IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION AT JACKSON

JAMES ROGER BISHOF And MARY K. BISHOF,	)	Tipton Equity No. 10765
Plaintiffs/Appellants.	)	
VS.	)	C. A. NO. 02A01-9411-CH-00256
YARBROUGH CONSTRUCTION COMPANY; WESLEY YARBROUGH; HOME BUYERS WARRANTY CORPORATION; NATIONAL HOME INSURANCE COMPANY; Aurora, Colorado; CENTURY 21 A-1 PROPERTIES; And LUPE LAUGHLIN BEHRENS,	)	
Defendants/Appellees.	)	

FILED

August 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

From the Chancery Court of Tipton County at Covington.
Honorable John Hill Chisolm, Chancellor

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Attorneys for Defendants/Appellees, Century 21 A-1 Properties and Lupe Laughlin Behrens.

OPINION FILED:

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

FARMER, J.

HIGHERS, J. : (Concurs)
TOMLIN, Sr. J. : (Concurs)

In this action, Plaintiffs-Appellants, James Roger Bishof and Mary K. Bishof ("Plaintiffs" or "Bishofs"), appeal the dismissal of their claims for rescission, fraud, outrageous conduct and breach of warranty against Defendants-Appellees, Yarbrough Construction Company, Wesley Yarbrough, Home Buyers Warranty Corporation, National Home Insurance Company, Century 21 A-1 properties, and Lupe Laughlin Behrens, arising from the Bishofs' purchase of a residence.

The pleadings, affidavits and depositions reveal the following relevant facts: The Bishofs purchased a residence located at 9432 Holly Grove Road, Brighton Tennessee, on or about May 24, 1989, from Yarbrough Construction Company, a sole proprietorship owned by Wesley Yarbrough ("Yarbrough"). Lupe Laughlin Behrens ("Behrens"), an agent of Century 21 A-1 Properties ("A-1 Properties"), acted as the real estate agent throughout the sale of the property to the Bishofs.

On January 31, 1989, the Bishofs signed a contract of sale in which Yarbrough warranted ***inter alia*** that the plumbing system in the residence would be in working order at the time of the closing. Prior to closing, the Bishofs noticed that the toilets would not flush properly and that the tubs, sinks, dishwasher, and washing machine would not drain properly. The Bishofs allege that both Behrens and Yarbrough assured them that these problems would clear up over time after the septic system had time to "settle in." They further allege that Behrens represented that she would put pressure on Yarbrough to fix any problems that did not clear up after a short time.

At closing, the Bishofs received a "Home Buyers Warranty" issued by the Home Buyers Warranty Corporation ("HBWC") and insured by National Home Insurance Company ("NHIC"). This warranty purported to provide certain workmanship coverage during the first year of the warranty, certain systems coverage for the first two years of the warranty, and certain structural coverage for the first ten years of the warranty.

Shortly after moving into the residence, the Bishofs noticed that the lot around their house would not drain properly and that "pop-ups" of raw sewage were occurring in the backyard of the property. Additionally, the Bishofs' problems with their toilets and the drainage of their tubs,

sinks, dishwasher and washing machine did not improve as Yarbrough and Behrens represented they would. The Bishofs reported these problems to Yarbrough, and he twice dug up the septic tank and moved it in an effort to remedy the problem.

Unable to receive satisfaction from Yarbrough, the Bishofs submitted their complaints to arbitration. In their request for arbitration, the Bishofs alleged that they had experienced problems with their septic system and site drainage system.

An arbitration hearing was conducted at the Bishofs' residence on September 7, 1990. The Bishofs told the arbitrator about all of the problems that they were experiencing with the toilets not flushing properly, the sinks and drains not draining properly, and the pop-ups of raw sewage appearing in the backyard. They also explained the problems they were experiencing with water not draining from their property.

The Bishofs allege that at this hearing Yarbrough told the arbitrator that the Bishofs problems were caused by excessive water usage occurring during their occupation of the residence. Yarbrough allegedly claimed that this excessive usage had created grooves in the septic lines and permanently ruined the Bishofs' septic system. The Bishofs allege that to support his claim Yarbrough presented water usage records which showed that the Bishofs had used an unusually high amount of water during the period that they had occupied the home.

After inspecting the home and hearing the testimony of the Bishofs and Yarbrough, the arbitrator found on September 12, 1990, that Yarbrough was not responsible for the septic system problems, but that he was responsible for the lot drainage problem. The arbitrator provided the Bishofs with a copy of the arbitration award and advised them in a letter that they could appeal the award if they so desired. The Bishofs did not appeal the arbitration award, but instead they accepted the award and executed a document entitled "Acceptance of Arbitrator's Award" in which they agreed to "accept the terms of said award, exactly as rendered, in full settlement of all complaints submitted for arbitration" on October 2, 1990.

Sometime around January 1, 1991, the Bishofs discovered that, contrary to Yarbrough's statements during the arbitration hearing, their unusually high water usage was due to water use by another contractor who had hooked a hose up to the Bishofs' water supply while working on a neighboring house.

Subsequent to the arbitration award, Yarbrough did not repair the site drainage problems to the satisfaction of the Bishofs. The Bishofs reported Yarbrough's noncompliance with the arbitration award to HBWC. Consequently, NHIC, by letter dated January 30, 1991, offered $654 as a cash settlement to be used to regrade the lot and repair the site drainage problem. As part of its offer of settlement, NHIC required the Bishofs to execute a Release and Assignment agreement ("Release"), releasing HBWC and NHIC from any and all claims concerning problems with the septic and drainage systems and assigning any claim arising from these defects to NHIC. The Bishofs executed the Release on February 5, 1991, and subsequently negotiated the settlement check.

On July 15, 1991, the Bishofs brought this suit, alleging that the Defendants had violated the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101-121, and had committed breach of contract, breach of warranties, negligence, outrageous conduct, fraud and misrepresentation. The Bishofs' Complaint sought rescission of the contract to purchase the property and return of the full purchase price in the amount of $57,000, together with treble damages pursuant to the Tennessee Consumer Protection Act, T.C.A. § 47-18-109. Additionally, the Bishofs sought damages for breach of warranties, damages for emotional and mental distress and exemplary damages. They further sought special damages resulting from their having to vacate the premises and secure other housing.

On June 22, 1993, the Bishofs filed a "Motion to Vacate Arbitration Award or in the Alternative to Modify or Correct the Award, Stay Arbitration and Hear the Case" ("Motion to Vacate"), alleging that the arbitration award had been knowingly procured by fraud on behalf of Yarbrough. In their motion, the Bishofs alleged that Yarbrough had misrepresented the cause of the Bishofs' problems in the arbitration proceeding and they further alleged that Yarbrough knew at the time that the Bishofs' problems were a result of Yarbrough's own "grossly inadequate workmanship,

grossly inadequate materials and inadequate and poor soil and geological conditions existing on the land."

On May 13, 1993, the Bishofs amended their Complaint to allege breach of the implied warranty of good workmanship and materials. Yarbrough, HBWC and NHIC all filed motions for summary judgment, alleging ***inter alia*** that the Amended Complaint failed to state a cause of action and arguing that the Bishofs' claims were barred by the Uniform Arbitration Act, T.C.A. §§ 29-5-301-320 and the Release signed by the Bishofs. Additionally, Yarbrough moved to dismiss on the ground that the action sounded in tort and was a claim for liquidated damages properly triable in circuit court.

The trial court denied the Bishofs' Motion to Vacate, holding that the Motion to Vacate had not been filed within 90 days from when the Bishofs allegedly discovered that the arbitration award had been procured by fraud. The trial court also found that the Bishofs were estopped from setting the arbitration award aside because they had accepted the arbitration award and executed the Release even though they knew the arbitration award was based upon possible fraud by Yarbrough.

The trial court confirmed the arbitration award and dismissed all of the Bishofs' claims concerning the septic system and site drainage system. The court determined that any claim against the remaining defendants must be first submitted to arbitration and had been prematurely filed in chancery court. Additionally, the trial court determined that the claims concerning defectively installed plumbing lines were due to be dismissed against HBWC and NHIC because they were discovered well after the warranty coverage for the plumbing system had expired.

The court then granted Defendant's motions for summary judgment as to outrageous conduct, fraud and all other claims asserted by Plaintiffs. Finally, the court ruled that it did not have "jurisdiction of suits in tort for unliquidated damages to person on [sic] property and if Plaintiffs prevail at a later time on any of the above issues the Court orders this suit to be transferred to Circuit pursuant to T.C.A. § 16-11-102."

The Bishofs appeal the trial court's decision, presenting the following issues for our review:

> 1. Whether the trial court erred in denying Plaintiffs' motion to vacate the arbitration award, or in the alternative modify, correct award[,] stay arbitration and hear case.
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> 2. Whether the trial court erred in ruling that the motion to vacate was not [timely] filed.
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> 3. Whether trial court erred in confirming the arbitration award.
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> 4. Whether the trial court erred in ruling that execution of the release and acceptance of the arbitration award expressly discharges and forever releases all the Defendants from all claims.
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> 5. Whether the trial court erred in ruling that Plaintiffs' failure to request arbitration as to the plumbing problems renders their court action improper at this time.
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> 6. Whether the trial court erred in granting all three [Defendants'] motions for summary judgment.
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> 7. Whether the trial court erred in ruling that the Plaintiffs' suit for rescission cannot be heard in chancery, but must be transferred to circuit court.

We will consider the Bishofs' first three issues together. The Bishofs argue that the trial court erred in refusing to vacate or modify the arbitration award due to the alleged misrepresentations made by Yarbrough during the arbitration proceedings. Judicial review of arbitration decisions is statutorily limited, and any judicial review must be conducted within those limits. ***Arnold v. Morgan Keegan & Co.***, 914 S.W.2d 445, 450 (Tenn. 1996). In respect to vacation of an arbitration award, T.C.A. § 29-5-313(a) provides:

> (a) Upon application of a party, the court shall vacate an award where:
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> (1) The award was procured by corruption, fraud or other undue means;
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> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
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> (3) The arbitrators exceeded their powers;
>
> (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or
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> (5) There was no arbitration agreement and the issue was not

> adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

T.C.A. § 29-5-313(a) (Supp. 1995). Additionally, T.C.A. § 29-5-313(b) provides:

> (b) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

T.C.A. § 29-5-313(b) (Supp. 1995).

Assuming ***arguendo*** that Yarbrough's statements during the arbitration hearing did constitute fraud as claimed by the Bishofs and assuming further still that Yarbrough's alleged fraudulent misrepresentations are sufficient to set aside an arbitration award under the Tennessee Uniform Arbitration Act,[1] we believe that the Bishofs' Motion to Vacate still must be denied due to the fact that the Bishofs failed to file their Motion to Vacate within 90 days of the time that they knew or should have known about Yarbrough's alleged fraud as required by T.C.A. § 29-5-313(b).

In a deposition taken on September 14, 1992, James Bishof stated that he discovered in January of 1991 that Yarbrough had incorrectly attributed the unusually high water usage to the Bishofs during the arbitration hearing. Despite this discovery in January of 1991, the Bishofs filed their Motion to Vacate on June 22, 1993.

The Bishofs argue on appeal that they timely filed their Motion to Vacate because they did not actually discover Yarbrough's alleged fraud until December 29, 1993, when the Bishofs'

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[1]We make this statement because it is unclear whether an arbitration award can be set aside under Tennessee law when the fraud alleged is not the fraud of the arbitrator, but is instead the fraud of one of the participating parties. We have found no authority in this jurisdiction addressing this issue.

expert witness, C. L. Howell, revealed that the faulty installation of plumbing was the source of the Bishofs' problems during a deposition. The Bishofs argue that knowledge of Yarbrough's misrepresentations about the Bishofs' excessive water usage did not constitute knowledge of Yarbrough's fraud because they had not discovered the actual cause of their problems at the time that they discovered Yarbrough had misrepresented the cause of their problems. We are not persuaded by the Bishofs' argument on this issue.

The Bishofs make their argument notwithstanding the fact that James Bishof stated in his September 14, 1992 deposition, taken well before December 29, 1993, (1) that the Bishofs first determined that the pipes in their plumbing system were installed improperly and were not draining properly sometime around January of 1991; and (2) that the Bishofs realized that the arbitration award had been based on Yarbrough's fraud in January of 1991. Consequently, we find the Bishofs' argument that they did not discover Yarbrough's fraud until December 9, 1993, to be somewhat disingenuous.

Therefore, we believe that reasonable minds could not differ with respect to the trial court's finding that sometime in January of 1991 the Bishofs knew or should have known that the arbitration award was procured by Yarbrough's fraud. Accordingly, we hold that the trial court did not err in determining that the Bishofs' Motion to Vacate was not timely filed.

As to modification of an arbitration award, T.C.A. § 29-5-314(a) provides:

> (a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:
> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
> (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

T.C.A. § 29-5-314 (Supp. 1995).

The Bishofs have failed to allege any facts that would constitute grounds for a modification of the award under this statute. As such, we believe that the trial court properly

confirmed the arbitration award and dismissed the Bishofs' claims arising from problems with their septic system and site drainage.

As their fourth issue, Plaintiffs argue that the trial court erred in finding that their execution of the Release and their acceptance of the arbitration award discharged and forever released all the defendants from all of the claims concerning the existing defects in the septic system. We disagree with Plaintiffs' contentions and affirm the trial court.

After Yarbrough failed to fulfill his obligations under the arbitration award, the Bishofs made demand upon HBWC to satisfy these obligations. Consequently, NHIC, by letter dated January 30, 1991, offered $654 as a cash settlement to be used to regrade the lot and repair the site drainage problem. As part of its offer, NHIC required the Bishofs to execute the Release. This document contained the following provisions:

> In consideration of the sum of $654.00, sufficiency of which is, hereby acknowledged, the undersigned homeowner(s) execute this Release and Assignment.
>
> The undersigned homeowners(s), for themselves and their heirs, agents, successors, and assigns expressly discharge and forever release the Insurer, (National Home Insurance Company or other insurer of the warranty), the Service (Home Buyers Warranty Corporation or any Builders Structural Services company), their employees, agents, successors, and assigns from all claims and actions, whether at law or in equity, that homeowner(s) now have or might have in the future arising as a result of the homeowner's submittal of the attached Notice of Claim and any additional notices of workmanship/systems defects, which notices, if any, are also attached hereto and specified as follows: Arbitration Award dated 9/12/90.
>
> Homeowner(s) assign to the Insurer and the Service all rights, claims, and actions, whether at law or in equity, which the homeowner(s) might have against any person or entity arising out of the above-referenced claim. Homeowner(s) agree to fully cooperate with the Service or Insurer in pursuit of these assigned rights, claims, and actions.
>
> The undersigned homeowner(s) understand and agree that this document is executed with the express intention of extinguishing all obligations on the part of the Insurer or the Service with regard to the defects described in the above-referenced claim. Homeowner(s) further understand that this document is not an admission of any liability by the Service or Insurer.

A general release covers all claims between the parties which are in existence and within their contemplation; a release confined to particular matters or causes operates to release only such claims as fairly come within the terms of the release. ***Cross v. Earls***, 517 S.W.2d 751, 752 (Tenn. 1974); ***Evans v. Tillett Bros. Constr. Co.,*** 545 S.W.2d 8, 11 (Tenn. App. 1976). Where a release has been executed in writing without fraud, misrepresentation or duress and with every reasonable opportunity for consideration of its terms, it will be binding. ***Evans***, 545 S.W.2d at 11.

The language of the Release in this case is clear and cogent. It contains no terms which can be deemed as a general release or a release of any claim except those that exist or later arise as a result of the issues previously arbitrated by the parties to the agreement.

> A release which is confined or which is construed as being confined to claims or demands arising from, or relating to, a specified matter operates to release all the particular claims or demands properly embraced in the specifications, but it does not release other claims or demands, . . .

Cross, 517 S.W.2d at 752-53 (quoting 76 C.J.S. ***Release*** § 51, p. 696). Because the arbitration award referred to in the Release dealt specifically with liability for the defects in the Bishofs' sewer system and site drainage, we believe that the trial court properly held that the Bishofs were barred from bringing any claims arising from these defects.

Inasmuch as the Release contains a provision assigning all claims arising from defects in the septic and site drainage systems to HBWC and NHIC, we believe that the trial court properly held that this agreement barred the Bishofs from bringing claims arising from these defects against the other defendants.

"In the absence of statute, an obligee has a right to assign a chose in action and the general rule is that the unqualified assignment of such right of action vests in the assignee the title thereto to the same extent as the assignor had it at the date of the assignment." ***Kivett v. Mayes***, 354 S.W.2d 492, 494 (Tenn. App. 1961). An assignment "passes the whole right of the assignor, nothing remaining in him capable of being assigned, and the assignor has no further interest in the subject matter of the assignment." 6A C.J.S. ***Assignments*** § 73 (1975).

The general rule is that an assignee in whom legal title is vested must bring an action as he is the real party in interest. ***Northwest Oil & Ref. Co. v. Honolulu Oil Corp.***, 195 F. Supp. 281, 287 (D. Mont. 1961); ***Duke v. Brookshire Grocery Co.***, 568 S.W.2d 470, 472 (Tex. App. 1978). Typically, an assignor cannot bring an action after he has fully and completely transferred to another title to a cause of action. ***Acme Blacktop Paving Corp. v. Brown & Matthews***, 294 N.Y.S.2d 826, 827 (N.Y. App. Div. 1968); ***Bernard Bake Shop v. Glassman***, 109 N.Y.S.2d 520, 521 (N.Y. Sup. Ct. 1952).

Moreover, Rule 17.01 of the Tennessee Rules of Civil Procedure mandates that "[e]very action shall be prosecuted in the name of the real party in interest." The assignment language in the Release is sufficiently broad and explicit to divest the Bishofs of all of their interests in a cause of action arising from defects in their septic and site drainage systems. As such, the Bishofs are no longer the real parties in interest in respect to those claims. Accordingly, the Bishofs cannot properly bring a claim against any one of the Defendants based on those defects. Consequently, the trial court properly dismissed all claims brought by the Bishofs which arose from these two specific defects.

The Bishofs further argue that the release is invalid because it was procured through the fraud of Yarbrough. However, as discussed ***supra***, it is clear from the deposition testimony of James Bishof that the Bishofs discovered Yarbrough's alleged fraud prior to their signing of the release. As such, we cannot see how the Bishofs can claim to have reasonably relied upon Yarbrough's statements or to have been defrauded when they signed the release. Consequently, we affirm the trial court's determination that the release is valid.

The trial court found that the Plaintiffs' claims concerning the plumbing system were distinct from their claims regarding their defective septic and site drainage systems. Thus, the trial court determined that its confirmation of the arbitration award did not affect Plaintiffs' claims that arose from their defective plumbing system. The trial court's finding is supported by the undisputed deposition testimony of C. L. Howell, who testified that the septic system and the plumbing system were two distinct systems.

Consequently, we will henceforth consider only the Bishofs' claims that arise as a result of their allegedly defective plumbing. After determining that they were distinct from Plaintiffs' previously arbitrated claims, the trial court dismissed the Bishofs' claims regarding the plumbing, finding that they should be arbitrated pursuant to the Warranty Agreement entered into by the Bishofs, HBWC, NHIC and Yarbrough. The Bishofs argue that the trial court erred in determining that they were bound to arbitrate their claims against the Defendants when the Bishofs did not sign or initial the provision in the Warranty Agreement, which required them to submit any controversy to arbitration.

T.C.A. § 29-5-302(a) of the Tennessee Uniform Arbitration Act provides:

> (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; provided, however, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.

T.C.A. 29-5-302(a) (Supp. 1995).

Because the Bishofs did not sign or initial the arbitration agreement and there is no indication in the record that they have engaged in a separate agreement to arbitrate any claim in regard to their plumbing system, we hold that the trial court erred in dismissing the Bishofs' claims in regard to their allegedly defective plumbing system.[2]

The court further found that HBWC and NHIC were dismissed from any subsequent

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[2]Notwithstanding the absence of a valid arbitration agreement, the Bishofs continue to be bound by the arbitration award inasmuch as it addresses the defects in their septic and site drainage systems because they failed to comply with T.C.A. § 29-5-313(a)(5) and T.C.A. § 29-5-313(b) when they did not seek to vacate the arbitration award within 90 days of delivery of the award. Moreover, there is no proof in the record that the Bishofs ever objected to the arbitration hearing. In fact, as previously noted, the Bishofs filed a request for arbitration and accepted the arbitrator's award. T.C.A. § 29-5-313(a)(5) disallows the vacation of an arbitration award on the ground that there was no arbitration agreement when the party seeking the vacation participated in the arbitration hearing without raising the objection.

claim because the plumbing defect was discovered after the warranty had expired. It is clear that the trial court erred in making this finding because the warranty specifically states that it applies to all defects of an item covered by the warranty that occur during the applicable warranty term. Accordingly, we hold the trial court erred when it dismissed NHIC and HBWC from all claims arising from the allegedly defective plumbing.

We turn now to the issue of which claims the Bishofs will be entitled to pursue upon remand. The Bishofs argue that the trial court erred in granting summary judgment to each Defendant on the Bishofs' claims of fraud, violation of the Tennessee Consumer Protection Act, outrageous conduct, and breach of the implied warranty of good workmanship and materials.

We will consider the Bishofs' claims ***seriatim*** to determine whether summary judgment was properly granted. A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56.03 T.R.C.P.; ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Dunn v. Hackett***, 833 S.W.2d 78, 80 (Tenn. App. 1992). When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Byrd***, 847 S.W.2d at 210-11. In ***Byrd***, the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial.

Id. at 211.

The summary judgment process should only be used as a means of concluding a case when there are no genuine issues of material fact, and the case can be resolved on the legal issues

alone. ***Id.*** at 210 (citing ***Bellamy v. Federal Express Corp.***, 749 S.W.2d 31, 33 (Tenn. 1988)).

Plaintiffs' Complaint contains allegations of fraud on behalf of Yarbrough, A-1 Properties and Lupe Laughlin Behrens. Although perhaps inartfully drafted, it appears that Plaintiffs' seek rescission of their contract with Yarbrough on the basis of Behrens and Yarbrough's fraudulent or negligent misrepresentations or alternatively they seek an award of damages due to these same misrepresentations.

It is clear that an individual induced by fraud to enter into a contract may elect between two remedies. He may treat the contract as voidable and sue for the equitable remedy of rescission or he may treat the contract as existing and sue for damages at law. ***Vance v. Schulder***, 547 S.W.2d 927, 931 (Tenn. 1977); ***Derryberry v. Hill***, 745 S.W.2d 287, 291 (Tenn. App. 1987); ***Graham v. First Am. Nat'l Bank***, 594 S.W.2d 723, 726 (Tenn. App. 1979). The trial court granted summary judgment to Yarbrough, Behrens, and A-1 Properties finding that the Bishofs had failed to present facts supporting a cause of action for fraud against these defendants.

In an affidavit filed in opposition to Defendants' motions for summary judgment, James Bishof states that:

> Shortly after moving into the residence I noticed slow flushing and draining and bubbling of toilets and tubs, sinks, dishwasher and washing machine. When I addressed these occurrences with Wesley Yarbrough he assured me that those things were experienced by all residences of new houses with septic systems and that these conditions would clear up on their own once the plumbing and septic systems "settled in" through continued use. I had never owned a house with a septic system before and knew nothing about them.
>
> In reliance on Mr. Yarbrough's assurances Mrs. Bishof and I met with the realtor, Lupe Laughlin Behrens to discuss a closing date.
>
> Prior to closing, Lupe Laughlin Behrens, assured us that the slow draining of toilets, tubs, sinks and dishwasher and washing machine would clear up on their own with consistent steady use and if they did not she could put sufficient pressure to bear on the contractor, Wesley Yarbrough, to correct the slow draining.

Fraud contains four elements: (1) an intentional misrepresentation of material fact, (2) knowledge of the representation's falsity, and (3) an injury caused by reasonable reliance on the

representation. ***Axline v. Kutner***, 863 S.W.2d 421, 423 (Tenn. App. 1993). The fourth element requires that the misrepresentation involve a past or existing fact or, in the case of promissory fraud, that it involve a promise of future action with no present intent to perform. ***Axline***, 863 S.W.2d at 423; ***Oak Ridge Precision Indus., Inc. v. First Tenn. Bank***, 835 S.W.2d 25, 28 (Tenn. App. 1992); ***Steed Realty v. Oveisi,*** 823 S.W.2d 195, 200 (Tenn. App. 1991); ***Stacks v. Saunders***, 812 S.W.2d 587, 592 (Tenn. App. 1990).

In commercial transactions, Tennessee courts have recognized a less stringent standard of liability for fraudulent misrepresentations than the common law action for deceit. As our Supreme Court noted in ***Ritter v. Custom Chemicides, Inc.,*** 912 S.W.2d 128 (Tenn. 1995):

> One who, in the course of his business, profession, or employment, or during a transaction in which he had a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon such information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Ritter, 912 S.W.2d at 130; ***Haynes v. Cumberland Builders, Inc.***, 546 S.W.2d 228, 232 (Tenn. App. 1976); ***McElroy v. Boise Cascade Corp.***, 632 S.W.2d 127, 130 (Tenn. App. 1982); ***Keller v. West-Morr Investors, Ltd.***, 770 S.W.2d 543, 546 (Tenn. App. 1988).

Where a claim of fraud is presented, ordinarily only upon a full trial of the action can the issue properly be developed. As a general rule, summary judgment is not an appropriate procedure for the disposition of such an issue. ***Fowler v. Happy Goodman Family***, 575 S.W.2d 496, 499 (Tenn. 1978). However, it is incumbent upon the party asserting fraud, when confronted by a motion for summary judgment, to produce some competent and material evidence legally sufficient to support his claim or defense. ***Fowler***, 575 S.W.2d at 499.

Taking the strongest legitimate view of the evidence in favor of the nonmoving party, we find that the trial court erred in granting summary judgment in favor of Yarbrough. Yarbrough allegedly told the Bishofs that their drainage problems would clear up in time. He did not qualify this statement by telling the Bishofs this was merely his opinion or what he believed. He stated this

belief as a fact and the Bishofs interpreted it as such. His statements later proved to be false when the Plaintiffs' problems did not clear up as promised and an investigation revealed improperly installed plumbing lines. Because Yarbrough built the house, there is a clear inference that he was in a position to know that the plumbing lines were improperly installed. Finally, Plaintiffs, who are not experts in homebuilding, had every right to rely on these representations from the builder that their problems would clear up after use.

As such, we believe that a question of fact exists as to whether the Bishofs justifiably relied upon the fraudulent or negligent misrepresentations of Yarbrough in respect to the status of their plumbing when they purchased their home. Consequently, we hold that the trial court's grant of summary judgment in respect to Yarbrough on the issue of fraudulent and negligent misrepresentation was improper.

In regard to Behrens and A-1 Properties, the Bishofs have presented no proof to support their allegations of fraudulent or negligent misrepresentation on behalf of Behrens or A-1 Properties. The Bishofs relied solely on James Bishof's affidavit to oppose Defendants' motions for summary judgment. The Bishofs have offered no proof that Behrens and A-1 Properties, as realtors, knew or should have known that defectively installed plumbing was at the source of the Plaintiffs' problems.

Furthermore, any representation by Behrens that she would put pressure on Yarbrough to fix any slow drainage problems would not constitute a misrepresentation of an existing or past fact. Therefore, such a statement does not meet the definition of actual fraud. To constitute promissory fraud, Plaintiffs would be required to show that the statement involved a promise of future action with no present intent to perform. ***Oak Ridge Precision,*** 835 S.W.2d at 29. There is no proof that Behrens did not intend to perform when she told Plaintiffs that she would put pressure on Yarbrough to fix any slow drainage problems. Consequently, we believe that the trial court properly granted summary judgment in favor of Behrens and A-1 Properties in respect to the Bishofs' claims of fraudulent or negligent misrepresentation.

The trial court also granted summary judgment in favor of Yarbrough, Behrens, A-1

Properties, NHIC and HBWC on the issue of their alleged violation of the Tennessee Consumer Protection Act. T.C.A. § 47-18-104(b)(27) of the Tennessee Consumer Protection Act of 1977 provides that "[e]ngaging in any other act or practice which is deceptive to the consumer or any other person" is unlawful and in violation of the Act. T.C.A. § 47-18-109(a) provides in pertinent part:

> (a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.
>
> . . . .
>
> (3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

T.C.A. § 47-18-109(a) (1995).

The unfair or deceptive act does not have to be fraudulent or intentional to impose liability under the Act as a matter of law. Negligent misrepresentations which are unfair or deceptive to the consumer can also be deemed violations of the Act. ***Smith v. Scott Lewis Chevrolet, Inc.***, 843 S.W.2d 9, 13 (Tenn. App. 1992). Once again, taking the strongest legitimate view of the evidence in favor of the nonmoving party, we believe that the Bishofs have presented sufficient proof to create a question of fact as to whether Yarbrough engaged in an unfair or deceptive act when he sold the house to the Bishofs. Under the same reasoning as above, we believe that Plaintiffs have failed to present proof sufficient to create an inference that Behrens and A-1 Properties acted unfairly or deceptively in respect to the sale of the house.

Moreover, we cannot find any evidence in the record which would support a finding that HBWC or NHIC acted unfairly or deceptively in any way. As such, we hold that the trial court erred in granting summary judgment to Yarbrough in respect to his alleged violation of the Consumer Protection Act, but we affirm the trial court's grant of summary judgment to Behrens, A-1 Properties, HBWC and NHIC.

As to Plaintiffs' cause of action for outrageous conduct, this cause of action was first recognized in the case of ***Medlin v. Allied Investment Co***., 398 S.W.2d 270 (Tenn. 1966). In ***Medlin***, the Court, adopting the rule as expressed in the Restatement (Second) of Torts § 46, stated:

> These factors are set out in the Restatement of Torts (2d), § 46, "Outrageous Conduct Causing Severe Emotional Distress".
>
> > "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm."
>
> Clarification of this statement is found in the following comment:
>
> > "d. ***Extreme and Outrageous Conduct***. The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct is characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly untolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'"

Medlin, 398 S.W.2d at 274.

Pursuant to ***Medlin***, liability for the tort of "outrageous conduct" exists only where (1) the conduct of the defendants has been so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society, and (2) the conduct results in serious mental injury. ***Id.***; ***Swallows v. Western Elec. Co.,*** 543 S.W.2d 581, 582 (Tenn. 1976); ***Dunn v. Moto Photo, Inc***., 828 S.W.2d 747, 752 (Tenn. App. 1991).

It is the trial court's responsibility to determine, in the first instance, whether the defendant's conduct as a matter of law is so extreme and outrageous as to permit recovery.

Alexander v. Inman, 825 S.W.2d 102, 105 (Tenn. App. 1991) (citing ***Medlin,*** 398 S.W.2d at 275)**.**

We have concluded that the allegations of Plaintiffs, if true, do not rise to the level of outrageous conduct. Consequently, we hold that the trial court properly granted summary judgment to all Defendants on Plaintiffs' claims of outrageous conduct.

In respect to the Bishofs' claim for breach of the implied warranty of good workmanship and materials, we note that this implied warranty was recognized in this state in ***Dixon v. Mountain City Construction Co.***, 632 S.W.2d 538 (Tenn. 1982). Quoting from the North Carolina Supreme Court's decision in ***Hartley v. Ballou***, 209 S.E.2d 776 (N.C. 1974), the court stated:

> "[w]e hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee."

Dixon, 632 S.W.2d at 541.

The court in ***Dixon*** further reasoned that this warranty is implied only when the written contract is silent. Builder-vendors and purchasers are free to contract in writing for a warranty upon different terms and conditions or to expressly disclaim any warranty. ***Axline,*** 863 S.W.2d at 424. However, any disclaimer of this warranty must be in clear and unambiguous language. ***Id.***

In ***Dewberry v. Maddox***, 755 S.W.2d 50 (Tenn. App. 1988), this Court held:

> Because the buyer is completely relying on the skills of the vendor-builder in this situation, we think that in order to have a valid disclaimer of the implied warranty, it must be in clear and unambiguous language. The buyer must be given "adequate notice of

> the implied warranty protections that he is waiving by signing the contract." ***Tyus v. Resta***, 328 Pa.Super. 11, 476 A.2d 427, 432 (1984). In addition, such a "disclaimer" must be strictly construed against the seller. Id. This is generally the law in other jurisdictions which have adopted this, or a comparable, implied warranty of good workmanship and materials. See ***Belt v. Spencer***, 41 Colo. App. 227, 585 P.2d 922 (1978); ***Hesson v. Walmsley Construction Co.***, 422 So.2d 943 (Fla.App.1982); ***Griffin v. Wheeler-Leonard & Co., Inc.***, 290 N.C. 185, 225 S.E.2d 557 (1976).

Dewberry, 755 S.W.2d at 55.

The Warranty Agreement in the instant case does not contain an express, unambiguous disclaimer of the implied warranty of good workmanship and materials. Therefore, the Plaintiffs should be allowed to seek damages against Yarbrough for the breach of this implied warranty upon remand for their allegations of defectively installed plumbing.

In regard to Plaintiffs' final issue, chancery courts have both statutory and inherent jurisdiction involving suits for rescission. ***See Tucker v. Simmons***, 287 S.W.2d 19, 21 (Tenn. 1956). As we believe the reason for this lawsuit and the gravamen of this lawsuit, as stated in the Bishofs' Complaint, is for rescission of the underlying contract, we hold that the trial court erred in dismissing the Bishofs' claim due to lack of jurisdiction. When a chancery court has jurisdiction for one purpose, it will take jurisdiction for all purposes incidental to its jurisdiction of the main subject. ***Tucker***, 287 S.W.2d at 21; ***Martin v. Martin,*** 755 S.W.2d 793, 797 (Tenn. App. 1988).

In summary, we hold (1) that the trial court properly confirmed and upheld the arbitration award in this case; (2) that the Plaintiffs cannot maintain an action against any one of the Defendants for the defects in their septic and site drainage systems that were previously arbitrated since they effectively assigned all claims arising out of the defective septic and site drainage systems to NHIC and HBWC; (3) that the alleged defects of the Plaintiffs' plumbing system are distinct from those of the septic and site drainage systems; (4) that the Plaintiffs are not bound to arbitrate their claims concerning the plumbing system in the absence of a signed arbitration agreement; (5) that the trial court improperly granted summary judgment in favor of Yarbrough on Plaintiffs' claims of misrepresentation and violation of the Tennessee Consumer Protection Act; (6) that the trial court properly granted summary judgment to all Defendants on Plaintiffs' claims of outrageous conduct;

(7) that the trial court improperly granted summary judgment in favor of Yarbrough for breach of the implied warranty of good workmanship and materials; and (8) that the chancery court has jurisdiction to hear this case since the gravamen of Plaintiffs' Complaint is based on the equitable remedy of rescission.

It results that the judgment of the trial court is affirmed in part, reversed in part and this cause is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed

equally to Appellants and Appellees, for which execution may issue if necessary.

_____
FARMER, J.

_____
HIGHERS, J. (Concurs)

_____
TOMLIN, Sr. J. (Concurs)