Rel: August 25, 2023

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0965

Jacob Cooper

v.

Cody Durham

Appeal from Jackson Circuit Court
(CV-20-900166)

MENDHEIM, Justice.

Cody Durham commenced this action in the Jackson Circuit Court against Jacob Cooper, alleging breach of a purchase agreement between them involving the sale of Cooper's residence. Following a bench trial, the

trial court awarded Durham $79,000 in damages. Cooper appeals the judgment. We reverse and remand.

I. Facts

In August 2020, Durham saw a listing on the Facebook Marketplace social-media website advertising for sale Cooper's house and the two acres of real property on which the house is situated, located in Stevenson ("the subject property"). Both Durham and Cooper testified that Cooper's wife, Brandi, had listed the subject property on Facebook Marketplace. Durham and his wife went to look at the house, and Durham made an offer on the subject property the same day. Over text messages between Durham and Cooper on August 19, 2020, they agreed to a purchase price of $236,000, with Cooper paying the closing costs of $6,626, bringing the total amount owed by Durham to $229,374. They also agreed that the closing date would be September 21, 2020. Durham testified that he picked that date because his bank had informed him that "they needed four weeks to prepare the loan."

On August 24, 2020, Durham and Cooper agreed via text messages to meet at a Jack's restaurant in Stevenson to sign the purchase agreement. Durham testified that he did not engage any realtor or lawyer

to help him with drafting the purchase agreement. Instead, he just searched for "residential purchase agreement" on the Google Internet search engine and used the first fillable form generated by that search. Durham admitted that he had filled in all the blank terms on the form contract and that Cooper had played no role in drafting the purchase agreement. On August 24, 2020, Cooper and Durham signed the purchase agreement in the Jack's restaurant parking lot. The purchase price was the previously discussed amount of $236,000, with Cooper paying the closing costs, and the closing date was listed as September 21, 2020, at 5:00 p.m.

According to the purchase agreement, Durham was financing the purchase through a Federal Housing Authority ("FHA") loan. One of the apparent conditions of Durham's FHA loan was that the loan would not be approved unless the subject property's appraised value was confirmed by a certified appraiser. On September 14, 2020, a certified appraiser, Adria L. Bradford, came to the subject property on behalf of Durham's lender. Bradford issued an appraisal ("the original appraisal") assessing the subject property's value to be $238,500, but that appraisal value was subject to the condition that a storage shed in Cooper's backyard needed

to be fixed or torn down. On the same date, Brandi Cooper sent Durham a text message relating that Bradford had told Brandi that the storage shed needed to be fixed or torn down and that, if it was not, the FHA loan would not be approved. Bradford also told Brandi that she would return to the subject property before closing to confirm for the lender that the storage shed had been fixed or removed. Brandi informed Durham that Cooper had told her that they "don't have the money" to fix or tear down the storage shed, so it would be up to Durham to take care of it.

In the evening on September 14, 2020, Durham and Cooper exchanged text messages concerning the storage shed, and Durham stated that he would stop by the subject property to decide whether he would fix the storage shed or tear it down. On September 16, 2020, Durham stopped by the subject property to look at the storage shed.

On September 19, 2020, Cooper sent Durham the following text message:

> "I guess we're gonna back out on selling you guys the house. The closing date has already been changed and you guys didn't show up today to look at the shed. Not trying to be rude, but I have already been through this and I don't plan on going through it again."

In the text conversation that followed Cooper's declaration, Durham stated that the closing could still occur within the next week so long as the storage shed was removed. Durham further stated that he was planning to come to the subject property the next day to take down the shed by burning it. Cooper responded that he was still "gonna back out" of the sale, after which Durham accused Cooper of "breach[ing] the contract."

On November 9, 2020, Durham commenced this action against Cooper in the Jackson Circuit Court seeking specific performance of the purchase agreement, damages for breach of contract, and any other relief the trial court may deem appropriate. In his complaint, Durham alleged, among other things, that Cooper owned the subject property, that he and Cooper had executed the purchase agreement on August 24, 2020, and that the agreed-upon purchase price was $236,000. Durham attached a copy of the executed purchase agreement to his complaint.

On December 1, 2020, Cooper answered Durham's complaint. In his answer, Cooper expressly admitted the allegations that he owned the subject property and that he and Durham had "entered into a contract on August 24, 2020, for the sale of Cooper's property at a price of

$236,000.00." Cooper also admitted that "he refuses to now accept $236,000.00 and now convey the property to Durham," and he admitted that "the parties entered into a valid, legal, and enforceable contract for the sale of land." However, Cooper denied that he had breached the purchase agreement. In his assertion of affirmative defenses, Cooper contended that Durham had "failed to perform under the contract," that Durham had "breached the contract," and that Durham had not suffered any damages.

On June 23, 2021, a bench trial was held before Judge John H. Graham. The sole witnesses at the trial were Durham and Cooper. During their testimony, Cooper's wife Brandi was mentioned several times, including in reference to the facts that she had listed the subject property for sale, that she lived at the subject property with Cooper and their two kids, and that she had communicated directly with Durham concerning the appraiser's statements about the storage shed. During the trial, Durham argued that Cooper had prematurely backed out of the sale, and Cooper argued that removal of the storage shed was a contingency of the sale that was never satisfied.

On July 26, 2021, Judge Graham entered an "Order Granting Complaint for Specific Performance." In that order, Judge Graham held, among other things:

> "1. The express written real estate contract between [Durham] and [Cooper] is valid and enforceable.
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> "2. Defendant Cooper breached the contract (via the 'backing out' text message) and did so without a valid or lawful reason.
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> "….
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> "5. Defendant Cooper 'backed out' and breached before the stated closing date.
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> "6. The FHA loan problem identified by an appraiser (not the lender) was Plaintiff Durham's problem to solve, not Defendant Cooper's problem. It gave [Cooper] no legal reason to breach. It might have given [Durham] a legal reason, but not [Cooper].
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> "….
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> "10. The Court finds that the object of the contract is lawful and that the consideration is adequate.
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> "11. The Court finds that [Durham] is entitled to the relief requested in the complaint and that specific performance of the real estate contract is the appropriate remedy in this case."

Judge Graham ordered Durham to pay $236,000 to the clerk of the circuit court within 30 days of the entry of the order and to prepare a clerk's

deed conveying the subject property and to provide that deed to the clerk. The clerk would then deliver the money to Cooper, and Cooper was to convey the subject property to Durham.

On August 9, 2021, Cooper filed a postjudgment motion seeking to alter, amend, or vacate the trial court's order. In that motion, Cooper argued that the subject property was Brandi Cooper's homestead because she lived on the property with Cooper as his wife and that, as such, the subject property was protected by § 6-10-3, Ala. Code 1975, which provides in relevant part that "[n]o mortgage, deed or other conveyance of the homestead by a married person shall be valid without the voluntary signature and assent of the husband or wife …." Cooper further asserted that, based on § 6-10-3, "[w]ithout Mr. Cooper's wife's 'voluntary signature and assent' to the alienation of Mr. and Mrs. Cooper's homestead property, any conveyance would be void, including this Court's court-ordered conveyance." Cooper therefore insisted that the trial court was "without authority to order specific performance of the alienation of [Brandi's] homestead property, which, essentially, is the result of [the trial court's] orders."

On August 17, 2021, Durham filed a response in opposition to Cooper's postjudgment motion. Durham observed that Cooper had admitted in his answer to Durham's complaint: (1) that Cooper was the owner of the subject property and (2) that Durham and Cooper had entered a "valid, legal, and enforceable contract." Durham also observed that Cooper did not raise any affirmative defense related to preventing alienation of a homestead due to lack of consent from a spouse based on § 6-10-3 until he filed his postjudgment motion. Given those facts, Durham contended that Cooper's defense was "too late" to matter in this case.

On September 13, 2021, Judge Graham held a hearing on Cooper's postjudgment motion. In that hearing, Cooper's counsel contended that any judgment ordering specific performance was void pursuant to § 6-10-3 but that "[a]ll other items in [the purchase agreement] are valid and enforceable, except for the fact that Mrs. Cooper cannot be alienated from her homestead property." He conceded that Cooper was the owner of the subject property and that the purchase agreement was a valid contract, but, he argued, specific performance was not a legal remedy

available in this situation. Durham's counsel contended that Cooper had waived any such defense.

On November 5, 2021, Judge Graham entered an order granting in part and denying in part Cooper's postjudgment motion. In that order, Judge Graham upbraided Cooper's counsel for failing to raise any issue with respect to the antialienation principle in § 6-10-3 until filing the postjudgment motion, finding that Cooper's counsel had "violated the most basic principles of notice pleading and ha[d] done so in a way that [made] the court's Order of Specific Performance of a real estate contract potentially impossible, unrealistic, or problematic." Judge Graham expressly found that Cooper had "waived any and all defenses regarding ownership of the property or the validity of the [purchase agreement] by failing to raise any such defenses in his Answer, in any amendment to the Answer, or at trial." He also concluded that Cooper "lacks standing to raise any arguments about [Brandi's] homestead" because "[a]ny homestead interest and any related arguments belong to the unidentified female identified as the 'wife,' assuming she is [Cooper's] lawful wife, and

not [Cooper]."[1] Nonetheless, Judge Graham granted Cooper's postjudgment motion to the extent that his July 26, 2021, order had

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[1]We note that this Court has repeatedly stated that "'standing' is not a necessary or cognizable concept in private-law civil actions …." Cahaba Riverkeeper, Inc. v. Water Works Bd. of Birmingham, 362 So. 3d 1221, 1231 n.4 (Ala. 2022) (citing Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama, 42 So. 3d 1216 (Ala. 2010)).

We also observe, as we explained at length in Matherly v. Citizens Bank, [Ms. 1210396, Oct. 28, 2022] ___ So. 3d ___, ___ (Ala. 2022), that the notion that the antialienation principle in § 6-10-3 is entirely dependent upon whether the nonassenting spouse invokes it ignores "the interplay between §§ 6-10-3 and 6-10-40." Section 6-10-40, Ala. Code 1975, provides:

> "When the homestead, after being reduced to the lowest practicable area, exceeds $5,000 in value and the husband or wife has aliened the same by deed, mortgage, or other conveyance without the voluntary signature and assent of the spouse, shown and acknowledged as required by law, the alienor or, if he or she fails to act, the spouse or, if there is no spouse or if he or she fails to act, their minor child or children may, by filing a complaint, have the land sold and the homestead interest separated from that of the alienee."

As we noted in Matherly, a trial court may award a homestead interest to a nonassenting spouse "even though [the nonassenting spouse] did not invoke the remedy in § 6-10-40" when "otherwise [the nonassenting spouse] would not receive any compensation" because the purchase agreement at issue "was not entitled to protection under Article X, § 205, Ala. Const. 1901, and § 6-10-3, Ala. Code 1975." ___ So. 3d at ___.

Moreover, we further explained in Matherly that,

granted the relief of specific performance, but Judge Graham denied Cooper's postjudgment motion "as to the factual findings in the court's [July 26, 2021,] Order, both general and specific. This includes the court's finding that [Durham] is entitled to relief in this case." Accordingly, Judge Graham reset the case to the active docket and ordered that the case would be retried, but, he ruled, "[t]he only issue remaining to be tried is the relief to which [Durham] is entitled, or not, and the damages to which [Durham] is entitled, or not."

On March 30, 2022, Durham filed a pretrial motion in limine seeking the admission into evidence of an appraisal of the subject

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> "if the alienated property exceeds the value of a 'homestead' defined in § 6-10-2, then the antialienation principle in Article X, § 205, and § 6-10-3 does not apply, and, therefore, the mortgage or conveyance is valid, but the nonassenting spouse is entitled to a homestead interest of $5,000 pursuant to § 6-10-40."

___ So. 3d at ___. The value of a "homestead," as defined in § 6-10-2, Ala. Code 1975, is $15,000. It is undisputed that the subject property exceeds that value, and thus Cooper's conveyance of the subject property to Durham was not void under § 6-10-3.

We realize that the Matherly appeal had not been decided at the time Judge Graham entered his November 5, 2021, order, and so neither he nor the parties had the benefit of the explanations about the homestead statutes provided in that decision. We simply make the foregoing observations to avoid any confusion in future cases.

property produced by Bradford on January 19, 2022 ("the new appraisal"). The new appraisal assessed the value of the subject property to be $315,000. The new appraisal's only comment on the storage shed was that "[i]n the previous appraisal the storage building was in need of repair. For this reason this building is given no weight in this assignment." Durham contended in his motion that the new appraisal was relevant "in connection with establishing damages at the continuation and conclusion of this trial." On April 5, 2022, Cooper filed an objection to Durham's motion in limine on the ground that the new appraisal was not relevant to the standard for measuring damages in this case because, he said, the proper legal standard was the difference between the contract price and the market value of the subject property at the date of the breach of the contract.

On April 7, 2022, Judge Graham held a hearing concerning the damages to which Durham might be entitled to based on the previous finding that Cooper had breached the purchase agreement. First, the parties argued about the admissibility of the new appraisal. Durham's counsel contended that the new appraisal was relevant because the measure of damages

> "on a seller breach … is that the damages recoverable for a breach are such as the natural and proximate consequence of the breach. You know, the proximate loss -- one of the proximate losses on this breach was that Mr. Durham lost the benefit of a big run-up in value in this area over the last 18 months, and that's what this appraisal proves."

Cooper's counsel contended that "the measure of damages for the breach of a land sale contract is the difference between a contract price and the market value -- and here's the key part -- at the date of the breach." Thus, Cooper argued that the new appraisal was irrelevant to the issue of damages because it did not address the value of the subject property on the date the breach of the purchase agreement occurred. Judge Graham concluded that Cooper's objection to the new appraisal "goes to the weight to be given the appraisal, not the admissibility of it, and it is admitted."

In the same hearing, Judge Graham heard testimony from Durham in which he stated that he had not been able to purchase another residence and that he had not been able to find a residence in the same geographic area of comparable quality for a price similar to the purchase price agreed to in the purchase agreement. Durham testified that he and his wife had made an offer on one house, which had been accepted, but that the closing had not occurred. The price for that property was $275,000, but Durham testified that it was "[d]efinitely a lot lower

quality house for sure" than the subject property. Durham also briefly testified as follows concerning the new appraisal:

> "Q. [Durham's counsel:] Okay. Or in the alternative, you have heard mention of this appraisal that would tend to indicate that the Cooper home is $79,000 more valuable at the present than it was when you were supposed to buy it back in 2020.
>
> "In the alternative, do you also request that $79,000?
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> "A. Yes."

Following Durham's testimony, the parties again argued about the proper legal standard for measuring damages. During that discussion, Judge Graham concluded that measuring damages from the price Durham had offered on another house -- $275,000 -- was "speculative until [Durham] does close" on the property.

On August 2, 2022, Judge Graham held another hearing to find out if Durham had closed on the property on which he had an accepted offer. Durham stated that "it hasn't closed yet because -- or the seller is wanting to put it off. He isn't ready to close on the house." Judge Graham then reiterated that he believed that measuring damages based on a sale that had not closed would be speculative, and Durham's counsel conceded that point.

On September 30, 2022, Judge Graham entered a "Final Order Amended and Restated Judgement for the Plaintiff." In that order, Judge Graham repeated many of the findings he had stated in his July 26, 2021, and November 5, 2021, orders. Additionally, Judge Graham stated, in part:

> "12. Plaintiff Durham asks the Court to punish Defendant Cooper for his 'bad' trial tactics, by imposing court costs and attorney fees upon him. Durham insists that the trial tactics employed by Cooper, referenced and explained more completely in the November 5, 2021, order, are a continuing breach of the contract and caused Plaintiff Durham to incur additional costs, losses, and damages. Plaintiff Durham says that [Cooper] misled the court and misled Durham. He says that much time was spent pursuing legal theories that correspond to Cooper's express admissions, tacit admissions, and intentional omissions, only to have the Defendant Cooper 'ambush' the Plaintiff Durham with defensive matters that Cooper should have … alleged in his first responsive pleading. Durham further complains that Cooper did so after more than a year in court, after an all-day trial, and after a judgment for [Durham]. Durham contends that doing so is a continuing breach of the contract and caused him to sustain additional loss, cost, and damage on a continuing basis.
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> "13. The court is not one hundred percent on-board with this theory of damages. But the failure to plead or even mention during trial that Cooper was married and assert the defense that his wife did not join in the contract was ridiculous. Is it worthy of imposing damages under Rule 11, [Ala. R. Civ. P.]? Probably not. The request for damages is not proven to the legal standard or to the court's satisfaction.

> Damages beyond the actual costs of the breach of contract are denied.
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> "14. [Durham's] complaint and his request for relief are, therefore, GRANTED in part.
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> "Upon consideration of the facts and the applicable law, IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:
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> "a. That the Plaintiff Durham is entitled to and is awarded a $79,000.00 judgment against the Defendant Jacob Cooper, for losses caused solely and exclusively by Defendant Cooper's breach, Defendant Cooper's continuing breach, for which execution may issue;
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> "b. That any claim of any party not addressed herein is DENIED; and
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> "c. That all costs, including the fees of the appraiser, are taxed against [Cooper], for which execution may issue."

(Capitalization and emphasis in original.)

On October 20, 2022, Cooper filed a postjudgment "Motion to Find Facts Specially" in which he asked the trial court to "state its findings of fact on how it derived the monetary award of $79,000.00." On October 21, 2022, Judge Graham denied Cooper's motion without further elaboration. On October 28, 2022, Cooper filed what he styled as a "Motion to Finalize Order" in which he argued that Judge Graham's September 30, 2022, order was not final because the order charged the fees of the appraiser to

Cooper but did not "specifically state what [the] fees of the appraiser are." On October 31, 2022, Cooper appealed from Judge Graham's September 30, 2022, order. On November 18, 2022, Judge Graham entered an order finding that the fees and expenses of the appraiser were $450 and taxing that amount against Cooper.

II. Standard of Review

> "Because the trial court heard ore tenus evidence during the bench trial, the ore tenus standard of review applies. Our ore tenus standard of review is well settled. '"When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error."' Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)).
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> > "'…. The ore tenus standard of review, succinctly stated, is as follows:
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> > > "'"[W]here the evidence has been [presented] ore tenus, a presumption of correctness attends the trial court's conclusion on issues of fact, and this Court will not disturb the trial court's conclusion unless it is clearly erroneous and against the great weight of the evidence, but will affirm the judgment if, under any reasonable aspect, it is supported by credible evidence."'
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> "Reed v. Board of Trs. for Alabama State Univ., 778 So. 2d 791, 795 (Ala. 2000) (quoting Raidt v. Crane, 342 So. 2d 358,

> 360 (Ala. 1977)). However, 'that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts.' Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994).
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> "'The ore tenus standard of review extends to the trial court's assessment of damages.' Edwards v. Valentine, 926 So. 2d 315, 325 (Ala. 2005). Thus, the trial court's damages award based on ore tenus evidence will be reversed 'only if clearly and palpably erroneous.' Robinson v. Morse, 352 So. 2d 1355, 1357 (Ala. 1977)."

Kennedy v. Boles Invs., Inc., 53 So. 3d 60, 67-68 (Ala. 2010) (emphasis added).

III. Analysis

We begin our analysis by clarifying the fact that Cooper's appeal stems from a final judgment. In his October 28, 2022, "Motion to Finalize Order," Cooper appeared to contend that Judge Graham's September 30, 2022, order -- the order from which Cooper appealed -- was not final because it failed to state the amount of the fees for the appraiser's services that were taxed against Cooper. However, "[g]enerally, '"[t]he assessment of costs is merely incidental to the [final] judgment...."' Ford v. Jefferson Cnty., 989 So. 2d 542, 545 (Ala. Civ. App. 2008) (quoting Littleton v. Gold Kist, Inc., 480 So. 2d 1236, 1238 (Ala. Civ. App. 1985))." Regions Bank v. Lowrey, 101 So. 3d 210, 221 (Ala. 2012). Therefore, the

fact that one of the items taxed as costs against Cooper had not been specified at the time of the appeal did not render the trial court's September 30, 2022, order a nonfinal judgment.

With the foregoing procedural issue clarified, we now address the core issue disputed by the parties in this appeal: the proper legal standard for measuring damages in this case.[2] The parties' divergent positions on this issue are straightforward. Cooper contends that "[t]he trial court erroneously calculated the damages as being the difference between the September 2020 appraisal and the 2022 appraisal. The actual correct measure of damages is the difference between the contract price and the market value at the date of the breach." Cooper's brief, p. 13. Thus, Cooper asserts that the proper damages amount is $2,500: the difference between the purchase agreement price of $236,000 and the assessed market value of the subject property of $238,500 provided in the original appraisal. In contrast, Durham contends that "where a seller defaults the measure of damage is what the buyer has lost, i.e., the 'benefit of his bargain' or[,] as some cases say, his 'expectancy damages'

[2]Cooper does not contest in this appeal the trial court's conclusion that he breached the purchase agreement.

or 'expectation interest,' to put the buyer where he would have been had the contract been fully performed." Durham's brief, p. 28 (emphasis in original). Thus, Durham asserts that "[t]he trial court [correctly] found Mr. Cooper's breach resulted in losses to Mr. Durham of $79,000 (the difference in the September 2020 and January 2022 appraisals)." Id. at 29.

Radetic v. Murphy, 71 So. 3d 642 (Ala. 2011), is one of the many cases Cooper cites in support of his argument concerning the proper legal standard for measuring damages. Radetic explained:

> "It is well settled that '[t]he measure of damages for the breach of a contract for the sale of land is the difference between the contract price and the market value at the time of the breach.' Wilkens v. Kaufman, 615 So. 2d 613, 614 (Ala. Civ. App. 1992). See also Duncan v. Rossuck, 621 So. 2d 1313, 1315-16 (Ala. 1993) ('The measure of damages for the breach of a contract involving the sale of land is the difference between the contract price and the market value of the land on the date of the breach.'); Brett v. Wall, 530 So. 2d 797, 798 (Ala. 1988) ('Of course, the measure of damages for the breach of a contract for the sale of land is the difference between the contract price and the market value at the date of the breach.'); Woodham v. Singletary, 545 So. 2d 78, 78 (Ala. Civ. App. 1989) ('The measure of damages for the breach of a contract involving the sale of land is the difference between the contract price and the market value at the date of the breach.'); and Cook v. Brown, 428 So. 2d 59, 62 (Ala. Civ. App. 1982) ('We readily agree that the measure of damages for the breach of a land sale contract is the difference between the

> contract price and the market value at the date of the breach.')."

71 So. 3d at 649-50 (emphasis added).

The rule stated in Radetic fits the type of claim at issue in this case -- a breach of a contract involving the sale of real property -- and Radetic further makes it clear, with quotations from multiple supporting authorities, that the relevant market-value assessment is the value of the property at the time of the breach of the contract. In this case, the market-value assessment contained in the original appraisal meets that requirement.

Durham attempts to push back against the rule pronounced in Radetic and numerous other cases by arguing that none of those cases involved situations in which the seller breached the contract. Durham does not dispute that when a buyer breaches a contract for the sale of real property, the damages are measured by the market value of the property on the date the breach occurred. Durham insists, however, that the proper standard for measuring damages is different when the seller breaches a contract for the sale of real property. Goolesby v. Koch Farms, LLC, 955 So. 2d 422, 427-28 (Ala. 2006), perhaps best summarizes the

legal standard for damages that Durham argues the trial court correctly applied in this case:

> "As a general rule, damages in a breach-of-contract action are '"that sum which would place the injured party in the same condition he would have occupied if the contract had not been breached."' Ex parte Steadman, 812 So. 2d 290, 295 (Ala. 2001) (quoting Brendle Fire Equip., Inc. v. Electronic Eng'rs, Inc., 454 So. 2d 1032, 1034 (Ala. Civ. App. 1984)). This measure is commonly referred to as a party's 'expectation interest.' 24 Richard A. Lord, Williston on Contracts § 64:2, at 22 (4th ed. 2002)."

Durham contends that,

> "[h]ad Mr. Cooper honored his contract, Mr. Durham would today be the owner of a home that was in move-in condition in September 2020, for which he would have paid $236,000 then in accordance with the contract. At the time of the April 7, 2022 hearing on damages[,] the Cooper home had a market value of $315,000 according to the same appraiser who did the original appraisal. The difference is Mr. Durham's lost 'market gain.'"

Durham's brief, p. 38.

There are several intractable problems with Durham's argument. First, despite Durham's assertion that a different legal standard for measuring damages applies depending on whether it is the buyer or the seller who breaches a contract involving the sale of real property, our cases have never drawn any such distinction. As Radetic stated: "'[T]he measure of damages for the breach of a contract for the sale of land is the

difference between the contract price and the market value at the time of the breach.'" 71 So. 3d at 649 (citation omitted; emphasis added). Durham fails to cite a single case involving a sale of real property that indicated that a different standard for measuring damages applies in seller-breach cases as opposed to buyer-breach cases.

Second, the cases Durham cites and quotes from for the legal standard permitting what he calls "expectancy damages" did not involve contracts for the sale of real property. Goolesby concerned the recovery of chattels, specifically chickens raised on a poultry farm. Shorter Bros. v. Vectus 3, Inc., 343 So. 3d 508, 516 (Ala. 2021), involved the sale of trucks and trucking routes. Similarly, Mannington Wood Floors, Inc. v. Port Epes Transport, Inc., 669 So. 2d 817, 822-23 (Ala. 1995), was a case concerning two truck-hauling contracts. Ex parte Steadman, 812 So. 2d 290, 295 (Ala. 2001), concerned a breach of a contract to perform a complete title search on property. Med Plus Properties v. Colcock Construction Group, Inc., 628 So. 2d 370, 377 (Ala. 1993), concerned a contract for the construction of a building. Brendle Fire Equipment, Inc. v. Electronic Engineers, Inc., 454 So. 2d 1032, 1034 (Ala. Civ. App. 1984),

involved a contract to furnish planned and programmed background music.

The unifying element of the foregoing cases cited by Durham is that they were cases involving contracts for goods or services, not contracts for the sale of real property. Sometimes, in cases involving the breach of a contract for goods or services, damages may be recovered not just to put the nonbreaching party in the position the party would have been in if the contract had been fulfilled, but also to allow the nonbreaching party to recoup lost profits. As this Court explained in Med Plus Properties, in such cases there is

> "an ambiguity in the phrase 'lost profit,' as it is used in the case law to denote an item or element of damages recoverable in an action for breach of contract. The phrase 'lost profit' has been used either to designate an item of what is often called 'general' or 'expectancy' damages, or to designate a form of 'consequential damages.' One commentator has observed:
>
> > "'Many claims for consequential damages are claims for loss of profits. The term profit is sometimes used loosely to refer to any gain the plaintiff would have made but for the contract breach. But some gains, such as gains in a simple market transaction, are not profits in the sense that income from business operations are profits. On the contrary, if the breach of contract causes the plaintiff to lose a market gain, the claim is merely one for general damages as to which no special proof requirements attach.'

> "3 Dan Dobbs, Law of Remedies § 12.4(3), at 71 (2d ed. 1993); see also id. § 12.20(1)."

628 So. 2d at 376.

As Cooper observes in his reply brief, Durham is trafficking in the above-described ambiguity in attempting to use the legal standard for measuring damages stated in those goods-and-services contract cases. "While Durham may call his damages 'expectancy damages,' Durham is practically advocating for consequential damages, i.e., lost profits, on what Durham 'could have' sold the house for in 2022." Cooper's reply brief, p. 2 (emphasis in original). The problem with that measure of damages in this context, as Cooper also correctly observes, is that "[t]here was no testimony that would have shown that the parties expected real estate values to go up considerably in value. Durham did not testify that he had expected property to dramatically increase during the pendency of litigation." Cooper's reply brief, p. 5. Indeed, Durham's argument misapplies the "expectancy damages" standard even on its own terms.

> "Alabama law is well settled that the damages awarded in an action for breach of contract should be an amount sufficient to return the nonbreaching party to the position he would have occupied had the breach not occurred. Aldridge v. Dolbeer, 567 So. 2d 1267, 1269 (Ala. 1990). '[T]he damages claimed must be "the natural and proximate consequences of the breach and such as may reasonably be supposed to have been within the

> contemplation of the parties at the time the contract was made."' Aldridge, 567 So. 2d at 1269-70 (citations omitted)."

HealthSouth Rehab. Corp. v. Falcon Mgmt. Co., 799 So. 2d 177, 183 (Ala. 2001) (emphasis added). See also Ex parte Steadman, 812 So. 2d at 295 (explaining that "[t]he damages sought also must have been in the contemplation of the parties when they made the contract"). The fact that the market value of the subject property substantially increased two years after execution of the purchase agreement was not a natural and probable consequence of the breach, and there is no evidence indicating that such an increase was within the contemplation of Durham and Cooper at the time they executed the purchase agreement.[3] Of course, that is because the subject property's market value just as readily could have plummeted in the two years that succeeded Cooper's breach.

Durham is correct that the general standard for remedying a breach of contract is returning the nonbreaching party to the condition or position he or she would have occupied if the breach had not occurred.

[3]We note that there also was no testimony from Durham indicating that, if the sale had occurred in September 2020, as the purchase agreement stipulated, Durham even would have contemplated selling the subject property in January 2022 in order to realize the financial benefit the trial court awarded Durham in this case.

However, because of the unique nature of real-property transactions, ordinarily the only remedy that can return the nonbreaching party to the position that the party would have occupied if the breach had not occurred is specific performance. See, e.g., Downing v. Williams, 238 Ala. 551, 554, 191 So. 221, 222-23 (1939) ("[T]he principle which underlies specific performance of a contract relating to real estate, without regard to quantity, quality or location is that 'a specific tract is unique and impossible of duplication by the use of any amount of money.'" (quoting 2 Restatement of the Law of Contracts § 360 cmt.a (Am. Law Inst. 1932))). That is precisely why the law presumes that damages are not an adequate remedy for the breach of a contract involving the sale of real property. See, e.g., § 8-1-47, Ala. Code 1975 ("It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved."). But if the remedy of specific performance is not appropriate -- as Judge Graham determined in his November 5, 2021, order and as he reaffirmed in his September 30, 2022, order -- then the legal standard for measuring damages on a breach of a contract involving the sale of real property must

be specific about the point in time to be used for determining the nonbreaching party's original position. Our cases are unequivocally clear that the legal standard is "'the difference between the contract price and the market value at the time of the breach.'" Radetic, 71 So. 3d at 649 (citation omitted; emphasis added).

A fallback position argued by Durham for why it was appropriate for the trial court to determine damages by using the market value of the subject property at the time of the damages hearing, rather than at the time of the breach of the purchase agreement, is that Cooper's litigation tactics during the trial constituted a kind of continuing breach of the purchase agreement. See, e.g., Durham's brief, p. 37 (arguing that "Mr. Cooper's breach, based on excuses the trial court found were 'without a valid or a lawful reason,' … borders on bad faith, especially given his surprise 'homestead' defense that he raised only after being ordered to specifically perform his contract.").

One problem with that contention is that this Court rejected a very similar theory in Brett v. Wall, 530 So. 2d 797, 798 (Ala. 1988):

> "Of course, the measure of damages for the breach of a contract for the sale of land is the difference between the contract price and the market value at the date of the breach. Cook v. Brown, 428 So. 2d 59 (Ala. Civ. App. 1982), citing

> Howison v. Oakley, 118 Ala. 215, 23 So. 810 (1898). While the plaintiffs do not argue with this proposition of law, their position is that the breach here continued to the date of the trial, and thus that their evidence of the market value of the lot as of the date of trial satisfied their burden of proof on that issue.
>
> "But, plaintiffs chose to treat the contract itself as breached by initiating this suit because, as plaintiffs alleged, '[d]efendant has failed and refused to perform the obligations and undertakings imposed upon him by the agreement.' Plaintiffs further alleged substantial damages and prayed for an award of 'such damages as may be found to have been suffered by them.' Although plaintiffs also alleged their willingness and ability to perform the agreement, that allegation did not extend until trial the time for determining the liability of the defendant in damages."

(Emphasis added.) The Brett Court concluded that the usual measure of damages for the breach of a contract involving the sale of real property applied despite the plaintiffs' assertion of a continuing breach.

> "The plaintiffs' evidence adduced a reasonable market value of the lot on February 11, 1987, the date of trial. There was no evidence of the reasonable market value as of the date of the breach, i.e., March 31, 1986. … Thus, it is clear that there was a failure of proof on the element of damages essential to plaintiffs' recovery. Accordingly, the trial court erred in concluding that, because the testimony established 'that the lot has a value, a fair market value, today of $90- to $95,000, it would appear the difference in value as of the time of this contract and the time of this judgment would be the sum of $15,000.00.' (Emphasis added.)"

Brett, 530 So. 2d 799.

Similar to the plaintiffs in Brett, Durham contends that Cooper's breach continued through the date of the damages hearing. But, just as the Brett Court concluded, the reality is that Durham chose to treat the purchase agreement as breached by initiating this action on November 9, 2020, and, thus, the trial court could not rely upon the theory of a continuing breach to justify using the assessment of the subject property's market value around the time of the damages hearing for determining the appropriate amount of damages.[4] See also Woodham v. Singletary, 545 So. 2d 78, 78 (Ala. Civ. App. 1989) (concluding that "the trial court erred in awarding damages based on evidence of the property's

[4]For further support, Durham cites Duncan v. Rossuck, 621 So. 2d 1313 (Ala. 1993), contending that in that case this Court approved a trial court's admission of "an appraisal done 19 months after the breach as relevant to the issue of value at the time of the breach." Durham's brief, p. 29 n.4. However, in Duncan, this Court once again reiterated that "[t]he measure of damages for the breach of a contract involving the sale of land is the difference between the contract price and the market value of the land on the date of the breach." 621 So. 2d at 1315-16. Moreover, the Duncan Court approved the admission of the postbreach appraisal because, in "undisputed testimony," the appraiser "expressed the opinion that, based on the commercial real estate market conditions between August 1990 -- the date of breach -- and April 1992 and assuming no substantial improvement or deterioration, the value of the property would have been approximately the same in August 1990 as in April 1992." Id. at 1316. In short, that appraisal was deemed relevant only because it reflected the value of the property in question on the date of the breach. Thus, Duncan supports Cooper's position, not Durham's.

value after the breach" when the evidence consisted of a completed sale of the property three months after the breach).

Another problem with Durham's contention that Cooper's litigation tactics constituted a kind of continuing breach of the purchase agreement is that that contention was expressly rejected by Judge Graham in his September 30, 2022, order. As we recounted in the rendition of facts, Judge Graham observed in that order that Durham had argued that Cooper's delay in asserting a defense based on the principle of antialienation of a homestead "is a continuing breach of the contract and caused him to sustain additional loss, cost, and damage on a continuing basis." But Judge Graham stated that he was "not one hundred percent on-board with this theory of damages," concluding that that theory "for damages is not proven to the legal standard or to the court's satisfaction. Damages beyond the actual costs of the breach of contract are denied." (Emphasis added.) Thus, Judge Graham expressly awarded damages on the basis of what he deemed to be the actual loss Durham sustained from Cooper's breach of the purchase agreement, not based on any allegedly dilatory legal tactics employed by Cooper. In other words, Judge Graham did not base his assessment of damages on Cooper's actions subsequent

to the breach of the purchase agreement; rather, he based the award of $79,000 upon Durham's argued standard for measuring "expectancy damages."

Durham also argues that Judge Graham's award of damages was a "determination of fact [that] was within the [trial] court's discretion." Durham's brief, p. 32. However, as we just noted, Judge Graham clearly based his damages award on Durham's asserted legal standard for measuring damages, i.e., the standard expressed in Goolesby, and thereby rejected Cooper's asserted legal standard for measuring damages, i.e., the standard expressed in Radetic. That determination was an application of the law to the facts. As we recounted in section II of this opinion, a presumption of correctness does not apply when a trial court is shown to have improperly applied the law to the facts. See, e.g., Radetic, 71 So. 3d at 650 ("Because the trial court improperly applied the law to the facts, the ore tenus rule does not apply.").

In a last-ditch effort to avoid a reversal, Durham, at the end of his brief, tacitly admits to the dearth of on-point legal authorities for his position, stating: "Mr. Cooper may argue there are no cases specifically allowing 'benefit of the bargain' or 'expectancy' damages where the

contract at issue is for real property and the seller refuses to perform." Durham's brief, p. 44. Undaunted, Durham suggests that this "Court should either limit or overrule the line of cases such as Radetic v. Murphy … and others that Mr. Cooper cites in his principal brief … to the extent that these opinions might be read to deny a real property buyer the proper measure of damages for a seller's breach" because, he says, "there is no reason in law or logic why a real property seller should have a different potential liability for refusing to perform than sellers in non-realty transactions." Id. at 45.

However, as we have already explained, the law does treat contracts involving the sale of real property differently precisely because of the unique nature of the purchase, ordinarily favoring the remedy of specific performance for that reason. Moreover, as this opinion also has noted, our courts have never applied different legal standards for measuring damages for a breach of a contract involving the sale of real property based on which party breaches the contract. Finally, it makes eminent rational sense to measure such damages from the date the breach occurs rather than from the date a judgment happens to be issued, for it is only at the former date it can be said with any certainty that the

nonbreaching party is placed in the same financial position he or she would have been if the breach had not occurred. Cf. Garrett v. Sun Plaza Dev. Co., 580 So. 2d 1317, 1320 (Ala. 1991) (plurality opinion) (noting that "the injured party is not to be put in a better position by a recovery of damages for the breach than he would have been in if there had been performance"). For all the foregoing reasons, we decline Durham's entreaty to overrule Radetic and the numerous other cases that have held that "'[t]he measure of damages for the breach of a contract for the sale of land is the difference between the contract price and the market value at the time of the breach.'" 71 So. 3d at 649 (citation omitted).

IV. Conclusion

Based on the foregoing, we conclude that the trial court misapplied the law to the facts by measuring Durham's damages based on the difference between the contract price and the subject property's assessed market value in the new appraisal because the proper legal standard for measuring damages for the breach of a contract involving the sale of real property is the difference between the contract price and the subject property's market value at the time of the breach. Accordingly, we reverse the trial court's judgment and remand the cause with

instructions for the trial court to enter a judgment awarding damages based on the correct legal standard.[5]

REVERSED AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Shaw, Wise, Sellers, Stewart, Mitchell, and Cook, JJ., concur.

Bryan, J., concurs in the result.

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[5]Our decision pretermits any need to determine whether the trial court erred by admitting the new appraisal into evidence.

We also note that Durham's request at the end of his brief that we "should remand the case so that Mr. Durham can pursue specific performance if he chooses" is misplaced. Durham's brief, p. 46 (emphasis omitted). Judge Graham determined in his November 5, 2021, order, and he reaffirmed in his September 30, 2022, order, that specific performance was not an appropriate remedy in this case. Even though, as we observed in footnote 1, that determination may not have been legally correct, Cooper's appeal does not question that conclusion and Durham did not file a cross-appeal challenging Judge Graham's judgment in that respect. Accordingly, we are not at liberty to reverse that portion of the trial court's judgment. See, e.g., Cavalier Mfg., Inc. v. Clarke, 862 So. 2d 634, 643 (Ala. 2003) ("'[T]he law of Alabama is well-settled on this point. In the absence of taking an appeal, an appellee may not cross-assign as error any ruling of the trial court adverse to appellee.'" (quoting McMillan, Ltd. v. Warrior Drilling & Eng'g Co., 512 So. 2d 14, 24 (Ala. 1987))).