IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 15, 2009 Session

ROBERT JOE LEE v. NANCY KATHERINE STANFIELD, ET AL.

Appeal from the Chancery Court for Bradley County
Nos. 05-167 and 07-174 Jerri S. Bryant, Chancellor

No. E2008-02168-COA-R3-CV - FILED NOVEMBER 30, 2009

In this action Robert Joe Lee ("the Lessee") sought to void the sale by Nancy Katherine Stanfield ("the Lessor") of 68 acres of her property to realtor Teresa Vincent and Vincent's sale by contract of 50 plus acres to Hyde Development, LLC. The Lessee, who leased approximately 4.3 acres of the larger tract of property later bought by Hyde, sought specific performance of a "first [sic] right of refusal to purchase said leased property,"[1] and, alternatively, damages for the denial of the opportunity to purchase the property. (Footnote added.) By the time the case was tried, the parties to this litigation included all of the individuals and the entity named above plus David S. Humberd, the trustee on a deed of trust from Hyde in favor of Hyde's lender, and Fidelity National Title Insurance Company, the issuer to Hyde of a title policy. Numerous counterclaims and cross-claims were filed, including Hyde's claim that the Lessee wrongfully detained the property and Hyde's claim that the Lessor and Vincent breached warranties of title in their respective contracts and deeds. After seven days of trial, the court submitted the case to a jury with 27 special interrogatories and instructed the jury to answer all of the interrogatories. Based on the jury's answers to the interrogatories and the court's rulings of law, some of which were consistent with the jury's interrogatory answers and some of which were not, the trial court fashioned a final judgment which, as later amended, held that the right of first refusal was unenforceable, but that the same right, and the Lessee's actions taken to enforce that right, caused damage to Hyde in the amount of $611,676.38 for which the Lessee, the Lessor and Vincent were jointly and severally liable. The Lessee was the first to file a notice of appeal, but most all of the parties challenge some aspect of the trial court's judgment. We reverse in part and affirm in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the ChanceryCourt
Reversed in Part and Affirmed in Part; Case Remanded

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[1] The parties treat the language "*first* right of refusal" as the equivalent of "right of *first* refusal." We will follow their lead.

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Brian C. Quist and Joanna R. O'Hagan, Knoxville, Tennessee, for the appellant, Robert Joe Lee.

James F. Logan, Jr., Cleveland, Tennessee, for the appellee, Nancy Katherine Stanfield.

Kenneth R. Jones, Jr., Nashville, Tennessee, and William C. Carriger and Samuel R. Anderson, Chattanooga, Tennessee, for the appellee, Teresa Vincent.

Roger E. Jenne, Cleveland, Tennessee, for the appellee, Hyde Development, LLC.

David S. Humberd, Cleveland, Tennessee, pro se.

Robert J. Uhorchuk, Chattanooga, Tennessee, for the appellee, Fidelity National Title Insurance Company.

OPINION

I.

A.

The Lessor and her elderly mother, Virginia Runyon, owned approximately 200 acres of inherited land in Bradley County. In January 1997, Ms. Runyon and the Lessor both signed a written "commercial lease" with the Lessee. Sometime before the lease was signed, the Lessee had tried to purchase property from Runyon and had been told that, so long as she was alive, not so much as a "blade of grass" would be sold. The Lessee then inquired about leasing a portion of the property for a mobile home sales lot. The Lessee and Runyon discussed the terms of the lease and agreed on terms as reflected in the handwritten notes of Runyon, being trial exhibit 18. The Lessee, with the assistance of his attorney wife, then prepared the typewritten document that he, Runyon and the Lessor signed on January 1, 1997. It was to become trial exhibit one.

The lease was for "the property located at 4565 Georgetown Road N.W., Cleveland, Tennessee 37312, being 200 feet deep and 945 feet along Georgetown Road." The described property constitutes approximately 4.3 acres. The initial term of the lease was for five years from January 1, 1997, to December 31, 2001, "and to renew automatically for successive five year terms thereafter," with "rent to increase at the rate of 25% for each successive five (5) year term." The annual rent for the first three years was set at $7,200, payable in equal monthly installments of $600 due on the first day of each month. Rent for the next two years was set at $9,000 payable in installments of $750 on the first of each month. The lease provided the tenant a right of termination on written notice with no corresponding right in the landlord. The lease made the Lessee responsible for property taxes, liability insurance, and utilities. The Lessee was granted the right to make improvements to the property with the responsibility for the upkeep of any improvements made. The

Lessee, but not Runyon and the Lessor, was prohibited from revealing or discussing "the terms of this agreement . . . with anyone." Paragraph 10 of the lease, which is the driving force behind this litigation, states as follows:

> The lessor gives first [sic] right of refusal to purchase said leased property in the event property is offered for sale to anyone or any company during terms of this contract.

The Lessee cleared and graded the leased property and made it suitable for a mobile home sales lot. According to the Lessee, the improvements cost $140,000. Runyon died in 2003. The Lessee thereafter made his payments directly to the Lessor. By all accounts, his payments were sporadic. He made some payments early and some payments late. According to the Lessee, the first of the year is a bad time for the mobile home business so he had an agreement with Runyon and then the Lessor to pay as cash flow allowed rather than on the first of the month. The Lessor denied such an agreement. According to the Lessor, she had trouble getting the Lessee to pay rent, either when due or in arrears. The Lessor testified that when she tried to collect rent from the Lessee in early 2005, he told her that he had lost his license, had no business and could not even get any homes to park on the lot for resale. The Lessor said she understood that the Lessee was out of business and unable to continue with the lease.

Apparently the Lessor was not as inseparable from the property as had been her mother, because, on May 10, 2005, she accepted an offer to sell Vincent three tracts of land totaling approximately 68 acres for $2,250,000. In the discussions leading up to the land contract, the Lessor told Vincent that the Lessee had a month to month lease and that he was in default of the lease. The Lessor later testified that she told Vincent there was no written lease, because she thought there was none. Vincent testified that the Lessor said she did not have a written lease which Vincent took to mean that one did not exist. Within two weeks, Vincent was able to arrange a sale of one of the three tracts, one that amounted to slightly over 50 acres, to Hyde for $1,750,000. Vincent learned that she could save some money by having the Lessor deed the land directly to Hyde, so at a closing held June 30, 2005, the Lessor executed two deeds, one to Hyde for the 50-acre parcel and one to Vincent for the other two parcels, which totaled about 18 acres. Prior to closing, the Lessor provided an affidavit at Fidelity's request stating, in pertinent part, as follows:

> There are no unrecorded . . . agreements . . . which encumber the real estate.
>
> * * *
>
> There are no tenants or other occupants presently in possession of the premises.
>
> * * *

> There is no "right of first refusal" or other restriction on the sale of the premises.

(Paragraph numbering in original omitted.)

The transactions between the Lessor, Vincent and Hyde, thus consisted of a contract for the Lessor to sell Vincent about 68 acres, a contract for Vincent to sell Hyde about 50 acres, a deed from the Lessor to Vincent for about 18 acres and a deed from the Lessor to Hyde of about 50 acres. The Lessor-Vincent contract, trial exhibit 12, contained a warranty that

> at the time of closing, Seller will convey or cause to be conveyed to Buyer or Buyer's assign(s) good and marketable title to said Property by general warranty deed, subject only to . . . (4) leases and other encumbrances specified in this Agreement. . . . Good and marketable title as used herein shall mean title which a title insurance company licensed to do business in Tennessee will insure at its regular rates, subject only to standard exceptions.

The Lessor-Vincent contract listed the lease with the Lessee among "Special Stipulations, [which,] if conflicting with any preceding paragraph, shall control." The stipulation was, "Buyer will honer [sic] lease agreement with the Mobile Home Park." Vincent prepared the contract with the Lessor as well as the contract with Hyde. The warranty provision and the stipulation in the Vincent-Hyde contract are identical to those in the Lessor-Vincent contract. In addition to the warranty of title in the sale contracts, the Lessor's deeds to Vincent and Hyde include the following warranty:

> [W]e do covenant with the said GRANTEES that we are lawfully seized and possessed of said land in fee simple, have a good right to convey it, and the same is unencumbered . . . and we do further covenant and bind ourselves, our heirs and representatives, to warrant and forever defend the title to the said land to the said GRANTEES, their heirs and assigns, against the lawful claims of all persons whomsoever.

As previously indicated, the Lessee's mobile home lot was situated on approximately 4.3 acres of the tract conveyed to Hyde. The Lessee was not offered an opportunity to purchase the leased property. Instead, on July 1, 2005, he was sent a letter from the Lessor informing him that the property had been sold, and that he could stay on with the new owners by paying "$1000 per month on a month to month basis." He was also informed in the letter of the amount of past due taxes for which he was responsible and that failure to pay the rent to the new owners when due or the "5 months back rent to [the Lessor]" would leave him with 10 days to vacate the property. The testimony is conflicting about when and how the Lessee received the letter, but it is clear that he did receive it. Sometime in late July 2005, the Lessor accepted a check from the Lessee for the back rent through June 30, 2005.

B.

On July 29, 2005, the Lessee filed a complaint naming the Lessor, Hyde and Humberd as defendants. He sought specific performance of the right of first refusal as to the 4.3 acres of leased property and, in the alternative, for damages not to exceed $500,000. The Lessee also filed a lien *lis pendens* with the register of deeds. In her answer to the complaint, the Lessor denied she or her mother had ever agreed to a right of first refusal. The Lessor denied knowledge of same and denied that she had ever been given a copy of the lease. She asserted that the alleged right of first refusal was void and that the lawsuit was barred by the doctrine of unclean hands. The Lessor admitted in her pleadings that she had been called to her mother's house to sign a document at the request of her mother. The Lessor also alleged that the Lessee was in breach of his lease and that he had told her he was unable to continue leasing the 4.3 acres. Hyde asserted a counterclaim against the Lessee for wrongful detainer, as well as a cross-claim against the Lessor for breach of warranty of title. Hyde also filed a thirty-party complaint against Vincent for breach of the warranty of title, as well as a claim against Fidelity on the title insurance policy it had issued to Hyde. Fidelity cross-claimed against the Lessor for equitable indemnification, and the Lessor filed a third-party action against Vincent. Before trial, the Lessor and Vincent settled. The court bifurcated the claims by and against Fidelity. Thus, the case went to trial primarily on the Lessee's claims against everyone involved in the purchase and sale, and Hyde's claims against the Lessee based on his alleged wrongful possession and Hyde's claims against the Lessor and Vincent based on warranty of title.

The Lessee twice moved to amend his complaint to claim more property and damages. First, he moved to amend to claim *all* of the property Hyde purchased instead of just the 4.3 acres. The trial court allowed the first amendment. In the second motion to amend, the Lessee sought leave to amend his complaint to cover the two tracts that Vincent retained. The trial court denied the second motion but the Lessee immediately filed a new complaint against Vincent and accomplished his amendment by having the new case consolidated with the old one. Interestingly, by the time the Lessee brought Vincent and her land within the scope of his claims, Vincent had sold approximately 4 acres of her 18 acres to Hughes for the sum of $1,750,000. Rather than bring Hughes into the suit, the Lessee treated the Hughes sale as a "credit," alleging that he was entitled to allow the Hughes conveyance to stand but receive a credit for $1,750,000 so as to allow him to exercise his right of first refusal and acquire the entire 68 acres, minus the 4 acres purchased by Hughes, by paying the "net contract price" of $500,000 into court. The Lessee arrived at the net figure by subtracting $1,750,000 from the $2,250,000 Vincent agreed to pay for the entire 68 acres.

C.

At trial, the Lessee admitted that the intent of the parties in the right of first refusal was that he would have an option to purchase only the 4.3 acres on which his mobile home lot was situated to protect his investment of approximately $140,000 in grading and improving the property. The Lessee also admitted that was a correct reading of an affidavit he had submitted in support of a pleading. The Lessee was asked at length about the evolution of his position in the first and second amendment to his complaint and he explained that he understood the law to require him to match the terms of the actual sale to Vincent. The Lessee was also questioned at length concerning what the various opposing parties viewed as "fraud" and overreaching in his dealing with Runyon and the

Lessor. Specifically the opposing parties challenged differences between trial exhibit 18 – the notes that Ms. Runyon gave the Lessee and told him to prepare a lease from – and the actual lease that Runyon and the Lessor signed. The primary differences were the change from a "renewal option" as reflected in the draft to the automatic, perpetual renewal contained in the lease, with no right to terminate by the landlord. The Lessee was repeatedly asked in cross-examination to explain why a woman who would not even consider selling a "blade of grass" would assign him all the benefits of ownership without even so much as a right to terminate. Further, he was asked repeatedly about the absence of a right of first refusal in the draft and its appearance in the lease. The Lessee's primary explanation was that the notes were just a draft of Runyon's position and that he also had points of interest. The Lessee admitted, in a deposition read to the jury, that he and his wife inserted all the language and provisions that were in the signed document that were not contained in the notes. The Lessee also said that Runyon did not ever intend to sell, so she did not have a problem with a right of first refusal that would never materialize. As to the renewals, with only the Lessee having a right of termination, the Lessee explained that it was uncertain whether he would ever be successful and that if he were successful Runyon was better off with his rent payments than with using the land as the hayfield it had been before the lease. If he was not successful, then he assumed the lease would be terminated for his failure to perform. The Lessee also claimed that he left the document with Runyon for a few days before it was actually signed. The Lessee was also challenged as to why he apparently had the only version of the lease. Although the Lessee's testimony was not always consistent, his position at trial was that he left both a duplicate original and a copy with Runyon after it was signed by all the parties.

At trial, the Lessor remembered and admitted being summoned to her mother's home to sign something allowing the Lessee to rent a portion of their property for a mobile home lot. The Lessor testified that both Ms. Runyon and the Lessee were present. She recognized her signature on the lease but did not otherwise know the contents of the document she signed. It was the Lessor's testimony at trial that her mother would never have knowingly signed a document with an automatic renewal and a right of first refusal. The Lessor said she believed that the Lessee only had a month-to-month lease and that even that had been abandoned by him. She admitted, however, requiring Vincent to honor what she thought was a month-to-month lease. She also acknowledged that she had not terminated the lease.

Considerable proof at trial concerned the contention that the Lessee was broke and out of business in July 2005. The Lessor, as previously indicated, testified the Lessee told her he was unable to carry on his business. The Lessor testified that the Lessee was seldom, if ever, present at the lot. Rich Hyde of Hyde testified that he knew about the mobile home lot on the property he had purchased, but observed no activity at the business and thought that the Lessee was out of business. On this subject, Vincent testified consistent with the testimony of Lessor and Mr. Hyde. Numerous other witnesses testified that there was little or no activity at the mobile home lot and that the gate was chained or cabled on a consistent basis.

The Lessee countered this proof with his testimony that while he often took time off in the slow winter months, and sometimes visited his father in Florida, he ran a viable continuing business

at all times. The Lessee claimed that when his sale of new homes slowed, he switched more to used homes as a way to cope. The Lessee submitted an aerial photograph taken in the spring of 2005 that showed, according to the Lessee, units present for resale. The Lessee testified that the photograph was representative of his business activity in July 2005. The Lessee also introduced checks that his business had written during the period of its alleged demise to show that he was doing business in that time frame.

Hyde claimed the same damages at trial against the Lessee for wrongful detainer as against the Lessor and Vincent for breach of warranty. Hyde's summary of damages is trial exhibit 46. The Lessee admitted that he had used more than the 4.3 acres described in the lease and that the only monthly payments he had made to Hyde were in the curious amount of $416. The acreage actually used by the Lessee was approximately seven acres. Therefore, Hyde calculated loss of rental income for the seven acres the Lessee had used at Hyde's estimated rental value of $4,000 per month for 32 months and applied a credit of $416 per month. Additionally, Hyde claimed that it lost the reasonable rental value of the remaining 44 acres, of his 50 plus total, which loss he valued at $2,000 per month for 32 months. Hyde testified as to additional damages of $184,462 in interest paid on a loan from the Bank of Cleveland, and $136,489.37 in loss of use of the funds it had used in purchasing its 50-acre plus tract. Hyde also asked for real estate taxes that accrued and went unpaid by the Lessee in the amount of $4,037.01. Finally, Hyde asked for $108,000 as the additional cost to Hyde of developing the parcel at the time of trial as opposed to what it would have cost at the time of the purchase. The jury awarded all damages listed in trial exhibit 46.

The jury's findings, as reflected in answers to interrogatories, are paraphrased by number as follows:

> 1. The Lessee was in substantial and material breach of the lease when the Lessor sold the property.
>
> 2-3. The Lessor did not terminate the lease, either before the contract with Vincent or before the closing.
>
> 4. The lease was not "free from fraud."
>
> 5. The lease was unconscionable.
>
> 6. Vincent did not have actual or inquiry notice of the Lessee's right of first refusal.
>
> 7. Hyde did not have actual or inquiry notice of the Lessee's right of first refusal.
>
> 8-9. Under the circumstances it was reasonable of Vincent to ask the Lessor and not ask the Lessee if there was a written lease.

10-12. Under the circumstances it was reasonable of Hyde to ask Vincent and the Lessor and not ask the Lessee if there was a written lease.

13. Hyde knew that the Lessee was a tenant on the land Hyde contracted to buy.

14. A portion of the land sold by the Lessor was of special or unique importance to the Lessee.

15. The intent of the parties at the time of the lease was that the Lessee's right of first refusal be limited to the original leased premises as described in the lease.

16. The purchase price payable by the Lessee under the right of first refusal is $649,500.

17-18. Both the Lessor and Vincent breached their warranty of title to Hyde.

19. Hyde's damages from the breach of warranty are those reflected in trial exhibit 46.

* * *

25. The Lessee's lease was not orally amended to include more land than described in the lease.

26. The Lessee did not unlawfully detain Hyde's property.

27. Hyde was damaged by the Lessee's alleged unlawful detainer in the amount of $611,676.38, the amount reflected in trial exhibit 46.

The "Amended Final Judgment," incorporating all changes made as a result of post trial motions, approved the findings of the jury as supported by the weight of the evidence.[2] In light of the findings that (1) the lease was not "free from fraud" and (2) was unconscionable, the trial court held that the right of first refusal was unenforceable, and dismissed the Lessee's claims against all parties. The court also released all liens *lis pendens* that the Lessee had filed, and granted Hyde possession of the property it had purchased. As to the jury's finding that the Lessee had materially breached the lease, the trial court agreed but found that the lease lacked an automatic termination

[2]While the trial court found that the jury findings are supported by the weight of the evidence, it negated some of those findings as being impermissible under the law.

clause; therefore, it required an affirmative act on the part of the Lessor to terminate it. The trial court also negated the jury's finding that Hyde and Vincent acted reasonably in not making inquiry directly of the Lessee. The court held that Hyde and Vincent, as a matter of law, were required to either ask for a copy of the lease or ask the Lessee directly about his interest given that the Lessee was a tenant in possession of commercial property. Therefore, the trial court concluded that neither Hyde nor Vincent was a bona fide purchaser without notice. Also, the trial court negated the jury's finding that the intent of the parties to the lease was to restrict the Lessee's right of first refusal to his 4.3 acre tract. The trial court held, as a matter of law, that the Lessee could only have acted by matching Vincent's offer. Therefore the right of refusal applied to *all* the land the Lessor sold Vincent – the full 68 acres. As a result, the court held that Hyde was damaged by the existence of the undisclosed lease and the Lessee's possession of the property pursuant to the lease. The existence of the lease was a breach of the Lessor's and Vincent's warranties, and the possession was a wrongful detainer on the part of the Lessee. The trial court thus awarded Hyde a judgment in the amount of $611,676.38 against the Lessor, Vincent and the Lessee, jointly and severally. As to Fidelity's claim against the Lessor, the court ordered it set for later hearing and certified the judgment as to the other claims as final pursuant to Tenn. R. Civ. P. 54.02. The Lessee was first to file a timely notice of appeal, followed by others.

II.

Given the number of parties raising and phrasing issues, we find it impracticable to state every issue in the case exactly as phrased by the parties. Instead, we identify the issues in our own words:

> 1. Whether fraud on the part of the Lessee was pleaded or tried by consent or proven.
>
> 2. Whether the lease was unconscionable.
>
> 3. Whether, if the Lessee's right of first refusal is enforceable, he is entitled to specific performance as to all or some of the land sold by the Lessor or damages as an alternative remedy.
>
> 4. Whether the Lessee was in material breach, and, if so, whether some affirmative act of the Lessor was necessary to terminate the lease.
>
> 5. Whether the jury's finding that the Lessee did not wrongfully detain the property absolves the Lessee of liability for the damages the jury found Hyde sustained.
>
> 6. Whether the damages awarded under trial exhibit 46 are in accord with the law.

7. Whether Hyde and Vincent were required as a matter of law to either obtain a copy of the written lease or inquire directly of the Lessee to satisfy inquiry notice

8. Whether the existence of the lease with right of first refusal was a breach of the warranties made by the Lessor and Vincent to Hyde.

9. Whether, if the right of first refusal was enforceable, it is limited to the 4.3 acres described in the lease or does it extend to all the land sold by the Lessor.

10. Whether the value of the land Vincent bought from the Lessor was an issue in the case to be submitted to the jury once Vincent and the Lessor settled.

Given the number of issues, we will identify the standard of review we are employing as we engage a particular issue.

III.

We begin with the issue of fraud. It was not pleaded, but treated by the trial court as tried by consent. The Lessee's counsel, as best we can tell, objected consistently to any proof of fraud. The jury found only that the lease was not "free from fraud." It is telling that the jury was told nothing about what does or does not constitute fraud. It is not surprising that the jury asked for a definition of fraud. It was told, in essence, that fraud defies definition but "embraces all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another or by which an undue advantage is taken of another." As a consequence of all of this, we cannot discern exactly what the jury's finding means. Generally a trial court has broad discretion in ruling on whether matters are tried within the pleadings and whether to allow pleadings to conform to the proof. ***George v. Building Materials Corp.***, 44 S.W.3d 481, 486 (Tenn. 2001). Our review of the issue of whether fraud was properly before the court thus presents a question of whether there was an abuse of discretion on the part of the trial court. ***Id.*** Notably, even though the trial court included fraud as a basis for denying the Lessee relief in the final judgment as amended, it denied the Lessor's post-trial motion to amend her pleadings.

The Lessor, who is the chief proponent of the fraud theory, argues in her brief that the "lease was procured fraudulently." The fraud, as argued by the Lessor, was in failing to provide Runyon and the Lessor a copy or duplicate original, and in "[s]ubstituting terms which are inconsistent with and impose[d] a greater burden on [the Lessor and Runyon] than those which [were] agreed to." The Lessor points to the Lessee's deposition testimony, read to the jury, that anything in the signed document that was not in Runyon's notes was added by the Lessee and his attorney wife. The Lessor argues the same concerning the automatic renewal provision. Thus, according to the Lessor, presentation of the document to the Lessor and Runyon constituted a misrepresentation concerning

its contents that the Lessee continued to cover up by keeping the document from the Lessor and Runyon.

Vincent, apparently not completely content with the position taken by the Lessor, argues that the threshold is lower when the fraud is claimed as a defense to enforcement of a contract. Vincent argues that all a party need do to sustain the defense to a transaction is to prove the transaction "tainted." We disagree with Vincent. The person seeking to rescind a contract on the basis of fraud must prove the fraud by clear and convincing evidence.. *See* ***Estate of Acuff v. O'Linger***, 56 S.W.3d 527, 531 (Tenn. Ct. App. 2001). We must review the proof to determine whether it is such as to establish in the trier of fact an abiding conviction that it is highly probable the contract was procured by fraud. ***Id.*** at 535-36.

The problem we have with both arguments is that regardless of how bad a light in which the Lessee is painted, or how bad a renter or untruthful person he was proven to be, the alleged fraud is premised entirely upon a failure to read the documents. As we have recently stated:

> One who signs a contract cannot later plead ignorance of its contents if there was an opportunity to read it before signing. The law will not allow a party to enter a contract and then seek to avoid performance because he did not read the agreement or know its contents. Otherwise, written contracts would be worthless.

Moody Realty Co., Inc. v. Huestis, 237 S.W.3d 666, 676-77 (Tenn. Ct. App. 2007) (citations omitted). We have previously held that a party cannot have reasonably relied upon something another person told that party about the contents of a document he or she signed when the truth was to be found by reading the document. ***Overton v. Lowe***, E2007-00843-COA-R3-CV, 2009 WL 1871946 at *10-11 (Tenn. Ct. App. E.S., filed June 30, 2009) (*quoting* ***Solomon v. First American National Bank***, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989)). Given the high burden of proof, the stringent standard of review, and the trial court's denial of the Lessor's post-trial motion to amend, we conclude that the trial court erred by translating the jury's finding that the contract was "not free from fraud" into a *de facto* rescission of the contract.

We next consider whether the lease was unconscionable. This is a question of law which we will review *de novo*. *See* ***Taylor v. Butler***, 142 S.W.3d 277, 285 (Tenn. 2004); ***Brown v. Tennessee Title Loans, Inc***., 216 S.W.3d 780, 783 (Tenn. Ct. App. 2006). If we find that the contract is unconscionable, we may enforce the contract without the unconscionable part, or we may refuse to enforce the contract. ***Taylor***, 142 S.W.3d at 285. We must consider all the attendant circumstances, including the setting, purpose and effect. "[W]eaknesses in the contracting process" are relevant factors to consider. ***Id***. We also look at whether the terms are unreasonably favorable to the drafter, whether the terms provide favorable default remedies to one party and deny them to the other, and whether the terms are so one-sided that "no reasonable person would make them on the one hand,

and no honest and fair person would accept them on the other." ***Id***. If one party is more sophisticated than the other, we take that into consideration as well. ***Id***.

The Lessee correctly points out that unconscionability is a question for the court's determination rather than the jury, as we have already observed based upon the cases of ***Taylor*** and ***Brown***. Vincent and the Lessor correctly point out that the trial court is free to use the jury in an advisory capacity and that the trial court specifically approved the jury's findings as supported by the weight of the evidence.[3] *See* ***O'Linger***, 56 S.W.3d at 537 n.1. We also agree with Vincent that we can conclude from abundant impeachment of the Lessee and the jury's and trial court's resolution of the conflicting positions that neither the jury nor the trial court found the Lessee to be a credible witness. *See* ***Richards v. Liberty Mutual Ins.***, 70 S.W.3d 729, 733-34 (Tenn. 2002). Other than the documents themselves, almost all the testimony about how Runyon's notes were transformed into the signed lease came from the Lessee.

We must conclude, from the jury's findings (1) that the lease was not "free from fraud" and (2) that it was unconscionable, that the jury, and also the trial court, rejected the Lessee's *trial* testimony that the notes were just one of a series of drafts and, instead, adopted his earlier *deposition* testimony that the notes were what he was to incorporate into a document. His attorney wife, whom he falsely denied ever represented him, then prepared a document that was much more favorable to the Lessee. We believe the jury and trial court were also entitled to infer that the Lessee took the only version of the lease with a promise to furnish a copy that he never intended to supply so Runyan and the Lessor would not know what had happened. Ms. Runyon was elderly and ill when she signed the document, and the Lessor testified that she deferred to her mother and signed the document at the request of her mother. The resulting terms were one-sided in favor of the Lessee. He had a right of termination, but the landlord did not. He had a perpertual, automatic renewing lease that gave him possession forever from a woman who vowed she would never sell a "blade of grass" from her property. That is part of the "setting" of this case. The "COMMERCIAL LEASE" did not identify any right of termination in the landlord, even in the event of default. Additionally, the lease contained a right of first refusal that lasted as long as the perpetual lease. With the Lessee's attorney wife, who ran a general practice including real estate transactions, involved there was a level of sophistication on one side of the transaction that was not present on the other. Even though we have held that the trial court erred in rescinding the contract for unpleaded fraud, we are required to consider whether the Lessee's actions, in this particular setting, are "[w]eaknesses in the contracting process." ***Taylor***, 142 S.W.3d at 285. We believe they were. Accordingly, we conclude that almost all of the factors that this court must consider in determining unconscionability were present in this lease between the Lessee and the Lessor and Runyon. We hold that the lease was unconscionable as the jury and the trial court found. The Lessee invites us to simply not enforce the renewal provision which the Lessee now says he does not want or need to enforce, and enforce the remainder of the lease. We could do so, under the teaching of ***Taylor***, 142 S.W.3d at 285, if the

[3] As previously noted in this opinion, the trial court negated some of these findings as impermissible under the law.

unconscionability were limited to the renewal term but we decline because the unconscionability is not limited to the renewal term and to do so would not be a just result in this case.

Our holding that the lease was unconscionable means that the Lessee could not enforce the lease and the trial court correctly dismissed his claims. We therefore need not address the issue of whether the Lessee was entitled to specific performance versus damages, and how much in damages. We will, however, consider other issues that impact the rights and liabilities of the other parties and alternative grounds discussed by the trial court for denying relief to the Lessee.

We will now decide whether or not the Lessor was required to take an affirmative act to terminate the lease upon the Lessee's breach in order to negate the right of first refusal. First, we reject any suggestion that the Lessee was not in breach. The Lessee testified that he had an arrangement with Runyon which allowed him to pay the rent whenever cash flow allowed. We have previously observed that neither the trial court nor the jury found the Lessee believable. Both the trial court and the jury found that the Lessee was in material breach. We believe that means they did not believe his story. Our conclusion is reinforced by the fact that the lease contains a term to the effect that the landlord's failure to declare a breach on one occasion does not amount to a waiver, and the record contains testimony and documentary evidence that the Lessor told the Lessee he needed to catch up on his rent.

The Lessee insists that none of a tenant's rights under a lease are lost by way of a tenant's breach until the landlord takes an affirmative act to terminate the lease. *See* ***Cain Partnership Ltd. v. Pioneer Investment Services Co.,*** 914 S.W.2d 452, 459 (Tenn. 1996). Vincent, the Lessor and Hyde argue the general rule established in ***Cain*** is subject to limitations which are applicable to the present case. Vincent argues that while special considerations prevent an instantaneous termination of possession, those special considerations do not apply to save other covenants in a lease such as a right of first refusal. The Lessee relies on three cases, ***Cain***, 914 S.W.2d 452 (Tenn. 1996), ***Hooton v. Nacarato GMC Truck, Inc.***, 772 S.W.2d 41 (Tenn. Ct. App. 1989), and ***Foster v. Shim***, No. 01A01-9512-CV-00569, 1997 WL 33620294 (Tenn. Ct. App. M.S., filed May 9, 1997) for the proposition that a right of first refusal will not be forfeited by a default unless the lease is appropriately terminated. While none of those cases focus on a right of first refusal, we believe collectively they stand for the proposition that the right to continue possession of the premises, whether as a lessee or as a future owner, is a valuable right, the termination of which must be accomplished as outlined in ***Cain***, 914 S.W.3d at 459. At the very least, the landlord must take some affirmative act to terminate the lease.

We also agree with the Lessee and the trial court that the affirmative act of termination did not occur in this case until after the sale. The Lessor admitted that she did not terminate the lease. Vincent argues that the Lessor did not need to terminate the lease because the Lessee abandoned any future interest by telling the Lessor that he was unable to pay the rent and unable to continue his business. There are two facts in this record that make us unable to find an abandonment. First, when

the Lessor notified the Lessee of the sale, she also advised him that he would be able to continue as a tenant of the new owner. Second, the sales contract from the Lessor to Vincent extracted a "Special Stipulation" requiring Vincent to honor the lease. If the Lessor had thought the Lessee had abandoned the lease, she would not have needed Vincent to honor it. In summary, although we have held that the lease was unconscionable and the right of first refusal unenforceable against the Lessor, Vincent and Hyde for that reason, we do not find the Lessee's breach to be an independent ground for refusing to enforce the right of first refusal.

We now turn to the issue of whether the Lessee is guilty of unlawful detainer. We agree with Hyde that the Lessee is guilty of unlawful detainer as a matter of law notwithstanding the jury's finding to the contrary. The Lessee does not argue on appeal that he complied with the rental and insurance terms of the lease after the sale. The Lessee disclaims any reliance on any terms of the lease other than the right of first refusal. The Lessee's argument is that by virtue of the right of first refusal, he acquired equitable title to the property as a whole and that the remaining terms and obligations of the lease are blotted out of existence. We have decided the "right of first refusal" issue against the Lessee and it follows from this that his argument based upon that alleged "right" is also unavailing. We note also that Hyde appears to have availed itself of every imaginable avenue to secure possession in the trial court, but was unable to secure possession until sometime after the judgment was rendered by the trial court. It is an understatement to say that the Lessee stayed on the premises without the legal right to be there knowing that the true owner, Hyde, objected to his presence. All of this leads, without question, to a finding of wrongful detainer. *See* Tenn. Code Ann. § 29-18-104 (2000) (defining unlawful detainer).

We note that although the amount of damages due with respect to a given cause of action is a fact question, the measure of damages available in a given case is a question of law for the court. *See* ***Dickinson v. Bain***, 921 S.W.2d 189, 193 (Tenn. 1996); ***Uhlhorn v. Keltner***, 723 S.W.2d 131, 135 (Tenn. Ct. App. 1986). Our review of questions of law is *de novo*. ***Ridings v. Ralph M. Parsons Co.***, 914 S.W.2d 79, 80 (Tenn. 1996). A tenant who lawfully holds over without an express agreement with the landlord as to the amount of rent during the holdover period becomes liable for the fair market rental value of the occupied property during the holdover period. ***Brooks v. Networks of Chattanooga, Inc.***, 946 S.W.2d 321, 325 (Tenn. Ct. App. 1996). A tenant who holds unlawfully commits a tort, and the tenant is liable for all damages that proximately flow from the tort. ***Simmons v. O'Charley's, Inc.***, 914 S.W.2d 895, 903 (Tenn. Ct. App. 1995). In most cases, the measure of damages available to an owner that has been dispossessed of property is the rental value of the property. ***Uhlhorn***, 723 S.W.2d at 135.

The Lessee argues that Hyde is not entitled to damages because the property has gotten much more valuable, as shown by the jury's determination of various values at different points in time, and that Hyde, by the proof, would have developed the property before its value could have increased but for the Lessee's interference. Vincent argues a similar point. With one proviso that will become apparent below, we agree with Hyde that this is illogical and sheer speculation.

However, our agreement with Hyde that it is entitled to damages against the Lessee does not mean that we approve all the damages claimed by Hyde on exhibit 46 and awarded by the jury. The result of our holdings in this case is that Hyde owns the property it purchased. The interest in the amount of $184,462 on money it borrowed from Bank of Cleveland so it could buy the property is merely a cost of owning the property it wanted to own. The same reasoning applies to the loss of use of Hyde's own money that it did not have to borrow which was the basis for claims of $101,333.12 and $35,156.25. If we were to award damages to Hyde for owning the property, plus the rental damages sustained from not having it, we would be, in colloquial terms, allowing him to have his cake and eat it too. If we were to start down this road, we would need to consider whether the property became more valuable during the subject time frame so as to offset the cost of owning it. As to the claim of $4,037.01 in "real estate taxes not paid by [the Lessee]" we are reviewing this award in the absence of an agreement between Hyde and the Lessee. Thus, we will not sustain the unpaid taxes on the basis of the prior agreement between the Lessee and the Lessor.

Accordingly, we hold that Hyde's cost of owning the property and the unpaid taxes were not proper elements of damages for the jury to consider. In summary, we conclude that it was error to sustain the claim as to the $184,462, the $101,333.12, the $35,156.25 and the $4,037.01. The damage award must be reduced by the total of these four figures, *i.e.*, $324,988.38. All other components of damages claimed by Hyde were proper notwithstanding objections by the Lessee, Vincent and the Lessor. We do not view them as speculative, but the best estimate and opinion of the lawful owner as to the damages. It has long been accepted as a general rule that a property owner's opinions as to such figures is competent proof of the owner's damages. ***Merritt v. Nationwide Warehouse Co.***, 605 S.W.2d 250, 256 (Tenn. Ct. App. 1980).

We are not told why the damages awarded against the Lessor and Vincent, if they are indeed liable to Hyde, should be any different from the damages awarded against the Lessee. Therefore, our holding as to the amount of damages applies with equal force to the Lessor and Vincent subject to the caveat that we have not yet discussed their liability.

We turn now to whether Hyde and Vincent were required as a matter of law to either obtain a copy of the written lease or inquire directly of the Lessee to satisfy inquiry notice. The jury found that Hyde and Vincent had acted reasonably even though they had neither obtained a copy of the lease or inquired of the Lessee. The trial court held that, in the context of a commercial lease with a tenant in possession, inquiry notice cannot, as a matter of law, be satisfied unless the transferee either obtains and looks at the lease, or inquires directly of the tenant. As we have previously stated, on the authority of ***Parsons***, 914 S.W.2d at 80, we review questions of law *de novo*. The trial court grounded its holding in ***Texas Co. v. Aycock***, 227 S.W.2d 41, 45-46 (Tenn. 1950) and ***Gregory v. Alexander***, 367 S.W.2d 292 (Tenn. Ct. App. 1962). Before we discuss the particulars of those cases and the proof in this case, we must take a look at the statutes that govern recording of interests in land.

Leases for more than three years are subject to registration in the office of the local register of deeds. Tenn. Code Ann. § 66-24-101(15)(Supp. 2009). Section 66-26-101(2004) deals with the effect of unregistered documents as follows:

> All of the instruments mentioned in § 66-24-101 shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided.

The effect of unrecorded leases is addressed in Tenn. Code Ann § 66-7-101 (2004) as follows:

> Leases for more than three (3) years shall be in writing , and, to be valid against any person other than the lessor, the lessor's heirs and devisees, and persons having actual notice thereof, shall be proved and registered as provided in chapters 22-24 of this title.

Another statute that concerns the present case, Tenn. Code Ann. § 66-26-103(2009), pronounces the effect of unregistered documents on creditors and bona fide purchasers as follows:

> Any instruments not so registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice.

Aycock and ***Gregory*** are both cases that applied the above recording statutes, as codified at the time of those cases, to the context of unrecorded commercial leases. One case, ***Aycock***, held that under the circumstances of the case, the subsequent purchaser did not satisfy inquiry notice without going directly to the lessee. The later case, ***Gregory***, held that, under the circumstances, the subsequent purchaser satisfied inquiry notice even though he knew there was a tenant in possession and the tenant told the purchaser that he, the tenant, had bought the land.

Aycock, a pronouncement of the highest court in our State that has not been overruled, established several rules that we must undoubtedly follow in the present case, but the ultimate question is whether its holding controls the outcome. In the ***Aycock*** case, Brown's agent executed a written lease to The Texas Company. The Texas Company did not record its lease. An important fact in ***Aycock*** that is not present in this case is that The Texas Company then subleased the property to Mr. Aycock. 227 S.W.2d at 43. After being The Texas Company's sublessee for about nine years, Mr. Aycock decided to buy the property from Brown and eliminate the middle man, so to speak. ***Id.*** The deed to Aycock from Brown specifically listed "a lease to Texas Company" as an

existing encumbrance. ***Id.*** at 43. The Texas Company then made rental payments to Mr. Aycock for a period of time. ***Id.*** at 43. Aycock was, thus, his own landlord. Mr. Aycock did not like this arrangement and gave notice to The Texas Company that he was terminating the lease. The problem that resulted in litigation was that the "lease to Texas Company," of which Mr. Aycock was aware, contained an option – of which he was not aware – for The Texas Company to purchase the property. The option was on favorable terms so The Texas Company, not content to be cut out, filed an action asking that title be vested in it and divested out of Mr. Aycock. Mr. Aycock argued that he did not know about the option and had The Texas Company recorded the lease as it should have, he would have known about the option. Mr. Aycock, thus claimed to be a bona fide purchaser without notice of the option under the recording statutes. These facts led the Court to consider whether Mr. Aycock's actual knowledge of the lease prevented him from claiming the protection of the statutes as to the option. ***Id.*** at 44.

The High Court in ***Aycock*** specifically held that constructive notice to Mr. Aycock was not enough to prevent him from claiming the protection of the recording statutes. ***Id***. at 45. Rather, it was Mr. Aycock's actual notice that there was an existing lease between Brown and The Texas Company that

> put [him] upon inquiry as to what were the provisions of that lease, and as to whether it contained the commonly occurring option to purchase clause. All [he] had to do was to ask The Texas Company or Brown and wife to let [him] see the lease and delay consummation of the purchase until there had been answered the inquiry as to which [he was] put on notice.
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> . . . When anything appears which would put a man of ordinary prudence upon inquiry, the law presumes that such inquiry was actually made, and therefore fixes the notice upon him as to all legal consequences.
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> . . . The rule upon the question of notice is, that whatever is sufficient to put a person upon inquiry, *is notice of all the facts to which that inquiry will lead*, when prosecuted with reasonable diligence and in good faith.
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> * * *

> Aycock . . . [was] put upon . . . inquiry by notice of this lease as to what were its contents, and as to whether it granted the lessee an option to purchase. . . . [Aycock was] thereby given notice of all the facts to which that inquiry with reasonble diligence and in good faith would have lead. [He was], therefore, given actual notice, or its equivalent, of the option granted The Texas Company to purchase the real estate in question, and that this option had been fully authorized, ratified and affirmed by the owners of the property, Brown and wife, who were [Aycock's] grantors.

Id. at 45-46 (emphasis in original; citations omitted).

As we have intimated, ***Aycock*** does not fully resolve the issues in the present case. The facts of our present case are different in that Mr. Aycock both paid rent to and accepted rent from The Texas Company under the lease he tried to deny. Nothing like that happened in the present case. The Lessor told Hyde and Vincent there was not a written lease and that the Lessee was a month to month tenant in default and out of business. The proof was conflicting about the Lessee's physical presence and level of activity at the time of the sale and subject to the jury's resolution. Thus, while we believe the rules articulated in ***Aycock*** impact the present case, the holding does not control this case.

Also, although ***Aycock*** mentioned inquiry to either The Texas Company or Brown as a way to find out the true facts of the lease, it did not explicitly say whether inquiry to one would or would not be sufficient. That issue was directly addressed in ***Gregory***, 367 S.W.2d 292. The key facts in ***Gregory*** are that the same person who deeded property to Alexander had earlier signed a lease with option to purchase to Gregory, and Gregory had exercised that option and obtained a deed from the parties' common grantor. The common grantor did not know that the lease contained an option or that she had later signed a deed. ***Id.*** at 295. Gregory was in possession of the property when Alexander bought it but had not recorded his lease or his deed. When Alexander tried to rent the property to someone other than Gregory, the legal fight broke out. The question to this court was, thus, whether "Alexander had such actual notice of the existing instruments . . . as to estop him from questioning said instrument." ***Id.*** This court held as follows:

> As is pointed out by the Chancellor, after Gregory told . . . Alexander that he had a deed to the property which he had been renting [from the common grantor], Alexander went to the Register's Office and found that no such deed was on record. He then went to Rosalee, the owner [and common grantor], and inquired of her and was told by her that she had not given Gregory a deed to the property. The Chancellor held that this was a reasonable and sufficient investigation of the matter by Alexander and that his recorded deed took priority over the unrecorded but prior dated deed to Gregory.

Id. at 296.

The court in ***Gregory*** also considered the effect of Alexander's knowledge of Gregory's possession under his lease. The court held that where a tenant's possession is explained by a lease, a subsequent purchaser may reasonably infer that the possession is explained by the disclosed lease and "a subsequent purchaser will not be charged with notice of any other undisclosed title or equity which the occupant may have." ***Id.*** We stated:

> Under all the circumstances shown here, we think, as did the Chancellor, that Alexander made such inquiry as was reasonable and that the rule as to notice from possession did not apply so as to give priority to Gregory's deed.

Id. at 297.

We believe the reasoning of ***Gregory*** applies with equal force in the present case. The question of reasonableness was for the trier of fact. ***Id.***; ***Smith v. Sloan***, 225 S.W.2d 539, 541 (Tenn. 1950). The trier of fact concluded that Hyde and Vincent acted reasonably under the circumstances in asking repeatedly of the Lessor whether there was a written lease. The affidavit of the Lessor furnished to Hyde's title insurer specifically stated that there was no right of first refusal. The Lessee's presence was explained by reference to a terminable lease of which the Lessee was purportedly in default. The trier of fact was entitled to believe, and apparently did believe, that the Lessee was noticeably absent and the business noticeably not active during the time in question. In fact, the jury could have easily believed that any efforts to inquire of the Lessee would have been fruitless in light of his absence. We hold that the trial court erred in negating the jury's finding that Vincent and Hyde satisfied inquiry notice. Accordingly, we hold that the Lessor's transfers to Vincent and Hyde had priority over the Lessee's unrecorded lease and the right of first refusal therein.

We now turn to the issue of whether the Lessee's unrecorded lease was a breach of the warranties given Hyde by the Lessor and Vincent. Under the unique circumstances of this case, we think it was not. Hyde cites a secondary source, 21 C.J.S, *Covenants* § 142, for the proposition that it is entitled to be placed in the same condition it "would have stood if the covenant had been kept." The warranties have been quoted above and we need not repeat them. First and foremost the warranties required that Hyde receive good title to the property it purchased. We have held Hyde's title is superior to the unrecorded lease, but that does not end the inquiry as to aspects of the warranty that cover incidental damages to Hyde. Another aspect of the warranties given is the covenant of "siesen," or a covenant that the sellers were in possession of everything granted and could turn over

to the purchaser – Hyde – the estate exactly as described in the deed. *See* ***King v. Anderson***, 618 S.W.2d 478, 483 (Tenn. Ct. App. 1980). Also, the sellers warranted against encumbrances.[4]

Hyde treats the covenants of seisen and against encumbrances as one and argues, on the basis of ***Murdock Acceptance Corp. v. Aaron***, 230 S.W.2d 401, 406 (Tenn. 1950), that the object of the warranties was to protect against any diminution in the value of the estate to Hyde regardless of any knowledge Hyde had of the Lessee's presence or assurances in the contracts that Vincent and Hyde would "honor" the lease. Hyde argues that ***Murdock*** stands for the proposition that knowledge of an encumbrance before a conveyance will not defeat an action based upon a breach of a covenant against encumbrances in a deed because knowledge of the encumbrance might have been the driving force behind extracting the warranty with the expectation the encumbrance had been or would be discharged. *See* ***Murdock***, 236 S.W.2d at 406. We do not disagree with or disavow ***Murdock*** in any regard; however, the actual holding of ***Murdock*** works against Hyde. The covenant against encumbrances at issue in ***Murdock*** was made by a land company in a deed to Patterson. The land company escaped liability under the covenant despite the existence of an encumbrance because of a prior land sale contract that had the effect of negating the encumbrance as to the land company. ***Id***. at 403. The Court held that "the Land Company was entitled to rely upon its defensive equities" established in the prior sale contract that preceded the deed to Patterson. ***Id.*** at 406. We believe the same is true of the Lessor and Vincent *vis-a-vis* Hyde. They are entitled to rely on the "defensive equity" that everyone had equal knowledge of the Lessee's presence on the property, and that the Lessor to Vincent transaction and then the Vincent to Hyde deal extracted a requirement that the vendee "honor" the lease.

To the extent the mere existence of the lease was an "encumbrance," everyone contracted with the same knowledge on the front end. Hyde, Vincent and the Lessor all consistently argued, at trial and on appeal, that the Lessee had given up on the lease and was out of business at the time the sale was consummated and is nothing more than an opportunist trying to make money off their efforts and their deal. They were able to convince the jury of the merits of their position. To allow Hyde a recovery against the Lessee in tort, as we have, for the period he wrongfully held without a legal right, we believe would be inconsistent with holding that the Lessee's actions constitute a breach of warranty. We are not shown why the Lessor and Vincent should be liable for the opportunistic torts of the Lessee. Accordingly, we hold that the Lessor and Vincent are not liable to Hyde for breach of warranty for the time Lee held wrongfully outside the scope of his lease.

We believe our holdings (1) that the lease is unconscionable and (2) that Vincent and Hyde acquired title superior to the unrecorded lease eliminate the need to decide whether the right of first

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[4] A form of damages recoverable in breach of warranty against encumbrances is attorney fees and expenses the purchaser incurred in defending the title against encumbrances. ***Dickenson v. Bain,*** 921 S.W.2d 189, 193(Tenn. 1996). This approach requires proof that the vendor was asked but refused to defend title. ***Id.*** Hyde does not argue that either the Lessor or Vincent refused to defend title and makes no argument for attorney fees as a remedy.

refusal, if enforceable, would be limited to the 4.3 acres under lease or rather to the whole 68 acres sold by the Lessor. Accordingly, we elect not to reach this issue. Because of our holdings adverse to the Lessee on the "right of first refusal" issue, we decline to give what amounts to an advisory opinion on a hypothetical issue. *See* ***City of Memphis v. Shelby Cty. Elec. Com'n***, 146 S.W.3d 531, 538-39 (Tenn. 2004).

While we elect not to decide whether the Lessee's right of first refusal would have applied to the 4.3 acres under the lease or the 68 acres sold by the Lessor, we find it prudent to point out that the reliance of the Lessee on our decision in ***Torrence v. Higgins Family Ltd. Partnership***, E2005-1549-COA-R3-CV, 2006 WL 1132080 (Tenn. Ct. App. E.S., filed April 28, 2006), to support his "68 acres" argument is misplaced. While the defendant in ***Torrence*** attempted *on appeal* to raise the issue of whether a right of first refusal pertains only to the property under lease or, on the contrary, to an offer to purchase a larger tract of which the leased premises are a part, we noted in that case that the issue was "raised for the first time on appeal." 2006 WL 1132080 at *9. We went on to say, by way of dicta, that "even had this issue been raised [at the trial court level]," ***id***., we "doubt[ed] that it would have had merit." ***Id***. This was because the owner of the property, by its own actions, had treated the right of first refusal as applying to the *larger* tract contrary to the position it was trying to assert on appeal.[5] In other words, ***Torrence*** did not expressly hold that a right of first refusal on a smaller tract extended to a larger tract encompassed by another party's offer of purchase. Simply stated, that issue was not addressed by us in our decision in ***Torrence***.

The last issue we address is raised only by Vincent, and, the best we can tell from reading and re-reading the multitude of briefs, is left untouched by all the other parties. Vincent asks us to reverse the trial court's finding in its amended final judgment that "[t]he land sold by [the Lessor] to Vincent was of a greater value than the amount paid by . . . Vincent." Vincent is correct that the finding is contrary to the values stipulated by the parties for inclusion in special interrogatory 15 to the jury. We are uncomfortable going beyond this observation because we are being asked to rule on an issue that, according to Vincent, "is not relevant to any claim or defense that was before the court." If that statement is true, and no party has disputed its truth, then the trial court issued an advisory opinion in making the finding and we would be making an advisory opinion in reversing it. Vincent challenges the finding for fear it will be "prejudicial to Ms. Vincent" in an arbitration

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[5] *See* ***Galleria Associates, L.P. v. Mogk***, 34 S.W.3d 874, 877 (Tenn. Ct. App. 2000):

> The rule of practical construction states that the interpretation placed upon a contract by the parties thereto, as shown by their acts, will be adopted by the court and that to this end not only the acts but the declarations of the parties may be considered. ***Hamblen County v. City of Morristown***, 656 S.W.2d 331, 335 (Tenn. 1983). In addition, "[i]f the conduct of the parties subsequent to a manifestation of intention indicates that all of the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation." ***Id***. (*quoting* Restatement of Contracts § 235).

that will be conducted pursuant to the settlement between Vincent and the Lessor. We encountered a similar argument recently in ***Heaton v. Steffen***, No. E2008-01564-COA-R3-CV, 2009 WL 2633050 at *6 (Tenn. Ct. App., E.S. filed August 27, 2009) , to which we responded:

> Presumably, the plaintiffs want a ruling to use in the future. We need not tarry long over this argument. The courts of this state act on real controversies between persons with real and adverse interests. ***Rodgers v. Rodgers***, No. M2004-02046-COA-R3-CV, 2006 WL 1358394 at *4 (Tenn. Ct. App. filed May 17, 2006) (*citing* ***City of Memphis v. Shelby County Election Commission***, 146 S.W.3d 531, 539 (Tenn. 2004)). Our courts will not issue advisory opinions. ***Id.***

We do not reverse judgments for errors that did not affect the judgment. Tenn. R. App. P 36(b). We must leave it to Vincent to find a way in arbitration to show that an alleged irrelevant and erroneous finding should not be given preclusive effect.

IV.

The judgment of the trial court is affirmed in part and reversed in part. Costs on appeal are taxed to the appellant Robert Joe Lee. This case is remanded, pursuant to applicable law, for such further proceedings as are necessary and consistent with this opinion including, specifically, modification of the judgment of the trial court by (1) granting judgment against Hyde and in favor of the Lessor and Vincent on the breach of warranty claims and (2) reducing the damage award in favor of Hyde and against the Lessee by the amount of $324,988.38.

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CHARLES D. SUSANO, JR., JUDGE