded in its filings with this Court that Count V. of Plaintiffs' complaint, an alleged violation of the Delaware Consumer Fraud Statute, 6 Del. C. §2501 *et seq*. provides a private right of action to be obtained against "any person who has acquired any money or property, real or personal, by means or practices declared by this chapter to be unlawful." 6 *Del. C.* §2525(b). Defendant therefore concedes the applicability of the Act but argues plaintiffs claim fails because other tests and/or condition precedents for violation of the applicable statute are not met.

The central purpose of §2513(a) of the Consumer Fraud Act, in relevant part, provides as follows:

> "(a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice."

*See In Re: Brandywine Volkswagon, Ltd,* Del. Supr., 306 A.2d 24 (1973); *Stephenson v. Capano Development, Inc.*, Del. Supr., 462 A.2d 1069, 1072 (1983); *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of North America*, *Inc.*, Del. Supr., 558 A.2d 1066, 1074 (1989); *State, ex rel. Brady v. Publisher's Clearing House*, Del. Ch., 787 A.2d 111, 116-9 (2001).

Plaintiffs carefully outlined at page 24 of their Opening Brief JTHC's misrepresentations by defendants. They are summarized as follows:

| **MISREPRESENTATIONS** | **ACTUAL FACTS** |
|---|---|
| [To Plaintiffs] JTHC would follow proper NCCL | JTHC rarely obtained certificates of occupancy for its construction. |

| Procedures | |
|---|---|
| [To Plaintiffs] JTHC was providing them with copies of the documents that they signed. | JTHC switched the forms of Guaranty so that the one held by the consumer did not have the steps for asserting a warranty claim. |
| [To Plaintiffs] JTHC obtained a building permit. | JTHC falsified the building permit. |
| [To Plaintiffs] JTHC had obtained inspections of the footers and electrical work. | JTHC obtained no inspections during the course of construction. |
| [To Court] JTHC had followed proper procedures to obtain permit. | JTHC either knew that it had not done so or ignored all indicia that there was no permit. |
| [TO NCCLU] JTHC had followed proper procedures to obtain permit. | JTHC either know that it had not done so or ignored al indicia that there was no permit. |
| [TO Plaintiffs] JTCH was producing documentation that it had installed stone. | JTHC altered a check. |
| [To NCCLU] JTHC was submitting plans consistent with the agreement with homeowner. | JTHC altered the plans to be consistent with its construction of shortened ceilings. |
| [To NCCLU] JTHC had properly constructed the pre-slab | JTHC failed to install stone and a vapor barrier. |

Plaintiffs point out that JTHC "infrequently complied" with NCC Land Use procedures; NCC Land Use Building Application Summary dated December 19, 2002 shows that of 32 building permits obtained between May 19, 1999 and December 3, 2001. The trial record indicates that defendant did not obtain certificates of occupancy for 23 homes or 71.9% of the homes as constructed. The Court also finds by a preponderance of evidence based upon the sworn trial testimony that either inadvertently or intentionally Gary Manco of JTHC had plaintiff signed one copy of the guarantee provided to the plaintiff for with "qualifications on the backside" but the forms were switched and not provided to plaintiffs when he subsequently left their initial meeting after they signed the contract.

It is also clear by a preponderance of the evidence based upon the evidence listed above that plaintiffs were provided by JTHC a falsified permit placard. As noted, JTHC concedes a falsified permit was obtained from New Castle County but has refused to accept responsibility for the culpable party who falsified the placard.

The Court also finds by a preponderance of evidence following trial that JTHC represented it had obtained the necessary inspections but had not done so for the sunroom work in question.

As outlined in page 26 of plaintiff's Opening Brief in plaintiff's original Motion for Summary Judgment the Affidavit of Joseph Day, III, New Castle Assistant Land Use Administrator provided seven factual basis for finding that JTHC permit was falsified. They are as follows:

> "a. There is no record that J.T. Hickman Company or any other person or entity ever obtained a permit, or even began the permit process, to construct a sunroom at 26 Bellamy Drive. Had the permit process been started, a permit number would have been assigned to that property in our computer records, for any information collected, even if the permit was not issued.
> b. The format used on the placard was changed before the alleged permit date, June 18, 2001. The format used by the Department of Land Use on June 18, 2001 can be found on Exhibit B.
> c. The fake permit identifies the issuing agency as "New Castle County Development and Licensing." The issuing agency of on June 18, 2001 was Department of Land Use.
> d. The code authority cited on the fake pert was superseded before the permit date.
> e. The fake permit number 200109388, was issued on July 25, 2001 to another property, 102 Berry Drive, a permit obtained by J.T. Hickman Company. Our system does not permit the same number to be issued to two separate properties.
> f. On June 18, 2001, the permit number issued by Department of Land Use is different that than the number placed on the fake permit.

g. There is no record on our sign-in log for June 18, 2001 of a J.T. Hickman Company representative. There is a notation for July 25, 2001, the date of the permit issued to 102 Berry Drive."

Having been fully apprised of the falsified permit, it is clear that JTHC as plaintiffs argue in their post-trial memoranda, did not take the responsibility of a fraudulent permit as "very serious". Plaintiffs set forth in their brief accurately the trial record. Hickman did little to investigate. He did not inquire as to whether there was a canceled check before he signed his affidavit and in fact there was no check. Hickman also was aware that the New Castle County Department of Land Use may require change in plans before they approve them. Hickman never found any stamped or approved plans for the plaintiffs' sunroom. Assuming arguenda this is true, the absence of any approved plans must have been an indication that the permit was either forged or not an actual permit filed with the Land Use Department. Troubling to the Court is plaintiffs' argument at page 31 of their Opening Brief that in response to a Supplemental Request for Discovery for "records relating to material used at 26 W. Bellamy Drive such as invoices, delivery slips, etc. for stone, concrete and vapor barrier and attached document for a check for $201.93 was submitted. Plaintiffs' obtained an electronic version that after the check was processed JTHC alleged they altered it to add the words "supplies" to make it seem like payment was not just for concrete. Willis did not testify at trial although he was listed as a trial witness and Field did not offer any testimony as to the installation of the stone. The Court does find that this is a credibility issue JTHC did not address in the record.

At page 24 of its supplemental filing, JTHC argues *inter alia*, that the production of a falsified permit by JTHC, if it qualifies as misrepresentation of a material fact, occurred after "the sale, lease or advertising of merchandise." 6 *Del. C. Ch.* 25. JTHC argues that the falsified permit was produced "long after the execution of the contract." JTHC misses the point. The

permit was required before the building of the sunroom. Contrary to JTHC's argument at page 24, this Court finds that a transmittal of JTHC of the falsified permit meets the "deception test" under the Consumer Fraud statute. In addition, the Court finds the continued failure to obtain a valid building permit during the contract process was an ongoing violation of 25 *Del. C.* §2501 *et seq.* and not an initial sales introduction or meeting.

Notwithstanding these facts, it is clear that defendant JTHC as a principal is liable for its employees' acts or fraudulent activities conducted within the scope of their employment. *Southerland v. Oakwood Mobile Homes, Inc.*, 1997 WL 1737118, (Del.Com.Pl. 1997). Clearly, all elements of the Consumer Fraud statute listed above have been proven by a preponderance of the evidence. 6 *Del. C. Ch.* 25. Plaintiffs are therefore entitled to a refund of their payments to JTHC totaling $26,975.00. *See Gordon v. Stickney*, 1999 WL 1847414 (Del.Com.Pl. 1999). The law also allows punitive damages where the "fraud is gross, oppressive or aggravated, or where it involves breach of trust or confidence…" *See Stephenson v. Capano Development Company, Inc.* Del. Supr., 462 A.2d 1069 (1983).

After reviewing the facts of this case it is clear that plaintiffs are entitled to a minimum punitive damages warranted and punitive damages have been proven in the trial record by a preponderance of the evidence. The Court bases this opinion on an award of punitive damages because of JTHC's continual practice of not obtaining certificates of occupancy; falsifying a permit placard: and a review of Day's Affidavit listing seven factors that lead this Court to find that it was not merely accidental that JTHC filed a false permit. JTHC also failed to install stone and vapor barrier and never informed the plaintiffs and failed to get an inspection either of the footers or the electrical work.

The Court is convinced after a careful consideration of the trial evidence and as this Court analyzed the legal standard in the W*irt* decision that $1,000 is an appropriate measure of punitive damage because of the defendant's conduct outlined above. *Wirt v. Matthews*, 2002 WL 31999360, *6-9 Del. Com. Pl. (2002). Clearly a breach of public trust or confidence occurred in the trial record because of JTHC's conduct; a falsified permit was used and filed; no inspections took place as required by the Code; no stone or vapor barrier was installed in the concrete pad and the pad was covered up before it was inspected; the guaranty by JTHC was either switched or not provided to plaintiffs after they signed a formal contract; and JTHC did not obtain certificates of occupancy for 23 of the 32 homes or 71% between May 19, 1999 and December 3, 2001. The fact that JTHC continually denies its legal responsibility to file and obtain a valid building permit for this sunroom when the New Castle County Land Use Department requires a *bona fide* contractor to obtain the same requires exemplary damages to be set and ordered by this Court. The conduct by JTHC listed above clearly warrants a $1,000.00 punitive damages award.

## III. THE COURT FINDS JTHC DEFRAUDED PLAINTIFFS

Common Law Fraud requires the Court find by a preponderance of evidence the following**:**

1) A false representation, usually one of fact, made by the defendant;
2) The defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3) An intent to induce the plaintiff to act or refrain from acting;
4) The plaintiff's action or inaction taken in justifiable reliance upon the representation; and
5) Damage to plaintiff as a result of such reliance.

*See, Stephenson v. Capano Development, Inc.*, 462 A.2d at 1074. As the Superior Court in *Stephenson* noted, "Fraud does not consist merely of over representations. It may also occur through deliberate concealment of material facts, or by silence in the face of a duty to speak. Thus, one is equally culpable of fraud who by admission fails to reveal that fact which is his duty to disclose in order to prevent statements actually made from being misleading." *See Lock v. Schreppler*, Del. Supr, 426 A.2d 856 (1981); *Wirt v. Matthews*, 2002 WL 31999360, Del. Com. Pl. Welch, J. (2002).

In addition the damages for Common Law Fraud case allows a refund of the payments and an award of punitive damages. *See Lockford, Inc. v. James Tennefoss & Jim Lee, Inc.*, 1988 Del. C.P. Lexis 4 (1988); *Wirt v. Matthews*, 2002 WL 31999360, Del. Com. Pl. (2002). The Court has already addressed the issue of punitive damages.

In Argument I this Court found the Facts constituting a breach of contract. These facts are incorporated herein as a basis for concluding by a preponderance of the evidence that JTHC defrauded plaintiffs. JTHC filed a falsified permit; JTHC failed to obtain necessary inspection by the County; JTHC failed to install stone and vapor barrier under the concrete pad; and JTHC made numerous factual misrepresentations to plaintiff. All five elements set forth above have

been proven by a preponderance of the evidence at trial. JTHC files a falsified permit; it was made in a manner the Court concludes by a preponderance of the evidence, considering the trial record, affidavits, in a credibility of all sworn witnesses with "reckless indifference." Even accepting the New Castle County Land Use hearings findings, JTHC still was required to file a legal, *bona fide*, permit and failed to file the same before the new hearing was held and JTHC was required to pay double damages. A preponderance of the evidence exists that the falsified permit, in part, was to induce plaintiffs to accept a sup par inferior structure and that plaintiff's "action or inaction" was unjustifiable reliance upon a valid permit as set forth in the initial meeting with JATHC indicating all permits required by JTHC would be obtained.

## IV. WHILE JTHC BREACHED THE WARRANTY OF PLAINTIFFS, PLAINTIFF DID ACT ACCORDINGLY IN INVOKING THE WARRANTY

As the trial record indicates, at the end of the initial meeting with plaintiffs, JTHC's employee Manco left a set of documents, including a blue page that said "Guarantee". (Oct. TR. 138). The trial record, by a preponderance of the evidence, indicates these documents were a different set of documents he left at the plaintiffs' residence than the documents plaintiffs actually signed. The Court finds that JTHC is now estopped from arguing the warranty agreement is barred for failure to technically comply with the warranty documents when the defendant's agent employee did not leave a copy of the original or photocopy of the guarantee with qualifications to invoke the warranty at the plaintiffs' residence after JTHC and plaintiffs signed the contract document. Plaintiffs have made up a folder and put all the documents in side (June TR 167). As the Court has noted above, each party has set forth their respective version of the facts in their filings and testimony as to whether a preponderance of the evidence exists as to plaintiffs' invoking the warranty procedure and whether JTHC properly left the warranty documents with the plaintiff following the Untied Sales remedy.

Manco was not present to give contradictive testimony at trial to what the trial record indicates; the correct documents were not left with the plaintiffs. The Court finds by a preponderance of the evidence that five months after Hickman of JTHC believed he expected plaintiffs to have a copy of the warranty and when plaintiffs actually had a dispute over the quality of work there was nothing on the backside of the guaranty. Hence, they did not have the contract warranty documents which detailed the steps to invoke the warranty guarantee. (June TR 167). The documents in plaintiffs' possession where not the same as what Manco took with him when he left the initial meeting. Warranty documents such as these, as plaintiff argues, should be interpreted to meet the expectation of the insured and in resolving disputes, they

should be read according to the reasonable expectations of a bona fide purchaser "so far as the language will permit". *See Stigler v. Insurance Co. of North America*, at 384 A.2d 398, 401, Del. Supr., (1978).

With regards to the qualifications that the entire balance and remaining $500.00 should be paid, it clear in the trial record that plaintiffs paid $26,500 of the $27,000 value of the contract. (June TR 121).

According to plaintiffs at trial the $500.00 was held back allegedly due to a damaged glider fence and what appeared to the Court, to be a checklist issues of items to be completed by JTHC. (June TR 129, 141-142). According to the trial transcript, Fields indicated to the plaintiffs there was "no problem" with holding back $500.00. (June TR 130-131). This originally, constitutes a waiver of the final step to invoke the warranty.

Finally, plaintiffs' attorney wrote to JTHC's attorney and tendered the $500.00 to satisfy condition #1. (Oct. TR 59). The Court finds this act satisfies the warranty procedure.

Plaintiff raises the argument that she followed Hickman's introductory letter. (PX 10) which told plaintiffs that "several of our key staff members that will be assisting in the coordination of your job." Joanne of Customer Relations was the key in placing the defendants on notice of the problems with the sunroom. The letter also identified John Fields of JTHC as the "Construction Superintendent/Job Site Management" employee. Fields was also a sunroom mechanic and site supervisor. (Oct. TR 16). Hickman also testified at trial that Fields was "experienced with sunrooms". (Oct. TR 20). The Court therefore finds the predicate notice requirement to give Hickman a cure was satisfied. *See Rollins Environmental Services v. Catalytic, Inc.*, 1975 WL. 167665 (Del. Supr., 1975).

In addition, both Fields as an employee of Hickman and plaintiffs provided testimony at trial that Fields attempted to repair the leaks from September through December. (Mar. TR). Therefore, the Court concludes that the warranty procedure should not be construed that it was providing notice to John Hickman personally as JTHC's owner in the filings with the Court, but Hickman's employees who identified themselves in Hickman's initial welcome letter.

Finally, it is clear that in scrutinizing the testimony of Hickman of JTHC at trial the Court must conclude that he was not qualified or personally involved in the sunroom to investigate a complaint. All previous conduct and course of his employees was to handle it themselves, not with Hickman himself. Hickman had no experience in installing sunrooms or remedying defects in order to supervise or oversee fields and was relatively unknowledgeable about the procedures.

Scrutinizing the warranty documents in the trial record based upon the totality of circumstances, the Court must conclude by a preponderance of evidence that not only did the plaintiffs not get the subject warranty documents, but they substantially complied with the warranty procedure. In addition, when their counsel provided the $500.00 remaining balance, this act satisfied the procedure to invoke the warranty notwithstanding JTHC's employee, Fields, did not leave the current copy of the original documents. Any ambiguity in the contract documents in the terms of and drafting of the contract should be resolved against the party drafting the contract. *See e.g., E.I. DuPont deNemours & Co., v. Shell Oil Co.,* Del. Supr., 498 A. 2d 1108 (1995).

JTHC argues at page 33 of its supplemental filing the "profound disagreement" by JTHC whether the ninety (90) day core period requirements were met by the plaintiff's crucial to the Court's findings in this matter is whether plaintiff's were actually given the property contract warranty documents at closing by the JTHC Company representative. JTHC argues at page 35

that some information appearing on the reverse side of the warranty documents "is readily available" at trade shows. At trial, plaintiffs produced a document that set out the Guarantee provisions on one side and "irrelevant information" on the other side instead of the executed sunroom provisions; therein lies the problem.

Based upon the trial record, the Court finds that JTHC breached the warranty by having continuing leaks despite several attempts to repair them; failed to install the sunroom according to New Castle County Code by omitting stone and vapor barrier beneath the concrete pad; breached the contract by constructing the ceiling too low contrary to the CAD drawings and contract specifications; failed to obtain and file a false building permit; misrepresented that obtained foundation and electrical inspections; JTHC also installed flashing improperly and in an unworkmanlike manner. Finally, the trial record supports the conclusion by a preponderance of evidence that JTHC failed to properly connect the sunroom to the house for stability to the house. Therefore, JTHC breached the warranty given to the plaintiffs and plaintiffs sustained damages as a result of the breach by JTHC.

## V. JTHC DID NOT VIOLATE THE MAGNUSON-MOSS WARRANTY ACT AS IT DOES NOT APPLY

It is clear from the trial record and arguments of counsel in their respective brief filings that plaintiffs may not allege a violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301(1) because the action was not plead with specificity and the Act covers only personal property. Defendant's counsel has set forth at page 23 of their supplemental briefing schedule the legal authority and case law directly on point. *See e.g. National Consumer Law Center, Consumer Warranty Law, Lemon Law; Magnuson-Moss, UCC, Mobile Home and other Warranty statutes* (2d Ed., 2001) §2.2.2.3 at 27 (When a consumer contracts with a builder to construct a home, an edition, or other realty such as a garage, swimming pool or sundeck, the building material used are not consumer products, although separate identified at the time of the contract, because the parties intend the contract for a construction of realty which will integrate the component materials.) *See Zimprich, et al. v. Stratford Homes, Inc., et al.*, 453 N.W.2d (Minn.Ct.App. 1990). Clearly the Magnuson-Moss Warranty Act applies to certain consumer products, but not to reality or other building materials incorporated and which becomes the structure of the dwelling at the time of sale. The Court so finds in the instant action. *See e.g. Miller v. Showcase Homes, Inc.*, 2000 U.S.Dist. LEXIS 6028 (N.D.Ill March 14, 2000); *Clark v. Jim Walter Homes, Inc.*, 719 F.Supp. 1037 (M.D.Ala. 1989). Therefore, plaintiffs' claims are not within the provisions of the Magnuson-Moss Warranty Act and are therefore denied.

## CONCLUSIONS

The Court therefore concludes based upon the trial testimony, by a preponderance of evidence that JTHC breached the instant contract with plaintiffs' failure to comply with New Castle County and International Residential Code Regulations with respect to installation of the sunroom inspections, installing the stone and vapor barrier and proper installation of flashing.

Overall, by a preponderance of evidence, JTHC failed to construct a sunroom in a workmanlike manner. Substantial material problems will likely occur because of the lack of stone and vapor barrier, poor installation of flashing and leaking.

The Court notes that the New Castle County Code provides a process for obtaining the required building permit "post hoc". The Court is fully aware that this process requires the applicant to submit all necessary drawings, information, and a *bona fide* building permit but JTHC did obtain such a permit in August 2003.

As to the issue of the appropriate award of damages, the Court finds that the value of the contract is not the actual damages sustained by a preponderance of the evidence in the trial record by the plaintiffs. Rather, the Court finds the appropriate award of damages is the cost of constructing a sunroom to the original contract, damages for breach of the contract and include costs to install a new concrete pad and demolish the old pad and sunroom. The Court incorporates the findings of fact in each of its decisions on the complaint listed above for these conclusions.

The Court also finds that JTHC violated the Consumer Fraud Act, committed Common Law Fraud due to falsifying permits, misstatements about timely inspections, and failing to conduct the same; making false statements by its employees and agents to the New Castle County Land Use Department regarding obtaining permits and required inspections and a

submitted altered document. The Court also finds JTCH breached its warranty, failed to provide a copy of the subject warranty documents to plaintiff and when tendered $500.00 to technically satisfy the contract refused. The Court also finds JTHC breached the instant contract.

The Court enters judgment on all counts plead in the complaint except the Magnus Moss Warranty Act claim in the amount of $37,500.00 against JTHC which shall include costs to demolish the sunrooms and construct a new sunroom and install a replacement pad plus pre- and post-judgment costs at the legal rate, 6 *Del. C.* §2301 *et seq.* plus costs. The Court also awards $1,000.00 in punitive damages. Counsel is directed to file with Chambers directly and the Civil Clerk cross-memoranda on or before Friday, November 10, 2006 as to whether 6 *Del.C.* §2533(b) this action falls within a "willful violation" of 6 *Del.C. Ch*.26 and/or an exceptional case warranting attorney's fees.

**IT IS SO ORDERED** this 24th day of October, 2006.

John K. Welch
Judge

/jb
cc: Rebecca Dutton, Case Processor
CCP, Civil Division