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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-810

DAVID H. PICKERING and MARY L. PICKERING APPELLANTS V. WINFRED W. GARRISON and CYNTHIA R. GARRISON APPELLEES	**Opinion Delivered** February 18, 2009 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV2004-13789] HONORABLE JAMES MAXWELL MOODY, JR., JUDGE AFFIRMED

KAREN R. BAKER, Judge

David and Mary Pickering have appealed from the Pulaski County Circuit Court's decision awarding rescission of a real-estate contract to appellees Winfred and Cynthia Garrison. This dispute was previously before us, in CA06-59, when we reversed the entry of summary judgment to the Pickerings and remanded the case for trial. After a bench trial, the circuit court granted rescission to appellees, prompting this appeal. We affirm the circuit court's decision in all respects.

This case began with the May 26, 2004 sale of a house in Chenal Valley in west Little Rock by appellants to appellees. Mr. Pickering's construction company built the house in 1991– 92 and the Pickerings lived there.[1] Appellees agreed to buy the house for $890,000,

[1]Mr. Pickering has built houses in Pulaski County for over thirty-five years.

and appellants provided appellees with a written disclosure about the property's condition. On behalf of appellees, Al Williams performed an inspection of the property on May 17, 2004, while Mrs. Garrison, Mr. Pickering, and appellees' real estate agent, Betty Coney, were present. According to appellees, Mr. Williams asked Mr. Pickering about some foundation vents located in the brick on the back side of the house, and Mr. Pickering replied that the foundation was a concrete slab, failing to mention that there were also two crawl spaces. (Because there was no access to either crawl space, the witnesses referred to them as "voids.") Mr. Williams found no serious problems with the house. Appellees obtained a letter from AAA Roofing Co., Inc., stating that the roof was in good condition. Mr. Pickering also provided appellees with a letter from Specialty Services stating that there was no roof damage. The termite inspection also found no problems.

The contract contained a merger clause, and in paragraph 15(B), it provided for the buyers' inspection. It stated: "The buyer understands and agrees that pursuant to the terms of Paragraph 15(B), they will be accepting this property 'AS IS' at closing." It set forth the following buyers' disclaimer:

> 26. BUYER'S DISCLAIMER OF RELIANCE: BUYER CERTIFIES BUYER HAS PERSONALLY INSPECTED OR WILL PERSONALLY INSPECT, OR HAS HAD OR WILL HAVE A REPRESENTATIVE INSPECT, THE PROPERTY AS FULLY AS BUYER DESIRES AND IS NOT RELYING AND SHALL NOT HEREAFTER RELY UPON ANY WARRANTIES REPRESENTATIONS OR STATEMENTS OF THE SELLER, LISTING AGENT FIRM, THE SELLING AGENT FIRMS, OR ANY AGENT, INDEPENDENT CONTRACTOR OR EMPLOYEE ASSOCIATED WITH THOSE ENTITIES, REGARDING THE AGE, SIZE (INCLUDING WITHOUT LIMITATION THE NUMBER OF SQUARE FEET IN IMPROVEMENTS LOCATED ON THE PROPERTY), QUALITY, VALUE OR

> CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION ALL IMPROVEMENTS, ELECTRICAL OR MECHANICAL SYSTEMS, PLUMBING OR APPLIANCES OTHER THAN THOSE SPECIFIED HEREIN (INCLUDING ANY WRITTEN DISCLOSURERS [SIC] PROVIDED BY SELLER AND DESCRIBED IN PARAGRAPH 16 OF THIS REAL ESTATE CONTRACT), IF ANY, WHETHER OR NOT ANY EXISTING DEFECTS IN ANY SUCH REAL OR PERSONAL PROPERTY MAY BE REASONABLY DISCOVERABLE BY BUYER OR A REPRESENTATIVE HIRED BY BUYER. NEITHER LISTING AGENT FIRM NOR SELLING AGENT FIRM CAN GIVE LEGAL ADVICE TO BUYER OR SELLER. LISTING AGENT FIRM AND SELLING AGENT FIRM STRONGLY URGE STATUS OF TITLE TO THE PROPERTY, PROPERTY CONDITION, SQUARE FOOTAGE OF IMPROVEMENTS ON THE PROPERTY, QUESTIONS OF SURVEY AND ALL REQUIREMENTS OF SELLER AND BUYER HEREUNDER SHOULD EACH BE INDEPENDENTLY VERIFIED AND INVESTIGATED. BUYER IS HEREBY NOTIFIED THAT BUYER WILL BE REQUIRED TO UTILIZE THE INSPECTION REPAIR & SURVEY ADDENDUM PURSUANT TO PARAGRAPH 10 AND PARAGRAPH 15B, AND WILL BE REQUIRED TO DO A FINAL SIGN OFF ON PAGE 3, UPON COMPLETING ALL INSPECTIONS ON SAID ADDENDUM PRIOR TO, OR AT CLOSING.

The "Inspection, Repair and Survey Addendum" form, signed by appellees before closing, stated:

> 5. BUYERS AGREEMENT TO PROPERTY CONDITIONS: THE BUYER ACKNOWLEDGES THE AGENT(S) INVOLVED IN THIS TRANSACTION HAVE MADE THE BUYER AWARE THAT HOME INSPECTORS WHO PROVIDE THAT SERVICE REGULARLY ARE AVAILABLE AND THE BUYER COULD CHOOSE FROM THOSE HOME INSPECTORS LISTED IN THE YELLOW PAGES, OR THOSE THE AGENTS(S) KNOW ABOUT, OR THE BUYER COULD CONTACT A PROFESSIONAL SOCIETY OR ORGANIZATION OF HOME INSPECTORS TO FIND A SUITABLE HOME INSPECTOR. BUYER IS NOT RELYING ON THE AGENT(S) ADVICE OR RECOMMENDATION IN REGARDS TO CHOOSING A HOME INSPECTOR. ALSO, BUYER UNDERSTANDS THAT THE RECEIPT OF A HOME INSPECTION AND A SELLER PROPERTY DISCLOSURE DOES NOT RELIEVE BUYER FROM THE RESPONSIBILITY OF PERSONALLY INSPECTING THE PROPERTY UNTIL THE BUYER IS FULLY SATISFIED. BUYER WARRANTS, REPRESENTS AND ACKNOWLEDGES THAT BUYER AND ALL PERSONS OR ENTITIES DESIRED BY BUYER HAVE INSPECTED THE PROPERTY TO THE FULLEST EXTENT DESIRED BY BUYER AND FIND THE CONDITION OF THE PROPERTY ACCEPTABLE IN ALL RESPECTS. BUYER REAFFIRMS ALL DISCLAIMERS SET FORTH WITHIN THE REAL ESTATE CONTRACT BETWEEN BUYER AND SELLER.

> BUYER HAS HAD AN OPPORTUNITY TO INSPECT, REVIEW AND VISIT THE PROPERTY AND TO OBTAIN A BOUNDARY SURVEY OF THE PROPERTY TO DETERMINE THAT THE PROPERTY ACTUALLY CONVEYED IS THE PROPERTY THE BUYER UNDERSTANDS IS BEING CONVEYED, AND BUYER IS NOT RELYING ON ANY STATEMENT (WRITTEN OR ORAL) OF LISTING AGENT FIRM, SELLING AGENT FIRM, OR SELLER CONCERNING THE SIZE, DIMENSIONS, ACREAGE, AREA OR LOCATION OF THE PROPERTY. THE FACT THAT THE BUYER COMPLETES THE PURCHASE OF THIS PROPERTY WARRANTS THAT THE BUYER IS COMPLETELY SATISFIED WITH THE CONDITION OF THE PROPERTY.

When appellees moved into the house, they discovered that portions of it were not built on a slab foundation, as had been represented by David Pickering. In fact, two additions to the house were built on crawl spaces, for which no exterior access existed. These crawl spaces did not comply with construction codes and were not shown on the original building plans presented to the City of Little Rock or the Chenal Valley Property Owners' Association. As it turned out, a final building inspection had not been performed; a certificate of occupancy had never been issued; and appellants had failed to obtain the necessary permits and inspections for the construction of an addition to the family room at the back of the house. However, in the disclosure form, appellants had represented that all additions were done following the issuance of permits and in compliance with building codes.

In August 2004, appellees discovered termite damage in the bedroom next to the family room and in the exercise room adjacent to the garage. Appellees received a letter in October 2004 from Charles Givens, the building codes manager for the City of Little Rock's planning department, listing numerous code and zoning violations and stating that, although the house received all final plumbing, electrical, and mechanical inspections, there had never

been a final building inspection; that a certificate of occupancy had never been issued; and that most of the termite damage was a result of the code violations:

> This house was permitted in 1991 by David Pickering Construction Company. The house received all final plumbing, electrical and mechanical inspections. However, there was never a final building inspection or a certificate of occupancy issued for the structure.
>
> Our inspection revealed the following code violations as well as zoning violations.
>
> 1) Three additions built on the house without zoning clearances, permits or inspections.
> 2) Master bedroom and formal living room had no crawl space or access openings or ventilation.
> 3) Extensive termite damage to additions, back front and west walls and surrounding wood foundations, also potential termite damage where not already exposed.
> 4) Improper footings and foundation [of] formal living room.
> 5) Courtyard addition on west side had no zoning clearance, permits or inspections.
> 6) Courtyard addition slab has visible signs of extensive cracking throughout.
> 7) Columns and wall on exterior of slab are at least ten (10) feet in height and require an architect or engineer approval prior to construction.
> 8) Concrete drainage goes under corner of family room foundation.
> 9) Numerous leaks in roof, visible damage to ceilings and walls.
> 10) No ground vapor barrier on room additions and debris under crawl space.
> 11) Dishwasher has no air gap.
> 12) Under island sink drains too small, must be at least 3 inch.
> 13) Hot water heater has been replaced since permitting of house.
> 14) Recommend that electrical, plumbing and mechanical concerns be checked out by licensed contractors.
> 15) Alterations have also been done to the rear deck/patio.
> 16) Front driveway was not permitted under original building permit application.
> 17) Kitchen cooking top vent pipe needs to be properly vented (currently vents to manual roof vent).
> 18) Covers needed on six closet lights.

> Conclusion: The house was never finaled and it has been over ten years since this house was originally permitted. There has been a lot of work that was performed without permits or inspections on these additions as well as other parts of the house. Most of the problems with termite damage are a result of construction not meeting code. The courtyard addition because of numerous structural problems should be completely removed and rebuilt. The other additions should be permitted, corrected and re-inspected for code compliance. Also the entire house needs to be checked by licensed electrical, plumbing and mechanical contractors to ensure that all systems are working properly and are code compliant. After all of these items are corrected the house should be reinspected by the building inspector and a final certificate of occupancy issued.

Appellees asked appellants to repurchase the house, and they refused to do so. Appellees filed this lawsuit in December 2004, alleging fraud in the inducement and requesting rescission, actual damages, and punitive damages. In their answer, appellants stated that Mr. Pickering's statement to the inspector about the foundation was a mistake. Appellants filed a third-party complaint for negligence against Arkansas Pest Control Supplies, Inc., which had conducted the termite inspection incident to the sale.

Appellants moved for summary judgment, arguing that appellees had failed to produce evidence that appellants knowingly made false statements of material fact with regard to the condition of the property or that appellees justifiably relied on any representations made by appellants. Appellants argued that appellees' allegations were contrary to the express language of the contract, in which appellees disclaimed reliance upon any representations of appellants and agreed to accept the property "as is." With their response, appellees filed a first amended complaint, adding a claim for constructive fraud.

Appellees filed a supplemental motion for summary judgment on the constructive fraud claim. The circuit court granted summary judgment to appellants on all of appellees' claims, finding that appellees did not, as a matter of law, justifiably rely on any representations made by appellants. The court also dismissed the third-party complaint against Arkansas Pest Control. Appellees then took an appeal. Because issues of fact remained to be tried, we reversed and remanded the case for trial.

The case was tried as a bench trial. The parties presented the testimony of Mr. Garrison; Ms. Coney; Clif Gilliam, the owner of Arkansas Pest Control; Charles Givens; Tom Ferstl, a real-estate appraiser; Porter Brownlee, a construction consultant; and both appellants. The trial court entered an order on February 26, 2008, finding constructive fraud on the part of appellants with regard to "the lack of a certificate of occupancy and code violation and that the Garrisons were justified in relying on the Pickerings' statements on these issues." The court also found that appellants' "misrepresentations regarding the slab" amounted to constructive fraud and were material to appellees' decision to buy the property. The court awarded appellees compensatory damages, totaling $833,047.33, as follows:

> [T]he return of the purchase price of the home in the amount of $890,000, the closing cost of the transaction in the amount of $10,043.30, taxes in the amount of $20,169.23, and maintenance of $2,934.77. These damages are off set by $90,000, representing $2,000 per month for forty-five months, which the Court finds to be the fair rental value of the home during the time that the Garrisons have had possession of the home.

Appellees filed a motion for attorney's fees and costs, and appellants moved for the court to vacate or modify the judgment. The court entered a supplemental order dismissing

the claims against Arkansas Pest Control on April 3, 2008. On April 17, 2008, the court partially granted appellants' motion to modify the judgment. It awarded appellees rescission, but found that the reasonable monthly rental value of the home was $4000, rather than $2000, and awarded appellants a set-off of $180,000, making the compensatory damages $743,047.33. It awarded appellees attorney's fees and costs totaling $97,533.74, the entire amount appellees requested. Appellants then pursued this appeal.

I. *Rescission*

In their first point on appeal, appellants argue that the circuit court erred in granting appellees' request for rescission because the property is no longer substantially the same as it was when appellants sold it to appellees. Appellants assert that appellees permitted the termite contract to expire; that they did not replace it; and that there has been additional termite damage. In addition to the termite clearance letter, appellees received on closing one year's service from Arkansas Pest Control. Mr. Garrison testified that Arkansas Pest Control had made satisfactory repairs to the damage appellees discovered a few months after the closing. When the termite policy came up for renewal in 2005, Arkansas Pest Control offered a policy that involved a baiting system and four inspections per year, rather than one. According to appellants, appellees did not accept this proposal and did not obtain other termite coverage. Mr. Garrison testified that Arkansas Pest Control would not guarantee him a continuing repair contract covering the previously-repaired areas, even if he did purchase a baiting system. Mr. Gilliam testified in contradiction that the offered contract was

renewable and that it included repairs. Mr. Garrison admitted that there had been two termite swarms since the contract with Arkansas Pest Control expired, but said that appellees currently had some "limited" termite services with George Termite Company. The George Termite Company documents entered into evidence indicate that the agreement was for corrective, not preventative, services. In any event, there is evidence in the record that George Termite Company did in fact correct the problems concerning the new termite swarms.

We review traditional cases of equity de novo and will not reverse the trial court's findings of fact unless they are clearly erroneous. *Hudson v. Hilo*, 88 Ark. App. 317, 198 S.W.3d 569 (2004). 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 committed. *Id*. In an action for rescission of a contract, the court applies equitable principles in an attempt to restore the status quo or place the parties in their respective positions at the time of the sale. *Riley v. Hoisington*, 80 Ark. App. 346, 96 S.W.3d 743 (2003). Rescission will be granted only when the party asking for it restores to the other party substantially the consideration received. *Id*.

The law does not require appellees to return the house to appellants in *exactly* the same condition as it was originally; they are only required to restore to appellants *substantially* the consideration they received. *See Cox v. Bishop*, 28 Ark. App. 210, 772 S.W.2d 358 (1989), in which we stated that the injured party is the primary object of

restoration and that it is not indispensable that the complainant be able to place the defendant in *statu quo* when it will not be inequitable to permit a rescission without so doing. We also stated that equity will not decline to grant its aid merely because circumstances intervening since the occurrence of the transaction complained of may render it difficult to restore the parties exactly to their original situations. In light of the testimony that the new termite swarms were treated; the lack of evidence that they caused substantial damage; and Mr. Garrison's testimony that appellees had not made substantial changes to the house, we affirm the trial court's award of rescission.

II. *Constructive fraud*

Appellants next argue that the circuit court erred in finding constructive fraud on their part with respect to the slab, the lack of a certificate of occupancy, and code violations. The elements of fraud are (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; and (5) damage suffered as a result of the reliance. *Joplin v. Joplin*, 88 Ark. App. 190, 196 S.W.3d 496 (2004).

To rescind a contract based on fraud, it is not necessary that actual fraud exist; a person may commit fraud even in the absence of an intention to deceive. This is constructive fraud, in which liability is premised on representations that are made by one who, not knowing whether they are true or not, asserts them to be true. *Beatty v. Haggard*, 87 Ark.

App. 75, 184 S.W.3d 479 (2004). Constructive fraud has been defined as a breach of a legal or equitable duty, which, irrespective of the moral guilt of the fraud feasor, the law declares to be fraudulent because of its tendency to deceive others. *Id*. In fact, it has been said that constructive fraud generally involves a mere mistake of fact. *Id*. Thus, neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud, and a party's lack of knowledge of the material representations asserted by him to be true or his good faith in making the representations is no defense to liability. *Id*. In *Lane v. Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965), our supreme court held that constructive fraud could occur where a seller made a misrepresentation, even though he did not know that he was making a misrepresentation, and even though he made the representation in good faith; the key was that the buyer relied to his detriment on statements that proved to be untrue. *See also Knox v. Chambers*, 8 Ark. App. 336, 654 S.W.2d 582 (1983).

Appellants contend that any representation that they made about the slab was not a material influence on appellees' decision to buy the house. Appellants do not deny that areas off the master bedroom and the living room are not on a full slab like the rest of the house, but state that they comprise only 1.79% of the entire square footage of the house and garage; that these areas were not the site of any termite activity or damage; and that appellees failed to present any evidence that the nature of the slab was a material influence on their decision to purchase the property. We disagree. Mr. Garrison testified that the crawl spaces include over 100 square feet and that he did not consider that a small area in relation to the rest of the house. Appellees also presented evidence that the crawl spaces contained a black

substance resembling mold or mildew. Further, Mr. Pickering informed appellees of his experience in home-building, and Mr. Garrison testified that he placed a lot of reliance on Mr. Pickering's having built the house.

Appellants also claim that appellees failed to prove constructive fraud with respect to the lack of a certificate of occupancy and code violations regarding the original construction. Appellants state that there was no evidence presented at trial that they made any representations concerning the existence of a certificate of occupancy or any code violation for the original construction. Although this is correct, it makes no difference to our decision, in view of Mr. Pickering's misrepresentation about the foundation and appellants' incorrect statement on the disclosure form that all additions were done following the issuance of a permit.

Appellants further argue that the status of the permit for the family-room addition was not material to either the condition of the property or to appellees' decision to purchase it. They also question whether a code violation for the family-room addition even existed. They concede that Porter Brownlee testified that the additional footing did constitute a code violation but point out that he admitted that he did not independently verify the existence of a code violation but relied upon Mr. Givens's letter to appellees. We find no merit to this argument. Mr. Givens testified that he did not know whether the footing in the addition constituted a code violation, but explained that he was relying on Mr. Pickering's statements. He also explained that this inability to know the condition of the footing after the fact was

why it was so important to first have such plans reviewed for compliance with applicable codes.

Appellants also argue that the circuit court erred in finding constructive fraud because appellees did not justifiably rely on any representation by appellants concerning the slab, the certificate of occupancy, or code violations. They assert that appellees relied upon their own inspections of the property and by contract, disclaimed reliance upon any of appellants' representations and agreed to accept the property "as is." Appellants point to the "as is" and disclaimer-of-reliance clauses in the contract, citing *Morris v. Rush*, 77 Ark. App. 11, 69 S.W.3d 876 (2002), and *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005), to support their position. They also point out that, in *Beatty v. Haggard*, 87 Ark. App. 75, 185 S.W.3d 479 (2004), on which appellees relied, there was no indication that the buyer signed a disclaimer like the one contained in the Inspection, Repair and Survey Addendum. Appellants state that this case is like *Barringer*, in that the buyers found the condition of the property acceptable in all respects and, by completing the purchase, warranted that they were completely satisfied with the property. They note that Mr. Garrison signed the Inspection, Repair and Survey Addendum after the property's final "walk through"; that appellees engaged Mr. Williams to inspect the property and a roofer to inspect the roof; and that Mr. Williams noticed the brick vents in what was represented as the slab (but was actually a crawl space with no access) and pointed them out to Mrs. Garrison during the inspection. Appellants also note that paragraph 27 of the real-estate contract provided that the contract was contingent upon appellees' acceptance of the inspection and repair results.

The facts that appellees hired an inspector and a roofer to inspect the property before closing did not necessarily prevent them from establishing that they justifiably relied on appellants' representations. For example, in *Fausett & Co. v. Bullard*, 217 Ark. 176, 179–80, 229 S.W.2d 490, 491–92 (1950), the supreme court explained:

> In this case Fausett was engaged in the business of buying and selling houses. He had been living in this house for a number of months. He said that his crew had been under the house and it was in excellent condition. In view of these circumstances the trial court correctly refused to declare as a matter of law that the Bullards were not entitled to trust Fausett's assurances. "The recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation. The rule applies not only where an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction but also where it could be made without any considerable trouble or expense." Rest., Torts, § 540.
>
> Nor are the appellees precluded from recovery merely because Bullard made some inquiries about the house. The court instructed the jury that the appellees could not recover if they relied upon information obtained from other sources and not upon Fausett's representations. This theory of the case was correct. "It is not enough to relieve the maker of a fraudulent representation from liability that the person to whom it is made makes an investigation of its truth. It is necessary that the other shall rely upon his investigation and shall not rely upon the false statement." Rest., Torts, § 547.

Whether justifiable reliance occurred is generally a question of fact. *See Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002); *Hart v. Bridges*, 30 Ark. App. 262, 786 S.W.2d 589 (1990); *Godwin v. Hampton*, 11 Ark. App. 205, 669 S.W.2d 12 (1984). Reliance is presumed when the misrepresentation goes to a material matter. *See Manhattan Credit Co. v. Burns*, 230 Ark. 418, 323 S.W.2d 206 (1959). As discussed above, appellees established that the condition of the foundation was material.

The "as-is" clause also did not prevent appellees from proving justifiable reliance on appellants' misrepresentations. In *Beatty*, *supra*, we held that neither an "as-is" clause nor a buyer's disclaimer of reliance barred a purchaser's action for rescission of a real-estate contract based on constructive fraud. The sellers' disclosure form indicated that there had been no structural modifications or settling. The buyers later discovered that there had been settling and that the sellers had poured concrete at one corner of the home to stop it. Mr. Haggard, a seller, was an experienced builder, and the sellers' son, a builder, built the house. Also, the buyers had a home inspector inspect the house before the sale; he testified that he was not aware of the additional concrete and that, if he had been aware of it, he would have included it in his report and recommended that the buyers have a structural engineer look at the house. The trial court held that the buyers failed to prove fraud. We reversed, holding that an "as-is" clause does not bar a claim for fraud. We noted that the Buyer's Disclaimer of Reliance excluded from its terms, "written disclosures provided by the seller." Although *Beatty v. Haggard* did not discuss the buyers' statement in the Inspection, Repair and Survey Addendum that they found the condition of the property acceptable in all respects and, by completing the purchase, warranted that they were completely satisfied with the property, we do not find that distinction significant under the facts of this case.

Appellants contend that this case is similar to *Morris v. Rush*, *supra*, in which we affirmed a summary judgment for the sellers in an action alleging fraud in the inducement of a real-estate contract. We disagree. In that case, there was no doubt that the buyers had relied on their own professional inspectors and not on any representation by the sellers. In

fact, the buyers did not allege that the sellers made any false representations; they simply contended that the sellers had concealed the fact that the house was prematurely settling.

Appellants also rely on *Barringer*, *supra*, in which we affirmed a jury verdict for the sellers in a case brought by the buyers for damages for fraud and breach of contract. The seller's disclosure form had stated that the property was served by an individual septic system "to the best of the owner's knowledge"; in fact, the house's sewage ran through a pipe to the side of a mountain approximately 250 feet away, where it emptied into a ravine. The contract contained an "as-is" clause and a buyer's disclaimer of reliance, and the buyers signed an Inspection, Repair, and Survey Addendum before closing. The jury found that the buyers had proven none of the elements of fraud, and this court agreed, distinguishing the case from *Beatty v. Haggard*:

> In discussing the "as-is" clause, we held that, while the sale of property "as is" generally relieves a vendor from liability for defects, unless the defects are patent, an "as-is" clause does not bar an action by the vendee based on claims of fraud or misrepresentation. We also held that the Buyer's Disclaimer of Reliance excluded from its terms "written disclosures provided by the seller." However, there is no indication that the buyers in *Beatty* signed a disclaimer such as the one contained in the Inspection, Repair and Survey Addendum in the case at bar. That disclaimer provided that the buyers found the condition of the property acceptable in all respects and, by completing the purchase, warranted that they were completely satisfied with the property. Further, *Beatty* did not discuss the effect of language in the owner disclosure form that representations were made to the best of the owners' knowledge; that the owner had no expertise in certain areas; and that the disclosure form was not a substitute for an inspection. We also observe that *Beatty* involved a *de novo* review for clear error while, in the present case, our task is to determine whether there was substantial evidence to support the jury's verdict.

> In light of the above factors distinguishing *Beatty*, we agree with the trial court that the jury could have found a lack of justifiable reliance based on appellants' inspection of the property and on the disclaimers and other portions of the sale documents. Therefore, we cannot say that the jury's finding on this element of fraud was not supported by substantial evidence.

89 Ark. App. at 302-04, 202 S.W.3d at 574-75.

Based on these cases, which demonstrate that the justifiable-reliance issue is a question for the trier of fact, we hold that the "as-is" clause, the Buyer's Disclaimer of Reliance, and the Inspection, Repair, and Survey Addendum did not require a decision in favor of appellants, although they were relevant facts for consideration by the trier of fact. Disputed facts and determinations of the credibility of witnesses are within the province of the fact-finder. *Farmers Home Mut. Fire Ins. Co. v. Bank of Pocahontas*, 355 Ark. 19, 129 S.W.3d 832 (2003). We cannot say that the trial court's findings of fact on these issues were clearly erroneous.

III. *Attorney's fees*

In their next point, appellants challenge the circuit court's decision to award attorney's fees and the reasonableness of the award. The circuit court based its decision to award fees on paragraph 29 of the contract, which stated, "Should Buyer or Seller initiate any type of administrative proceeding, arbitration, mediation or litigation against the other . . ., it is agreed by Buyer and Seller . . . that all prevailing parties shall be entitled to an award of their respective attorney's fees and costs incurred in defense of such initiated action against

the non-prevailing party."[2] Appellants contend that the proper construction of this paragraph is that the attorney's fee provision is triggered *only* when either the buyers or sellers successfully *defend* an action brought against it by the other. Because appellees incurred their attorney's fees as plaintiffs, and not in defense of an action initiated by appellants, appellants contend that the plain language of paragraph 29 would not permit this award. We disagree.

The first rule of interpretation of a contract is to give to the language employed the meaning that the parties intended. *Wal-Mart Stores, Inc. v. Coughlin*, 369 Ark. 365, 255 S.W.3d 424 (2007). The court must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning. *Id*. It is a well-settled rule that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. *Id*. Different clauses of the contract must be read together and the contract construed so that all of its parts harmonize, if that is possible. *See Tyson Foods, Inc. v. Archer*, 356 Ark. 136, 147 S.W.3d 681 (2004). The best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, as it may safely be assumed that such was the aspect in which the parties themselves viewed it. *Magic Touch Corp. v. Hicks*, 99 Ark. App. 334, 260 S.W.3d 322 (2007). Language is ambiguous if there is doubt or uncertainty as to its meaning and it

[2]Arkansas Code Annotated section 16-22-308 (Repl. 1999), which allows for attorney's fees in breach-of-contract cases, does not provide for them in contract-rescission cases. *Hilo*, *supra*.

is fairly susceptible to more than one equally reasonable interpretation. *Id*. When the terms of a contract are ambiguous, extrinsic evidence is permitted to establish the intent of the parties, and the meaning of the contract becomes a question of fact. *Vogelgesang v. U.S. Bank, N.A.*, 92 Ark. App. 116, 211 S.W.3d 575 (2005). The trial court construed this provision, which was ambiguous, as applying to all parties, regardless of their posture as plaintiffs or defendants, so long as they were the prevailing party. We believe that the trial court's construction of this paragraph was not clearly erroneous.

Next, appellants contend that, even if such an award was authorized by paragraph 29, the circuit court abused its discretion in awarding appellees the full amount of the fees and costs requested. They contend that the award of $83,950.00 was not reasonable because appellants did not prevail upon all of their claims. This argument lacks merit because appellees obtained the primary relief they had sought, rescission of the entire transaction and substantial compensatory damages, and the language of the contract did not prohibit this award.

Appellants next contend that the circuit court abused its discretion in awarding appellees $13,583.74 in costs because $6,727.33 was related to expert-witness fees and depositions, and therefore, were not proper costs under Arkansas law. Appellants also assert that the $302.75 in messenger expenses for deliveries and pickups within the city of Little Rock, primarily between the law firms and the circuit court, were not proper. They cite *Sunbelt Exploration Co. v. Stephens Production Co.*, 320 Ark. 298, 896 S.W.2d 867 (1995),

and *Wood v. Tyler*, 317 Ark. 319, 877 S.W.2d 582 (1994). The cases relied upon by appellants, however, do not apply here, because they dealt with costs authorized by statute or rule, rather than those governed by a contract. *See Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002).

Appellants have moved for sanctions against appellees and their counsel pursuant to Ark. R. Civ. P. 11, based upon appellees' alleged misrepresentations in their appellate brief that they had maintained a termite contract on the house. After reviewing the relevant exhibits and testimony, we do not find that the imposition of sanctions would be appropriate in this case. Accordingly, we deny appellants' motion.

Affirmed.

GLADWIN and HENRY, JJ., agree.