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ARKANSAS COURT OF APPEALS

DIVISIONS I & IV
No. CV-20-265

DONNELL BAUER AND MARILYN BAUER APPELLANTS/CROSS-APPELLEES V. JESSE LEE BEAMON, JR., AND MARY A. BEAMON, INDIVIDUALLY AND AS TRUSTEES OF THE JESSE LEE BEAMON, JR. AND MARY A. BEAMON FAMILY TRUST DATED 13TH OCTOBER 2015; AND THE JESSE LEE BEAMON JR. AND MARY A. BEAMON FAMILY TRUST DATED 13TH OCTOBER 2015 APPELLEES/CROSS-APELLANTS	Opinion Delivered March 1, 2023 APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. 17CV-17-549] HONORABLE MICHAEL MEDLOCK, JUDGE REVERSED AND DISMISSED ON DIRECT APPEAL; AFFIRMED ON CROSS-APPEAL

N. MARK KLAPPENBACH, Judge

In May 2016, the appellees, Jesse Lee and Mary A. Beamon, purchased a house from the appellants, Donnell and Marilyn Bauer. After the sale, the Beamons learned that poor soil conditions on an adjoining lot threatened the stability of their new property. They also learned that an improperly installed air conditioning condensate line and apparent pet soiling of a bedroom carpet caused a significant mold problem in the house.

The Beamons filed a complaint alleging that the Bauers fraudulently failed to disclose the poor soil conditions on the lower lot, as well as the conditions in the house that caused

the mold. The complaint made an equitable claim for rescission and a legal claim for damages based on the alleged fraud. After a bench trial, the circuit court ruled that the Beamons waived rescission of the land transaction, but it awarded damages reimbursing them for costs they incurred to remediate the mold and to stabilize the hillside above the adjoining lot.

The Bauers appeal the circuit court's judgment, arguing that reversal is warranted because the award of damages on the Beamons' legal claims violated their constitutional right to a jury trial; that the circuit court erred by awarding damages on a breach-of-contract theory that was not alleged in the complaint; and that the circuit court erred by awarding attorney's fees. The Beamons have filed a cross-appeal in which they argue that the circuit court erred by denying their request for rescission. We reverse and dismiss on the direct appeal and affirm on the cross appeal.

I. *Factual Background*

This litigation concerns Lots 18 and 24 in the Highland Hills subdivision in Van Buren. Lot 24 is on a hillside approximately forty feet above Lot 18. Steve Franklin, the developer of Highland Hills, lived in the residence on Lot 24 from 1995 until 2004. He also cleared the land on Lot 18 where he found a "small pond" approximately "twenty to twenty-five feet in diameter" close to the property line that separated Lot 18 and Lot 24. Mr. Franklin said that he "cleaned out and backfilled the pond" and installed a curtain drain "to catch the seep water that was coming into it," which "pretty well dried everything up," so Lot 18 "never [gave him] any problems."

Mr. Franklin sold Lot 24, Lot 18, and two other downhill lots—Lot 19 and Lot 20—to the Bauers in 2004. The Bauers lived in the residence on Lot 24 and built a large pole barn and driveway on Lot 18. The construction of the barn included leveling the ground and the creation of a new drainage ditch that, according to Mr. Bauer, "was just to carry [rain] water away from the barn."

Mr. Bauer eventually noticed "wet weather seep" coming from the hillside at the property line between Lots 18 and 24, and he acknowledged that the construction of the barn "very well could have disturbed" the curtain drain that Mr. Franklin installed. In 2009, the Bauers attempted to address the problem by using a bulldozer to improve the drainage ditch on that side of the barn. In 2010, they rented a mini excavator to further help water removal from the upper side of the barn, and in the summer of 2011, the Bauers hired a contractor to reshape the area above the pole barn and remove a dead tree.

The Bauers moved to Oklahoma in 2012, and in 2013, they listed Lots 18, 19, 20, and 24 for sale. They sold Lot 18 and Lot 20 to John Will in 2013, disclosing that there had been "slippage, sliding, and other poor soil conditions" on Lot 18. Mr. Bauer told Mr. Will that he had pushed dirt back up the hillside on two occasions and "both times it rained five inches and . . . washed it back out." Mr. Will observed that the hillside between Lot 18 and Lot 24 was unstable, and with rain, large amounts of dirt would slide down the hillside and accumulate against the pole barn. In 2016, Mr. Will paid a contractor to work on the slope on the hillside above the barn, but he failed to permanently fix the problem.

The Bauers relisted Lot 24 for sale in 2015 and executed a seller property disclosure answering "no" to the following questions:

> 10. To your knowledge, has there been any settling from any cause, or slippage, sliding, or other poor soil conditions at the Property *or at adjacent properties*?
>
> 11. To your knowledge, has there been any flooding, drainage, grading problems, or has water ever stood on the Property or under any improvement constructed thereon?
>
> 12. To your knowledge, are there any facts, circumstances, or events *on or around the Property* which, if known to a potential buyer, could adversely affect in a material manner the value or desirability of the Property?

(Emphasis added.)

On April 1, 2016, the Beamons viewed Lot 24 with their real-estate agent. They did not know about the soil conditions around the property or Mr. Will's attempts to improve them. As they approached the property from the road that day, Mr. Beamon could see "that off the downhill side there was some disturbed ground and bare ground" and "that the water flowed down . . . a common drainage area" that was "pretty close" to where he thought the property-line border "probably" was. Nevertheless, the Beamons relied on the information in the seller's property-disclosure form and after a series of offers and counteroffers, the Beamons bought Lot 24 for $315,000.

The Beamons had a survey done on the property on April 28, 2016. The survey showed that Mr. Will's dirt work on Lot 18 had encroached onto Lot 24. This information prompted the following exchange of text messages between Mr. Bauer and Mr. Will:

> BAUER: This is Don Bauer. We finally got a contract on the house and it looks like it will close in a couple of weeks. They had a survey done today so

you will see some of the boundary marker flags around. I just drove up your driveway [on Lot 18] and saw where they placed the flags. They are on past where you had been digging. It doesn't look right to me[.] [C]ould you take a look when you have a chance?

WILL: Ok. I am in Talladega right now [and will be] home next week. That dirt is a nightmare[.] [I] spent $7000 for nothing[.] [I am] waiting to build some cash to try something again. Sorry for the mess.

BAUER: I can certainly sympathize with the situation. I hired an engineering firm to try to figure out a solution and they finally would not answer my calls. They had no idea. My concern is with the buyer of my house. If the survey stakes are correct, your digging has encroached onto my property by perhaps 75 feet. It's no big deal to me. The east end of the lot is useless anyway, I just don't know how the buyer will react.

Mr. Bauer did not tell the Beamons about these text messages or make any amended disclosures about the soil conditions on Lot 18.

The transaction closed on May 26, 2016. Later that day, Mr. Bauer drove to Lot 24 to explain some of the operating systems of the house. Mr. Beamon asked Mr. Bauer about his efforts to control "the soil down below," which Mr. Beamon still believed was merely "surface erosion." Mr. Bauer told Mr. Beamon, for the first time, that he had "uncovered water seep down on Lot 18" when he built the pole barn.

The Beamons began moving into the residence on Lot 24 on June 17, 2016. The next day, Mr. Beamon observed mold growing on several doors and door frames in the house. A neighbor also told the Beamons of "some problems and history" about the hillside between Lot 24 and Lot 18.

Mr. Beamon contacted his real-estate agent, Melissa Yeakley, and "talked to her about the mold that [they] found" and "the erosion concerns." Mr. Beamon described himself as

"pretty distraught at the time" because "the situation seemed to be going south pretty quickly." Mr. Beamon asked Ms. Yeakley,

> if her firm could make a recommendation for an engineer because I wanted to—it was obvious to me that the situation down [the hillside] was much more, at that point in time, was much more than just simple soil or surface erosion. And I wanted to get to the bottom of it.

Mr. Beamon said the mold appeared to get progressively worse, and the house became "musty smelling." The Beamons thereafter began moving their things out of the house and took up temporary residence nearby. They also re-called their home inspector, Lowell Coomer, who confirmed that the substance was mold. The Beamons then hired a mold remediation firm, EGIS, whose testing revealed a high concentration of mold in the master bedroom. The carpet was removed, and the underlying jute and subfloor were discolored and emitting strong musty odors. EGIS found an air conditioner condensate line that was improperly installed in the return air plenum, which caused humidity inside the home that contributed to the mold growth. The Beamons paid $20,716.16 for mold remediations.

The Beamons began living in the residence on Lot 24 on September 1, 2016. Mr. Beamon spoke with John Will and Mark Jones, who mowed the hillside for the Bauers. According to Mr. Jones, the poor soil conditions left an area of the hillside "unsafe to mow."

The Beamons hired Andy McClarrinon, a geotechnical engineer from GTS, Inc., to perform an investigation of the slope failure on Lot 24. In his February 2, 2017 report, McClarrinon recommended a remediation plan for the unstable slope, which if not remediated, would progress up the gradient to the residence on Lot 24. GTS recommended

stabilizing the hillside portion on Lot 24 by re-sloping and compacting the hillside and lining part of Lot 24 with fabric and placing stone rip rap on the lined area. The Beamons hired a contractor who re-graded the slope and prepared the area for laying the fabric and the rip rap, but after a June 17, 2017 rain, the re-graded area became unstable once again. The plan to lay fabric and rip rap was abandoned.

On September 26, 2017, the Beamons received a written report in which GTS concluded that the instability of the hillside could not be remediated from Lot 24. Based on that information, the Beamons' counsel sent a rescission notice to the Bauers on September 29, 2017, in which the Beamons told the Bauers that they

> have investigated and based on engineering advice, have attempted repair work regarding the water seep on the property (and resulting erosion) *of which you informed Mr. Beamon after the closing of the real estate transaction*. Your real estate disclosures regarding the property did not disclose the water and erosion problems, and the disclosures did not reveal the previous repair actions apparently attempted by you and others on the adjacent property and on the subject property. The recent August rains made obvious the attempted repair work has failed to solve the water/erosion problems.

(Emphasis added.) The Beamons "concluded the appropriate action is a rescission of the real property sale/purchase," and they sought "a return of the money paid for the property," as well as reimbursement of the costs associated with their remediation of the mold in the residence and their attempted remediation of the hillside.

On October 23, 2017, the Beamons filed a complaint seeking rescission of the sale and recovery of their expenses. On September 11, 2018, they filed a second amended complaint claiming both equitable rescission and damages based the same factual allegations

and the same legal theory asserting fraud and deceit. The Bauers filed an answer that, among other things, demanded a jury trial.

On May 28, 2019, the Beamons filed a motion requesting the circuit court to strike a jury-trial setting and to schedule a bench trial. The Beamons asserted that

> Count I seeks rescission as a remedy which would restore the parties to their pre-closing positions[.] ... Count II is an action for the common law tort of fraud and deceit and resulting damages. [The Beamons] *understand the doctrine of election of remedies will require [them] to make an election of remedies before the case can be submitted to the fact finder*. [Citations omitted.] To the extent required by the doctrine of election of remedies, [the Beamons] have *elected the remedies associated with their equitable claim for rescission*.

(Emphasis added.) The Beamons maintained, however, that "the remedies associated with their equitable claim for rescission" included damages contending that,

> a grant of rescission resulting in the restoration of the parties to their pre-closing positions will involve a transfer of title, return of consideration paid, reimbursement for repairs to the subject property, taxes, insurance, and other maintenance expenses together with a setoff . . . for a reasonable rental value of the property [while] in [the Beamons'] possession.

Relying on *Marx Real Estate Investments, LLC v. Coloso*, 2011 Ark. App. 426, 384 S.W.3d 595, the Beamons alternatively claimed that "even if rescission is not granted[,] . . . [they] are entitled to recover their damages proved at trial."

The Bauers urged the circuit court to deny the Beamons' motion for a bench trial asserting that the Beamons' "purported election of remedies is, at best, only a partial election of remedies [to the extent they dropped a claim for punitive damages]." "In truth," the Bauers said, "the [Beamons] continue to both pursue an untimely and prejudicial claim for rescission of the parties' real estate contract, and simultaneously pursue a claim for legal

damages," including some of the same expenses they sought in association with their rescission claim. The Bauers asserted that, in any event, the Beamons were not entitled to rescission because they unreasonably delayed their request.

The circuit court granted the Beamon's motion for a bench trial, and the case was tried in September 2019. The circuit court issued a letter opinion in which it rejected the Beamons' equitable-rescission claim, finding that the Beamons "did not act with reasonable diligence in advising the sellers of their intent to rescind" because

> [t]he evidence shows [the Beamons] were put on notice of the issue of mold shortly after taking possession; further, conversations with Mr. Bauer indicate they were told about the "wet weather" issue with Lot 18, shortly after closing. They acted with intention to keep, maintain and repair the property for at least 12 or more months. They engaged in mold eradication, hired engineers, excavators, and various repairs after taking possession. These acts of possession, repair and reclamation are inconsistent with the intent to rescind and . . . impair the opportunity to restore the parties to [their] original position as nearly as possible.

The circuit court also suggested that the Beamons' alleged justification for rescission lacked merit, finding that "a failure to disclose issues about adjacent land does not equate to a material breach of contract[.]"

The circuit also found, however, that the Beamons were entitled to damages, observing that "it is undisputed the [Bauers] did not disclose the issue with the adjoining lot and slope," which the circuit court ruled was "a breach of contract." The court awarded the Beamons damages "for the reclamation [of the hillside] spent by [the Beamons] in the amount of $30,950, as well as the GTS report and recommendations in the amount of $5900."

Rescission also was not appropriate, the court said, "as to the issue of mold." Nevertheless, the circuit court found that "the house was delivered to the [Beamons] in a defective condition" because "an improperly installed condensation line contributed to the mold problem." That defect "breached the contract," and the circuit court found that the Beamons were entitled to damages for the cost of the mold inspection and eradication, the cost of replacing the bedroom carpet, and the cost of repairs to the air conditioning unit.

The circuit court entered a judgment incorporating its letter opinion. The Beamons followed with a motion for attorney's fees as the prevailing party under the provisions of their real estate contract and also as the prevailing party in a breach-of-contract action under Ark. Code Ann. § 16-22-308 (Repl. 1999). The circuit court granted the attorney's-fee motion over the Bauers' objection. This appeal followed. The Bauers contend that reversal is warranted because the bench trial on the Beamons' legal claim violated their constitutional right to a jury trial; that the circuit court erred by awarding damages on a breach-of-contract theory that was not alleged in the complaint; and that the circuit court erred by awarding attorney's fees. The Beamons have filed a cross-appeal, arguing that the circuit court erred by denying their request for rescission.

II. *Standard of Review*

The standard of review on appeal from a bench trial is whether the circuit court's findings of were clearly erroneous or clearly against a preponderance of the evidence. *Travelers Cas. & Surety Co. of Am. v. Cummins Mid-South, LLC*, 2015 Ark. App. 229, at 9, 460 S.W.3d 308, 315. A finding is clearly erroneous when, although there is evidence to support

it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Jones v. John B. Dozier Land Tr.*, 2017 Ark. App. 23, 511 S.W.3d 869. A circuit court's conclusion on a question of law, however, is reviewed de novo and is given no deference on appeal. *E.g.*, *Travelers*, 2015 Ark. App. 229, at 9, 460 S.W.3d at 315. The same is true for claims to a right to a jury trial, which are also reviewed de novo. *Bandy v. Vick*, 2020 Ark. 334, at 4, 608 S.W.3d 903, 905.

III. *Discussion*

A. Direct Appeal

For their first argument on appeal, the Bauers contend that the circuit court erred when it granted the Beamons' motion for a bench trial and, after rejecting their claim for rescission, awarded them relief on their "complaint for damages." The Beamons respond that the circuit court did not err by granting their request for a bench trial because rescission is historically an equitable remedy for which there was no right to a jury. The Beamons also suggest that circuit court's award of damages was within its equitable discretion to grant "a less disruptive remedy," once it determined that rescission inappropriate. Because we agree that the circuit court erred by failing to hold the Beamons to their elected remedy of equitable rescission, and the consequence was a violation of the Bauers' fundamental right to a jury trial, we must reverse.

A jury trial is a fundamental constitutional right that is protected by article 2, section 7 of the Arkansas Constitution, which provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy[.]"

The "Arkansas Constitution does not assure the right to a jury trial in all possible instances," however, "but [only] in those cases where the right to a jury trial existed when the constitution was framed." *Baptist Health v. Murphy*, 2010 Ark. 358, at 13, 373 S.W.3d 269, 280.

To be sure, the circuit court did not err when it granted the Beamons' motion for a bench trial in which they expressly elected rescission as their remedy. After all, "the right to a jury trial extends only to those cases that were subject to trial by jury at common law," and "in equitable proceedings, there was no right to a jury at the common law." *Murphy*, 2010 Ark. 358, at 13, 373 S.W.3d 269, 280. Rescission is an equitable remedy, *see Hudson v. Hilo*, 88 Ark. App. 317, 198 S.W.3d 569 (2004); therefore, the order granting a bench trial did not itself constitute reversible error.[1]

Rather, the circuit court erred when it did not hold the Beamons to their election of remedies. The supreme court summarized the rules regarding the doctrine of election of remedies in *Greene v. Pack*, 343 Ark. 97, 32 S.W.3d 482 (2000), where it said,

> The general rule applicable in election-of-remedies cases is that where a party has a right to choose one of two or more appropriate but inconsistent remedies, and with full knowledge of all the facts of the case and his rights, makes a deliberate choice of one, then he *is bound by his election and is estopped from again or electing or resorting to the other remedy, although the judgment obtained in the first action fails to afford relief to the party making the election*.

[1]We are aware that at the hearing on the Beamons' motion a bench trial, the Bauers argued that the Beamons were ineligible to elect rescission—and therefore were limited to a legal remedy that must be awarded by a jury—because they had not acted in a reasonably diligent manner. While we ultimately agree, *infra,* that the evidence at trial demonstrated that the Beamons were not reasonably diligent, we cannot say that the circuit court erred by allowing them to elect rescission on the limited record developed at the motion hearing.

Id. at 102, 32 S.W.3d at 485 (emphasis added); *see also Bush v. Barksdale*, 122 Ark. 262, 265-66, 183 S.W. 171, 173 (1916) ("The principle that an election of remedies is irrevocable seems too plain for argument to the contrary[.]"). According to these principles, the Beamons' election of their equitable remedy in Count I in the second amended complaint precluded them from later seeking—and receiving—the damages they alleged in Count II.

The Beamons suggest, however, that the circuit court, once it rejected rescission, could exercise its equitable discretion to fashion any appropriate alternative remedy—including damages. In support of this argument, they principally rely on our decisions in *Marx Real Estate Investments, LLC v. Coloso*, 2011 Ark. App. 426, 384 S.W.3d 595, and *Morris v. Knopick*, 2017 Ark. App. 225, 521 S.W.3d 495.

Coloso and *Morris* are both distinguishable. In *Coloso*, the buyers of a mold-infested house (the Colosos) filed a complaint against the sellers ("the Marx defendants") alleging breach of contract, fraud in the inducement, constructive fraud, negligence, and violation of the Arkansas Deceptive Trade Practices Act. They sought rescission of the real estate transaction or, in the alternative, money damages. The Marx defendants demanded a jury trial, and a jury was empaneled to hear the case.

The circuit court required the Colosos to elect between their remedies of rescission or contract damages at the close of their case-in-chief. *Id.* at 6, 384 S.W.3d at 599. The Colosos elected recission, whereupon the circuit court dismissed the jury and heard the remainder of the case in a bench trial. The circuit court ultimately found that rescission was

not available as a remedy, but it found that the Colosos were entitled to some of their costs in correcting the mold infestation. *Id.* at 6, 384 S.W.3d at 599. Accordingly, the court awarded the Colosos money damages in the amount of $56,574.35. *Id.*

The Marx defendants appealed, arguing—as the Bauers do here—that the circuit court denied them their right to a jury trial when it awarded damages to the Colosos after they elected equitable rescission. This court affirmed on the principles that the circuit court was authorized to fashion any remedy justified under the proof once rescission was no longer available, and in exercising that authority, it was not required to substitute one equitable remedy for another.

Our holding in *Coloso* is inapposite here because it was based on two cases, *Jones v. Ray*, 54 Ark. App. 336, 925 S.W.2d 805 (1996), and *Smith v. Eastgate Properties, Inc.*, 312 Ark. 355, 849 S.W.2d 504 (1993), that relied on the power of courts hearing cases in equity to fashion legal remedies under the clean-up doctrine. The supreme court has since clarified that amendment 80 abolished the clean-up doctrine. *See Tilley v. Malvern Nat'l Bank*, 2017 Ark. 343, at 8, 532 S.W.3d 570, 575. Consequently, it cannot justify the circuit court's failure to hold the Beamons to their election of rescission here.

Morris is also distinguishable. In that case, Knopick (the buyer) and Morris (the seller) negotiated the sale of a house and its surrounding property. A key item in the negotiation was a set of tools that Morris valued at $150,000 and promised would be included in the sale. Knopick, who later determined that the tools were worth significantly less than $100,000, sued Morris to rescind the sale or, alternatively, for damages. After a bench trial,

the circuit court rejected Knopick's claim for rescission and awarded him damages in the amount of $92,000. Knopick cross-appealed, alleging that the circuit court erred in awarding him damages instead of rescission. We affirmed, holding that rescission was not appropriate because improvements to the property since the sale made it "difficult, if not impossible, to restore to Morris substantially the consideration he received." *Morris*, 2017 Ark. App. 225, at 11-12, 521 S.W.3d at 503. Unlike here, there was no election of remedies, or for that matter, any argument that the circuit court violated either party's right to a jury trial.

In summary, neither *Coloso* nor *Morris* supports the Beamons' assertion that damages could still be awarded after they elected equitable rescission. The circuit court erred when it did not hold them bound by their election, and the consequence was a violation of the Bauers' fundamental right to a jury trial. Accordingly, because the Beamons' pursuit of their elected remedy failed, and their election estops them from pursuing their claim for damages, we reverse and dismiss the case on direct appeal.[2]

B. Cross-Appeal

The Beamons contend that the circuit court clearly erred when it determined that they were not entitled to rescission. They assert that the Bauers were intentionally deceitful when they failed to disclose the soil conditions on Lot 18, or at the very least, their behavior amounted to constructive fraud. The Beamons further assert that the circuit court erred when it found that their failure to exercise reasonable diligence waived their right to rescind

[2]Because we reverse and dismiss on the Bauer's jury-trial claim, we do not reach their remaining arguments on appeal.

the real-estate transaction. They maintain that "reasonable diligence" allowed them time to investigate the soil conditions on the hillside, and the clock to notify the Bauers of their intent to rescind did not start until September 2017, when they learned that the stability of the hillside could not be remediated from Lot 24. Because we agree that the Beamons waived their right of rescission, we affirm the circuit court's ruling.

Rescission is a drastic remedy that sets aside a contractual relationship. 2 Howard W. Brill & Christian H. Brill, *Arkansas Law of Damages* § 31:3 (6th ed. 2014). Accordingly, "one who desires to rescind upon the ground of fraud or deceit must, as soon as he discovers the truth, announce his purpose at once, adhere to it, and act with reasonable diligence, so that all parties may be restored to their original position as nearly as possible[.]" *Herrick v. Robinson*, 267 Ark. 576, 585, 595 S.W.2d 637, 643 (1980). Further,

> if a party wishing to rescind a contract continues to treat the property involved in the transaction as his own or conducts himself with reference to the transaction as though it were still subsisting and binding, he will be held to have waived the objection and will be as conclusively bound by the contract as if the fraud had not occurred.

Id. Stated another way, "[a] buyer who has the option of rescinding a contract may waive that option by continuing to exercise acts of ownership over the property." Brill, *supra*. Indeed, that buyer "has in effect made an election to affirm the contract, and therefore the only available remedy is to sue for damages." *Id*.

The circuit court did not err when it ruled that the Beamons were not entitled to a rescission of the contract. Regardless of the legal theory underlying the claim—breach of contract or fraud—the Beamons waived their right of rescission when they failed to give

notice of their intent to rescind in a reasonably diligent manner. The Beamons learned about the Bauers' fraudulent answers on the disclosure form when, on the day of closing, Mr. Bauer told them that there had been "water seep" on Lot 18. Mr. Beamon said that neighbors told him about the hillside in June 2016 as they were moving into the residence, and those reports, as well as the mold that they discovered, left Mr. Beamon "distraught" because "the situation appeared to be going south pretty quickly." Indeed, Mr. Beamon contacted his real estate agent because it became "obvious" to him "that the situation down [the hillside] was much more than just simple soil or surface erosion." Despite these concerns, the Beamons hired a firm to eradicate the mold and attempted (for the better part of a year) to remediate the soil conditions on the hillside—acts of ownership over the property that are contrary to any intent to rescind. Accordingly, we affirm the circuit court's ruling that the Beamons were not entitled to rescission.

The Beamons' cited cases do not support their assertion that they acted in a reasonably diligent manner. There was no discussion of reasonable diligence in *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965), because the circuit court there determined that the homebuyers failed to make a threshold showing of fraud. The supreme court's opinion reversing the circuit court was limited to answering whether the appellants came forward with clear and convincing evidence establishing the elements of fraud.

Ballard v. Carroll, 2 Ark. App. 283, 621 S.W.2d 484 (1981), is also no help to the Beamons. In that case, the seller failed to disclose that the property had flooded four times in the ten years immediately preceding the sale in 1977. The house flooded in September

1978, prompting the buyer to investigate the water problem. The buyer did not learn the information that the seller failed to disclose, that is the flooding history of the property or how often it flooded, until July 1979, and promptly filed suit on July 6, 1979. Under these circumstances, this court found no merit in the seller's waiver argument. Here, Mr. Beamon learned about the Bauers' failure to disclose the water seep on Lot 18 on May 26, 2016 (the day of closing), and they received additional information from neighbors—enough to conclude the problem was "much more than just simple soil erosion"—later that summer. They did not give the Bauers notice of their intent to rescind, however, until September 29, 2017. Accordingly, *Ballard* does not support a conclusion that the Beamons diligently sought rescission of the real estate transaction, as they claim.

Finally, our conclusion that the defrauded buyers were entitled to rescission in *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003), was not based on any analysis of whether they were diligent in making their request. Rather, the seller's argument against rescission was limited to his assertion that "alterations to the property prevented the parties from being restored to their positions prior to the contract." *Id.* at 355, 96 S.W.3d at 749. The court rejected that argument without any discussion of the buyers' diligence, saying only that "despite the modifications [to the property following the sale], the house remained substantially the same structure as it had been when [the seller] sold it to [the buyers]." *Id.*

In summary, the circuit court did not clearly err when it determined that the Beamons failed to give the Bauers notice of their intent to rescind in a reasonably diligent manner. Accordingly, we affirm in the cross-appeal.

III. *Conclusion*

We reverse and dismiss on the Bauers' direct appeal because the circuit court's award of damages to the Beamons violated the Bauers' right to a jury trial, and the Beamons, having elected the equitable remedy of rescission, are bound by that election. On cross-appeal, we affirm the circuit court's ruling that the Beamons were not entitled to rescission.

Reversed and dismissed on direct appeal; affirmed on cross-appeal.

ABRAMSON, GLADWIN, and MURPHY, JJ., agree.

HIXSON and BROWN, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. The majority opinion misinterprets the real issue in this appeal. This appeal arises out of a real estate transaction and has virtually nothing to do with the doctrine of election of remedies. The parties agree that appellees, the Beamons, elected the equitable remedy of rescission. The Beamons purchased a house and lot from the appellants, the Bauers. It turned out that the house and the lot had a long history of substantial water problems, and the Bauers intentionally and fraudulently concealed those problems by providing false answers in their sellers disclosure statement as more fully set forth below. It is not unusual in a real estate setting that the alleged unlawful conduct complained of by the defendant may constitute a breach of contract or it may constitute the tort of fraud, depending on the evidence. Hence, it is not unusual—and, in fact, is prudent—for the plaintiff to file a lawsuit alleging two separate counts and theories arising out of the same set of facts. That is precisely what the Beamons did in this case. In Count I of the second amended complaint, appellees alleged that appellants breached the

warranty by providing false answers in the sellers disclosure statement regarding the water problems, and the Beamons requested the remedy of equitable rescission of the contract and what was previously referred to as "clean-up damages" to restore them to the financial position they were in prior to execution of the contract.[1] In Count II of the second amended complaint, appellees alleged that the appellants committed the tort of fraud by providing false answers on the sellers disclosure statement and requested compensatory and punitive damages. In short, were the Bauers' false answers only a breach or did they rise to the level of intentional fraud?

In due course, the Beamons decided that the Bauers' false answers constituted a breach of contract instead of intentional fraud. Hence, the Beamons requested that the court strike a jury-trial setting and to schedule the case for a bench trial. In that motion, appellees elected equitable rescission and damages and pled the following: "[P]laintiffs *elect the remedies associated with their plead equitable action for rescission. Second Amended Complaint,*

[1]In Count I, paragraph 13 of the second amended complaint, the Beamons alleged the following: "In the Real Estate Contract between the parties, Defendants warranted their answers contained in their written disclosures 'to be true and correct and complete to Seller's knowledge.' That warranty was *breached* as alleged in paragraph 9 above." (Emphasis added.) Paragraph 9 alleged, "In conflict with their January 2, 2013, disclosure regarding Lot 18 and their knowledge of the condition of Lot 18, Defendants falsely and fraudulently failed to disclose the [conditions.]"

Count I." (Emphasis added.)[2] [3] It is the hearing on this motion that we previously ordered to be supplemented. *See Bauer v. Beamon*, 2022 Ark. App. 496. At the hearing, appellees reiterated that they alleged two separate counts. Although appellees did not specifically state that Count I was a breach-of-contract claim, they did explain that it was a claim for equitable rescission, which is an equitable remedy for breach of contract, and distinguished it from Count II, which appellees specifically asserted was for fraud. Moreover, appellees explained that by their election to have a bench trial on their equitable-rescission claim in Count I, they did not waive their right to have the court fashion a "substitute remedy" in the event the circuit court eventually found that they waited too long to be granted rescission after hearing all evidence at the bench trial as appellants had argued. This is precisely how the circuit court resolved this case after holding a bench trial. It found that the appellants had breached the contract but found that it could not return the parties to their precontract positions. Instead, the circuit court awarded appellees their costs of soil and mold remediation and awarded attorney's fees.

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[2]Count I of the second amended complaint requests rescission of the contract and the following costs incurred by them to "restore the parties to their pre-closing positions." Paragraph 39, subparagraphs (a)–(d) set forth the return of the purchase price and closing expenses. Subparagraph (e) includes soil remediation of $36,850. Subparagraph (f) includes mold remediation of $20,721. Subparagraph (g) includes miscellaneous costs, such as real estate taxes, insurance, and structural repairs. All of these damages are alleged as a part of the rescission of the contract to restore the parties to their pre-closing positions which is generally the principle behind rescission.

[3]The issue of whether the appellees were required as a matter of law to elect their remedies prior to trial is left for another day.

This appeal involves the issue of whether a plaintiff who prays for equitable relief can also be awarded damages that were formerly referred to as equity "clean-up damages." It was rudimentary that prior to the merger of the courts of equity and law in 2001, a plaintiff who prayed for equitable relief could also receive clean-up damages. At that time, the general principle was that a plaintiff could be awarded monetary damages in a court of law (circuit court), or a plaintiff could be awarded equitable relief in a court of equity (chancery court). The plaintiff had to elect which court in which to file the complaint on the basis of the relief sought. However, the question often presented was what happened when a plaintiff that was awarded equitable relief in chancery court also sustained monetary damages? For the sake of judicial economy, the courts did not want to have to try the lawsuit twice. So the courts developed the "equity clean-up doctrine" so that the chancellor (the equity judge) could award the plaintiff damages in the right circumstances to restore the plaintiff to his or her financial condition prior to the contract in addition to the equitable relief awarded.

That all changed with the adoption of amendment 80 in 2001. Because the courts of law and equity merged, the plaintiff no longer had to select which court in which to file his or her complaint: circuit or chancery. There is now only one court—the circuit court. In *Cruthis*, the supreme court provided the following explanation:

> Prior to adoption of Amendment 80, a choice had to be made by a plaintiff of whether it was best to file suit in chancery or circuit court. The clean-up doctrine was used to allow a chancery court to decide law issues because under that longstanding rule, once a chancery court acquired jurisdiction for one purpose, it could decide all other issues. *Douthitt v. Douthitt*, 326 Ark. 372, 930 S.W.2d 371 (1996). The doctrine reached the point in recent years that unless the chancery court had no tenable nexus to the claim, this court would consider the matter of whether the claim should have

> been heard in chancery to be one of propriety rather then one of subject-matter jurisdiction. *Douthitt*, *supra*; *Liles v. Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). Further, it was possible to sever claims at law to be tried in circuit court. *Tyson v. Roberts*, 287 Ark. 409, 700 S.W.2d 50 (1985); *see also Spitzer v. Barnhill*, 237 Ark. 525, 374 S.W.2d 811 (1964).
>
> There is no longer a need to elect in which court to file a lawsuit. *See Clark v. Farmers Exch., Inc.*, 347 Ark. 81, 89, 61 S.W.3d 140 (2001). However, as already discussed, Amendment 80 did not alter the jurisdiction of law and equity. It only consolidated jurisdiction in the circuit courts. Therefore, matters that could be submitted to a jury for decision and the matters that must be decided by the court remain unaltered.

First Nat. Bank of DeWitt v. Cruthis, 360 Ark. 528, 534, 203 S.W.3d 88, 92 (2005).

Now, the circuit court wears both hats—that of chancellor (equity) and that of law. This concept was supplied by amendment 80, section 6 (A), wherein it states the following: "Circuit Courts are established as the trial courts of original jurisdiction of all justiciable matters not otherwise assigned pursuant to this Constitution." While the supreme court made it clear in *Cruthis* that the courts of law and equity merged, the narrower issue of whether the "equity clean-up doctrine" survived the merger was not directly addressed. Logically, since there was no longer the separation of law and equity, there was no per se need for the equity clean-up doctrine. The circuit court had original jurisdiction of all justiciable matters. This was later explained by the supreme court in *Tilley v. Malvern National Bank*, 2017 Ark. 343, 532 S.W.3d 570.

> We take this opportunity to clarify that after the enactment of amendment 80, the clean-up doctrine was abolished in Arkansas. Instead, *we emphasize that in deciding whether a claim should be submitted to a judge as an equitable matter or to a jury as a legal matter, a circuit court must review the historical nature of the claim. Nat'l Bank of Ark. v. River Crossing Partners, LLC*, 2011 Ark. 475, at 8, 385 S.W.3d 754, 759 (citing *Cruthis*, *supra*). *Our opinions since 2001 have affirmed this historical test by looking to the remedies sought in the complaint. Stokes*, *supra*. Accordingly, we overrule all prior decisions to the extent that they conflict with this opinion.

Tilley, 2017 Ark. 343, at 8, 532 S.W.3d at 575 (emphasis added).

That brings us to the crux of this appeal. Clearly, the clean-up doctrine was abolished in *Tilley*. Simply put, the clean-up doctrine was antiquated and no longer served a useful purpose after amendment 80 was adopted. While the antiquated clean-up doctrine has been abolished, the real question in this appeal is whether a circuit court that has original jurisdiction of all justiciable matters can still award monetary damages (clean-up damages) in a case where historically the remedies sought are equitable in nature. That is the case before us. That answer is clearly yes.

The answer to this question can best be established from a combined analysis of *Marx Real Estate Investments, LLC v. Coloso*, 2011 Ark. App. 426, 384 S.W.3d 595, and 1 Howard W. Brill & Christian H. Brill, *Arkansas Law of Damages* § 2:8 (6th ed. 2014). In *Coloso*, MREI sold a house to the Colosos. Eventually, the Colosos discovered mold and other issues with the house. The Colosos sued MREI for equitable rescission or, alternatively, money damages for breach of contract and fraud. MREI demanded a jury trial. At the trial, the Colosos *elected equitable rescission*, and accordingly, over the objection of MREI, the circuit court dismissed the jury. The circuit court denied rescission but awarded damages of $56,574 for restoration costs. Prior to amendment 80, these damages would have been referred to as "clean-up damages." In affirming the circuit court's award of these types of damage, the *Coloso* court stated the following:

> The [circuit] court accordingly found that rescission was not available as a remedy and proceeded to address the Coloso's argument that they should be awarded damages in

> the event that rescission was unavailable. The court noted the argument by the Marx defendants that the Colosos had elected rescission as their remedy, *but held that a court of equity could fashion any remedy justified by the proof*. The court concluded that the Colosos were entitled to recover some, but not all, of the costs of correcting the mold infestation because of their failure to take curative actions at little or no cost. The court awarded the cost of repairs to the veranda, $17,500, and one-third of the cost of the mold remediation, $39,074.35, for a total judgment of $56,574.35.

Coloso, 2011 Ark. App. 426, at 6, 384 S.W.3d at 599 (emphasis added).

In analyzing whether the circuit court was clearly erroneous in awarding damages in an equitable proceeding, the *Coloso* court affirmed the award and held the following:

> The amount and measure of damages is a question of fact. *Quality Truck Equip. Co. v. Layman*, 51 Ark. App. 195, 912 S.W.2d 18 (1995). *The circuit court considered the equities between the parties, including the problems caused by the Colosos, and made a reasoned decision that balanced those equities. As the Colosos point out, the court may adopt a measure of damages that awards the cost of putting the property in the condition as it was represented, if that is best suited to accomplishing substantial justice in the particular circumstances. Knox v. Chambers*, 8 Ark. App. 336, 654 S.W.2d 582 (1983). We cannot say that the court was clearly erroneous in its damages award to the Colosos.

Coloso, 2011 Ark. App. 426, at 12–13, 384 S.W.3d at 602–03 (emphasis added). After the *Coloso* mandate by the court of appeals was handed down, MREI filed a petition for review with the supreme court. It is not insignificant that the Arkansas Supreme Court denied MREI's petition for review, leaving the *Coloso* holding firmly in place for future authority and precedential value.

While it is secondary authority, the *Coloso* case is cited with approval in Brill & Brill, *supra*, § 2.8.

> Note that this election must be made prior to the judge determining the appropriateness of an equitable remedy. For example, the buyer of real property alleged fraud and properly sought the traditional inconsistent remedies. The defendants demanded a jury. After all the evidence, the court mandated an election,

> and the plaintiff chose rescission. With the jury dismissed, the trial court concluded that the property could not be returned in substantially the same condition, thus rescission was not available. But, *under traditional clean-up principles, now simplified with the merger of law and equity, the trial court awarded compensatory damages*.

(Emphasis added and internal citations and footnotes omitted.) These two authorities establish that a circuit court is clothed with the authority to award damages in cases where equitable relief was sought.

The facts in the case at bar are frighteningly similar to the facts in *Coloso.* The Beamons purchased a house from the Bauers. The Beamons alleged that the Bauers falsely answered some of the questions in the seller disclosure statement. The evidence revealed that house had a long history of water problems and that the Bauers had full knowledge of the problems. Despite this knowledge, the Bauers answered no to the following questions:

> 10. To your knowledge, has there been any settling from any cause or slippage, sliding or other poor soil conditions at the Property or at adjacent properties?"
>
> 11. To your knowledge, has there been any flooding, drainage, grading problems, or has water ever stood on the Property or under any improvement constructed thereon?
>
> . . . .
>
> 35. To your knowledge, are there any facts, circumstances or events on or around the Property which, if known to a potential buyer, could adversely affect in a material manner the value or desirability of the Property?

The evidence introduced at trial clearly showed that the answers given by the Bauers were false. As a result of the undisclosed water problems, the house developed mold and other drainage issues. Over a period of approximately three years, the Beamons spent $36,850 on

excavation services attempting to reroute the water and $17,921 for mold remediation in the house.

After hearing all the evidence and argument of counsel, the circuit court found that the Bauers had breached the contract. However, the court was faced with the same dilemma that the circuit court in *Coloso* faced. The goal in equitable rescission is to return the parties to the same position they were in prior to the contract. Here, as in *Coloso*, because the Beamons had spent so much money and effort in attempting to reroute the water and remediate various defects, the court determined that equitable rescission was not appropriate. Essentially, the circuit court found that it could not return the parties to their precontract positions. Since the court could not award equitable rescission, the court used its "flexibility and creativity of equity" to fashion a less disruptive remedy of damages and awarded the Beamons their costs of soil and mold remediation. The circuit court stated the following:

> For the reasons stated above, the Court cannot find rescission as the proper remedy. However, it is undisputed that the [Bauers] did not disclose the issue with the adjoining lot and slope. The Court finds this is a breach of contract and awards damages for the reclamation spent by the [Beamons] in the amount of $30,950, as well as the GTS report and recommendations in the amount of $5,900. Further, as to the issue of mold, while the Court is of the opinion rescission is not appropriate, the house was delivered to the [Beamons] in a defective condition. The testimony shows that an improperly installed condensation line contributed to the mold problem. Although this was hidden by construction, it is the Court's opinion that this was a defect that breached the contract. Therefore, [the Beamons] are awarded judgment for the mold eradication and the HVAC repair in the amount $14,250 and $844.63, respectively. Also, the Court awards judgment for the mold inspection for $1,500.00. Further, judgment is awarded for the replacement of the carpet in the amount of $1,327.19 which was necessary as part of the mold eradication process.

In Count I, the Beamons alleged a breach of warranty and requested equitable rescission of the contract.[4] However, a simple rescission would not restore the Beamons to their precontract position. To that end, the Beamons also prayed for damages for closing costs, interest paid, real estate taxes and insurance, and other related costs to restore them to their precontract position (i.e. clean-up damages). In using its flexibility and creativity in equity, the circuit court, after finding the Bauers had breached the contract, fashioned a remedy and awarded the Beamons some of the costs of remediation for soil and mold in the combined amount of $56,574.35. Additionally, because the court found there was a breach of contract, the circuit court awarded attorney's fees.

I cannot find that the court committed reversible error. In fact, I would hold that the circuit court in this complicated case acted judiciously and intelligently and followed the law precisely. Thus, I would affirm.

BROWN, J., joins.

Kenneth W. Cowan, PLC, by: *Kenneth W. Cowan*, for appellants/cross-appellees.

Daily & Woods, P.L.L.C., by: *Jerry L. Canfield*, for appellees/cross-appellants.

[4]See footnote 1.