IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 29, 2022 Session

CHRISTOPHER LEE DUNN v. BRUCE VUKODINOVICH, ET AL.

Appeal from the Circuit Court for Sullivan County
No. C14856 John S. McLellan, III, Judge

No. E2021-00146-COA-R3-CV

This appeal arises from a suit to rescind a contract for the sale of a home due to fraud. The trial court found clear and convincing evidence of fraud justifying rescission. It ordered the buyer to convey the property back to the sellers, with the sellers returning the purchase price, minus the fair rental value of the property, with a credit to the buyer for various expenses he had incurred. However, the trial court declined to award any offset to the buyer for improvements he had made to the property. It also declined to award punitive damages but did award the buyer attorney fees. Taken together, the parties present twenty-five issues for review on appeal. We vacate in part, reverse in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part, Reversed in Part, and Remanded

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

Donald K. Vowell, Knoxville, Tennessee, and Mark W. McFall, Johnson City, Tennessee, for the appellant, Christopher Lee Dunn.

Brett N. Mayes and Thomas J. Seeley, III, Johnson City, Tennessee, for the appellees, Bruce Vukodinovich and Pamela Vukodinovich.

OPINION

I. FACTS & PROCEDURAL HISTORY

In January 2011, Christopher Dunn entered into a purchase and sale agreement by

which he agreed to purchase a lakefront home in Piney Flats, Tennessee, from Bruce and Pamela Vukodinovich. The property was located on Boone Lake. Mr. Dunn was deployed to Afghanistan at the time, so his fiancée, Whitney, handled many aspects of the transaction prior to his return. Mr. Dunn also had a realtor, Lisa Lohoff, assisting him and his fiancée with the process.

The Purchase and Sale Agreement contained a few handwritten "Special Stipulations." Due to Mr. Dunn's impending return from Afghanistan, the first stipulation stated, "Contingent upon buyers viewing and approval of home [and] property on or before March 14th 2011." The second stipulation stated, "Contingent upon buyers viewing septic layout for property." According to Mr. Dunn, viewing the septic layout was important to him because he planned on remodeling the home after the purchase and knew that a contractor would need to know the location of the septic tank. Mr. Dunn returned from Afghanistan in mid-March and performed a "final walk-through" of the property. According to Mr. Dunn, he toured the property with his fiancée, their realtor, and Pamela Vukodinovich. According to Mr. Dunn, while they were standing on the front deck of the home, he asked Mrs. Vukodinovich where the septic tank was located. She allegedly pointed out in the front yard and stated that the septic tank was located adjacent to a gazebo. Prior to closing, Mr. Dunn's realtor checked for records regarding the septic tank at the local environmental department, but there was no record on file regarding its location. According to the realtor, this was not uncommon due to the age of the house. The parties attended closing on March 18, 2011, and Mr. Dunn paid $302,000 to purchase the home. There was no further discussion of the septic tank that day.

After closing, Mr. Dunn proceeded with his planned remodeling of the home. He and Whitney were married, and they also had a child. In March 2013, two years after closing, the septic system backed up into the shower in the downstairs level of the home. Mr. Dunn was overseas at the time on another rotation in Afghanistan. Mrs. Dunn called a plumber and septic service company, and they tried to locate the septic tank in the front yard where Mrs. Vukodinovich said the tank was located. They probed the yard but were unable to locate the septic tank. Eventually, Mrs. Dunn contacted her realtor, Ms. Lohoff, and told her that she needed the contact information of the previous owners because no one could locate the septic tank. The realtor provided a telephone number for Mr. Vukodinovich. When Mrs. Dunn contacted Mr. Vukodinovich, he instructed her to go downstairs into the lower level of the home and "knock around" on the parquet floor underneath the pool table until she located a hollow place where the parquet tiles were not glued down. He told her that the cleanout for the septic system was there beneath the tile under the pool table (which was left in the home at the time of the sale). Mrs. Dunn located the hollow area and removed several tiles to reveal a piece of plywood covering the septic tank cleanout. She informed the septic tank service company and had the tank pumped, which resolved the existing overflow problem.

Shortly thereafter, Mr. Dunn filed suit in general sessions court, but he took a

nonsuit. He then filed this lawsuit against Mr. and Mrs. Vukodinovich in circuit court in July 2014. Mr. Dunn's complaint noted the "Special Stipulation" in the contract regarding the location of the septic tank, and he asserted that he would not have purchased the home if he had known the true location of the septic tank inside the residence. He alleged that Mrs. Vukodinovich had indicated that the septic tank was underground outside the residence near a gazebo. The complaint alleged fraudulent misrepresentation by the sellers, asserting that Mrs. Vukodinovich intentionally misrepresented the location of the septic tank when Mr. Dunn affirmatively inquired about its location. Mr. Dunn alleged that the location of the septic tank was material and that he reasonably relied on Mrs. Vukodinovich's representation as to the location. He also asserted fraudulent inducement to enter the contract. He sought actual damages or alternatively rescission of the contract, in addition to an award of punitive damages and attorney fees. Mr. and Mrs. Vukodinovich filed an answer in August 2014, denying that Mrs. Vukodinovich pointed out the location of the septic tank prior to closing.

Due to mostly inexplicable delays, the case was not tried for several years. The record contains "pre-trial submissions" and a witness and exhibit list filed in June 2015, but the trial, set for July 2015, was continued. In November 2015, Mr. Dunn filed a motion for a continuance of a second trial date, stating that his damages would include the cost of installing a new septic tank but that he had encountered problems obtaining an estimate for a new septic system. On November 19, 2015, the trial court entered an agreed order of continuance of the November trial date, until rescheduled by the parties or ordered by the court. However, the record before us contains no other documents that were filed in the matter until April 2019, when the court entered an order setting trial for September 2019. A few days prior to the trial date, an agreed order of continuance was entered, stating that counsel for Mr. and Mrs. Vukodinovich had experienced a fire at his office and was unable to participate. The trial date was reset for October 2019, but it was again continued. The case was finally tried in January 2020, five years after it was re-filed in circuit court.

A very brief bench trial was held on January 13, 2020. The trial court heard testimony from Mr. and Mrs. Dunn, their realtor, and Mr. and Mrs. Vukodinovich. However, the trial transcript from *all* of the testimony only spans about 100 pages. At the outset, Mr. Dunn's attorney stated that he was electing the remedy of rescission, noting again that Mr. Dunn had experienced difficulties in trying to get a contractor to testify as to the cost of constructing a new septic system.

Mr. Dunn testified first. He described his search for a lakefront home while being deployed to Afghanistan. He explained that he included the Special Stipulations regarding viewing the home upon his return and viewing the septic layout because he planned to remodel the home after the purchase. Mr. Dunn also described his discussion with Mrs. Vukodinovich regarding the location of the septic tank during the final-walkthrough. He said they were standing on the front deck of the house when he asked where the septic tank was located, and Mrs. Vukodinovich "pointed out that it was adjacent to the gazebo." Mr.

Dunn said that this was enough, in his mind, to satisfy the contingency in the contract regarding the septic tank.

Mr. Dunn said he ultimately paid $302,000 to purchase the property in 2011, but he did not owe anything on it at the time of trial in 2020. Mr. Dunn described numerous improvements he made after closing and said they "did all the remodeling, probably, within six months." He said he bought all new appliances, "put all hardwood floor in," installed granite countertops, refinished the downstairs bedroom, remodeled the downstairs bathroom and added a shower, removed wallpaper and painted, remodeled the laundry room, replaced electrical wiring, took out landscape timbers and installed new brick stairs going up to the home, put in a brick retaining wall along the side of the house, and "shored up the sea wall" where it had started to buckle. Thus, he testified that the home was "in better shape than it was when I bought it." Mr. Dunn estimated that he had spent about $50,000 on these improvements. He also explained that this home has an upstairs level and a downstairs level, but there is no interior access between the two. He said that in order to get to the downstairs level, you have to walk out the back door, go down a stairway, and then enter through another door.

Mr. Dunn testified that he had since discovered the true location of the septic tank inside the lower level of the home, beneath the pool table. He explained that he did not want the pool table when he bought the home, but the Vukodinoviches wanted to leave it, so "it came with the house." Mr. Dunn testified that he now has the septic tank pumped every couple of years because "there's gases and stuff that come up." He said that the home "constantly smells like a dead body" because of the gases, so he has the septic tank pumped frequently for "peace of mind." Mr. Dunn also explained how that process works. He said that the septic service company has to drag its hoses inside the house, which makes the house smell bad for a week or so afterward. He said that he and his wife have to do extra cleaning afterward because of the hoses being dragged through the inside of the house. He said they mop the area, disinfect it, light candles, spray air fresheners, and leave the door open "to let it air out." Still, Mr. Dunn said, the smell circulates throughout both levels of the house because of the HVAC system serving both levels. Mr. Dunn said that "none of us" need to be breathing in those smells, but especially not his seven-year-old daughter. He said that his family does not use that area of the house much because of the septic tank issue, even though it is completely furnished since he remodeled the downstairs. Mr. Dunn acknowledged that there had not been another overflow into the shower since 2013, because of the frequent pumping, so the only problem they had experienced was the smell.

When asked if the septic tank meets state and local requirements, Mr. Dunn said, "I would assume no," but, he added, "I'm not a septic tank expert." Mr. Dunn said he had met with someone from the county after he found out the location of the septic tank in order "to get a diagram for a new septic layout," but the trial court sustained an objection to any testimony regarding what he was told.

Whitney Dunn also testified. She described the home buying process while Mr. Dunn was overseas and the final walk-through with Mr. Dunn upon his return. She said that their realtor and Mrs. Vukodinovich were also present. Mrs. Dunn testified that Mr. Dunn had a conversation with Mrs. Vukodinovich about the location of the septic tank, and Mrs. Vukodinovich pointed out in the front yard beside a gazebo and told them that it was "out in the yard over there." She said they "took her for her word." Mrs. Dunn also testified about the overflow into the downstairs shower in March 2013, the septic company's unsuccessful attempts to locate the tank in the front yard where Mrs. Vukodinovich had pointed, her call to Mr. Vukodinovich thereafter, and her efforts to find the septic tank beneath the pool table in the finished basement. She submitted photographs of the area of the front yard where Mrs. Vukodinovich had indicated that the septic tank was located and the area beneath the pool table where it was found.

Mrs. Dunn testified that she and her husband try to "take care of" the septic tank due to its location inside the house, adding yeast to it once a month and having it pumped every few years "just to be on the safe side" and "ward off any . . . disaster with sewage coming up downstairs." However, she explained that the pumping process requires bringing dirty hoses inside the home and opening the septic tank access hole, "which then lets out about a million sewer flies into the downstairs." She said that even after the tank is pumped and the hoses are removed, "the smell is nauseating for a while." She added, "You know, it's bad enough, I guess, when you pump one outside, but when it's actually inside your home, it's a whole 'nother level of disgusting[.]" Mrs. Dunn said that she opens all of the doors, shuts off the vents downstairs, uses fans, and opens windows. She also described the cleaning process as "pretty disgusting altogether," considering that the septic company has brought hoses inside the home that have been stuck inside septic systems belonging to other customers. When asked about the condition of her "entire home," even with regular pumping, Mrs. Dunn said "we definitely know that it's there and in our home because, intermittently, we have horrible smells of, like, methane, sewage." She said that these smells appear randomly and that "it will literally make our entire house stink for a couple days, and I'm sure that that's not healthy."

Lisa Lohoff, Mr. Dunn's realtor, testified as well. She recalled attending the final walk-through with the Dunns prior to closing. Ms. Lohoff testified that Mrs. Vukodinovich was also present. When asked if it was "the lady here" in court, Ms. Lohoff responded affirmatively, stating that she recognized Mrs. Vukodinovich from being at the final walk-through and at closing. Ms. Lohoff testified that she was present when Mr. Dunn had the conversation with Mrs. Vukodinovich about the location of the septic tank. She recalled that Mr. Dunn inquired about its location, and Mrs. Vukodinovich "pointed out on the ground where it was." Specifically, she testified that Mrs. Vukodinovich pointed out in the front yard and indicated that it was beside a gazebo. She did not recall any further discussion about the septic tank. Ms. Lohoff explained that she checked the records of the environmental department prior to closing but there was no record on file regarding the

septic tank, which was not unusual for a home of that age. However, she said that the "Tennessee Residential Property Condition Disclosure" form included a question regarding whether the septic tank had an "approved design to comply with present state and local requirements," and the sellers had checked "yes."

On cross-examination, Ms. Lohoff conceded that it is not "customary" for a seller to be present at a walk-through, nor was it customary for a seller to attend without his or her own realtor. Still, she stated that a seller has a right to be at a walk-through because it is the seller's house. Counsel for Mr. and Mrs. Vukodinovich also asked Ms. Lohoff if she handled rental properties, but she did not. He asked if she had any opinion as to what the fair rental value of this property might be, but she did not.

Mr. and Mrs. Vukodinovich both testified as well. Mrs. Vukodinovich testified that she and her husband had lived at the property for eleven years before they sold it. She testified that the home was built in 1973, and to her knowledge, the septic tank had always been in the same location. Mrs. Vukodinovich testified that they had the septic tank pumped when they purchased the home and never had any problems with it thereafter. However, she explained that the lower level of the home had initially consisted of an apartment and garage, with dirt and asphalt, and she and her husband had the carport and garage door removed, concrete poured, and a parquet floor installed over the concrete. She said their contractor left a "cut out" where the tile could be lifted to access the septic tank. She identified a photograph showing how the downstairs area looked when they purchased the home, which depicted a PVC pipe coming out of the ground at the location of the septic tank.

Mrs. Vukodinovich testified that she "absolutely" knew where the septic tank was located at the time of the sale to Mr. Dunn. She said she was also aware of the contingency in the sales contract about viewing the septic layout. Mrs. Vukodinovich testified that her realtor asked if she had a drawing of the septic tank layout, but she did not, so her realtor informed her that she would consult with Mr. Dunn's realtor and "do whatever they needed to do." She added, "And I never heard another word." Thus, Mrs. Vukodinovich said "the last I heard of it" the realtor was going to get a drawing from public records. She insisted that she did not attend the final walk-through. According to Mrs. Vukodinovich, she "never met these people until the day of the closing," and no other questions were ever asked of her regarding the septic tank. She said she was present when her husband received a call from Mrs. Dunn in 2013 and overheard him say that the septic tank was under the pool table.

Mr. Vukodinovich testified that he was not present during the period of contract negotiations because he was working out-of-state, but he was present for the closing. He was also aware of the contingency regarding the septic tank. He said there was no discussion of the septic tank on the day of closing, but two years later, Mrs. Dunn called and wanted to know where it was located. He testified that he was surprised by the call

and told her where to find it under the floor beneath the pool table. Like his wife, Mr. Vukodinovich said that his family had lived at the home for eleven years and had no trouble with the septic tank, although it was pumped when they moved into the home. He had never checked any records with the county or state but assumed that his contractor would have pulled permits for the work on the home.

At the conclusion of this brief hearing, the trial judge reserved his ruling and instructed the parties to submit proposed findings of fact and conclusions of law. Although it is not entirely clear from the record, it appears that the trial judge may have emailed the parties after the hearing due to problems the trial judge perceived with the lack of proof on various issues. The record contains a transcript from a second hearing held on October 12, 2020 (nine months after the first hearing in January). Like the previous transcript, however, the portion attributable to testimony is extremely brief, with the testimony of all four witnesses spanning a total of about sixty pages. At the outset, the trial judge stated that "when I got into it, I found several things that I didn't have any information on and that's what I advised you by correspondence before the pandemic, I guess, and so, . . . whatever is required is required or I don't have anything to rule on." Specifically, the trial judge said he recalled that he lacked sufficient evidence regarding two major issues: the market value of the improvements made by Mr. Dunn (as opposed to the actual cost), and the fair rental value of the property for the time period that it was occupied by the Dunns. At that point, counsel for Mr. Dunn stated that the caselaw regarding rescission discusses putting the parties "back at status quo," so he also wanted to introduce evidence regarding mortgage interest, real property taxes, "and things like that," which Mr. Dunn "wouldn't have had to pay had they not entered into the contract."

Whitney Dunn testified again on the second day of trial. She explained that she and Mr. Dunn had used their "life savings" to pay off the mortgage on the house in 2017, so mortgage interest was no longer an ongoing expense for them. However, they had paid a total of $87,912.06 in mortgage interest on their loan between 2011 and 2017. She said they had also paid property taxes and homeowner's insurance premiums from 2011 through the date of trial, totaling $7,951 in taxes and $9,470 in insurance. She testified that the total amount they had incurred for these three sums was $105,333.06.

Mrs. Dunn also explained that during the first two years that they lived in the home, before the overflow, they had detected the bad smell inside the home but thought that there was something dead around the house. She said they figured out the source of the problem once they learned the true location of the septic tank and determined that it was the smell of the gases from the septic system coming from the clean-out and being circulated throughout the house by the HVAC system. She also testified that she and Mr. Dunn had no choice but to remain in the home up to the time of trial, as they could not sell it or rent it, and the house had been the subject of litigation for seven years.

Mr. Dunn also testified for a second time. He also confirmed that he and his wife

had detected the smell before the overflow. However, he said "we had thought it was a dead animal." Mr. Dunn explained that he actually went outside and found a dead squirrel and thought that was the source of the problem, but it was not because the smell returned a couple of weeks later.

The parties also presented testimony from appraisers in support of their positions. Mr. Dunn presented testimony from William Miller, who had been an appraiser for over forty years and owned his own company in Johnson City. Mr. Miller said he was asked for an opinion as to the rental value of the property. He explained that the home has two bedrooms on the upstairs level, which consists of 1430 square feet, and the basement level has 896 square feet with a third bedroom. However, Mr. Miller said that when he looked at the property, he detected problems with the septic system being located inside the home. Mr. Miller said "in forty some years of appraisal practice, I've never seen that at all. . . . I don't really think that it would be approved by any authorities." Mr. Miller opined that the house did not have *any* rental value in its present condition with the septic tank inside the home and the problems that had occurred. He said "it's a house that couldn't be sold. It can't be sold with that in place. I don't see how it could be leased." Mr. Miller explained that the problems with the location of the septic tank and its odors would have to be disclosed to any potential purchaser or renter.

Mr. Miller testified that he also considered the fact that the house is located on Boone Lake, and one side of the property has a dock on the water. He considered whether the property could be leased for someone to at least use a boat at the dock, but due to water levels being down for the past six to seven years, he determined that the dock itself was meaningless and had no rental value at the time of trial. He opined that the dock alone may have had some rental value from about 2011 to 2014, but "not the house." He believed the property had "no rental value whatsoever" at the time of trial.

During cross-examination, Mr. Miller was asked if he had checked into the rental values of other properties in the area. He responded,

> Sure. I mean I'm familiar with, with rental values of homes. The problem is if you've got a home, it's like selling it, you have to tell people if there's a problem, and if there's a problem, you have to demonstrate what the problem is, and if you, you do that, you're opening up -- well, the house is not leasable with the problems that it has or it's not sellable with the problems that it has.

When asked specifically about other rental properties presently available on Boone Lake, Mr. Miller testified that there were some houses that were rented from anywhere between $700 and $1800 per month. "But," he emphasized, "they're livable, they're livable." Counsel for the Vukodinoviches then suggested that this home was "livable" in the sense that the Dunns were still residing at the property. Mr. Miller acknowledged that they were but said it was his understanding that "there's a lot of problems" and that they were unable

to sell the house. He said, "They don't have anywhere else to go." He stated that the Dunns were still living there because it was "their only option at this time," and he said, "I don't think it's a satisfactory situation at all[.]" Mr. Miller's written report stated that the septic system located within the home "does not meet any building codes and in fact the writer is surprised to know that the home was not red tagged by county inspectors and owners were to vacate until the problem could be alleviated." The report also recited Mr. Miller's understanding that relocating the septic system to an outside location "may not be a viable alternative in that there is no location on the site to relocate the system and have adequate field beds."

Mr. and Mrs. Vukodinovich only called one additional witness – appraiser Randall Thomas from Kingsport. He had been certified as an appraiser since 1992 and worked as a general contractor before he was an appraiser. Mr. Thomas testified that he had also visited the home in an attempt to establish its fair rental value. He described the home as a contemporary one-level house with a basement, sitting on a hill with a very steep driveway. In considering the fair rental value of the home, Mr. Thomas admittedly considered only the upper level, "totally eliminating anything on that lower level" and considering "nothing in that finished basement area as rentable." Thus, he considered the property as a two-bedroom two-bath lakefront home. Mr. Thomas testified that he could not find any other rental properties on Boone Lake that were presently available, but he did find some that were rented. He said those ranged from about $900 to $1700 per month. Mr. Thomas said he established the rental value of Mr. Dunn's home at $900, which he said was "the very lowest level" in that range.[1] When asked what the rental value would have been in past years, including when the lake was full, he said probably about the same.

On cross-examination, Mr. Thomas was asked about a statement in his report that the septic tank in the finished basement area "most likely does not meet code," although Sullivan County did not adopt a code until 2012. Mr. Thomas testified that he had spoken to the gentleman at the county who enforced the code to find out if this septic tank "was up to code," and he learned that it is not. Mr. Thomas also acknowledged that the home's HVAC system serves both levels, and due to a return air vent on the lower level, it could pull in fumes from the lower level. When asked if this would "turn off" a potential renter, he said, "It could, yes, Sir." He also believed that this information would have to be disclosed to a potential renter. Mr. Thomas was then asked if "any reasonable potential renter" would pay $900 per month to rent the property in such a condition, and he responded,

A. Absolutely.
Q. And how can you be so sure about that?
A. Because I see every day in my business that people do crazy things to

[1] We note that according to Mr. Thomas's written report, only one of the seven presently rented homes on Boone Lake was a two-bedroom, and that home was rented for $900 per month.

> residential dwellings that you would think, "You have got to be an idiot to live here," but they continue to live here, vis-a-vis, these people were there when I was doing my inspection.

When pressed on whether the Dunns had any alternative, he responded, "I can't answer that, Sir." In his written report, Mr. Thomas had stated that "[a]s far as being rentable property, let me say the home owners have been living in this dwelling without being forced by either county officials or general living circumstances to vaca[te] and leave the property[.]" His report stated that the Dunns had apparently been living there satisfactorily and that the septic tank had "not caused such a problem that the home owners willingly left the dwelling[.]" However, when asked during his testimony whether he considered this a "satisfactory situation they're living in," he said "[p]robably not."

In Mr. Thomas's written report, he had also stated that based on his inspection, "the best remedy for this situation in my opinion is simply to remove the finished basement area[.]" When asked how demolishing half the house could be the best remedy, Mr. Thomas testified that his proposal would enable the septic system to have clean air flow "instead of being engulfed in that recreation room." The following exchange occurred regarding the availability of another option:

> Q. Wouldn't a better remedy be to construct a new septic system pursuant to a permit issued by the state?
> A. Well, I can't answer that. I don't, I don't believe so.
> Q. You don't think that creating a new septic system is better than cutting off half the house?
> A. Well, the house, basically, is cut off anyway. I mean there -- your – it's finished but you can't get to the upstairs from the downstairs. And I'm not sure that the lot, and I'm certainly not a geologist, but I'm not sure that the lot would support a new location for a septic system.

Mr. Thomas was then asked about an attachment to his report consisting of a copy of a permit, dated 2015, from the Tennessee Department of Environment and Conservation. However, he clarified that "I saw this as a permit to repair the one that was there, not to establish a new one."

At the close of proof, the trial judge again reserved his ruling and requested proposed findings of fact and conclusions of law. The trial judge again brought up the issue regarding the cost of improvements, but Mr. Dunn's counsel stated that he was just going to have to rely on the testimony Mr. Dunn gave originally regarding the cost of the improvements he made.

In January 2021, the trial court entered a written order containing findings of fact and conclusions of law from both days of trial, in January 2020 and October 2020.

Pertinent to this appeal, the trial court made the following findings of fact:

> 6. That on March 14, 2011, during the course of a final walkthrough of the property by the Plaintiff Christopher Dunn, the Plaintiff's fiancé, Plaintiff's realtor, Lisa Lohoff, and the Defendant Pamela Vukodinovich, Plaintiff asked Ms. Vukodinovich where the septic tank was located and she pointed to an area in the front yard of the property near a tree and gazebo and told the Plaintiff that the septic tank was located there.
> 7. . . . Whitney Dunn also confirmed that when asked where the septic tank system was located, that Pamela Vukodinovich stated where it was located and pointed toward the gazebo area.
> 8. The realtor, Lisa Lohoff, also confirmed that in the course of the walkthrough, that the Plaintiff, Plaintiff s fiancé and the Defendant Pamela Vukodinovich were present at the final walkthrough and she was present when Plaintiff Christopher Dunn inquired about the location of the septic system, and Pamela Vukodinovich pointed toward the gazebo area.
> . . . .
> 15. That Ms Vukodinovich knew the location of the septic tank under the pool table in the room on the lower floor of the residence since they purchased the property in approximately the year 2000, and knew of the true location of the septic tank on or before March 14, 2011, when she told the Plaintiff at the final walk through that it was in an area near the tree and gazebo in the front yard of the property.

In the section of the order containing conclusions of law, the trial court also found that the location of the septic tank was a material fact and that Mr. Dunn's reliance on the statement by Mrs. Vukodinovich was reasonable. It further found:

> Defendants were aware of the actual location of the septic tank and Defendant Pamela Vukodinovich made an intentional misrepresentation of the location of the septic tank when she knew it was located under the pool table. Plaintiff has carried his burden of proof by clear and convincing evidence and said Defendant's statement was witnessed by Lohoff, then Whitney Dunn and Plaintiff during walk through when all were on the front deck.

Thus, the trial court expressly found intentional misrepresentation.

The trial court found that "Plaintiff paid $302,000.00 to Defendants for the property and subsequently made improvements to the property of approximately $50,000.00, including adding a shower in the bathroom on the lower floor of the residence." The court stated that generally when a deed to real property is rescinded, the grantee is entitled to recover the purchase price in addition to the value of any improvements made to the

property. The order stated that "[t]he measure of compensation is the enhanced value of the land and the market resulting from permanent improvements, estimated as of the time the election to avoid the contract was made." The trial court recited the list of improvements discussed by Mr. Dunn during his testimony, including appliances, hardwood floors, granite countertops, finished downstairs, retaining walls, remodeling the laundry room, replacing electrical wiring, and shoring up the sea wall, all of which "he estimated cost him" approximately $50,000. Still, the court stated that it was "unable to ascertain the improvements to the basement only, nor did the Plaintiff state the value of enhancement to the value of the property by reason of the improvements." As such, the trial court reserved its ruling on the issue of the *value* of the improvements.

Regarding the testimony on the second day of trial, the trial court explained that it found the testimony of Mr. Thomas, who testified on behalf of the Vukodinoviches, more credible than that of Mr. Miller, who testified for Mr. Dunn. It stated:

> 1. Plaintiffs appraiser, William A. Miller, testified that the property had no rental value as based on the septic system, the home cannot be sold and Boone Lake level has been down for six or seven years due to dam repairs.
> 2. The Court does not accept the appraisal of William A. Miller as he testified that he did not research other rental properties in the Boone Lake area and due to the nature of the issue of which Plaintiff complains.
> 3. The Defendants presented Randall C. Thomas and it was his opinion that the subject property, a two-bedroom lakefront home had a fair market value of Nine hundred ($900.00) dollars per month. Thomas further testified that the property was in good condition and the problems of which the Plaintiff was complaining did not force him to vacate the property and, in fact, the Plaintiff has been residing in the property since March, 2011. The Court finds that Plaintiff should be charged with the value of rents while he had the subject property in his possession and control at the rate of $900.00 per month for the period of March 18, 2011 to January, 2021 for a total of 118 months for a total sum of $106,200.00.

The court again stated that "the testimony of Mr. Thomas is more credible than that of Plaintiff's appraiser, William A Miller, in that Mr. Thomas investigated and researched rental properties in the area of the subject property whereas Plaintiffs appraiser did not do so."

Next, the trial court's order stated that Mr. Thomas had "testified that Plaintiff acquired a permit for the construction of a sub-surface sewer disposal system from the State of Tennessee in March 12, 2015, but allowed that permit to expire[.]" Citing the Tennessee Pattern Jury Instructions, the trial court stated that "[a] person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented

by reasonable efforts or by expenditure that might reasonably have been made." The trial court added,

> The Court finds that Plaintiff could have mitigated his damages by installation of the proposed construction of another subsurface sewage disposal system as outlined on Plaintiff's permit obtained on 3/12/2015. The Court further finds that Plaintiff had a duty to mitigate his damages and that the period of its damages, based on the aforesaid events and the nature of the event was in 2013 when the event occurred and the permit for the construction of a subsurface sewage disposal system was obtained by Plaintiff on 3/12/2015.

Based on this ruling, the court noted Mrs. Dunn's testimony that they had paid $87,912.06 in mortgage interest, $7,951 in property taxes, and $9,470 in hazard insurance on the property; however, the trial court limited Mr. Dunn's damages to only the portion of those sums that was incurred during the years 2013, 2014, and 2015, and it calculated that amount at $35,643.02.

In sum, the court ordered that Mr. Dunn would be required to convey the property back to the Vukodinoviches, and he would receive $302,000 as the consideration he paid for the property, plus $35,643.02 for mortgage interest, taxes, and insurance he paid for three years, less $106,200 for rental value, with the value of the improvements being reserved. The trial court also reserved the issue of attorney fees.

Mr. and Mrs. Vukodinovich prematurely filed a notice of appeal to this Court. Meanwhile, Mr. Dunn filed a motion to alter or amend or for relief from the trial court's order, raising several issues. First, Mr. Dunn argued that the trial court "did not allow Plaintiff to recover the interest that had been paid on the purchase money since the property was purchased." Second, Mr. Dunn claimed that the trial court's calculation of rent at the rate of $900 per month was unjust and failed to fully place him in the status quo. He claimed that he should not have been charged with rent for the entire time period, citing, for example, the one year delay between the first trial date and the trial court's written order. Third, Mr. Dunn challenged the trial court's decision to reopen the proof *sua sponte* after the first trial date to consider the issue regarding the fair rental value of the home when Mr. and Mrs. Vukodinovich had not raised any issue regarding fair rental value. Fourth, Mr. Dunn noted that the trial court had not resolved his request for punitive damages. Finally, he claimed that he should have been awarded all of the mortgage interest he paid, totaling $87,912.06.

Mr. and Mrs. Vukodinovich filed a response. Regarding the first issue, they argued that Mr. Dunn had not requested prejudgment interest in his complaint or presented any testimony regarding what he would have done with the purchase price if he had not purchased the home, and they argued that an award of interest was inappropriate due to the

fact that he had borrowed the money from a mortgage company. As for rental value, they argued that this matter was an integral part of the rescission of the contract, and it was not waived by their failure to specifically request it. They argued that the trial court appropriately concluded that Mr. Dunn should not be permitted to live in the home rent-free for nearly nine years. Next, Mr. and Mrs. Vukodinovich argued that the court should decline to award punitive damages because, they claimed, the court had found that Mrs. Vukodinovich made an innocent mistake rather than committing fraud. They also claimed that punitive damages should not be awarded where the contract was executed over ten years earlier. Finally, they argued that the court properly limited the recovery of mortgage interest to a period of three years due to Mr. Dunn's failure to mitigate his damages.

After the entry of three agreed orders for continuances, the trial court held a third hearing to resolve the remaining issues in November 2021. The hearing was, once again, very brief, and it only involved one witness. Counsel for Mr. Dunn stated that he had "an expert witness here on the issue of the increase in value" attributable to the improvements. He called Christopher Doran, a certified residential appraiser. Mr. Doran testified that he had been an appraiser for 26 years and was certified in two states. At the outset, he explained that he had never seen a situation like this one as far as the location of the septic tank. He said that the house was unmarketable with the septic tank in its current location.

Next, Mr. Doran testified that he and the Dunns had discussed the improvements they had made and how much they spent on those improvements. He stated that the improvements "upped the overall condition of house, which, in turn, creates a newer, effective age, as well as less depreciation." He said their improvements included new flooring, redoing the basement, remodeling the kitchen, installing new floor joists in the master bedroom, replacing boards on the deck, adding a fence, installing new lighting and vanities, replacing bathroom fixtures, and "just a basic overall updating of the house." Mr. Doran opined that these improvements had increased the value of the home by about $129,000. He explained that he determined this number using a "market comparison." Mr. Doran said that he was able to view pictures on the MLS system from when the house was listed for sale ten years ago, and he discerned the condition of the house at that time from those pictures. He had also viewed the current condition of the house in person. Additionally, Mr. Doran said basically he "drew comparative sales that had not been updated as the house has now and compared them to houses that have sold recently that have been updated." At that point, counsel for Mr. Dunn sought to introduce Mr. Doran's written appraisal into evidence. Even though opposing counsel did not state any objection, the trial judge immediately responded, "No, that'll be denied. That'll be denied. He can testify as to – and his report should be limited to the value of improvements." The following exchange occurred:

> Q. All right, so it's limited to his testimony, then? Is that right, Your Honor?
>
> THE COURT: Yeah, that -- the improvements I was interested in, that I

reserved on was the value of what the homeowner put in. I think he said he spent about $50,000.00 on putting that in.

Q. That's what -- that was his testimony at the first trial, Your Honor.

THE COURT: Does this witness have any estimate of the value of the improvements that's in his report?

Q. You mean the dollar number that the Dunns spent?

THE COURT: Well, I'm just asking. He comes up with a hundred and twenty-nine thousand. That seems awful hard to do from fifty thousand.

Q. Well, Your Honor, it's, it's an issue of increasing or appreciating the value of the home. You spend so much money on the home and it increases the value of it, not limited to the amount you've spent to do the improvements. And I believe that was what Your Honor was looking for when he reserved that issue.

THE COURT: Well, he, he -- the plaintiff stated that he put in appliances, hardwood floor, granite countertop, finished the downstairs, put in retaining walls, remodeled the laundry room, replaced the electrical and shored up the seawall, and, that, he estimated, to cost him, approximately, $50,000.00. What, what is the – did he limit himself in his report, and I don't have that before me, to that valuation?

Q. Mr. Doran, do you understand the question?

A. Yeah, and, and, I mean, to be honest with you, you know, I'm doing a market comparison, so what somebody puts in is not exactly the amount that it ups the house or decreases the house. I'm, basically, going off what that house would sell for with the improvements versus what it might sell for without them. Does that, does that...

THE COURT: Are you saying with the improvements that I just read off that the plaintiff testified to?

A. Yes, Sir. Yeah.

THE COURT: And that's appliances, hardwood floor and that sort of thing?

A. Right. Yeah, yeah.

THE COURT: And, and he spent about $50,000.00 on it and you said that increases the value of the home a hundred and twenty-nine thousand?

A. Yes, Sir. Uh-huh.

THE COURT: Okay. All right. Cross examination.

During cross-examination, Mr. Doran explained that in his report, he had appraised the present value of the home at $439,000. However, he noted that this was his estimate of the value of the home, with the improvements, *if* the septic tank was successfully relocated. He added, "without that septic tank being moved, it would not bring that on the market, obviously." Mr. Doran noted that the Dunns had been unable to get any actual estimates on what it would cost to move the septic tank, but he estimated that it would cost between $50,000 and $100,000. As such, he estimated that the value of the home in its present state was $439,000 minus $50,000 to $100,000.

Counsel for Mr. and Mrs. Vukodinovich asked the following questions about appraisals:

> Q. You're, obviously, a very experienced appraiser and have plenty of experience in that.
> A. Right.
> Q. But let me ask you this. The appraisal is a spot in time, looking at a value in time, correct?
> A. Exactly. It is.
> Q. Okay.
> A. Uh-huh.
> Q. This home was bought in, I believe, 2011.
> A. Right. Uh-huh.
> Q. Can you say with any reasonable degree of certainty that the value you gave it in your report is based solely on improvements to it rather than 10 years worth of market changes?
> A. No, I can't, to be quite honest with you...
> Q. Okay.
> A. ...because I, basically, appraised it with today's value, you know.

Mr. Doran also reiterated that "there's not a precedent on a house selling with a septic underneath the house[.]"

The trial judge then asked Mr. Doran, again, "if the plaintiff was found to have installed the, the appliances, the hardwood floor, the granite countertop, down -- finished the downstairs, put in retaining walls, remodeled the laundry room, replaced the electrical and shore up the seawall, what would you say that added to the valuation of the house?" Mr. Doran said, "I -- well, I came up with by comparison a hundred and twenty-nine thousand." He clarified that "[t]he hundred and twenty-nine didn't really have anything to do with the septic as far as the removal of it or anything."

Counsel for Mr. and Mrs. Vukodinovich then made an objection to the use of Mr. Doran's expert testimony in this case, stating "this is not what an appraiser does." He argued that Mr. Doran's testimony was speculative and that an estimate on relocating the septic system was "not what was asked for" because the plaintiff elected the remedy of rescission. He also argued that Mr. Doran "can't say what improvements improve the value of the home relative to just natural market forces." Counsel noted that the case had been going on for "a decade" and suggested that "the market's changed."

The trial judge responded,

THE COURT: Well, it seems to me that he would have to go back to the day

> that these improvements were made and give a valuation, and as I understand it, his hundred and twenty-nine thousand was a valuation of today. And is that correct?
> A. It is. Yes, Sir. Uh-huh.
> THE COURT: So I, I think he would have to go back to the time that they would -- and what the Court was needing was the value of the improvements as of the time they were completed so -- but you don't have that, do you?
> A. No, I -- that wasn't asked of me so . . . .

Mr. Doran acknowledged that estimating how much the improvements increased the value of the home a decade ago would be difficult. The trial judge then stated:

> THE COURT: All right. I'll grant the Motion of the defendants in this case because it's, it's not what the Court was looking for and so, so I'll, I'll grant the Motion, and then the witness has verified that it's -- his -- the valuation, then, is based on today's value rather than at the time it was installed, so I, I will go ahead and grant the -- all right, thank you.

This concluded the testimony.

The trial judge and the attorneys went on to discuss the issue of attorney fees. Counsel for Mr. Dunn argued that an award was appropriate pursuant to a provision in the contract providing for attorney fees to be awarded to the prevailing party in litigation. In response, counsel for Mr. and Mrs. Vukodinovich argued that the plaintiff had elected rescission, which resulted in "an undoing of the entire real estate transaction," so the contract provision would not apply. The trial judge orally ruled that an award was proper pursuant to the contractual provision.

Finally, the discussion turned to the issues raised in the motion to alter or amend or revise filed by Mr. Dunn. Counsel for Mr. Dunn started out by stating, "The issue stated in paragraph 1 of my Motion, we're withdrawing that issue. Concededly, the plaintiffs borrowed the substantial majority of the purchase money and so no interest would really be coming to them for any cash they put into the deal." Next, he moved to the issue of fair rental value. Counsel argued that it was inequitable to charge Mr. Dunn with rental value considering the many delays throughout this litigation, including a fire in the office of the defendants' counsel and illness of his wife, and when it was not requested by the defendants. He also argued that Mr. Dunn had attempted to mitigate his damages by filing suit and that it would have been unreasonably expensive to move the septic tank. Still, the trial judge announced that he would not alter his original ruling on rental value because it was not proper for Mr. Dunn to get "a free ride." He stated that he had accepted the opinion of Mr. Thomas as to the amount of rental value rather than Mr. Miller's opinion "of no value." He also stated that the delays attributable to defense counsel were "no one's fault." Finally, the discussion turned to the issue of punitive damages. The trial judge stated that

"the thing about punitive damages is they're to punish [] a party for the purpose of this practice ceasing and, and that's why I didn't find punitive damages in this [case]."

The trial court entered a written order on January 31, 2022, incorporating the transcript by reference and setting forth the court's written rulings on these various issues. The order first noted that the court had reserved the issue of the value of the improvements and that Mr. Dunn had offered the testimony of Mr. Doran on that issue. The court stated that it "denied the entry of [Mr. Doran's] report into evidence and asked that his report be limited to the value of the improvements." The trial court noted Mr. Doran's testimony that the improvements increased the value of the property by $129,000. However, the court also stated that it "granted the Defendants' Motion to Strike Mr. Doran's testimony on the basis that it was irrelevant to the issue reserved by the Court." It explained, "The expert testimony offered by Plaintiff stated the value of the improvements that were made by Plaintiff as of the present time and not as of the time the improvements were made. Defendants' objection to this testimony is sustained and the testimony is rejected as irrelevant." The trial court concluded by stating that "Plaintiff is awarded no damages for the improvements made to the property."

The order stated that the first issue raised in Mr. Dunn's motion to alter or amend, regarding interest, "was withdrawn." It reaffirmed its previous award of only $35,643.02 to Mr. Dunn for mortgage interest, taxes, and insurance. As for rental value, the court stated that it reaffirmed its previous ruling and found the award appropriate "because it's not proper that he gets a free ride." Thus, it stated that Mr. and Mrs. Vukodinovich would "receive an offset against Plaintiff's damages . . . for the reasonable rental value of the property in the amount of $900.00 per month from the time Plaintiff purchased the property in March 2011 through the date possession of the property is transferred[.]" It denied the request for punitive damages on the basis that there was no ongoing practice to cease. Regarding attorney fees, the trial court found the contractual provision applicable despite rescission of the contract. As such, it awarded Mr. Dunn $19,740 in attorney fees.

Mr. Dunn filed a separate notice of appeal to this Court, although one had already been filed by Mr. and Mrs. Vukodinovich. Mr. and Mrs. Vukodinovich sought to voluntarily dismiss their appeal, so Mr. Dunn was re-designated as the appellant.

II. ISSUES PRESENTED

Mr. Dunn presents eighteen issues for review on appeal, which we quote directly from his brief:

> 1. Whether the court abused its discretion in *sua sponte* reopening the case more than a month after the trial had been concluded to give the Defendants the opportunity to establish (a) that they were entitled to credit for (a) the fair rental value of the property during the Plaintiff's occupancy

of the property, and (b) what the court referred to as "mitigation of damages."

2. Whether the Defendants had waived its claims for the fair rental value of the property and "mitigation of damages" by not raising them either in their Answer or at trial.

3. Whether in "undoing" the transaction the court misapplied the principles of restitution by (a) charging the Plaintiff/Purchaser with the rental value of the property for the entire eleven-year period, while only charging the Defendants with interest on the purchase price for three of those eleven years, and (b) by charging the Plaintiff/Purchaser with ongoing rent continuing through the future date that possession would be transferred as a result of the rescission (at the end of the litigation), but did not similarly charge the Defendants/Sellers with continuing interest on the purchase price.

4. Whether the court abused its discretion by not allowing the Plaintiff credit for all of the mortgage interest that he paid in 2013, with the court only allowing the small amount of interest charged by the original mortgage company, but not allowing the much larger amount charged by the new company.

5. Whether the court abused its discretion, or committed legal error, by not charging the Defendants with the full amount of the mortgage interest, real property taxes, and property insurance premiums that the Plaintiff paid, including not only the sums paid in 2013-2015, but also the sums paid in other years (2011-2012 and 2016-2020).

6. Whether the court impermissibly applied the principle of mitigation of damages as its justification for only charging the Defendants/Sellers with interest on the purchase price for three of the eleven years in question, including the following sub-issues:

a. Whether the question of "mitigation of damages" is even applicable to the determination of restitution.

b. Whether the court made an error of law in finding that the Plaintiff was required to "mitigate[] his damages" by installing a new septic tank located outside the house, at his own considerable expense ($50,000 to $100,000) and further finding that the "period of its [Plaintiff's] damages" was limited to a time beginning in 2013 "when the event occurred" [discovery of sewage and fecal matter flowing into the home] and ending when the Plaintiff obtained a permit to construct a subsurface sewage disposal system on March 12, 2015 (a period of three years).

c. Whether the court made an error of law in failing to recognize that the Defendants had waived the affirmative defense of mitigation of damages by failing to raise it either in their answer or at trial, which had been concluded on Jan. 13, 2020. (See Issue 1)

7. Whether the court unreasonably faulted the Plaintiff for having the septic tank pumped out (supposedly) "more frequently than is normally necessary" which, as the court put it, resulted in "frequent periods of

unpleasant and nauseating odors throughout the residence more frequently *due to their own actions*." (Emphasis added.)

8. Whether the court abused its discretion in disallowing or not "accepting" the testimony of the Plaintiff/Purchaser's rental value expert that the property was not rentable and thus had no rental value due to the fact that the septic tank was located inside the house, with the court's ruling being made because the expert "did not research other rental properties" when the question of the rental value of other properties was not necessary or relevant to the expert's opinion because his opinion was that the property was not rentable.

9. Whether the court abused its discretion in basing its decision as to rental value for the eleven-year period of occupancy on the testimony of the Defendants/Sellers' rental value expert when the expert (a) testified only to the *present* rental value (day of trial) and did not testify to the rental value for the eleven-year period in question, and (b) did not identify any truly comparable properties, that is, properties with the septic tank located under the house and that "constantly smell[ed] like a dead body."

10. Whether the court abused its discretion in "reject[ing] as irrelevant" the testimony of the Plaintiff/Purchaser's valuation expert as to the value of the improvements because the expert stated the value "as of the present time and not as of the time the improvements were made," thus giving the Plaintiff no credit for his very substantial improvements (cost: $50,000).

11. Whether the court thus committed an error of law in failing to recognize that the question of the value of the improvements is to be determined as of the time of rescission rather than as of the time the improvements are made.

12. Whether the court abused its discretion in not at least giving the Plaintiff/Purchaser credit for the cost of his improvements to the real estate.

13. Whether the court abused its discretion when it "rejected" the testimony of the Plaintiff/Purchaser's valuation expert as "irrelevant" because he gave the value at the "present time" rather than at the time the improvements were made, while the court, at the same time, allowed the testimony of the Defendants/Sellers' rental value expert as to the rental value for the eleven-year period even though he too gave the value as of the "present time."

14. Whether the effect of the court's decision was to unjustly and inequitably enrich the Defendants/Sellers by giving them a windfall of approximately $179,000 to $269,000 by charging the Plaintiff with the rental value of the property for the entire eleven-year period, while only charging the Defendants with interest on the purchase price for three of those eleven years, at the same time allowing the Defendants to reap the benefit of the improvements that the Plaintiff made to the property (cost: $50,000) as well as eleven years of appreciation in the value of the real estate.

15. Whether the court misapplied the law of punitive damages when, after finding that one of the Defendants/Sellers had been guilty of intentional misrepresentation of a material fact, it denied punitive damages for the reason that the behavior in question, a one-time event that induced the execution of the contract, had "ceas[ed]."
16. Whether the court was in error when it held held that the purpose of punitive damages was "to punish a party for the purpose of this practice ceasing….", when the purpose of punitive damages is actually to punish a wrongdoer and to deter the wrongdoer and others from similar behavior in the future; and whether the court's ruling frustrated the purposes of punitive damages, providing no punishment to the Defendants and no deterrence of the Defendants or others.
17. Whether the court abused its discretion by departing from its function as a judge and assuming, in effect, the role of advocate for the Defendants.
18. Whether the Plaintiff should recover his attorney fees on appeal.

In their posture as appellees, Mr. and Mrs. Vukodinovich frame the issues as follows:

1. Whether the Trial Court abused its discretion in requesting and allowing additional testimony and proof regarding the issues of fair rental value, value of improvements, mortgage interest, taxes, and insurance after the conclusion of the first trial date.
2. Whether the Trial Court abused its discretion in providing the Defendants compensation for the fair market rental value of the Property during Plaintiff's possession.
3. Whether the Trial Court erred or abused its discretion in denying an award of punitive damages to the Plaintiff.
4. Whether the Plaintiff waived his request for interest on the purchase price of the property, or, alternatively, whether such an award would be too speculative.
5. Whether the Trial Court abused its discretion in determining not to award the Plaintiff the cost or value of improvements.
6. Whether the Trial Court its discretion in awarding the Plaintiff mortgage interest, insurance, and taxes for only a portion of the time Plaintiff owned the property.
7. Whether the Trial Court erred in awarding the Plaintiff his attorneys' fees under the rescinded and repudiated contract.

For the following reasons, we vacate the decision of the circuit court in part, reverse in part, and remand for further proceedings.

III. DISCUSSION

We begin by noting that many of the twenty-five issues presented above are duplicative and overlap with other issues. Despite raising eighteen issues on appeal, the argument section of Mr. Dunn's brief is divided into only eight sections. We also note that all of the parties' issues in some way or another relate to the remedies available upon rescission, and neither party presented any issue on appeal regarding the trial court's underlying decision to rescind the contract on the basis of fraud. However, we must begin with a discussion of the concept of rescission in order to guide our analysis of the issues raised on appeal.

A. Rescission

"A purchaser who has been the victim of a misrepresentation . . . is afforded . . . a number of alternate remedies, including actions for rescission and restitution, actions for breach of contract and actions in tort for misrepresentation." *Isaacs v. Bokor*, 566 S.W.2d 532, 537 (Tenn. 1978). "Rescission is a common law remedy available as an alternative to a breach of contract claim." *Queen City Pastry, LLC v. Bakery Tech. Enterprises, LLC*, No. M2017-00112-COA-R3-CV, 2018 WL 3854912, at *4 n.3 (Tenn. Ct. App. Aug. 14, 2018). "The person seeking to rescind a contract on the basis of fraud must prove the fraud by clear and convincing evidence." *Lee v. Stanfield*, No. E2008-02168-COA-R3-CV, 2009 WL 4250155, at *8 (Tenn. Ct. App. Nov. 30, 2009). However, "[t]he equitable remedy of rescission is not enforceable as a matter of right but is a matter resting in the sound discretion of the trial court[.]" *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 632 (Tenn. Ct. App. 2002) (citing *Vakil v. Idnani*, 748 S.W.2d 196, 199 (Tenn. Ct. App. 1987)).

"Rescission, of course, involves the avoidance, or setting aside, of a transaction. Usually it involves a refund of the purchase price or otherwise placing the parties in their prior status." *Mills v. Brown*, 568 S.W.2d 100, 102 (Tenn. 1978). In many cases, the purchase price "is the only amount involved." *Isaacs*, 566 S.W.2d at 538. "It does not necessarily follow, however, that because refund of the purchase price is a common measure of damages upon rescission, it is the only amount which can ever be recovered by the complaining party." *Id.* Thus, "it is too narrow a view to state that a vendee, upon rescission, is limited strictly to the purchase price which he paid for the property." *Id.* at 540. A purchaser who has been the victim of fraud "may recover, in addition to the purchase price, other damages which he may have incurred in good faith[.]" *Mills*, 568 S.W.2d at 103.

It is "well established in this state that when a deed to real property is rescinded, the grantee is entitled to recover the purchase price," and "[u]nder certain circumstances he may also recover the value of any improvements to the property[.]" *Minton's Est. v. Markham*, 625 S.W.2d 260, 262 (Tenn. 1981). Where the purchaser "has changed his position and made improvements, he may well be entitled to recover for their value, although, in attempting to restore the parties to their former status, courts may require the

vendee to account to the vendor for the use or rental value of the property[.]" *Isaacs*, 566 S.W.2d at 540. Ultimately, "rescission is designed to place both parties in the same position as they were in when the contract was contemplated." *Lamons v. Chamberlain*, 909 S.W.2d 795, 800 (Tenn. Ct. App. 1993). "It 'amounts to the unmaking of a contract, or an undoing of it from the beginning[.]'" *Walsh v. BA, Inc*., 37 S.W.3d 911, 916 (Tenn. Ct. App. 2000) (quoting 17B C.J.S. *Contracts* § 422, at 41 (1999); *Black's Law Dictionary* 1174 (5th ed. 1979)). Thus, upon rescission, "[t]he buyer is also 'entitled to reimbursement for the costs of necessary repairs,' insurance premiums, and taxes paid on the property." *Bradford v. Terry*, No. M2019-01340-COA-R3-CV, 2021 WL 6210714, at *7 (Tenn. Ct. App. Dec. 27, 2021) (quoting 12A C.J.S. *Cancellation of Inst*. §§ 194-95); *see, e.g.*, *Fayne v. Vincent*, No. E2003-01966-COA-R3-CV, 2004 WL 1749189, at *4-5 (Tenn. Ct. App. Aug. 5, 2004) (directing the trial court on remand to determine "all such items as are necessary to place the parties in the positions in which they would have been had there been no contract," which could include "the closing expenses, mortgage interest, real estate taxes, prejudgment interest, fair rental value and such other matters as may place the parties in their pre-contract status quo positions").

B. Improvements

We now turn to the issues the parties raised regarding the improvements. "Where improvements have been made to the property by the vendee, it seems that a threshold determination must be made as to whether the improvements have value or enhanced the value of the property."[2] *Stinnett v. Johnston*, No. E2003-02908-COA-R3-CV, 2004 WL 2346140, at *3 (Tenn. Ct. App. Oct. 19, 2004). Generally, rescission "requires reimbursement of the purchase price, adjusted by the amount by which the vendees' alterations increased or decreased the market value of the property." *Ingram v. Beazer Homes Corp*., No. M2001-01641-COA-R3-CV, 2003 WL 1487251, at *10 (Tenn. Ct. App. Mar. 25, 2003). The purchasers' "actual costs for such alterations are relevant only in supporting or disputing their effect on market value." *Id.* In addition, "[t]he measure of compensation is the enhanced value of the land in the market as a result of the permanent improvements *estimated at the time the election of rescission was made*." *Harrison v. Laursen*, No. 01-A-019204CV00177, 1992 WL 301309, at *3 (Tenn. Ct. App. Oct. 23, 1992) (citing *Masson v. Swan*, 53 Tenn. (6 Heisk) 450, 456 (1871)) (emphasis added).[3]

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[2] In *Stinnett*, for example, this Court disallowed recovery of construction costs in a case involving a mistaken boundary line, where the buyer constructed a foundation extending fifteen feet across the boundary line onto a neighbor's property. 2004 WL 2346140, at *1-4. We recognized that when a buyer has expended sums to improve property, "clearly in some cases, it would be appropriate and equitable for the Seller to pay the Buyer for the improvements since the Seller will ultimately benefit from these improvements," but the foundation at issue "did not benefit the property and may have to be removed[.]" *Id.* at *3. Thus, it "did not enhance the value of the property." *Id.* at *4.

[3] The *Masson* Court explained:

> The equity of complainant is the amount of the enhancement of the value of the lot in

Here, the trial court found that Mr. Dunn did make numerous improvements to the property. In its initial order, entered after the first two days of trial, the trial court found that Mr. Dunn "made improvements to the property of approximately $50,000, including adding a shower in the bathroom on the lower floor of the residence." The order further stated:

> 4. Generally in Tennessee, when the Deed to real property is rescinded and the grantee is entitled to recover the purchase price or other consideration paid for the Deed, he may also recover the value of any improvements to the property. The measure of compensation is the enhanced value of the land and the market resulting from permanent improvements, *estimated as of the time the election to avoid the contract was made.*
>
> 5. In his testimony, the Plaintiff in stating the improvements he made to the property, discloses that to be appliances, hardwood floor, granite counter top, finished downstairs, put in retaining walls, remodeled laundry room, replaced the electrical and shored up the sea wall, all of which he estimated cost him approximately Fifty thousand ($50,000.00) dollars. The Court is unable to ascertain the improvements to the basement only, nor did the Plaintiff state the value of enhancement to the value of the property by reason of the improvements. . . .

(emphasis added). Thus, the first order stated that "[t]he value of improvements is reserved."

In its second order, entered after the third day of testimony, the court noted that Mr. Dunn offered the expert testimony of Mr. Doran as to the value of the improvements and that Mr. Doran opined that they increased the value of the home by $129,000. However, the order states that the trial court "granted the Defendants' Motion to Strike Mr. Doran's testimony on the basis that it was irrelevant to the issue reserved by the Court." The court explained, "The expert testimony offered by Plaintiff stated the value of the improvements that were made by Plaintiff *as of the present time and not as of the time the improvements were made.* Defendants' objection to this testimony is sustained and the testimony is rejected as irrelevant." (emphasis added). The incorporated transcript also reveals the following explanation by the trial judge, which bears repeating:

> market, resulting from the permanent improvements made upon it; this value to be estimated at the time he made his election to avoid the contract. The amounts actually expended in making or superintending the improvements do not furnish the criteria for ascertaining the enhanced value, though they may be looked to as legitimate evidence in the investigation.

Masson v. Swan, 53 Tenn. 450, 456 (1871).

> THE COURT: Well, it seems to me that he would have to go back to the day that these improvements were made and give a valuation, and as I understand it, his hundred and twenty-nine thousand was a valuation of today. And is that correct?
> A. It is. Yes, Sir. Uh-huh.
> THE COURT: So I, I think he would have to go back to the time that they would -- and what the Court was needing was the value of the improvements as of the time they were completed so -- but you don't have that, do you?
> A. No, I -- that wasn't asked of me so . . . .
> . . . .
> THE COURT: All right. I'll grant the Motion of the defendants in this case because it's, it's not what the Court was looking for and so, so I'll, I'll grant the Motion, and then the witness has verified that it's -- his -- the valuation, then, is based on today's value rather than at the time it was installed, so I, I will go ahead and grant the -- all right, thank you.

We recognize that questions regarding the admissibility and relevancy of expert testimony are left to the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). However, "a trial court necessarily abuses its discretion when it commits an error of law." *State v. Deberry*, 651 S.W.3d 918, 924 (Tenn. 2022). Here, the trial court erred in its conclusion, in its second order, that it was necessary to value the improvements "as of the time the improvements were made." *See, e.g.*, 12A C.J.S. *Cancellation of Inst.* § 196 ("The value of the improvements is to be determined as of the date of the judgment and not as of the date when they were made."). We therefore reverse the trial court's ruling striking the expert testimony of Mr. Doran as irrelevant based on the timing of his valuation.

Given the exclusion of Mr. Doran's testimony, the trial court awarded Mr. Dunn nothing for the improvements. Mr. Dunn argues on appeal that he should be credited with $129,000 for the value of the improvements, or at least $50,000 as the cost of the improvements. However, we recognize that the trial court's stated reason for striking Mr. Doran's testimony was different than the actual basis for the objection made by Mr. and Mrs. Vukodinovich. They argued that Mr. Doran's testimony was "too speculative" in nature, that this was "not a proper use of an appraisal expert," and that "he can't say what improvements improve the value of the home relative to just natural market forces." The trial court did not mention any of these other grounds in its ruling. As a result, we reverse the trial court's stated ground for excluding Mr. Doran's testimony but express no opinion as to these alternative arguments. The trial court should first consider these arguments on remand before deciding whether Mr. Dunn should be awarded a sum for any increase in the value of the property due to the improvements.

C. Mitigation of Damages

Next, we consider the issues the parties raise regarding mitigation of damages. Mr. Dunn presents several alternative arguments in support of his position that the trial court's ruling on mitigation of damages should be reversed. He argues that the trial court abused its discretion in reopening the proof and considering the issue after the first trial date, that Mr. and Mrs. Vukodinovich waived any issue regarding mitigation of damages, that the trial court erred in applying the principle of mitigation of damages in the context of rescission, and that the court erred in applying the doctrine under these facts where he would have incurred a considerable expense to relocate the septic tank, assuming it was even possible. We will begin with this latter argument.

The trial court made the following findings regarding mitigation of damages:

> Plaintiff purchased the property on March 18, 2011, and the incident discovered by Plaintiff s wife, Whitney Dunn, occurred on March, 2013, when sewage and fecal material was flowing into the shower in the bathroom in the lower floor of the property. Plaintiff had obtained a permit for the construction of a subsurface sewage disposal system on 3/12/2015. T.P.I.-Civil 14.52 regarding duty to mitigate property damage provides: A person whose property has been damaged by the wrongful act of another is bound to use reasonable care to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by reasonable efforts or by expenditure that might reasonably have been made. The Court finds that Plaintiff could have mitigated his damages by installation of the proposed construction of another subsurface sewage disposal system as outlined on Plaintiff's permit obtained on 3/12/2015. The Court further finds that Plaintiff had a duty to mitigate his damages and that the period of its damages, based on the aforesaid events and the nature of the event was in 2013 when the event occurred and the permit for the construction of a subsurface sewage disposal system was obtained by Plaintiff on 3/12/2015.

The record before us simply does not support the trial court's finding that Mr. Dunn "could have mitigated his damages by installation of the proposed construction of another subsurface sewage disposal system as outlined on Plaintiffs permit obtained on 3/12/2015." This permit is only in the record as an attachment to the report of Mr. Thomas, the appraiser who testified for Mr. and Mrs. Vukodinovich. His written report stated that he obtained the permit from the Tennessee Department of Environment and Conservation and that it was attached "for your knowledge." However, at trial, Mr. Thomas testified that, in his opinion, the best option for the house was to demolish the finished basement. He was specifically asked, "Wouldn't a better remedy be to construct a new septic system pursuant to a permit issued by the state?" Mr. Thomas said he "[did not] believe so." He said that he was "not a geologist" but he was "not sure that the lot would support a new location for a septic system." He was then asked about the permit attached to his report, to which he responded, "I saw this as a permit to repair the one that was there, *not to establish a new*

one." (emphasis added). Mr. Dunn's appraiser, Mr. Miller, likewise stated in his report that it was his understanding that relocating the septic system to the outside of the house "may not be a viable alternative in that there is no location on the site to relocate and have adequate field beds." Thus, the record simply does not support the trial court's finding that the permit would have enabled Mr. Dunn to install "another" septic system.

According to the trial court's order, it applied a pattern jury instruction that stated: "A person whose property has been damaged by the wrongful act of another is bound to use *reasonable care* to avoid loss and to minimize damages. A party may not recover for losses that could have been prevented by *reasonable efforts or by expenditure that might reasonably have been made*." (emphasis added). Again, however, the proof at trial simply does not support a finding that Mr. Dunn failed to use reasonable care or reasonable efforts under the circumstances, beginning in 2015 or otherwise. We therefore reverse the trial court's holding on mitigation of damages. We express no opinion as to the applicability of the doctrine in this context or whether it was waived, as the various alternative arguments presented by Mr. Dunn regarding mitigation of damages are pretermitted.

Because of the trial court's conclusion regarding mitigation of damages, it limited the "period" in which Mr. Dunn could recover mortgage interest, taxes, and insurance, to only three years, ending in 2015 when he obtained the permit. Discerning no basis in the record for this limitation, we conclude that Mr. Dunn is entitled to recover all of the mortgage interest, taxes, and insurance he paid. As of the second trial date in 2020, that amount was $105,333. However, given the delay in the litigation thereafter, and this appeal, Mr. Dunn has undoubtedly continued to incur expenses for taxes and insurance. We note that when the trial court fashioned its remedy regarding rental value, it provided that Mr. and Mrs. Vukodinovich would receive an offset against Mr. Dunn's damages for reasonable rental value from the date of purchase "through the date possession of the property is transferred to the Defendants[.]" Of course, the trial court did not include a similar provision regarding ongoing taxes and insurance because he limited Mr. Dunn's recovery to three years. However, Mr. Dunn argues on appeal that his ongoing obligation for taxes and insurance should be treated in the same manner. We agree. We deem it appropriate to fashion the same type of relief with respect to taxes and insurance. Thus, he is entitled to recover the amount of taxes and insurance he has paid in connection with the property through the date that possession of the property is transferred to the defendants.

D. Fair Rental Value

The next issues we address involve the fair rental value of the property. "[I]n attempting to restore the parties to their former status, courts may require the vendee to account to the vendor for the use or rental value of the property." *Isaacs*, 566 S.W.2d at 540. Thus, when a real estate contract is rescinded, "usually, the seller is entitled to an offset for the 'reasonable rental value of the premises.'" *Bradford*, 2021 WL 6210714, at *7 (quoting 92 C.J.S. *Vendor & Purchaser* § 281).

Mr. Dunn first argues that the trial court erred in reopening the proof after the first day of trial due to the lack of evidence regarding rental value. "Whether to re-open the proof to permit additional evidence after the proof has closed is within the discretion of the trial court." *Iloube v. Cain*, 397 S.W.3d 597, 604 (Tenn. Ct. App. 2012) (citing *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 149 (Tenn. 1991)). Unless it appears that the trial court's decision "'has permitted injustice, its exercise of discretion will not be disturbed on appeal.'" *Acosta v. Acosta*, 499 S.W.3d 785, 789 (Tenn. Ct. App. 2016) (quoting *Simpson*, 810 S.W.2d at 149). However, "'[t]he mere fact that evidence adduced after reopening the case produced a different result is not determinative of trial court error, for the trial court is entitled to and should have the benefit of all available evidence for its assistance in arriving at a just determination.'" *Id.* (quoting *McBay v. Cooper*, No. 01A01-9205-CV-00202, 1992 WL 205256, at *3 (Tenn. Ct. App. Aug. 26, 1992)). In this context, "'[t]he injustice which renders erroneous a reopening of proof is serious inconvenience to a party, the jury or the court, or the introduction of further evidence without a fair opportunity for rebuttal.'" *Id.* (quoting *McBay*, 1992 WL 205256, at *3).

In the case at bar, the trial judge apparently contacted the attorneys by email after the first hearing, which was very brief, due to the lack of evidence on *several* issues. At the beginning of the second hearing, the trial judge explained that he lacked sufficient evidence regarding two major issues: the market value of the improvements made by Mr. Dunn (as opposed to the actual cost), and the fair rental value of the property for the time period that it was occupied by the Dunns. At that point, counsel for Mr. Dunn stated that the caselaw on rescission discussed putting the parties back at status quo, so he also wanted to introduce evidence regarding mortgage interest, property taxes, "and things like that that the plaintiffs have had to pay that they wouldn't have had to pay had they not entered into the contract." Both parties also went on to present testimony from appraisers in support of their positions. We discern no injustice under these circumstances.

This Court has encountered similar gaps in the evidence in rescission cases, even on appeal. For instance, in *Harrison*, 1992 WL 301309, at *2, we noted that "[w]hen rescission is granted, the seller is entitled to compensation from the buyer for use of the real estate," with such damages normally being measured "by the rental value of the property while the buyer had the property in his possession or under his control." However, the sellers in that case "failed to present any proof as to the rental value of the property." *Id.* at *3. Because the buyers had possessed the property for almost two years, the sellers would have been entitled to compensation for that use. *Id.* at *2. We stated:

> Although we do not ordinarily give a party a second chance to prove his damages, whole justice would not be accomplished in this case if the [Buyers] could recover the amounts they had paid and were not required to reimburse the [Sellers] for the use of the land. Thus, we remand the case to the lower court in order to give the [Sellers] the opportunity to present proof

> concerning the rental value of the property while the property was in the [Buyers'] possession.

Id. at *3.[4]

Similarly, in *Ingram*, 2003 WL 1487251, at *1, a trial court had ordered rescission "but without any setoff for the rental value during the plaintiffs' occupancy." On appeal, we noted that the record did not include "any evidence of the fair rental value of the property between closing and trial." *Id.* at *5. We observed that "[t]he failure of the parties to offer evidence of rental value suggests that neither expected rescission to be ordered or that they overlooked the case law regarding rescission when property was occupied and used by the purchasers." *Id.* Upon examining the various aspects of the trial court's order, we concluded that it would result in "a windfall to the plaintiffs who have continued to use the property as their residence since 1994, unless there is a setoff for the rental value since that time." *Id.* at *10. Accordingly, we stated that the parties would be permitted to introduce evidence on rental value on remand. *Id.* Notably, this Court stated that it was "confronted by the dilemma" of choosing between several different options on exactly how to proceed, including "affirm[ing] the rescission, but remand[ing] for determination of the appropriate amount, after reopening proof for offset of rental value against the plaintiffs' ownership interest and expenses; or [] remand[ing] all issues, including rescission, for reconsideration in accordance with this opinion and new evidence on reopening the proof of both parties." *Id.* We stated that the *Harrison* case, discussed above, stood as precedent for the "option of affirming rescission but remanding for the parties to reopen their proof for offsetting claims," and "[e]ven though the defendant did not offer any evidence of rental value at the trial, the defendant would be entitled to offer such proof upon remand." *Id.* at *11. Ultimately, however, in *Ingram*, we chose the latter option and permitted the trial court to consider additional evidence from both parties on remand "and let the parties argue between the adequacy of damages and necessity of rescission."[5] *Id.*

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[4] Unfortunately, the *Harrison* litigation continued on for many years thereafter. *See Harrison v. Laursen*, No. 01A01-9705-CH-00238, 1998 WL 70635, at *6 (Tenn. Ct. App. Feb. 20, 1998) ("In the seven years since this litigation began, the parties have endured five trials and three appeals. We are loathe to continue this litigation and have endeavored to find a way to bring it to an appropriate conclusion without requiring a sixth trial. We have not succeeded . . . . [W]e have no choice other than to vacate the judgment against Mr. Laursen and to remand the case for another trial."); *see also Harrison v. Laursen*, 128 S.W.3d 204, 205 (Tenn. Ct. App. 2003) ("This is the fourth appeal regarding the sale of a 128-acre farm in Giles County.").

[5] We note that in his reply brief on appeal, Mr. Dunn suggested that this latter option was "perhaps appropriate here" and that this Court "could likewise remand with the question of rescission being left open." He suggests that the trial court "might allow the Plaintiff to recover damages for the installation of a new septic tank (if that is indeed possible), or for the cost of tearing off the downstairs portion of the house (as proposed by the Vukodinoviches' expert) as well as damages for the loss of 40% of their house, or to otherwise recover damages that would reasonably address the problem." However, we are not inclined to employ that approach in this case. In *Ingram*, the buyers "sought rescission or alternative relief," and the trial court ordered rescission. 2003 WL 1487251, at *1. The parties' failure to introduce evidence of

Given this Court's practice of permitting trial courts to reopen the proof on remand in these rescission cases, we cannot say that the trial judge abused his discretion in reopening the proof after the first day of trial, in the absence of any evidence on several key issues. The record does not support Mr. Dunn's assertion that the benefit of the trial judge's decision was one-sided or that he assumed the role of an advocate for Mr. and Mrs. Vukodinovich. Rather, as counsel for Mr. and Mrs. Vukodinovich noted during oral argument, "everyone got a second bite at the apple." There was no "serious inconvenience" to Mr. Dunn, and he had an opportunity to rebut the evidence presented by Mr. and Mrs. Vukodinovich and present further evidence of his own. *See Acosta*, 499 S.W.3d at 789.

We now turn to the trial court's ultimate calculation of the fair rental value of the property. To briefly recap, Mr. Miller testified that the home was not rentable in its current condition and that it had zero rental value. In its written order, the trial court stated that the court did not accept the opinion of Mr. Miller "as he testified that he did not research other rental properties in the Boone Lake area and due to the nature of the issue of which Plaintiff complains." The court likewise stated that it found Mr. Thomas more credible than Mr. Miller "in that Mr. Thomas investigated and researched rental properties in the area of the subject property whereas Plaintiff's appraiser did not do so." This statement is perplexing and is not supported by the record. Mr. Miller was asked if he had checked into the rental values of other properties in the area, to which he responded, "Sure. I mean I'm familiar with, with rental values of homes." Mr. Miller said the problem here is that "the house is not leasable with the problems that it has[.]" When asked specifically about other rental properties located on Boone Lake, Mr. Miller testified that houses there were presently rented from $700 to $1,800 per month. "But," he added, "they're livable." Although the Dunns lived at the property, he said they were unable to sell the house and "don't have anywhere else to go." He said it was not "a satisfactory situation at all." His written report stated that the home "does not meet any building codes and in fact the writer is surprised to know the home was not red tagged by county inspectors and owners were to vacate until the problem could be alleviated."

Mr. Thomas, who testified on behalf of the Vukodinoviches, determined the fair

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rental value suggested that "neither expected rescission to be ordered or that they overlooked the case law regarding rescission when property was occupied and used by the purchasers." *Id.* at *5. In choosing the option that was "most likely to produce a just result" on remand, this Court explained that the trial court "need not begin anew" but could hear additional proof, "let the parties argue between the adequacy of damages and necessity of rescission," and decide whether "rescission is still an appropriate remedy." *Id.* at *11. Here, however, it was Mr. Dunn who announced at the beginning of the first day of trial that he was solely pursuing the remedy of rescission, noting his continued inability to find a contractor to testify about the cost of constructing a new septic system. Mr. Dunn steadfastly pursued rescission for the next two years, throughout the three hearings in the trial court. Due to the tortured history of this litigation, we deem it appropriate to remand with instructions for the trial court to address the issues discussed on appeal without reopening the issue of rescission for the trial court to essentially begin anew.

rental value of the home considering only the upper level, deeming "nothing in that finished basement area as rentable." So, he considered the property as a two-bedroom two-bath home on the lake. He considered other lakefront properties that were presently rented in the area and said they ranged from about $900 to about $1700 per month. He testified that he established the rental value of the Dunns' home at $900, which was "the very lowest level" in that range. The trial court accepted Mr. Thomas's opinion that the Dunns' home had a fair rental value of $900 per month. The court added, "Thomas further testified that the property was *in good condition* and the problems of which the Plaintiff was complaining did not force him to vacate the property[.]" (emphasis added).

Again, however, we perceive some problems with the trial court's stated reasons for accepting Mr. Thomas's opinion of $900 in rental value. During cross-examination, Mr. Thomas conceded that the septic tank in the Dunns' home does not meet code. He also acknowledged that the fumes circulating through the HVAC system could "turn off" a potential renter, and that the situation would have to be disclosed to a potential renter. In light of these concessions, Mr. Thomas was asked if any *reasonable* potential renter would pay $900 per month to rent the property in this condition. He stated, "Absolutely. . . . Because I see every day in my business that people do crazy things to residential dwellings that *you would think, 'You have got to be an idiot to live here,' but they continue to live here, vis-a-vis, these people* were there when I was doing my inspection." (emphasis added). Although Mr. Thomas had said in his report that the septic tank issue apparently had not caused a problem to the degree that the Dunns were forced to vacate the property and they appeared to be satisfactorily occupying the dwelling, he admitted during his testimony that this was "probably not" a "satisfactory situation they're living in."

We also note that even though Mr. Thomas testified that he selected a rental value "at the very lowest level" of the range of rental values for houses on Boone Lake, he failed to mention that, according to his own written report, only one of the seven other presently rented homes in the area was a two-bedroom home, and that home was rented for $900 per month. In other words, a *normal* two-bedroom home on Boone Lake rented for $900 per month. His report stated that a four-bedroom was rented for $1,775 per month, while the remainder of the rental properties he considered were all three-bedroom homes.

On appeal, the Dunns argue that this Court should find a rental value of zero, while Mr. and Mrs. Vukodinovich ask this Court to affirm the trial court's rental value at $900 per month. The United States Court of Appeals for the Sixth Circuit considered a quite similar situation in *Bennett v. CMH Homes, Inc*., 661 F. App'x 329 (6th Cir. 2016). That case involved a defective mobile home, which was more than two inches out of level and had unlevel gutters, damaged decks, cracks in the foundation, and other issues. *Id.* at 333. The buyers sued for fraud, breach of contract, and other claims. *Id.* The trial court found that the seller had breached the contract and that revocation of acceptance was the most equitable option regarding the proper remedy. *Id.* The trial court determined that the buyers derived a benefit of $1,000 per month by living in the defective home and applied

this amount to arrive at the buyers' "rescission-damages total." *Id.* On appeal, the Sixth Circuit remanded for a new calculation on various issues, including the rental value. *Id.* at 334-35. The Court explained:

> [T]he benefit derived by the [Buyers] from use of the defective house should also be revisited on remand. The district court determined a value to the [Buyers] of $1,000 per month—a remarkably high sum in light of the many problems with the mobile home—with little elaboration as to how that amount was determined. The court did note correctly that local apartment rental prices, as to which there was some testimony, were "not ideal figures for comparison purposes because the mortgage payment included interest, and both [apartment rental] figures are based upon a residence being in good . . . condition, which Plaintiffs' home is not." In addition, a rental price presumably covers land value, which the use of the mobile home on plaintiffs' land does not. While we do not hold as a matter of law that $1,000/month is too much for the rental of a mobile home in as bad shape as the one in this case, the court, in reexamining the value to the [Buyers] of the mobile home, should provide a fuller explanation and may in its discretion consider additional evidence or testimony.
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> . . . .
>
> [T]he [Buyers'] contention that the district court erred by setting off the [Buyers'] award by the benefit they received is without merit. The [Buyers] cannot pay for a home, live in that home for a significant period of time, and then get their entire purchase price back. "[S]etoff is an equitable doctrine, and [it] generally rests in the inherent authority of the court to do justice to the parties before it." *Conister Trust Ltd. v. Boating Corp. of America*, 2002 WL 389864, at *20 (Tenn. Ct. App. Mar. 14, 2002). The theory of a rescission remedy is to bring the parties to the position they would be in absent the contract. *Stonecipher v. Estate of Gray*, 2001 WL 468673, at *5 (Tenn. Ct. App. May 4, 2001). Absent the contract, the [Buyers] would not have had the use of the (albeit defective) mobile home; the home—with all its deficiencies—was still the [Buyers'] place of residence. The district court was within its authority in deciding to reduce the award to account for the [Buyers'] use of the mobile home.

Id. at 334-35, 337. We likewise conclude that the trial court was within its authority in considering an offset for fair rental value, but the trial court's value of $900 per month is a remarkably high sum in light of the serious problems with the Dunns' home. Mr. Thomas's report indicates that a two-bedroom home on the lake would rent for $900 per month under normal circumstances, but the Dunns' home is not a normal home. The trial court should revisit this issue on remand.

E. Interest

Mr. Dunn also raises various issues regarding what he describes as "interest on the purchase price." For instance, one of these issues states:

> Whether in "undoing" the transaction the court misapplied the principles of restitution by (a) charging the Plaintiff/Purchaser with the rental value of the property for the entire eleven-year period, while only charging the Defendants with *interest on the purchase price for three of those eleven years*, and (b) by charging the Plaintiff/Purchaser with ongoing rent continuing through the future date that possession would be transferred as a result of the rescission (at the end of the litigation), but did not similarly charge the Defendants/Sellers with *continuing interest on the purchase price*.

(emphasis added). Within the argument section of his brief, it is clear that Mr. Dunn is sometimes referring to "interest on the purchase price" in relation to the trial court's award of mortgage interest for three years. However, at other times, he suggests that the trial court should have required Mr. and Mrs. Vukodinovich "to pay ongoing interest." In fact, Mr. Dunn clarified in his reply brief that "our argument about the recovery of interest is in two parts: first, that the court should have allowed credit for the mortgage interest that the Plaintiff actually paid . . . and second, that the Plaintiff should be allowed credit for the interest that has accrued, and is continuing to accrue, on the purchase price[.]"

We have already resolved the issue regarding the mortgage interest Mr. Dunn paid. It is undisputed that Mr. Dunn paid off his mortgage during the litigation and was no longer paying mortgage interest at the time of trial. Mr. Dunn concedes in his brief that he only paid mortgage interest from 2011 to 2017. However, Mr. Dunn argues that "even if the Court gives credit for all of the mortgage interest that the Plaintiff paid (2011 through 2017), that would not compensate the Plaintiff for the use of the $302,000 for the years after the mortgage was paid off (2018-the present), and the Vukodinoviches would thus be getting a 'free ride' for eight of the eleven years in question." He claims that "[p]er the court's order, the Defendants are somehow not being charged with ongoing interest" and that they should be required to pay "interest on the purchase price for the entire eleven-year period." Specifically, Mr. Dunn suggests that this Court should "charge the Defendants with the mortgage interest, taxes and insurance that the Plaintiff actually paid from 2011 through 2017, and to also charge the Defendants for an equivalent amount of interest, taxes and insurance (approximately $16,000/year) for the years 2018 and beyond, with the interest to continue until the transfer of property is complete."[6]

[6] According to his brief, the simplest approach to this interest issue would be:

> [F]or the years that the Plaintiff did not pay mortgage interest, the Court might simply adopt the approximate rate of interest that the Plaintiff paid on his mortgage with the result that interest, taxes and insurance would amount to approximately $16,000/year. [$14,000 average mortgage interest + $1,000 in taxes + $1,000 in insurance premiums = $16,000].

Unfortunately, Mr. Dunn does not cite to any location in the record to show that he raised this theory in the trial court, nor are we aware of any. The only mention of interest during the first two days of trial was mortgage interest. Thereafter, Mr. Dunn filed a motion to alter, amend, or revise the initial order, which stated:

> 1. In the Order entered January 14, 2021 (the "Order"), the Court ordered that Plaintiff is entitled to recover from Defendants "the consideration paid for the property of $302,000.00...." However, the Court did not allow Plaintiff to recover the interest that had been paid on the purchase money since the property was purchased. In *Isaacs v. Bokor*, 566 S.W.2d 532 (Tenn. 1978), where rescission was granted for tortious misrepresentations of the seller, "[i]nterest was also allowed upon the purchase money which had been paid." *Id.* at 539. Plaintiff should therefore be allowed to recover the interest that had been paid on the purchase money from the date of purchase.

However, at the hearing on the motion, Mr. Dunn's attorney began by stating, "The issue stated in paragraph 1 of my Motion, we're withdrawing that issue. Concededly, the plaintiffs borrowed the substantial majority of the purchase money and so no interest would really be coming to them for any cash they put into the deal." The trial court's final order noted that the issue was withdrawn.

On appeal, Mr. and Mrs. Vukodinovich argue that Mr. Dunn has waived any claim to this type of interest due to the statements of his counsel in the trial court. We agree. We cannot say that the trial court erred by failing to award ongoing interest when Mr. Dunn's counsel conceded that he was not entitled to it and was "withdrawing that issue." *Cf. Raley v. Brinkman*, 621 S.W.3d 208, 248 (Tenn. Ct. App. 2020) (concluding that a party waived an issue regarding prejudgment interest when the trial court did not address it in its orders after trial and the party failed to bring the issue to the trial court's attention in its motion to alter or amend, as he did not take "whatever action was reasonably available to prevent or nullify" the alleged error pursuant to Tenn. R. App. P. 36(a)).

F. Punitive Damages

Next, Mr. Dunn argues that the trial court applied an incorrect legal standard when denying his request for punitive damages. The trial court found that "Defendants were aware of the actual location of the septic tank and Defendant Pamela Vukodinovich made

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> With a charge of $16,000 each of the eleven years from 2011 through 2021, the total of interest, taxes and insurance premiums would be $176,000 ($16,000 x 11 years = $176,000). Subtracting the $35,643.02 that the court gave the Plaintiff credit for [R1:118], the net adjustment would be that the Plaintiff would recover an additional $140,356.98 above and beyond what the court allowed. [$176,000 - $35,643.02 = $140,356.98].

an intentional misrepresentation of the location of the septic tank when she knew it was located under the pool table. Plaintiff has carried his burden of proof by clear and convincing evidence[.]"[7] However, the trial court declined to award punitive damages, simply stating, "As to Plaintiffs request for punitive damages the Court concluded that punitive damages is to punish a party for the purpose of this practice ceasing and that's why the Court did not find punitive damages in this case so the Court respectfully denies the request for punitive damages." (quotation and alterations omitted). In its incorporated oral ruling, the trial judge similarly stated that "the thing about punitive damages is they're to punish a, punish a party for the purpose of this practice ceasing and, and that's why I didn't find punitive damages in this [case]."

As Mr. Dunn notes, the Tennessee Supreme Court has specifically recognized that "punitive damages may be awarded when the basis for rescission is common law fraud." *Seaton v. Lawson Chevrolet-Mazda, Inc*., 821 S.W.2d 137, 138 (Tenn. 1991). "'[P]unitive damages are available in such a case if the plaintiff can demonstrate the requisite degree of bad conduct and intent on the part of the defendant.'" *Id.* (quoting *Hutchison v. Pyburn*, 567 S.W.2d 762, 766 (Tenn. Ct. App. 1977). "[P]unitive damages are intended to 'punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him.'" *Goff v. Elmo Greer & Sons Const. Co*., 297 S.W.3d 175, 187 (Tenn. 2009) (quoting *Huckeby v. Spangler*, 563 S.W.2d 555, 558-59 (Tenn. 1978)). Because the trial court's stated reason for denying the request for punitive damages was solely because the fraudulent practice was no longer ongoing, we vacate and remand for the trial court to reconsider the issue under the appropriate legal standards.

G. Attorney Fees

The next issue we address is whether the trial court erred in awarding attorney fees to Mr. Dunn. Mr. and Mrs. Vukodinovich argue that the trial court erred in allowing Mr. Dunn to recover attorney fees under "the very contract he sought to rescind." In response, Mr. Dunn argues that the issue before us is controlled by this Court's decision in *Gibbs v. Gilleland*, No. M2015-00911-COA-R3-CV, 2016 WL 792418 (Tenn. Ct. App. Feb. 29, 2016), a rescission case in which, he claims, "this Court considered the same exact – word-for-word – contract provision" and held that attorney fees could be awarded. However, *Gibbs* is distinguishable. In that case, buyers of property sought rescission of a purchase

[7] We find no support for the position of Mr. and Mrs. Vukodinovich that the trial court deemed her conduct "innocent." Although the trial court's order quoted some case law regarding rescission that mentioned innocent and mutual mistakes, it unequivocally found that "Ms. Vukodinovich knew the location of the septic tank under the pool table in the room on the lower floor of the residence since they purchased the property in approximately the year 2000, and knew of the true location of the septic tank on or before March 14, 2011, when she told the Plaintiff at the final walk through that it was in an area near the tree and gazebo in the front yard of the property." It specifically found that "Pamela Vukodinovich made an intentional misrepresentation of the location of the septic tank when she knew it was located under the pool table." Clearly, the court did not find an innocent mistake on the part of Mrs. Vukodinovich.

and sale agreement on the ground of mutual mistake. *Id.* at *1. The trial court ruled in favor of the sellers and dismissed the complaint. *Id.* On appeal, we explained that the contract assigned the risk of mistake to the buyers, and therefore, "rescission on the ground of mutual mistake is *not available*." *Id.* (emphasis added). Simply put, the buyers were "not entitled to rescind the contract." *Id.* at *10. Because the defendant-sellers had *successfully defended* against the buyers' rescission suit, we considered whether *the sellers* were entitled to an award of attorney fees pursuant to a provision of the contract. *Id.* We concluded that the buyers' unsuccessful suit to rescind the contract was based on or related to the agreement, and therefore, the sellers were entitled to an award of attorney fees. *Id.* at *11. The obvious difference here is that the buyer in this case, Mr. Dunn, was successful in obtaining rescission of the contract, yet he also sought to recover his attorney fees pursuant to it.

We note that this Court has considered awards of attorney fees in other rescission suits. In *Fayne*, 2004 WL 1749189, at *1, purchasers of real property sued sellers for rescission, and the trial court ordered rescission but did not make an award of attorney fees. On appeal, the purchasers argued that they should have been awarded attorney fees, but the precise basis for their claim to attorney fees is not clear from this Court's opinion. *Id.* We invoked the familiar rule that "[i]n *the absence of* a statutory or contractual provision which calls for attorney's fees, awarding of such fees is not an appropriate element of damages." *Id.* at *5 (citing *Morrow v. Bobbitt*, 943 S.W.2d 384 (Tenn. Ct. App. 1996); *State v. Brown & Williamson Tobacco Co.*, 18 S.W.3d 186 (Tenn. 2000)) (emphasis added). Therefore, we stated that "if rescission was based upon the theory of common law fraud and deceit, attorneys fees would not be appropriate." *Id.* However, we noted that the court may award attorney fees "if predicated on the Tennessee Consumer Protection Act." *Id.* Thus, we remanded for the trial court to consider the awarding of attorney fees if the award was based on the TCPA. *Id.* Likewise, in another rescission suit, *Goodale v. Langenberg*, 243 S.W.3d 575, 591 (Tenn. Ct. App. 2007), a real estate agent argued that "the trial court erred by assessing attorney's fees against her where they are *not provided* by statute or contract." (emphasis added). We agreed, stating:

> Generally, an award of attorney's fees is not appropriate in the absence of a statutory or contractual provision. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186 (Tenn. 2000). Thus, attorney's fees are not appropriate when rescission of a contract is predicated on common law fraud and deceit. *E.g., Fayne v. Vincent*, No. E2003-01966-COA-R3-CV, 2004 WL 1749189, at *5 (Tenn. Ct. App. Aug. 5, 2004) (no perm. app. filed).

Id. We rejected the buyers' contention that the case presented "a special circumstance where equity demands the recovery of attorney's fees" and reversed the trial court's award of such fees. *Id.* at 592. However, both of these cases simply cited *the absence* of a contractual provision calling for an award of attorney fees and did not specifically analyze the precise issue raised here, where a party invokes a contractual provision for attorney

fees despite successfully pursuing a claim for rescission.

Mr. Dunn asserts that "[t]he question of whether a party could recover his attorney fees pursuant to a contract that has been rescinded is one that has divided the courts," and he asks this Court to consider cases from other jurisdictions allowing such awards. Having reviewed cases from several other jurisdictions, we agree that the issue has indeed divided the courts. For instance, the Florida Supreme Court has held:

> [W]hen parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract.

Katz v. Van Der Noord, 546 So.2d 1047, 1049 (Fla. 1989). *See also Ayotte v. Redmon*, 718 P.2d 1164, 1166 (Idaho 1986) ("'In an action to enforce the rescission of a written land sale agreement, containing a clause for attorney's fees which does not limit recovery of such fees to any particular form of action involving the contract, the prevailing party is entitled to an award of such fees.'") (quoting *Hastings v. Matlock*, 171 Cal.App.3d 826, 840-42 (Cal. App. 6th Dist. 1985)); *Norwood v. Serv. Distrib., Inc.*, 994 P.2d 25, 37 (Mont. 2000) (finding *Katz* persuasive and holding that when a contract is rescinded "the prevailing party may be awarded attorney's fees pursuant to an express provision in the contract"); *Mackintosh v. California Fed. Sav. & Loan Ass'n*, 935 P.2d 1154, 1162 (Nev. 1997) (agreeing with *Katz*); *Almanza v. Bowen*, 230 P.3d 177, 179 (Wash. Ct. App. 2010) (noting that home buyers "rescinded the purchase and sale agreement under which they claim costs and attorney fees" but nevertheless concluding that they were "entitled to a benefit of the attorney fee clause in that agreement even though they prevailed by having it set aside").

Other states have reached the opposite conclusion. The Court of Civil Appeals of Oklahoma recently examined the cases addressing this issue and found "no clear consensus." *Wiggin Properties, LLC v. ARCO Bldg., LLC*, 510 P.3d 1274, 1281 (Okla. Civ. App. 2021). The Court explained that some states, like Florida, "allow the recovery of contractual fees where a consummated contract is later rescinded," while others "hold that contractual fees are generally not recoverable after a complete rescission." *Id.* (collecting cases). Thus, the Court's "limited survey show[ed] that there is no consensus among the various states on this issue." *Id.* As a result, the Oklahoma Court was required to "predict how Oklahoma law would govern the issue." *Id.* The Court explained,

> The general tenor of the various Oklahoma statutes and case law indicate that

> Oklahoma does not currently recognize a fee clause as surviving a rescission of the underlying contract. Our survey of the existing law shows that a rescinded contract is void *in toto*, or "extinguished" in the wording of § 232, and no part of it survives a judicially ordered rescission. Things are as if no contract was ever made. The effect of a rescission in Oklahoma appears closest to that of a voiding of the contract *ab initio*.
>
> While Oklahoma does generally appear to disapprove of unilateral or non-mutual fee clauses, we find little or no Oklahoma precedent supporting what would constitute a substantial change in state contract law that would either sever a fee provision in the event of rescission, or declare contractual fees to one party as part of the remedy of rescission. We decline to impose such a change here, and find the fee provisions in the contract were voided *ab initio* by the rescission. Hence, ARCO may not recover contractual fees from WP.

Id. at 1281-82. In sum, the Court held that "[t]he current law of Oklahoma does not allow a party who is successful in rescinding a contract to invoke a prevailing party fee provision of the rescinded contract." *Id.* at 1288.

The Colorado Court of Appeals also examined the issue in *Kennedy v. Gillam Development Corporation*, 80 P.3d 927 (Colo. Ct. App. 2003). In that case, the buyers argued that disallowing the recovery of attorney fees pursuant to rescinded contract was illogical, unfair, and contrary to a "trend in numerous jurisdictions." *Id.* at 929-30. After examining *Katz* and related cases, the Colorado Court was "not persuaded." *Id.* at 930. The Court explained that "these cases are not consistent with the legal principle that Colorado courts have consistently applied: remedies of rescission of a contract and enforcement of a provision of the same contract are inherently inconsistent." *Id.* Thus, the Court concluded that its approach was "the better rule" and noted that it had been applied in several other jurisdictions. *Id.* (collecting cases). Ultimately, the Court concluded that "buyers cannot obtain a benefit from a provision in the contract they succeeded in rescinding." *Id.* "Once they elected the remedy of rescission and it was granted by the court, the option of obtaining the benefits of a provision in the rescinded contract was no longer available to them." *Id.* at 930-31.

Numerous other courts have reached the same conclusion. *See, e.g.*, *Overton v. Kingsbrooke Dev., Inc*., 788 N.E.2d 1212, 1220 (Ill. App. Ct. 2003) ("The recovery of attorney fees is an inconsistent remedy in an action for the rescission of contract. The remedy of rescission necessitates disaffirming the contract to allow the parties to return to the status quo. A party must elect a remedy based on the affirmance or disaffirmance of the contract, but the election of one is the abandonment of the other.") (citations omitted); *Barrington Mgmt. Co. v. Paul E. Draper Fam. Ltd. P'ship*, 695 N.E.2d 135, 143 (Ind. Ct. App. 1998) ("Seller's petition to rescind the Purchase Agreement required that Seller disaffirm the contract as a whole, including the right to an award of reasonable attorney

fees as provided under the agreement. Accordingly, we reverse and remand with instructions that the trial court vacate the award of attorney fees."); *Greenstreet v. Fairchild*, 313 S.W.3d 163, 172 n.4 (Mo. Ct. App. 2010) ("Buyers filed in this Court a motion for attorney fees on appeal premised upon the attorney fee provision in the Contract. The Contract, however, was rescinded, and no award for attorney fees can be made in reliance on a contract which no longer exists."); *Pickinpaugh v. Morton*, 519 P.2d 91, 95 (Or. 1974) ("[P]laintiffs' election to rescind the purchase agreement cancelled all of plaintiffs' contractual rights to the benefits of the contract, including an award of attorney's fees in the event of litigation. A contrary holding would allow plaintiffs to insist on defendant's performance of the contract insofar as the performance benefits plaintiffs, while avoiding those aspects of the contract which are burdensome to plaintiffs."); *BLT Inv. Co. v. Snow*, 586 P.2d 456, 458 (Utah 1978) ("Their claim for attorney fees is based upon a provision in the contract of sale. By asking for rescision of the contract, they disaffirmed it in its entirety. They may not avoid the contract and, at the same time, claim the benefit of the provision for attorney fees.").

Having carefully reviewed both approaches, we conclude that the latter approach is more consistent with Tennessee case law on rescission. According to the Tennessee Supreme Court,

> A purchaser who has been the victim of a misrepresentation or who has been induced to contract through a mistake of material fact mutual to him and his vendor, is afforded by courts both of law and equity with a number of alternate remedies, including actions for rescission and restitution, actions for breach of contract and actions in tort for misrepresentation. All that the law requires of such a purchaser is that he elect consistently among the remedies available to him. Of course, by his conduct he may not both affirm and at the same time disaffirm his contract.

Isaacs, 566 S.W.2d at 537-38 (citations omitted). In *Isaacs*, the Supreme Court observed that the petitioners had "at all times elected to treat the two contracts involved as rescinded" and "sought to have the court uphold their right to declare their contracts rescinded entirely."[8] *Id.* at 538. This Court has further explained:

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[8] We also note that

> As a general rule, a contract can only be rescinded *in toto*. A contract can be partially rescinded where the contract is severable. A contract is severable where each part is so independent of each other as to form a separate contract. The basic premise behind disallowing a party to affirm in part and repudiate in part is that one should not be able to accept the benefits on the one hand while he shirks its disadvantages on the other.

Robertson v. George, No. M2000-02661-COA-R3-CV, 2001 WL 1173270, at *7 (Tenn. Ct. App. Oct. 5, 2001) (quoting *James Cable Partners v. Jamestown*, 818 S.W.2d 338, 344 (Tenn. Ct. App. 1991)).

> The remedy of rescission involves the avoidance, or setting aside, of a transaction. It usually involves a refund of the purchase price or otherwise placing the parties in their prior status. *Mills v. Brown*, 568 S.W.2d 100, 102 (Tenn. 1978). Damages for breach of contract, on the other hand, place the injured party, as nearly as possible, in the same position he would have been if the contract had been performed. *Wilhite v. Brownsville Concrete Co., Inc*., 798 S.W.2d 772, 775 (Tenn. App. 1990).
>
> Because these remedies are inconsistent, it is necessary for the injured party to elect which remedy to pursue. The law does not allow one to repudiate a contract on one hand and claim the benefits of the contract on the other.

Ingram, 2003 WL 1487251, at *8 (quoting *Harrison*, 1992 WL 301309, at *2).

Likewise, "a party who has been fraudulently induced into entering into a contract has the option of treating the contract as void and rescinding it *or* going forward with the contract under the terms as they were represented by the defrauding party." *Davis v. Conner*, No. M2008-00661-COA-R3-CV, 2009 WL 3415284, at *8 (Tenn. Ct. App. Oct. 22, 2009) (emphasis added). Stated differently, the individual induced by fraud "may elect between two remedies" – "[h]e may treat the contract as voidable and sue for the equitable remedy of rescission or he may treat the contract as existing and sue for damages at law." *Id.* (quoting *Frizzell Constr. Co. v. Gatlinburg, LLC*, No. 03A01-9805-CH-00161, 1998 WL 761840, at *3 (Tenn. Ct. App. Nov. 2, 1998) *aff'd and remanded*, 9 S.W.3d 79 (Tenn. 1999)).

Thus, under Tennessee law, "a plaintiff generally must elect between inconsistent remedies and *may not at the same time repudiate a contract and claim its benefits*." *Goodale*, 243 S.W.3d at 585 (emphasis added).[9] In *Harrison*, for instance, a trial court granted rescission but at the same time ruled that the money paid for the property would "under the terms of this contract be declared a forfeiture," and it also ordered the payment of interest "under the terms of the contract." 1992 WL 301309, at *2. On appeal, we explained that the trial court had "granted damages for breach of contract, as well as granting rescission," and "the law does not allow a party to receive both remedies." *Id*.; *see also Goodman v. Jones*, No. E2006-02678-COA-R3-CV, 2009 WL 103504, at *10 (Tenn. Ct. App. Jan. 12, 2009) (explaining that if the buyer continued to seek rescission on remand and "disaffirm the sale of the property," then "any damage award must be consistent with the disaffirming of the transaction"); *Dunham v. Fortner Furniture Co*.,

[9] Applying this rule in *Goodale*, we explained that there "is no inconsistency between a claim for rescission of a contract and one for fraud in its procurement," and accordingly, "a claim for rescission is not inconsistent with one for punitive damages." 243 S.W.3d at 585.

No. 99, 1987 WL 6372, at *8 (Tenn. Ct. App. Feb. 13, 1987) ("[P]laintiff seeks recovery on the one hand by affirming his contract and on the other hand by disaffirming his contract. This he cannot do."). Thus, like the Colorado court, we conclude that Tennessee cases have consistently recognized that the remedies of rescission of a contract and enforcement of that same contract are "inherently inconsistent."

In addition, Tennessee cases on rescission differ from the view taken in *Katz*, in which the Florida Supreme Court reasoned that "[t]he legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist." 546 So.2d at 1049. The *Katz* Court reasoned that "'the *enforcement* of a contract may be prevented by equitable considerations, such as that the contract was fraudulently induced. In such a case, *since a contract exists, even though later declared to be void or voidable, certain of its provisions may be operative*.'" *Id.* (quoting *Leitman v. Boone*, 439 So.2d 318, 321 n.3 (Fla. 3d DCA 1983)) (emphasis added).[10] However, Tennessee courts have explained that

> A "rescission" amounts to the unmaking of a contract, or an undoing of it from the beginning. . . . It is the annulling, abrogation of the contract and the placing of the parties to it in status quo. It necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it.

Ingram, 2003 WL 1487251, at *6 (quotation omitted). Like the Oklahoma Court of Civil Appeals, we conclude that the effect of a rescission in our state "appears closest to that of a voiding of the contract *ab initio*." *Wiggin Props.*, 510 P.3d at 1281. "Things are as if no contract was ever made." *Id.*; *see, e.g.*, *Senior Hous. Alternatives, Inc. v. Bernard Glob. Loan Invs., Ltd.*, No. E2010-01964-COA-R3-CV, 2011 WL 2553260, at *11 (Tenn. Ct. App. June 28, 2011) ("If the Borrower elects recission of the contract, then the goal becomes to restore the parties to the positions they were in before the contract, as if it never existed."); *City of Blaine v. John Coleman Hayes & Assocs., Inc.*, 818 S.W.2d 33, 38 (Tenn. Ct. App. 1991) ("Should the contract be rescinded there is no contract containing an

[10] In *Katz*, the Court unequivocally held that "when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable," as the "legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist," and it would be "unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract." *Id.* However, the Court recognized that a prevailing party is not entitled to attorney fees in cases where a court finds that a "contract *never* existed." *Id.* It said "[t]he distinction between no contract at all and one that is unenforceable makes all the difference." *Id.* Although the language in *Katz* regarding rescission was broad, the Court of Appeals has stated that "we believe there is a distinction to be made between a contract that is rescinded based upon the breach of a party versus a contract voided on the grounds of mutual mistake." *Leo v. MacLeod*, 752 So.2d 627, 629 n.3 (Fla. Dist. Ct. App. 1999); *see also Punie v. Achong*, 765 So. 2d 823, 825 (Fla. Dist. Ct. App. 2000) (stating that "if Punie were to prevail on her rescission claim [based on mistake], there would be no contract between the parties from which an attorney's fee provision would emanate").

arbitration clause[.]").[11]

Finally, the *Katz* Court concluded that "attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein *even though the contract is rescinded or held to be unenforceable*." 546 So.2d at 1049 (emphasis added). This appears to be at odds with Tennessee law as well. For example, when discussing contractual attorney fee provisions in the context of marital dissolution agreements, the Tennessee Supreme Court has stated that "[i]f the MDA is determined to be a *valid and enforceable* agreement, the terms of the parties' agreement govern the award of fees." *Eberbach v. Eberbach*, 535 S.W.3d 467, 478 (Tenn. 2017) (emphasis added). However, "[c]ourts reviewing requests for fees pursuant to a MDA fee provision should first determine whether the parties have a valid and enforceable MDA that governs the award of attorney's fees for the proceeding at bar." *Id.* at 478-79.

In short, under Tennessee law, a party "must elect between inconsistent remedies and may not at the same time repudiate a contract and claim its benefits." *Goodale*, 243 S.W.3d at 585. According to the Tennessee Supreme Court, one "may not both affirm and at the same time disaffirm his contract." *Isaacs*, 566 S.W.2d at 537-38. "The theory of rescission denies the contract." *Petty v. Darin*, 675 S.W.2d 714, 715 (Tenn. Ct. App. 1984). "It necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it." *Ingram*, 2003 WL 1487251, at *6. As a result, we conclude that Tennessee law supports the approach taken by those jurisdictions holding that a party who is successful in rescinding a contract may not invoke a prevailing party fee provision of the rescinded contract. *See, e.g.*, *Wiggin Props.*, 510 P.3d at 1288. We therefore reverse the trial court's award of attorney fees to Mr. Dunn under the rescinded contract provision. We also decline Mr. Dunn's request for an additional award of fees on appeal pursuant to that same contractual provision.

IV. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. Specifically, the trial court is to resolve the objection to Mr. Doran's testimony before deciding whether Mr. Dunn should be awarded a sum for any increase in the value of the property due to the improvements; Mr. Dunn is to be awarded all of the mortgage interest, taxes, and insurance expenses that he has incurred through the transfer of possession; the trial court is to re-examine its award as to the fair rental value of the property; and it must reconsider the issue of punitive damages. All other issues are pretermitted. Costs of this appeal are taxed equally to the appellant, Christopher Lee Dunn, and the appellees, Bruce

[11] *See also* 12A C.J.S. *Cancellation of Inst.* § 212 ("Contractual provisions allowing attorney's fees in an action to enforce a contract also generally apply to allow an award if rescission is ordered or successfully resisted *unless no valid contract ever existed*.") (emphasis added).

Vukodinovich and Pamela Vukodinovich, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE