

IN THE COURT OF APPEALS 04/22/97
OF THE
STATE OF MISSISSIPPI
NO. 93-CA-01210 COA

ELAINE D. MULLINS, INDIVIDUALLY, AND AS
REPRESENTATIVE OF ANDREW P. MULLINS,
DECEASED
APPELLANT

v.

C. DOUGLAS COLEMAN, MYRA SUE COLEMAN, HIS WIFE, AND MERCHANTS &
FARMERS BANK
APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT L. LANCASTER

COURT FROM WHICH APPEALED: NOXUBEE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

W. H. JOLLY, JR.

ATTORNEY FOR APPELLEE:

J. RANDOLPH LIPSCOMB

NATURE OF THE CASE: CONTRACTS - RESCISSION

TRIAL COURT DISPOSITION: CONTRACT RESCINDED

EN BANC.

THOMAS, P.J., FOR THE COURT:

The Chancery Court of Noxubee County found that Andrew and Elaine Mullins [Mullins] committed fraud in representing to Douglas and Myra Sue Coleman [Coleman] that the home occupied by Mullins and offered for sale to Coleman was free of termite damage or infestation. Subsequent to purchasing the property and after having made substantial improvements thereto, Coleman discovered extensive termite damage and infestation in the home. Coleman offered to reconvey the property and demanded that Mullins rescind the sale. Mullins refused the offer, prompting Coleman to pursue this action in equity for a rescission of the contract. Upon finding that Mullins committed fraud in his representations to Coleman the chancellor decreed a rescission of the contract for the sale of the home. Both parties appeal the chancellor's ruling. On appeal to this Court Mullins raises the following issues:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ORDERING RESCISSION OF THE CONTRACT FOR SALE WHICH REMEDY SHOULD BE RESERVED FOR CASES INVOLVING FRAUD AND ONLY IN THE MOST EXTREME CASES, AND THAT SAID REMEDY IS NOT EQUITABLE UNDER THE FACTS AS PRESENTED IN THIS CASE, AND RESCISSION DOES NOT REPRESENT THE MOST EQUITABLE SOLUTION IN THIS CASE.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ORDERING RESCISSION OF THE CONTRACT OF SALE, WHICH RESCISSION PLACES AN UNREASONABLE BURDEN ON THE APPELLANTS IN THAT NUMEROUS CHANGES HAVE OCCURRED TO THE RESIDENCE IN QUESTION, AND, THEREFORE, IT IS IMPOSSIBLE TO PLACE THE PARTIES BACK INTO THE POSITIONS THAT THEY OCCUPIED ON THE DATE OF THE CLOSING, AND, IN EQUITY, THE COURT SHOULD HAVE ORDERED THE APPELLANTS TO MAKE REASONABLE REPAIR TO THE PREMISES OR, IN THE ALTERNATIVE, ORDER THE APPELLEES TO RESTORE THE PREMISES TO THE CONDITION IN WHICH THE HOUSE EXISTED ON THE DATE OF THE CLOSING.

III. THE JUDGMENT OF THE COURT ENTERED HEREIN IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND IS CONTRARY TO THE ORDER SPECIFYING FACTS, WHICH WAS ENTERED BY THE LOWER COURT PRIOR TO THE TRIAL.

On cross-appeal Coleman raises the following issues:

IV. THE CHANCELLOR ERRED AND ABUSED HIS DISCRETION IN FAILING TO AWARD PREJUDGMENT INTEREST TO APPELLEES.

V. THE CHANCELLOR ERRED IN FAILING TO AWARD APPELLEES THEIR

REASONABLE ATTORNEYS' FEES AND EXPERT WITNESS FEES.

We hold both Mullins's and Coleman's assignments of error to be without merit. Accordingly, the judgment of the chancellor is affirmed.

FACTS

In February of 1992 Mullins and Coleman entered into a contract for the purchase/sale of real property, whereby Coleman agreed to purchase Mullins's home in Macon, Mississippi for the sum of \$99,500. Prior to the formation of the sales contract Mullins represented to Coleman that the structure had no termite problems, damage, or infestation. In June of 1992 the sale was closed and Coleman took possession of the property and began to make improvements upon it. In August, live termites were found by a laborer working on the home. Coleman immediately called Redd Pest Control, who performed a thorough investigation of the structure. Upon detailed inspection it was discovered that termites had eaten holes in the floor which were not visible to the casual observer because they were underneath the carpet. These holes showed evidence of having previously been repaired with wood putty and sheets of metal, and then covered with carpet. The inspection also revealed that major support beams and floor joists were heavily damaged by termites. Additionally, it was observed that rafters supporting the roof had been eaten through by termites and the rafters repaired by "scabbing" at an earlier date.

In decreeing a rescission of the contract, the chancellor ordered that Coleman reconvey the real property to Mullins and that Mullins return to Coleman the purchase price of \$99,500 that Coleman had paid for the home. Additionally, the chancellor ordered Mullins to pay Coleman the sum of \$18,740.45, representing the value of the improvements Coleman made to the property prior to discovering the termite damage. The chancellor also ordered Mullins to pay Coleman the sum of \$188.54, representing the property taxes paid by Coleman during his possession of the premises in 1992. Furthermore, the chancellor's order declared valid a deed of trust upon the property in favor of The Merchants and Farmers Bank. In response to motions for new trial filed by both parties the chancellor denied the requests for a new trial, but modified his decree to also require Mullins to pay post-judgment interest on the \$99,500 and \$18,740.45 amounts that Coleman had expended on the home.

ANALYSIS

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ORDERING RESCISSION OF THE CONTRACT FOR SALE WHICH REMEDY SHOULD BE RESERVED FOR CASES INVOLVING FRAUD AND ONLY IN THE MOST EXTREME CASES, AND THAT SAID REMEDY IS NOT EQUITABLE UNDER THE FACTS AS PRESENTED IN THIS CASE, AND RESCISSION DOES NOT REPRESENT THE MOST EQUITABLE SOLUTION IN THIS CASE.

While not denying that there was termite damage to the home or that he represented to Coleman that

the home was free from termite damage or infestation, Mullins contends that a rescission of the contract was not the appropriate remedy for his actions. Mullins contends that the appropriate remedy was monetary damages in an amount necessary to place Coleman in the position he would have been but for the termite damage. Coleman, however, argues that because Mullins engaged in fraud, rescission of the contract was an appropriate remedy in equity. Coleman argues that he had the option of proceeding against Mullins under either the equitable theory of rescission, or an action at law on the contract. Coleman chose the equitable remedy and contends that the chancellor's decision to rescind the contract was not an abuse of discretion.

Rescission of contracts is allowed in cases of fraud, mistake, or material breach. *Cenac v. Murry*, 609 So. 2d 1257, 1273 (Miss. 1992). Fraud must be proven by clear and convincing evidence in order to justify the rescission of a contract. *Ezell v. Robbins*, 533 So. 2d 457, 461 (Miss. 1988). In *Ezell*, the Mississippi Supreme Court held that:

In order to establish fraud, the plaintiff must prove (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) his intent that it should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury.

Ezell, 533 So. 2d at 461.

The rescission of a contract is a highly fact-specific determination, which necessitates an exercise of the chancellor's sound discretion in finding an equitable resolution to the dispute at hand. *See* 2 Henry C. Black, *Rescission of Contracts and Cancellation of Written Instruments* § 616 (1916) (hereinafter Black) (stating that applications for rescission are addressed to just and sound discretion of court, which applies specific facts before it to determine what is reasonable and proper under circumstances of particular case). A chancellor's findings of fact will not be disturbed unless they are manifestly wrong or clearly erroneous. *Bowers Window and Door Co. v. Dearman*, 549 So. 2d 1309, 1312-13 (Miss. 1989). As part of the deference afforded by appellate courts to a chancellor's factual determinations, whenever there is substantial evidence in the record to support the chancellor's findings of fact, those findings must be affirmed on appeal. *Johnson v. Hinds County*, 524 So. 2d 947, 956 (Miss. 1988).

In making his determination that Mullins committed fraud the chancellor had substantial, credible evidence before him to support such conclusion. Dispositive of this issue are the facts delineated in the order specifying facts prepared by the chancellor pursuant to Mississippi Rule of Civil Procedure 56(d). Under Rule 56(d), when a motion for summary judgment is made and "judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court . . . shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." Miss. R. Civ. Pro. 56(d). After "examining the pleadings and the evidence before [him] and by interrogating counsel," the court "shall thereupon make an order specifying the facts that appear without substantial controversy." Miss. R. Civ. Pro. 56(d). The facts contained in the resulting order "shall be deemed established, and the trial shall be conducted accordingly." Miss. R. Civ. Pro. 56(d).

In the case at bar the chancellor's order specifying facts contains several items directly on point to the

issue of whether Mullins committed fraud in his representations to Coleman. Fact number eleven states that Mullins "represented that there were no termite problems, i.e., neither damage nor infestation." Fact number twenty-one further states that "[d]efendants individually and through their agents misrepresented to [p]laintiffs that there were no termite problems and omitted to advise [p]laintiffs of facts regarding the termite damage . . . and that those representations or omissions were material, significant and false." At no time did Mullins contest or object to the order; rather, these findings were (as stated by the chancellor in the order) derived from "the pleadings and evidence before [the court] and by interrogating counsel pursuant to Rule 56(d)" Rather than being a matter in controversy, the facts contained in the chancellor's order effectively amounted to stipulations of the parties, to which they were bound at trial. *Cf.* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2737 (1983) (stating that purpose of order made pursuant to Rule 56(d) is "to withdraw sham issues from the case and to specify those facts that really cannot be controverted"). These established facts make it clear that while there may have been a genuine issue as to the appropriate remedy, there was no issue as to the ultimate liability of Mullins. Considering the uncontroverted material facts contained in the order specifying facts, it is clear to this Court that, under the *Ezell* analysis, the chancellor was not clearly erroneous in finding that Mullins perpetrated a fraud upon Coleman. Because equity provides for the rescission of contracts in cases of fraud, the chancellor was within his discretion in granting the relief prayed for by Coleman. This assignment of error is without merit.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ORDERING RESCISSION OF THE CONTRACT OF SALE, WHICH RESCISSION PLACES AN UNREASONABLE BURDEN ON THE APPELLANTS IN THAT NUMEROUS CHANGES HAVE OCCURRED TO THE RESIDENCE IN QUESTION, AND, THEREFORE, IT IS IMPOSSIBLE TO PLACE THE PARTIES BACK INTO THE POSITIONS THAT THEY OCCUPIED ON THE DATE OF THE CLOSING, AND, IN EQUITY, THE COURT SHOULD HAVE ORDERED THE APPELLANTS TO MAKE REASONABLE REPAIR TO THE PREMISES OR, IN THE ALTERNATIVE, ORDER THE APPELLEES TO RESTORE THE PREMISES TO THE CONDITION IN WHICH THE HOUSE EXISTED ON THE DATE OF THE CLOSING.

In granting a rescission "the fundamental theory upon which equity acts is that of restoration,--of restoring the defrauded party primarily, and the fraudulent party as a necessary incident, to the positions they occupied before the fraud was committed." *Brown v. Norman*, 65 Miss. 369, 4 So. 293, 295 (Miss. 1888). As some courts have stated, the parties should be returned to the "status quo" that existed prior to the formation of the contract that has been rescinded. *Hamilton v. McGill*, 352 So. 2d 825, 829 (Miss. 1977). The Mississippi Supreme Court, however, has held that in a rescission the parties need not be returned to a literal status quo. In *Brown*, the court held that "[w]hen courts cannot place parties wholly *in statu quo*, they are not thereby precluded from granting relief against fraud. They may proceed to do so as nearly as possible, and make compensation [for the difference]." *Brown*, 4 So. at 297. The court further stated that "[u]pon principle and authority we think it immaterial that the *status quo* cannot be literally restored." *Id.* A good summary of this flexibility in equity equity was made by the commentator Henry C. Black, author of *Black's Law Dictionary*, in his two-volume treatise on the rescission of contracts. Black correctly summarized the status quo

rule, stating that "the rule does not mean that there must be an absolute and literal restoration of the exact previous condition, but such a restoration as is substantial, without material difference, and reasonably practicable, or, where fraud is involved, as nearly complete as the fraud of the opposite party will permit." Black § 616.

In the case at bar Coleman had begun to make substantial improvements to Mullins's former residence prior to his discovery of the termite damage. These improvements included repainting walls and woodwork, sanding and refinishing floors, repairing plaster, installing new wallpaper and new window sashes. Undoubtedly these improvements changed the home so that it was not the exact same as before the contract was executed. Despite the fact that the exact status quo cannot be restored, as discussed in the case law, *supra*, this did not preclude the chancery court from granting an equitable rescission to relieve Coleman from Mullins' fraud. The chancellor found that, in addition to returning the purchase price of \$99,500 to Coleman, Mullins should also be required to compensate Coleman for the value of the improvements made to the property. This allowance for good faith improvements made by the buyer is in accordance with the general principles of equitable rescission. *See* Black § 636 (stating that "the vendee, having been in possession, will ordinarily be entitled to a proper allowance for the expense incurred by him in making valuable and permanent improvements"). It should also be noted that the chancellor's order for Mullins to return to Coleman the taxes Coleman paid on the property, while Coleman had possession of the premises, was correct. *See* Black § 637 (stating that "where the contract is rescinded for the fraud of the vendor, he will be required to repay to the purchaser the amount paid by the latter for taxes"). This Court finds no error in the chancellor's determinations and therefore holds this assignment of error to be lacking in merit.

III. THE JUDGMENT OF THE COURT ENTERED HEREIN IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AND IS CONTRARY TO THE ORDER SPECIFYING FACTS, WHICH WAS ENTERED BY THE LOWER COURT PRIOR TO THE TRIAL.

This Court has previously reviewed the evidence before the chancellor, when addressing Mullins's first assignment of error. As detailed *supra*, the chancellor had substantial, credible evidence before him upon which to base his finding that Mullins committed fraud and that such fraud was reasonably relied upon and caused injury to Coleman. Under the facts available to the chancellor, a rescission of the contract was appropriate and not an abuse of discretion. With this third assignment of error, Mullins complains that the chancellor's decision was "contrary to the Order Specifying Facts." This Court finds that such an assertion could not be farther from the truth. In fact, as discussed with assignment of error number one, it is the very existence of the facts contained in the order specifying facts that make the chancellor's decision correct. The order specifying facts makes it clear that Mullins represented to Coleman that the home was free from termite damage or infestation. The order further makes it clear that such representations were material, significant, and false. These are precisely the criteria necessary for a finding of fraud upon which to predicate an order for the rescission of the contract. Accordingly, we hold this assignment of error to also be without merit. We now turn our attention to Coleman's assignments of error raised on cross-appeal.

IV. THE CHANCELLOR ERRED AND ABUSED HIS DISCRETION IN FAILING TO AWARD PREJUDGMENT INTEREST TO APPELLEES.

Coleman is correct in arguing that he is entitled to have his expense for prejudgment interest on the purchase price of the home accounted for in the equitable rescission of the contract. As the commentator Henry C. Black has stated:

One who is thus entitled to a decree for rescission and for the restoration to him of money paid under the contract is also entitled, under the ordinary circumstances, to ask that the decree shall likewise require that the sum payable to him shall include interest at the legal rate on his money for the time it was in the hands of the other party.

Black § 688. However, it is also fundamental to the principles of equitable rescission that the reasonable value of Coleman's use and possession of the premises be credited to Mullins, to offset his liability to Coleman. Commentator Black described this aspect of rescission as requiring that "the vendee, having been in possession of the land under the contract, should be charged with a proper sum for the rent or rental value of the premises, or rather, for the value of his use and occupation of them." Black § 634.

Although not explicitly stated in his order, it is apparent that the chancellor weighed the interest expense incurred by Coleman against the value of his use and possession of the premises. Accordingly, in his order for rescission the chancellor decreed that Coleman receive no compensation for his interest expense and Mullins receive no credit for Coleman's use and possession of the subject property. Apparently the chancellor, in his sound discretion, found that these two items had the effect of canceling each other out. Because such a factual evaluation was within the chancellor's discretion and was certainly not a clearly erroneous conclusion, given the credible evidence before him, this Court will not disturb the chancellor's findings. *See Johnson v. Hinds County*, 524 So. 2d 947, 956 (Miss. 1988) (holding that findings of fact made by chancellor and supported by substantial, credible evidence will not be overturned on appeal). This assignment of error is without merit.

V. THE CHANCELLOR ERRED IN FAILING TO AWARD APPELLEES THEIR REASONABLE ATTORNEYS' FEES AND EXPERT WITNESS FEES.

Coleman argues strenuously that he is entitled to both attorneys' fees and expert witness fees incurred in pursuing this action in equity. Central to Coleman's argument is that the contract for the purchase/sale of the Mullins home contained a covenant "severable" from the sales contract, which survived the rescission of the contract. The covenant in question concerns the recovery of attorneys' fees, but makes no mention of expert witness fees or any other expenses arising out of legal action concerning the sale of the home. Coleman argues that Rule 54(d) of the Mississippi Rules of Civil Procedure entitles him to recover his expert witness fees.

To properly address Coleman's argument, it must first be understood exactly what effect rescission has on a contract. As stated by the Mississippi Supreme Court, "[r]escission is a retroactive remedy

and renders a contract unenforceable from the outset" and "amounts to the unmaking of a contract, or an undoing of it from the beginning, and not merely a termination." *Cenacv. Murphy*, 609 So. 2d 1257, 1273 (Miss. 1992). A rescission is often referred to as making the underlying contract void *ab initio*. See *Douglas v. Nationwide Mut. Ins. Co.*, 913 S.W.2d 277, 279 (Ark. 1996) (stating that rescission is equitable, common law remedy which voids contract *ab initio*); *Michigan Nat'l Bank-Oakland v. American Centennial Ins. Co.*, 200 A.D.2d at 107 (1994) (holding equitable rescission of contract due to fraud is declaration that contract was void *ab initio*). Voiding a contract *ab initio* makes the contract "a nullity; it and each of its terms and provisions cease to be subsisting or enforceable against the other party." *Scollan v. Government Employees Ins. Co.*, 35 Cal. Rptr. 40, 41 (1963). When a court of equity rescinds a contract, "[t]he effect of a rescission is to extinguish the contract for all purposes and if a contract is rescinded, no rights can be predicated upon the contract." *Smith v. Ohio State Home Serv. Inc.*, Nos. 16441, 16445, 1994 WL 200801, at *1 (Ohio App. 9th May 25, 1994).

Mississippi follows the so-called "American rule" regarding the awarding of attorneys' fees, under which the litigants must bear the expense of attorney and expert witness fees as incidents of establishing their legal rights. See *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 544 (Miss. 1996) (holding that Mississippi follows American rule as to attorneys' fees). Under the American rule attorneys' fees are not awarded to the prevailing party unless there is a contractual provision so providing, statutory authority, or punitive damages are proper. *Willard*, 681 So. 2d at 544. While this rule may occasionally produce harsh results, the Mississippi Supreme Court has repeatedly held that the issue of attorneys' fees is a legislative one rather than for the judiciary to resolve. *Grisham v. Hinton*, 490 So. 2d 1201, 1208 (Miss. 1986). In the case at bar Coleman has cited no statute to support his claim for attorneys' fees. Additionally, there was no finding that punitive damages were appropriate against Mullins. This leaves the now-rescinded contract, which was rendered void *ab initio*, as the only basis to support Coleman's claim for attorneys' fees.

This Court holds that under the American rule, to which we are bound, and the well-settled principles of contract rescission, Coleman was not entitled to attorneys' fees incurred in pursuing his claim against Mullins. See Black § 688 (stating that buyer of land not entitled to recover his counsel fees expended in suit for rescission of sale). Because the chancellor rescinded the contract every clause within it perished with its rescission, including the one that Coleman now contends is "severable." Accordingly, there was no contractual provision upon which to authorize an award of attorneys' fees. It is intrinsic to an action for rescission that the rights and obligations of each party be determined "as though there never had been a contract in the first instance." *Aetna Casualty and Sur. Co. v. O'Connor*, 8 A.D.2d 530, 538 (N.Y. 1959). To allow Coleman to rescind the contract, yet permit him to enjoy the benefits of select portions of the now-extinguished contract would be contrary to logic and the principles underlying contract rescission.

Regarding expert witness fees, Mississippi Rule of Civil Procedure 54(d) allows for the prevailing party to recover his "costs," unless the court directs otherwise. Miss. R. Civ. Pro. 54(d). The term "costs" is explained in the official comment to the Rule as referring to expenses such as court fees and other official expenses. Miss. R. Civ. Pro. 54(d) cmt. The official comment further explains that expenses such as attorneys' fees and investigatory expenses "will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants." Miss. R. Civ. Pro. 54(d) cmt. In light of the official comment, it is clear to this Court that Rule 54(d) provides no basis upon which

to award Coleman his expert witness fees incurred in having the contract rescinded. This assignment of error is without merit.

THE JUDGMENT OF THE CHANCERY COURT OF NOXUBEE COUNTY OF RESCISSION OF THE CONTRACT IS AFFIRMED. STATUTORY PENALTIES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED AGAINST APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, KING, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS IN PART AND DISSENTS IN PART WITH A SEPARATE WRITTEN OPINION JOINED BY DIAZ, J. HERRING AND HINKEBEIN, JJ., NOT PARTICIPATING.

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PAYNE, J., CONCURRING IN PART, DISSENTING IN PART:

I concur in the majority opinion except as it applies to the issue of attorneys' fees. I find the case of *Knight v. McCain* to warrant an award of attorneys' fees to Coleman. *See Knight v. McCain*, 531

So. 2d 590, 597 (Miss. 1988). *Knight* was a suit based on a contract of sale which the seller had breached. *Id.* The chancery court granted the purchasers the equitable relief of rescission of deed, note, and deed of trust, all of which were executed according to the terms of the contract, on the grounds the seller breached the real estate contract. *Id.* at 594. Although the court did not mention rescission of that *contract*, the rescission of the fruits of the contract gave the same result--the contract was now of no effect. Even so, the chancellor reached into the body of that contract to find authority for awarding attorney's fees. *Id.* On appeal, the Mississippi Supreme Court affirmed the judgment of the chancellor and stated, "Attorneys' fees were awarded below, under *a contractual provision so providing*. This Court, having affirmed the judgment of the chancery court, entitles the [purchasers] to attorneys' fees under the contract as awarded by the chancery court." *Id.* at 597 (citations omitted) (emphasis added). Thus, the court awarded the purchasers/successful plaintiffs their attorney's fees on appeal in addition to the attorneys' fees awarded in the chancery court.

In the present case, we are presented with a sales contract which contained the following provision:

On the event legal action is instituted by any party, including the Agent, to this agreement to enforce the terms of this agreement, or rising out of the execution of this agreement or the sale, the prevailing party shall be entitled to receive from the other party a reasonable attorney fee to be determined by the court in which such action is brought.

The court of equity correctly found that there was fraud in the inducement by Mullins in the execution of the contract for the sale of realty. Rather than there being a breach after the contract was executed as occurred in *Knight*, here there was fraud prior to the execution of the contract. The chancellor rescinded not only the deed, note, and deed of trust, but also the contract. Therefore, the chancellor felt his hands were tied as to any basis upon which to make an award of attorney's fees because the contract provision providing for such was of no effect. I believe that the same equitable principles of *Knight* should apply in the present case. Certainly a defrauder should not be held to a lower standard than a one who breaches a contract! The chancellor looked to the body of the contract to determine the purchase price to be returned. By the same token, the chancellor should be allowed to look to the body of the contract in regard to attorney's fees. Anything less would allow the seller's wrong doing to inure to his own benefit rather than to his detriment. This certainly cannot be justice, much less equity.

Coleman also requests attorney's fees on appeal. In accordance with *Knight*, I believe Coleman is also entitled to attorney's fees on his appeal.

Because the sales contract allows for attorneys' fees, I believe the chancellor erred in denying such an award to Coleman. The parties clearly provided for an award of attorneys' fees in the contract for sale in the event of legal action involving the sales contract. The fact that Coleman was successful in his action to rescind the sales contract does not prohibit him from recovering attorney's fees which were provided for under that contract. I believe that the majority's conclusion regarding attorney's fees is a strained ruling with an inequitable result. I would reverse and render for an award of attorney's fees.

DIAZ, J., JOINS THIS SEPARATE WRITTEN OPINION.