IN THE SUPREME COURT OF THE STATE OF DELAWARE

CATHERINE VAUGHN and JOHN VAUGHN,	§	
	§	
Plaintiffs Below, Appellants,	§	No. 489, 2001
	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware in and
	§	for New Castle County
PETER RISPOLI, BARBARA BRODOWAY and NOLTE & BRODOWAY, P.A.,	§	C.A. No. 97C-10-254
	§	
Defendants Below, Appellees.	§	

Submitted: July 9, 2002
Decided: August 12, 2002

Before VEASEY, Chief Justice, WALSH, and BERGER, Justices.

O R D E R

This 12th day of August 2002, upon consideration of the briefs on appeal and the record below, it appears to the Court that:

(1) This is an appeal from a decision of the Superior Court denying plaintiffs' motion for additur or, alternatively, a new trial in a dispute over the purchase of a new home. The home buyers, appellants Catherine and John Vaughn ("the Vaughns"), brought suit against Barbara Brodoway, Esquire and her employer, Nolte & Brodoway, P.A., alleging legal malpractice in connection with Brodoway's representation of them

in the settlement of the property. The Vaughns also sued the seller of the property in question, Peter Rispoli, for fraud and breach of contract. The mortgagee of the property, Countrywide Mortgage, was joined as a plaintiff after asserting its own claim against Brodoway for negligence. Following trial, the jury returned a verdict against defendant Rispoli for both compensatory and punitive damages, but decided in favor of defendant Brodoway, finding that she had not committed malpractice as to the Vaughns and that her negligence as to Countrywide amounted to only 41%. The Vaughns moved for additur or a new trial on several grounds, in which Countrywide joined, but the motion was denied. Thereafter, this appeal was taken by the Vaughns; Countrywide chose not to appeal.

(2) The Vaughns entered into a contract with Rispoli on March 16, 1997 for the purchase of a new house in the Middletown area for $174,500. When the Vaughns signed the contract, they were aware that the house was in the "rough stages" and that much work needed to be done before it could be occupied. The original settlement date was to have been May 29, 1997, but, after several verbal extensions, the date was moved to June 11, 1997 because the house remained incomplete. The Vaughns inspected the property at various times during this delay and were in regular contact with the builder, Anthony Casale. Despite the delays, the house was not

completed on June 11, and New Castle County had refused to issue a certificate of occupancy (CO). Settlement proceeded without the issuance of the CO. After settlement, the Vaughns apparently realized that the house was substantially incomplete and brought suit against Rispoli, the builder, the realtors, the appraiser/inspector, and Brodoway. The builder, the realtors, and the appraiser/inspector all settled before trial. At the time of trial, the house remained incomplete and a CO had not been issued.

(3) Brodoway was hired by the Vaughns to represent them in their purchase of the property. Brodoway was notified of both settlement postponements but was not aware that the Vaughns, and their realtor, had not reduced those postponements to writing. Brodoway also did not become aware of the physical problems with the house until the morning of June 11, 1997, when the settlement was scheduled to occur. Brodoway testified that she was involved in 24 telephone calls on June 11th regarding this transaction. The first of these calls was from Mrs. Vaughn, who informed her that the Vaughns had been notified by Countrywide the previous day that no CO had been issued for the home. Mrs. Vaughn was insistent that settlement take place despite the absence of the CO, but apparently Countrywide refused to release the funds without it.

After a flurry of telephone calls between Brodoway, Countrywide, Rispoli and Casale, Brodoway was able to convince Countrywide to release the funds for the

settlement as planned, with the promise that the CO would be issued in the next few days after the correction of what Brodoway believed were minor defects. Despite Countrywide's standard written instructions that no funds should be released without a CO, Brodoway released the funds on the verbal authority provided by Countrywide's representative and the settlement went forward without the CO. After the settlement, the Vaughns did not receive keys to the property for several days. When they eventually entered the house, the Vaughns found that it was far from complete and that extensive work still needed to be done.

(4) The Vaughns' claim against Brodoway is that she failed to inform them about the lack of a CO, or the consequences of not having one. They claim that if they had known that the County had not issued the CO, they never would have gone to settlement. Brodoway testified that she had discussed the lack of a CO with Mrs. Vaughn at length, and further that she advised her that the Vaughns could withdraw from the transaction since the settlement date specified in the contract had expired. The jury apparently resolved this factual dispute in favor of Brodoway, since they found that she was not negligent as to the Vaughns. The Vaughns' legal challenge to that verdict is not entirely clear,[*] but they seem to argue that the trial court erred in allowing

[*]The briefs filed by the Vaughns' counsel are confusing, replete with grammatical errors and

Brodoway to present a contributory negligence defense; that the verdict was against the great weight of the evidence; and that the jury's verdict as to them and Countrywide is inconsistent. The Vaughns further argue that the trial court erred in limiting their damage testimony.

(5) We review the trial court's denial of motions for additur and/or a new trial for abuse of discretion. *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997). As to the Vaughns' first claim of error, we note that the jury concluded that Brodoway did not commit legal malpractice as to them. Thus, it is unclear how the defense of contributory negligence had any effect on the verdict subject to appeal. Nonetheless, the Vaughns argue that because Brodoway did not assert contributory negligence as a defense in her answer, she could not assert it thereafter. Brodoway did, however, assert

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below the standards of appellate competence expected of counsel appearing in this Court. Illustrative of this deficiency is the following sentence appearing on page 19 of the Vaughns' opening brief:

> The prejudice to the Appellant of allowing the admission of a previously unidentified and unproduced documentary exhibit that was at best, marginally relevant to a surprise defense that was not raised in the answer, the Pre-trial order or at any time during discovery, and if relevant at all, was not relevant to the claims of Countywide, caused further unfair prejudice to the Appellent (*sic*).

the defense of contributory negligence at the pretrial conference in this matter. At the court's discretion, the parties may amend pleadings at a pretrial conference and a pretrial order "shall control the subsequent course of action." *Super. Ct. Civ. R.* 16. Here, the pretrial order, signed by the Vaughns without objection, identified the defense of contributory negligence and stipulated that the order supplemented the pleadings and governed the course of the trial. There was no error in allowing Brodoway to present this defense.

(6) The factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based. *Mercedes-Benz of North America, Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1362 (Del. 1991). Despite the Vaughns' rambling and confusing argument to the contrary, there was ample evidence to support the jury's verdict in this case. The Vaughns' legal malpractice expert testified that the standard of care required that Brodoway inform the Vaughns of the absence of the CO and the consequences thereof. But there was no expert testimony to the effect that it was negligence for an attorney to permit an informed client to accept title in the absence of a CO. *See Alston v. Hudson*, 700 A.2d 735 (Del. 1997) (holding professional malpractice claims must be supported by expert testimony). Brodoway testified that she fully advised the Vaughns of the implications of

holding settlement without a CO and the jury apparently accepted her version of the events.

(7) The jury rendered a verdict in favor of Brodoway as to the Vaughns but found that she was negligent as to Countrywide in failing to disclose to them further requirements and the length of time needed to obtain a CO. Because the jury also found that Countrywide was 59% contributorily negligent, however, no award was made. The Vaughns, of course, have no standing to challenge the jury's verdict as to Countrywide. *Shearin v. Neuberger*, 738 A.2d 239 (Del. 1999). The Vaughns do allege that this verdict is somehow inconsistent, a contention we have difficulty understanding. We can find no inconsistency in a verdict that recognizes the separate duties owed to different parties and the related standards of care applicable to separate causes of action.

(8) Finally, the Vaughns argue that they were entitled to additur and that the trial court improperly limited the evidence they could present on damages. A jury verdict is presumed correct, however, and will be set aside only where it is so grossly out of proportion that it shocks the court's conscience and sense of justice. *Peterson v. William E. Street, Inc.*, 609 A.2d 669 (Del. 1992). There is no such compelling reason in this case to alter the jury's damage award. As to the evidence the Vaughns claim they

were prohibited from presenting, the trial court gave them ample opportunity to fully present their claims. The trial court properly limited the presentation of speculative, undocumented, and unsupported evidence. We can find no abuse of discretion in that decision.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

s/Joseph T. Walsh
Justice