IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 16, 2016 Session

JEFF LOWE v. JOHN SMITH, ET AL.

Appeal from the Chancery Court for Coffee County
No. 2014CV213 Vanessa Jackson, Judge

No. M2015-02472-COA-R3-CV – Filed September 19, 2016

Plaintiff seller filed suit against defendant buyers after buyers stopped paying interest on a line of credit under the terms of a contract for the sale of a convenience store. The trial court concluded that both sides breached the contract. As a result, the trial court ordered that buyers were required to pay the seller the contracted amount, less $16,000.00 resulting from buyer's breach. Buyers appealed. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

Jason L. Huskey, Manchester, Tennessee, for the appellants, John Smith and Karen Smith, d/b/a J & K Market.

Eric J. Burch, Manchester, Tennessee, for the appellee, Jeff Lowe.

OPINION

BACKGROUND

This case arises from a dispute between Plaintiff/Appellee Jeff Lowe and Defendants/Appellants John Smith and Karen Smith (together with Mr. Smith, "Appellants") concerning the sale of a convenience store business known as J&K Market ("J&K" or "the business"). Mr. Lowe owned and operated several convenience stores over a period of ten years. Mr. Lowe owned the business but not the real estate upon which the business is located ("real estate"). The real estate, which is owned by Doctor Hershel Taylor ("Dr.

Taylor") and from whom Mr. Lowe rented the premises, is located on the McMinnville Highway in Manchester, Coffee County, Tennessee, in close proximity to Interstate 24.[1] Mr. Lowe acquired J&K in September 2010 and operated it himself until he sold it to Appellants in July 2012. Sometime after J&K began operation, Mr. Lowe opened up a line of credit with American City Bank ("line of credit") to pay for the operating costs of the business including buying the necessary equipment and inventory.

Appellants were customers of the business. Before buying J&K, Mr. Smith drove a truck and Ms. Smith worked in a factory. In January of 2012, Ms. Smith was diagnosed with leukemia. In early June 2012, Ms. Smith approached Mr. Lowe to discuss buying J&K in part because of her desire to get Mr. Smith to quit his job. The discussions continued for about a month, and Appellants had the opportunity to do a walk-through of the store whereupon Appellants and Mr. Lowe entered into an oral agreement for the sale of the business. The inventory was well-stocked the day of the walk-through, and Appellants later testified that they assumed that they would receive the business in the same condition. Neither party conducted an inventory count of J&K. Once Appellants believed that the business was theirs, both Mr. and Ms. Smith quit their respective jobs. On July 3, 2012, the parties entered into a handwritten agreement titled "Bill of Sale." The agreement called for the sale of the "business of J&K[]" for $48,000.00 in cash. In addition to the cash payment, Appellants were to assume Mr. Lowe's line of credit totaled at approximately $225,000.00. Mr. Lowe testified that he based the $48,000.00 on the fact that he worked at J&K for two years without receiving a check, and the $225,000.00 was "what it took [him] to . . . build the business." When he first opened J&K, Mr. Lowe had to borrow money to stock the business with "the box, most everything in the store from the tables to the shelves full or [sic] product sets" such as "the product, the deli boxes, pizza ovens, drink machines, things like that in order to get it opened and ready for business." Pursuant to the contract, Appellants were given three years to either "pay the note off or work with the bank to remove [Mr. Lowe] from the note." The contract further provided that Appellants agreed to "keep the interest current" on the line of credit until they were able to refinance or pay off the line of credit. Finally, the contract provided that "[i]f at any point in time the interest becomes more than thirty (30) days late, the sale and agreement becomes null and void and [Mr. Lowe] will re-take the business." The contract indicates that Mr. Lowe, Mr. Smith, and Ms. Smith signed the contract at 10:01 p.m.

At the time they signed the contract, the parties did not discuss the amount of gasoline or inventory that was to be included in the sale, nor was any discussion of these items included in the parties' written agreement. Shortly after taking possession of the business, however, the parties engaged in a dispute concerning the proper inventory of the business. Appellants asserted that the inventory, including both gas and retail items, was dangerously low and that the equipment was in poor working condition. There is no dispute that at some

[1] Dr. Taylor purchased the real estate and generally paid for the remodeling of the building.

point after the sale, Ms. Smith telephoned Mr. Lowe to discuss the situation. During this discussion, Ms. Smith informed Mr. Lowe that Appellants would only pay the interest on the line of credit for eighteen months and no more due to the depleted inventory and other issues with the agreement, discussed in detail, *infra*. Mr. Lowe replied that Appellants should "do what you have to do and I'll do what I have to do." Allegedly as a result of this conversation, Appellants paid the interest on the line of credit for only eighteen months or until December 2013.

On June 26, 2014, Mr. Lowe filed his complaint for damages in Coffee County Chancery Court. Mr. Lowe asserted that Appellants breached the contract in failing to make the payments on the line of credit as originally agreed. Mr. Lowe sought to retake possession of the business pursuant to the contract, to recover for the interest payments he made on the line of credit when Appellants stopped paying, and "to recover a judgment against [Appellants] for the remaining balance on the [line of credit]."[2]

Appellants filed an answer to the complaint and counter-claim on September 3, 2014. Appellants admitted that they had agreed to assume the line of credit in exchange for the business but further asserted that:

> Immediately after taking possession of the business, Ms. Smith learned that [Mr. Lowe] had removed all of the inventory of value, moving most if not all of it to another store owned by [Mr. Lowe]. As a result, she called [Mr. Lowe] and advised that because of the removal of much of the inventory she would make payments on the debt for no longer than a year and a half, which [Appellants] did.

Appellants further asserted that the purchase price of approximately $270,000.00 was excessive in light of their allegation that they only received "a business in name only, some out of date inventory, a few broken pieces of equipment, and one or two table and chair sets." Appellants asserted that the removal of the inventory "constituted fraud . . . rendering the contract void." Appellants also asserted that there was no meeting of the minds as to the subject matter of the contract as Appellants did not receive all that they anticipated in the sale. Appellants additionally alleged that after learning of the depleted inventory, the parties agreed to a modification of the original contract wherein Appellants would only be liable for the line of credit interest payments for eighteen months and that, even if modification was not agreed to by Mr. Lowe, Appellants "detrimentally relied on that fact and continued to make payments until December 2013." Appellants finally contended that returning the premises,

[2] In Mr. Lowe's response to Appellants' closing argument filed on October 22, 2015, he clarified that he wished to assume the line of credit in return for repossession of the store and not to direct Appellants to pay off the $225,000.00 balance.

equipment, and inventory to Mr. Lowe would be inappropriate, as many of those items had either been purchased or repaired by Appellants.

On April 22, 2015, in response to discovery requests concerning the income of the business after its sale, Ms. Smith filed the following affidavit declaring:

> In a letter dated April 7, 2015, [Mr. Lowe's counsel] requested all daily cash register tapes that we have in relation to J&K Market for the first two months that we owned the store. I do not have those. Once the Sales and Use Tax Reports are prepared, I dispose of the tapes. I have provided the Sales and Use Tax Reports that are in my possession; however, if you need others I will contact my CPA and see if they have copies of other reports.

The case was heard without a jury on November 3, 2015. Mr. Lowe testified that he gave Appellants the contract to take home before they returned to sign it and that Appellants did in fact take it home. Ms. Smith, however, testified that Mr. Lowe called Appellants to the business premises late in the evening to sign and execute the contract of sale. According to Ms. Smith, Appellants did not know what the contractual terms were until they arrived at J&K to sign the contract. However, she admitted that whatever was in the Bill of Sale was basically what the parties had agreed to. Ms. Smith further testified that Appellants opted not to conduct another walk-through of the store because of the late hour that Mr. Lowe had called them in to sign the contract.

According to Ms. Smith, after Appellants assumed ownership of the store the next day, "there was no gas left in the store," "there was hardly [any] beer left," and "there were cigarettes missing." Ms. Smith testified that one day after taking possession of the business, she made a phone call to Mr. Lowe to complain about the depleted inventory and poor condition of the equipment. During this conversation, Ms. Smith testified that she informed Mr. Lowe that Appellants would only pay the interest on the loan for eighteen months. According to Ms. Smith, Mr. Lowe's reply was "do what you have to do and I'll do what I have to do." In his testimony, Mr. Lowe largely admitted the substance of this communication but contended that he did not receive this phone call from Ms. Smith until fifteen or sixteen months after Appellants took possession of the business.

Despite the alleged deficiencies in the inventory of the business, Appellants paid Mr. Lowe $48,000.00 approximately ten days after taking possession of the business and paid the interest on the line of credit for eighteen months, from July 2012 to December 2013. Beginning on January 2014 through September 2014, Mr. Lowe testified that he was required to pay $24,636.83 on the line of credit.

Terri Trail, Mr. Lowe's attorney's assistant, testified that she compiled summaries of records of products purchased from Amcon Distributing Company ("Amcon") from October 2011 through February 2013. Amcon supplied J&K with cigarettes, tobacco, candy, food items, general merchandise, and automotive supplies.[3] Under Mr. Lowe's ownership of the business from November 2011 through June 2012, J&K spent $12,000.00 to $19,000.00 per month on Amcon supplies, while under Appellants' ownership from July 2012 through September 2012, J&K spent approximately $13,000.00 to $18,000.00.[4] Brian McCall from Midsouth Distributing ("Midsouth"), which supplied Miller beer and Coors beer products to J&K before and after the sale, testified at trial for Mr. Lowe. When asked about his interaction with Appellants immediately after they took over the store, Mr. McCall testified that "[i]t was business as usual," that "[p]roduct was there," and that there was "[n]othing unusual" about Appellants' orders from Midsouth. He further testified that if the beer products were depleted, then "it would probably be [$]2,500[.00] to $3,000[.00] to fully stock the shelves. Mr. McCall testified, however, that Appellants did not need to fully stock J&K's shelves on that day. According to Mr. McCall, there had been no change in the amount of beer products sold to J&K since June 2012 until the date of the hearing. In fact, records admitted into evidence showed that the order Appellants placed during July when they took over J&K was slightly smaller than the orders Mr. Lowe had been placing throughout his ownership of J&K. Ms. Smith explained, however, that she could not place the full order that was needed because Appellants did not have the money to fully stock the inventory at the time. According to the regional sales manager for Amcon, J&K was not completely depleted of the inventory supplied by Amcon when Appellants took possession and that, if it was depleted, the purchase total for the month of July should have been much higher than the $13,200.14 that Appellants paid to restock inventory.

Other witnesses, however, disputed that the store was stocked at an appropriate level after it was sold to Appellants. Jeremiad Hibdon, a J&K customer, testified that Mr. Lowe allowed him to pump gas for free one day after he paid for his groceries, allegedly after Mr. Lowe already reached an oral agreement to sell J&K to Appellants. Carolyn Guyear, a former employee of J&K under both Mr. Lowe and Appellants, testified that she worked in the store right before Mr. Lowe sold it and that they had ample cigarettes in stock. She arrived at work "within two days" after Appellants took over and observed that a "noticeable" amount of cigarette stock was missing. Josephine Gibbons, who was employed as a cook at J&K, testified that prior to the sale of the business to Appellants, Mr. Lowe closed down J&K's kitchen. According to Ms. Gibbons, Mr. Lowe instructed her to empty out the food in the box freezer and carry it to Hilltop Market, a convenience store located about a mile and a half

[3] Amcon no longer serviced J&K as of the date of trial.

[4] Totals from October 2012 through February 2013 under Appellants' ownership plummeted, ranging from $2,000.00 to $6,000.00. No explanation was given as to why the totals dropped after the first few months of Appellants' assumption of ownership.

from J&K. Mr. Lowe alleged that Hilltop Market belonged to his girlfriend at the time the parties entered into the Bill of Sale. Ms. Smith contended that it cost Appellants between $13,000.00 to $16,000.00 to restock to the store to the level it had been during their walk-through.

Ms. Smith testified that Mr. Lowe represented to Appellants that J&K cleared $60,000.00 per month but that the business wasn't "making nowhere near that." According to Ms. Smith:

> We had no choice but to keep running that store and try to make something of it. Jeff even told us that he paid $60,000[.00]. I am not—that store has not—even $5,000[.00] a month.

At trial, the parties also disputed whether they even reached an agreement on what was included in the sale. Ms. Smith testified that Mr. Lowe told her he "owned everything in the store." According to Ms. Smith, she believed this included the real estate. Mr. Lowe testified that inventory was never even discussed and that he made no guarantee as to how much gas he was going to leave in the tanks. Rather, he testified that he intended to leave enough gas to prevent alarms from going off. On cross-examination, Mr. Lowe conceded that "the business" included inventory, a three-door cooler, a hotbox, some shelves, a used fountain drink machine, a used chest freezer, a deli box, a stove, and an oven. Mr. Lowe added, however, that "the business" included the clientele and the use of a desirable location. According to Mr. Lowe, "it is a little farfetched to think you can buy that corner of [real estate] with gas and tanks for [$]225[,000.00]."

According to Ms. Smith, Appellants learned of the true owner of the real estate only after they made the $48,000.00 payment to Mr. Lowe, approximately ten days after Appellants assumed ownership the business. On cross-examination, Ms. Smith admitted that she had never asked for a deed to the store:

> Q: Did you ever ask for the deed to the store?
> A: No, because I thought we would [not] get the deed until the loan was paid off, and that was ten days. I still thought in ten days we still had that store was ours after paying that loan off.
> Q: You purchased real estate before, haven't you ma'am?
> A: I have not. Not Commercial.
> Q: You have never purchased a piece of land?
> A: I have a house.
> Q: Did you know that land is transferred and property is transferred by deed?
> A: I did.
> Q: Did you ever ask for a deed of the [real estate]?

A: No, sir.
Q: Did you ever look for a deed to the [real estate]?
A: I did pull a deed up later and after we found out everything [Mr. Lowe] done to us, yes.
Q: The contract makes no mention of transfer of the real estate, does it?
A: It does not . . . .

Dr. Taylor testified that he could not remember whether he discussed rent payments with Appellants before or after Appellants took over the business.

Following the bench trial, the trial judge requested that the parties file written final arguments with proposed findings of fact. The trial court filed an "Opinion & Order" on November 3, 2015, and a final order on November 16, 2015, which incorporated the Opinion & Order by reference. In the Opinion & Order, the trial court found that the agreement between the parties did not include the real estate and concluded that although Mr. Lowe breached the agreement between the parties for the sale of the business by delivering nonconforming goods, Appellants accepted the goods and gave Mr. Lowe notice of the nonconformity. The trial court therefore ordered that Appellants pay any interest payments that Mr. Lowe paid on the line of credit as of the date of trial and assume the approximate $225,000.00 balance of the line of credit. As damages for Mr. Lowe's breach, the trial court allowed Appellants a credit of $16,000.00, which was the amount Ms. Smith testified that Appellants had to spend to fully stock J&K. The trial court subtracted $16,000.00 from $24,636.83, the amount paid by Mr. Lowe on the line of credit when Appellants stopped paying, the total of which came out to be $8,636.83. The trial court further concluded that there was no modification or novation of the parties' agreement for the sale of J&K and that the enforcement of the Bill of Sale between Mr. Lowe and Appellants was not unconscionable.

From this order, Appellants timely appealed.

ISSUES

Appellants raise the following issues on appeal, which are taken from their brief and restated as follows:

1. Whether the trial court erred in its conclusion that a binding contract existed between the parties.
2. Whether the trial court erred by neither recognizing that a novation nor a modification[5] existed between the parties.

[5] These issues were not raised in Appellants' answer and counter-complaint. Without objection,

3. Whether the trial court erred "by not recognizing the unjust enrichment to [Mr. Lowe by allowing [Appellants] to operate for two years on what they thought was a modification."
4. Whether the trial court erred in failing to recognize the contract as unconscionable.
5. Whether the trial court erred by fashioning a remedy when the contract contained a provision in the event of a breach.

STANDARD OF REVIEW

The trial court heard this case sitting without a jury. Accordingly, we review the trial court's findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). No presumption of correctness, however, attaches to the trial court's conclusions of law and our review is *de novo*. ***Blair v. Brownson***, 197 S.W.3d 681, 684 (Tenn. 2006) (citing ***Bowden v. Ward***, 27 S.W.3d 913, 916 (Tenn. 2000)). Additionally, the trial court's findings on credibility, whether express or implicit, are entitled to great deference on appeal. *See* ***Taylor v. McKinnie***, No. W2007-01468-COA-R3-JV, 2008 WL 2971767, at *4 (Tenn. Ct. App. Aug. 5, 2008). Where the trial court's factual determinations are based on its assessment of witness credibility, this Court will not reevaluate that assessment absent clear and convincing evidence to the contrary. ***Franklin Cnty. Bd. of Educ. v. Crabtree***, 337 S.W.3d 808, 811 (Tenn. Ct. App. 2010) (citing ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002)).

DISCUSSION

As an initial matter, we note that the trial court specifically concluded that this contract constituted a sale of goods for which the Uniform Commercial Code ("UCC") as adopted in Tennessee applies. Neither party disputes the trial court's conclusion on appeal. Indeed, both parties reference the UCC in their appellate briefs. Accordingly, we will apply the provisions of the UCC where applicable.

I. Contract Formation

We will first address the trial court's conclusion that a binding contract existed between the parties. Specifically, Appellants contend that there was no meeting of the minds when the Bill of Sale was signed because they believed that the sale of the "business" included the sale of the real estate, when, in reality, Mr. Lowe had no ownership interest in it. Under the UCC, formation of contracts for the sale of goods is governed by Tennessee Code Annotated Section 47-2-204. This section states:

Appellants raised the issues of novation and modification for the first time at trial.

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
> (3) Even though one (1) or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Section 47-2-204 relaxes many of the rigid common law requirements as they pertain to contract formation. ***Mid-South Materials Co. v. Ellis***, No. 87-314-II, 1988 WL 23914, at *1 (Tenn. Ct. App. Mar. 16, 1988). Under the UCC, a contract may be formed "in any manner sufficient to show agreement, including conduct" which "recognizes the existence of such a contract." Tenn. Code. Ann. § 47-2-204(1). "The rigid requirements of an offer and an acceptance that mirrors the offer have been repealed." ***Ellis***, 1988 WL 23914, at *1. "The common law requirement that the minds of the parties must meet on all of the essential terms is no longer valid." ***Id.*** Whether a binding contract was formed is a question of law. ***Jones v. LeMoyne-Owen Coll.***, 308 S.W.3d 894, 904 (Tenn. Ct. App. 2009) (citing ***Murray v. Tenn. Farmers Assurance Co.***, No. M2008-00115-COA-R3-CV, 2008 WL 3452410, at *2 (Tenn. Ct. App. Aug. 12, 2008)).

Our cases, in discussing contract formation under the UCC, have applied a more relaxed standard than did the common law. For example, in ***Schacter v. Friendly Chevrolet Cadillac Toyota, Inc.***, No. 02A01-9603-CH-00060, 1996 WL 895464, at *4 (Tenn. Ct. App. Dec. 30, 1996), this Court concluded that a binding contract existed where the parties simply "intended to make a contract and agreed by signing the computer printout." In another case, this Court held that a binding contract was created where "[t]he parties went through a negotiation stage, signed a confirming memo, worked out a delivery schedule, and the seller placed an order for the goods from its supplier." ***Ellis***, 1988 WL 23914, at *2 ("We think these facts show a binding contract between the parties."). In another case, the Court looked to the parties' conduct to conclude that a binding contract had been created. *See* ***Nashboro Records Div. of Ernie's Record Mart, Inc. v. Pickwick Int'l, Inc.***, No. 85-265-II, 1986 WL 5324, at *4 (Tenn. Ct. App. May 9, 1986) (concluding that the parties' conduct "establishes the terms of the agreement").

Appellants' brief contains little, if any, argument regarding their contention that there was no meeting of the minds in this case. Appellants also fail to cite any legal authority in support of their argument on this issue. Indeed, despite Appellants' argument, as previously discussed, contracts formed under the UCC generally do not require a meeting of the minds on every element to be binding on the parties. *See* ***Ellis***, 1988 WL 23914, at *1. Generally,

the failure to cite legal authority in support of an argument in an appellate brief results in waiver of the argument on appeal. *See* ***Newcomb v. Kohler Co.***, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006) (holding that the failure to cite to any legal authority or to fashion an argument constitutes waiver of an issue); ***Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.***, 131 S.W.3d 457, 474 (Tenn. Ct. App. 2003) ("Failure to cite authority for propositions in arguments submitted on appeal constitutes waiver of the issue."). Here, the lack of legal authority and, in fact, the nearly complete failure to even address this argument in Appellants' brief constitutes a waiver of this issue on appeal.

However, even assuming arguendo that this argument was properly presented by Appellants on appeal, it is not availing. While the trial court did not specifically address Appellants' meeting of the minds argument, it found that the parties had entered into an enforceable agreement for the sale of the business, which included inventory, equipment, and goodwill even if the "Bill of Sale [was] silent as to the exact items . . . to be included in the sale." The trial court made the following relevant findings of fact:

> 7. At the trial, [Appellants] testified that they believed the sale of the business included the real property on which the business was located; however, this allegation is not set forth in [Appellants'] Answer and Counter-Complaint. To the contrary, the Answer and Counter-Complaint states that "for the payments made and the payments to be made the [Appellants] were to receive all equipment and inventory, including the gas, cigarettes, beer and all food stock[."] The real property is not described or mentioned in the Bill of Sale. In addition, there was no credible evidence presented at trial to support [Appellants'] assertion that the real estate was to be included in the sale of the business.

The evidence does not preponderate against the trial court's findings. First, as the trial court correctly found, Appellants' answer to Mr. Lowe's complaint referred to the Bill of Sale as a sale of "all equipment and inventory." This claim supports the trial court's finding that Appellants did not initially contemplate that the real estate would be included in the sale. At trial, Ms. Smith admitted on cross-examination that she was aware that real properties are normally transferred by deed and that she made no effort to research or obtain the deed until after signing the contract. Finally, even Ms. Smith's own testimony does not support Appellant's contention that they were misled as to whether the real estate was included in the sale. At trial, Ms. Smith testified that Mr. Lowe informed them that he "owned everything **in** the store." (emphasis added). This statement does not equate with a statement that Mr. Lowe also owned the real estate. As such, the evidence does not preponderate against the trial court's ruling on this issue.

II. Novation/Modification

Appellants next argue that the trial court erred in refusing to find that a novation occurred when Ms. Smith called Mr. Lowe informing him of her intention to only pay interest on the line of credit for a period of eighteen months from the sale. "'A novation is a contract substituting a new obligation for an old one[,]' thereby extinguishing the existing contract." ***TWB Architects, Inc. v. Braxton, LLC***, No. M2013-02740-COA-R3-CV, 2014 WL 5502401, at *4 (Tenn. Ct. App. Oct. 30, 2014) (quoting ***Blaylock v. Stephens***, 258 S.W.2d 779, 781 (Tenn.Ct.App.1953)). The four essential elements of a novation are: "(1) a previous valid obligation, (2) an agreement supported by evidence of intention, (3) extinguishment of the old contract, and (4) a valid new [contract]." ***Burchell Ins. Servs., Inc. v. W. Sizzlin Steakhouse of Dyersburg***, No. E2003-01001-COA-R3-CV, 2004 WL 1459398, at *3 (Tenn. Ct. App. June 29, 2004)). "A novation . . . is never presumed, but it must be clearly established by evidence of the discharge of the original debt by express agreement or by the acts of the parties clearly showing the intention to work a novation." ***Cent. State Bank v. Edwards***, 111 S.W.2d 873, 880 (1937). "The novation need not be shown by express words, as the evidence supporting intent may be implied from the facts and circumstances attending the transaction and the parties' subsequent conduct." ***Cumberland Cnty. Bank v. Eastman***, No. E2005-00220-COA-R3-CV, 2005 WL 2043518, at *4 (Tenn. Ct. App. Aug. 25, 2005) (citing ***In re Edward M. Johnson & Assoc.***, 61 B.R. 801, 806 (Bankr. E.D. Tenn. 1986)). The party asserting the novation has the burden of proving a novation is intended. *See* ***Rhea v. Marko Constr. Co.***, 652 S.W.2d 332, 334 (Tenn. 1983). Where there is conflicting evidence, the parties' intent on a possible novation is a question of fact. 21 Steven W. Feldman, *Contract Law and Practice* § 3:43.

The trial court found that "Appellants did not present credible and sufficient evidence to establish that [Appellants] and [Mr.] Lowe intended to agree to extinguish the old agreement, embodied in the Bill of Sale, and substitute a new valid contract." Appellants contend that the telephone conversation between Ms. Smith and Mr. Lowe the day after Appellants took possession of the business reflected an intention by the parties that Appellants would pay the interest on the line of credit for only eighteen months. We agree that this conversation evidences an intention on the part of Appellants to extinguish the prior contract and create a new contract.[6] However, "Tennessee case-law on novation explains that **all** parties concerned with the transaction must evidence a clear and definite intent for the prior contract to be extinguished." ***Braxton, LLC***, 2014 WL 5502401, at *5 (citing ***Johnson City Elec. Supply Co., Inc. v. Elec. Inc.***, CA No. 81, 1986 WL 3885, at *3 (Tenn. Ct. App. Apr. 1, 1986)) (emphasis added). The evidence in the record is insufficient to show any clear intention on the part of Mr. Lowe to work a novation. Specifically, Ms. Smith testified that when she proposed the new contract by which Appellants were only liable for eighteen months of interest payments on the line of credit, Mr. Lowe responded that

[6] This conclusion assumes, of course, that Ms. Smith had the authority to bind Mr. Smith.

Appellants should "do what [they] need to do." Likewise, Mr. Lowe testified that his only response to Ms. Smith's request to change the parties' contract was that Appellants should "[d]o what [they] have to do." Even taking Ms. Smith's testimony as true, Mr. Lowe's response cannot be fairly interpreted as an express agreement to discharge the Appellants' prior debt; Mr. Lowe's statement does not indicate that he in any way approved the arrangement that Appellants proposed or that he agreed to forego the payments due under the original agreement. Furthermore, the circumstances attending the transaction and the parties' subsequent conduct also do not clearly and definitely reflect that a novation existed. Here, for eighteen months Appellants adequately performed under the original contract by paying the interest payments on the line of credit; at that time, there was nothing more required from Appellants. Thus, the case does not involve a situation where Mr. Lowe's acquiescence to Appellants' partial performance under the contract evidences his intention to agree to a novation. Appellants had the burden of proving a novation was intended, and, as the record reflects and the trial court found, Appellants did not meet this burden. We conclude that the evidence does not preponderate against the trial court's findings on this issue.

By the same token, Appellants' argument that the parties entered into a modification of the contract also fails. Under the UCC, "[a]n agreement modifying a contract within this chapter needs no consideration to be binding." Tenn. Code Ann. § 47-2-209. The trial court emphasized the fact that there was no agreement between the parties to effect a modification of the contract. An "agreement," as defined by the UCC, means "the bargain of the parties in fact, as found in their language or inferred from other circumstances." Tenn. Code. Ann. §47-1-201(b)(3). As the trial court observed:

> [Appellants] did not present credible and sufficient evidence to establish that [Appellants] and [Mr.] Lowe agreed to modify the terms of the Bill of Sale to allow [Appellants] to pay only eighteen (18) months of interest on the line of credit loan. The Court finds there was no modification . . . of the parties' agreement for the sale of J&K . . . .

Again, nothing in the record indicates that Mr. Lowe agreed, either expressly or by his conduct, to modify the parties' agreement.

Furthermore, the trial court clearly indicates that Appellants' evidence on this issue was neither sufficient nor credible. Indeed, Appellants admit in their brief that many of the issues in this case turn on the credibility of the witnesses. Appellants argue, however, that the trial court erred in finding Mr. Lowe's position more credible than that of Appellants. As argued by Appellants:

> When [Ms.] Smith was on the stand, she was passionate and she was very frustrated and upset by the whole ordeal, but she was

> candid and she was honest. We also heard from Mr. Lowe on the stand and he was very calm and collected and he told us how on his Discovery responses he said he had only been involved in one (1) litigation other than domestic litigation and then he amended his Discovery responses to include some case up in New York State. Then he proceeded after questioning to go through and address 8 lawsuits that had just supposedly slipped his mind when he was answering the questions under oath.

"The trial court's findings with respect to credibility and weight of the evidence may generally be inferred from the manner in which the court resolves conflicts in the testimony and decides the case." ***Walker v. G.UB.MK Constructors***, No. E2015-00346-SC-R3-WC, 2016 WL 2343177, at *4 (Tenn. May 2, 2016) (***citing Rhodes v. Capital City Ins. Co.***, 154 S.W.3d 43, 46 (Tenn.2004)). "[F]indings that are related to the issue of credibility will not be disturbed by this court, absent other concrete evidence to the contrary which shows that the trial judge erred in his judgment of the veracity of the witnesses." ***Worth v. Cumberland Mountain Prop. Owners Ass'n, Inc.***, No. 03A01-9709-CV-00442, 1999 WL 61629, at *4 (Tenn. Ct. App. Feb. 10, 1999) (quoting ***Farmers & Merchants Bank v. Dyersburg Prod. Credit Ass'n***, 728 S.W.2d 10, 18 (Tenn. Ct. App. 1986)). As previously discussed, where the trial court's factual determinations are based upon its assessment of witness credibility, we will only overturn the trial court's rulings if clear and convincing evidence to the contrary is shown. *See* ***Crabtree***, 337 S.W.3d at 811. The Tennessee Supreme Court has described the burden of "clear and convincing" as follows:

> "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). "In other words, the evidence must be such that the truth of the facts asserted [is] 'highly probable.'" ***Goff v. Elmo Greer & Sons Constr. Co.***, 297 S.W.3d 175, 187 (Tenn. 2009) (quoting ***Teter v. Republic Parking Sys., Inc.***, 181 S.W.3d 330, 341 (Tenn. 2005)). In general, "the bar for attaining relief is set very high and the burden borne by the [Appellant] is heavy." ***Johnson v. Johnson***, 37 S.W.3d 892, 895 n.2 (Tenn. 2001).

Furlough v. Spherion Atl. Workforce, LLC, 397 S.W.3d 114, 128 (Tenn. 2013).

Despite Appellants' argument otherwise, we cannot conclude that Appellants have presented clear and convincing evidence that would allow this Court to disregard the trial court's implied credibility finding in favor of Mr. Lowe. *See* ***Owens v. Tennessee Rural Health Improvement Ass'n***, 213 S.W.3d 283, 288 (Tenn. Ct. App. 2006) (refusing to

overturn trial court's credibility determinations when Appellants "failed to point to clear and convincing evidence in the record . . . demonstrat[ing] that the trial court erred" on the issue of witness credibility). Indeed, as noted by the trial court many of the Appellants' contentions were refuted by the testimony of what the trial court deemed "credible non-interested witness[es]," as well as the original allegations contained in Appellants' complaint. Furthermore, Appellants were unable to offer any documentary evidence to support their contentions regarding depleted inventory or the income of the business after they began its operation. Taking into account our highly deferential standard of review on matters of witness credibility in the trial court, Mr. Lowe's inconsistent testimony regarding his previous lawsuits is simply insufficient to overturn the trial court's decision to generally credit Mr. Lowe's testimony over that of Appellants'.

III. Unjust Enrichment

Appellants next take issue with the trial court's failure to recognize any unjust enrichment to Mr. Lowe. Appellants argue that, because of their belief that a modification occurred, they continued to make the interest payments on the line of credit and that Mr. Lowe was unjustly enriched in allowing them to do so. Courts may impose a contract implied in law where no contract exists under various quasi-contractual theories, including unjust enrichment. ***Whitehaven Cmty. Baptist Church v. Holloway***, 973 S.W.2d 592, 596 (Tenn. 1998). "A claim for unjust enrichment in Tennessee rests, in part, on the fact that the parties did **not** have an enforceable contract" that covers the same subject matter. ***Simpson v. Bicentennial Volunteers, Inc.***, No. 01A01-9809-CV-00493, 1999 WL 430497, at *2 (Tenn. Ct. App. June 29, 1999) (emphasis in original); *see also* ***CPB Mgmt., Inc. v. Everly***, 939 S.W.2d 78, 81 (Tenn. Ct. App. 1996). The remaining elements are: "(1) the furnishing of goods or services, (2) to the party to be charged, (3) under circumstances showing that the parties should have reasonably understood that the provider expected to be paid, and (4) under circumstances showing it would be unjust for the benefitted party to retain the benefit without paying for it." ***Id.*** **"**The trial court's findings with reference to the plaintiffs' claims of unjust enrichment are afforded a presumption of correctness on appeal and we must affirm, unless the evidence preponderates otherwise." ***Everly***, 939 S.W.2d 78 at 80.

In the instant case, we have already determined that an enforceable contract existed between the parties. The unjust enrichment claim and the existing enforceable contract cover the same subject matter, i.e., the sale of the business of J&K. Appellants were already obligated to pay the interest on the line of credit and their continued payments under the contract do not unjustly enrich Mr. Lowe in any way. "[T]he equitable remedy of unjust enrichment cannot be imposed where, as in this case, a valid contract exists on the same subject matter." ***Duke v. Browning-Ferris Indus. of Tennessee, Inc.***, No. W2005-00146-COA-R3-CV, 2006 WL 1491547, at *10 (Tenn. Ct. App. May 31, 2006). Instead, at the time of these payments, Appellants were operating J&K and receiving any income derived therefrom pursuant to the parties' valid contract. As such, there can be no claim of unjust

enrichment under the facts of this case.

IV. Unconscionability

We now address the issue of unconscionability. Whether a particular contract is unconscionable is a question of law. ***Taylor v. Butler***, 142 S.W.3d 277, 284–85 (Tenn. 2004). As the Tennessee Supreme Court recently explained:

> If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term. *See Restatement (Second) of Contracts* § 208 (1981). . . .
>
> Enforcement of a contract is generally refused on grounds of unconscionability where the "inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." ***Haun v. King***, 690 S.W.2d 869, 872 (Tenn. Ct. App. 1984) (quoting ***In re Friedman***, 64 A.D.2d 70, 407 N.Y.S.2d 999 (1978)); *see also* ***Aquascene, Inc. v. Noritsu Am. Corp.***, 831 F.Supp. 602 (M.D. Tenn.1993). An unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. ***Id.***

Berent v. CMH Homes, Inc., 466 S.W.3d 740, 746–47 (Tenn. 2015) (quoting ***Taylor v. Butler***, 142 S.W.3d 277, 285 (Tenn. 2004)); *see also* ***Owens v. Nat'l Health Corp.***, 263 S.W.3d 876, 889 (Tenn. 2007) ("A contract may be unconscionable if the provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice. . . . In making that determination, a court must consider all the facts and circumstances of a particular case.") (citations omitted).

There are two types of unconscionability: procedural and substantive. Procedural unconscionability "may arise from a lack of a meaningful choice on the part of one party." ***Trinity Industries, Inc. v. McKinnon Bridge Co., Inc.***, 77 S.W.3d 159, 170 (Tenn. Ct. App. 2001). In contrast, a contract is substantively unconscionable when its "terms are unreasonably harsh." ***Id.*** Tennessee courts, however, "have tended to lump the two together[.]" ***Wofford v. M.J. Edwards & Sons Funeral Home Inc.***, 490 S.W.3d 800, 818 (Tenn. Ct. App. 2015), *app. denied* (Tenn. May 6, 2016) (quoting ***Trinity Indus.***, 77 S.W.3d

159 at 171). Our Courts will therefore find unconscionability when "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other." ***Trinity Indus.***, 77 S.W.3d at 171 (quoting ***Haun*** 690 S.W.2d at 872). When deciding whether a contract is unconscionable, a court considers the contract's "setting, purpose, and effect," and analyzes factors such as "weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes[.]" ***Berent***, 466 S.W.3d at 747 (quoting ***Taylor***, 142 S.W.3d at 285 (quoting Restatement (Second) of Contract § 208, cmt. a (1981))). "Whether a contract is unconscionable is determined based on the circumstances as they existed at the time the parties executed the contract." ***Vintage Health Res., Inc. v. Guiangan***, 309 S.W.3d 448, 461 (Tenn. Ct. App. 2009).

As an initial matter, we note that Appellants' unconscionability argument is two-fold: (1) that the value of the business was substantially less than what Appellants paid: and (2) that Mr. Lowe misled Appellants as to the income to be generated from the business. We will consider each contention in turn.

First, Appellants cite ***Hasben v. McGinnis***, 387 S.W.2d 631 (Tenn. Ct. App. 1964), for the proposition that if a party receives real property for two-fifths of its actual value, then the result is "shocking and unconscionable." Thus, Appellants contend that the inadequacy of consideration, that is, the gross disproportionality between the sales price and property received, render the parties' contract unconscionable. This Court previously provided guidance on the type of proof that must be presented in order to meet the burden of arguing grossly inadequate consideration in ***Carpenter v. Sims***, No. E2007-0622-COA-R3-CV, 2007 WL 4963008 (Tenn. Ct. App. Nov. 7, 2007). "In order to carry their burden of proof that the consideration paid . . . was grossly inadequate, the [proponents of this argument] were necessarily obliged to establish the . . . fair market value at the time of sale." ***Id.*** at *4 (noting that "assessed [tax appraisal] value is not competent direct evidence of value for purposes other than taxation"). In addition:

> Inadequacy of consideration is a consideration not adequate or equal in value to the thing conveyed, and where the parties contract with knowledge of what they are doing, inadequacy of consideration is no ground for avoiding a contract. ***Farrell v. Third Nat'l Bank***, 20 Tenn. App. 540, 101 S.W.2d 158, 163 (1936). Courts are not at liberty to annul or change or amend a contract entered into by parties capable of contracting simply upon the ground that the judges may be of the opinion that a better agreement would or should have been arrived at. ***Matthews v. Matthews***, 24 Tenn. App. 580, 148 S.W.2d 3, 13 (1940).

In re Estate of Reynolds, No. W2006-01076-COA-R3-CV, 2007 WL 2597623, at *14 (Tenn. Ct. App. Sept. 11, 2007). "[T]he mere fact that the consideration for a contract is inadequate does not justify a denial of the right to its specific performance, in the absence of any unfairness or overreaching in its procurement, where, in other respects, the contract conforms with the rules and principles of equity." ***North v. Robinette***, 527 S.W.2d 95, 98–99 (Tenn. 1975) (citing 71 Am. Jur. 2d, *Specific Performance*, Sec. 78, pp. 108–09). "[T]he mere fact that a vendor should have received more money for the property does not show inadequacy of consideration." ***Id.***

The trial court found that "the evidence was insufficient to establish that the contract between [Appellants] and [Mr.] Lowe was so manifestly unequal that it would shock a person of common sense or that the terms of the contract were so oppressive that no reasonable person would accept them." Appellants point to their lack of experience and knowledge of commercial sales, emphasizing that Ms. Smith was a factory worker and Mr. Smith was a truck driver at the time they signed the Bill of Sale. In contrast, Appellants allege that Mr. Lowe was "known all over Coffee County for dealing in construction, home building, and general business" and "has probably signed off on as many contracts as either of the attorneys in this case."

Even if we accept that Appellants did not know what the contractual terms were until they arrived at J&K to sign the Bill of Sale, Ms. Smith admitted that whatever was in the Bill of Sale was basically what the parties had agreed upon. Based on this testimony, it appears that Appellants received nothing less than what was contemplated by their written agreement. Here, Appellants argue that the price that they paid for the business of J&K was excessive in light of what they were actually given in return. However, neither side presented any documentary or expert proof regarding the fair market value of the business. As noted, all that both parties presented were their own opinions regarding the value of the business. From this conflicting testimony, the trial court determined that the testimony of Mr. Lowe was more credible. As we have previously found no clear and convincing evidence in the record to overturn the trial court's implicit credibility findings, we will likewise not disturb the trial court's ruling on this issue, as it again rests on findings of credibility**.**

Appellants next argue that Mr. Lowe misrepresented to them the income generated from the business, rendering the resulting transaction unconscionable. According to Ms. Smith's testimony at trial, Mr. Lowe represented that J&K cleared $60,000.00 per month, which she testified was far less than that generated under Appellants' ownership. We first note that this argument appears to raise issues of intentional misrepresentation. *See* ***Hodge v. Craig***, 382 S.W.3d 325, 342 (Tenn. 2012) (holding that "'intentional misrepresentation,' 'fraudulent misrepresentation,' and 'fraud' are different names for the same cause of action" and directing courts to use the term "intentional misrepresentation"). An intentional misrepresentation occurs when: (1) the defending party makes a representation of a present or

past fact; (2) the representation was false when it was made; (3) the representation involved a material fact; (4) the defending party either knew that the representation was false or did not believe it to be true or the defending party made the representation recklessly without knowing whether it was true or false; (5) the party raising the claim of intentional misrepresentation did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) the party raising the claim of intentional misrepresentation sustained damages as a result of the representation. ***Hodge***, 382 S.W.3d at 342 (citing ***Walker v. Sunrise Pontiac-GMC Truck, Inc.***, 249 S.W.3d 301, 311 (Tenn. 2008)). Appellants' brief, however, contains no law or argument concerning intentional misrepresentation. Accordingly, any argument that Mr. Lowe's alleged statement regarding the income generated from the business constitutes intentional misrepresentation is waived. *See* ***Newcomb***, 222 S.W.3d at 401; ***Messer Griesheim***, 131 S.W.3d at 474.

Even assuming arguendo that this contention is properly framed as an issue of unconscionability, it is likewise unavailing. Here, the trial court found that it was "difficult . . . to accept that [Appellants] thought they were purchasing a business which cleared Seven Hundred Thousand Dollars ($720,000.00) a year for a purchase price of Two Hundred Seventy-three Thousand Dollars ($273,000.00)." The trial court therefore determined that Appellants' testimony that they anticipated earning approximately $60,000.00 per month from the business was implausible. Having considered the facts and circumstances presented in the record, we affirm the trial court's conclusion that the enforcement of the Bill of Sale between Mr. Lowe and Appellants is not unconscionable.

V. Remedies

Appellants next take issue with the remedies ordered by the trial court. Appellants argue that the trial court erred in ordering them to retain possession of the business despite the express term in the contract providing that a breach of the agreement would result in the business reverting back to Mr. Lowe. Parties may limit their remedies under a contract for the sale of goods. Limitations of remedies under Tennessee Code Annotated Section 47-2-719(1)(a) provides:

> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts . . . .

Appellants take issue with the trial court's fashioning of a remedy that was neither included in the contract nor requested by Mr. Lowe in his complaint. First, we note that despite Appellants' argument otherwise, Mr. Lowe in fact requested that the business revert

to him due to Appellants' failure to meet their contractual obligations. Accordingly, Appellants first assignment of error on this issue is, respectfully, without merit.

Appellants next argue that the trial court was required to abide by the parties' contract in fashioning a remedy. Here, the only specified remedy in the event of a breach by Appellants is to declare the contract "null and void" and that Mr. Lowe would "re-take the business." Even where a remedy is expressly provided by contract, however, the trial court may elect to "resort to a remedy as provided" by the UCC, "unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy." Tenn. Code Ann. § 47-2-719(1)(b). Official Comment 2 to the UCC states that this provision "creates a presumption that clauses prescribing remedies are cumulative rather than exclusive." ***Id.*** at cmt. 2. Thus, "[i]f the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed." ***Id.*** Furthermore, under Tennessee Code Annotated Section 47-1-103(b), "[u]nless displaced by the particular provisions of chapters 1-9 of this title [of the UCC], the principles of law and equity . . . supplement its provisions." Here, nothing in the parties' contract specifically states that the remedy provided is intended to be the sole remedy available in the event of a breach by Appellants. Thus, other remedies under the UCC are available in the event of a breach.

The trial court concluded that "money damages are an adequate remedy at law for [Appellants'] breach of the terms of the Bill of Sale, and it would be inequitable to award specific performance of this unclear, poorly worded provision of the Bill of Sale." "The decree of specific performance of a court of equity is largely discretionary with the Court." ***Northcutt v. Massie***, 201 Tenn. 638, 642, 301 S.W.2d 355, 356–57 (1957).

Despite their argument on appeal that the trial court erred in not allowing Mr. Lowe to retake the business, it does not appear that Appellants took this position prior to appeal. First, we note Appellants' Answer and Counter-Complaint contained the following allegation:

> 15. [Mr. Lowe] has requested that [Ms.] Smith surrender the premises, which neither party ever owned, and surrender all inventory, which is all stock she has purchased and supplied since the sale. He has asked for the furniture, which may actually include the table and chairs that he actually sold to them. He requests all equipment, which has all either been completed refurbished or replaced, since there was very little if any equipment working when she purchased the business. Clearly this would be inappropriate under the facts of the case.

In a later pleading filed by Appellants after trial, they reiterated their position that the business should not return to Mr. Lowe because the majority of the inventory and other items

were either repaired or purchased by Appellants. Tennessee law is well-settled that it is inappropriate to allow a party to take one position regarding an issue in the trial court, and then "change its strategy or theory in midstream, and advocate a different ground or reason in this Court." ***State v. Abbott***, No. 01C01-9607-CC-00293, 1996 WL 411645, at *2 (Tenn. Crim. App. July 24, 1996) (citing ***State v. Aucoin***, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988), *cert. denied*, 489 U.S. 1084, 109 S. Ct. 1541, 103 L. Ed. 2d 845 (1989); ***State v. Dobbins***, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988)). Because Appellants opposed Mr. Lowe's effort to retake the business in the trial court, they cannot now assign the trial court's failure to allow Mr. Lowe to retake the business as an error on appeal. The trial court therefore did not abuse its discretion in declining to enforce the specific performance clause contained in the parties' contract.

With regard to Mr. Lowe's breach of the contract by delivering nonconforming goods, the trial court allowed Appellants a credit of $16,000.00, which was the amount the trial court found to be the difference in the amount of inventory between the time when the parties negotiated the contract and the date of sale. Under Tennessee law, "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: (a) reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest." Tenn. Code Ann. § 47-2-601. Acceptance under the UCC occurs when the buyer:

> (a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or
> (b) fails to make an effective rejection (§ 47-2-602(1)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Tenn. Code Ann. § 47-2-606(1)(a)–(c). Acceptance of goods does not prevent buyers from seeking any other remedy for nonconformity under the UCC. ***Id.*** § 47-2-607. Thus, where the buyer accepts nonconforming goods and gives the seller notification of the breach, "he may recover as **damages**" the loss resulting from the seller's breach. ***Id.*** § 47-2-714(1) (emphasis added). "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted." ***Id.*** § 47-2-714(2). "The buyer . . . may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." ***Id.*** § 47-2-717. Under the UCC, the buyer may cancel the contract only "[w]here the seller [(1)] fails to make delivery or [(2)] repudiates or [(3)] the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole

contract (§ 47-2-612)." Tenn. Code Ann. § 47-2-711(1).

The trial court found that "[Mr.] Lowe breached the agreement between the parties for the sale of the business by delivering nonconforming goods, i.e. less inventory (beer, tobacco products, food items and general merchandise) than the parties had negotiated for in early to mid-June of 2012." Appellants, however, "accepted the nonconforming goods and gave [Mr.] Lowe notice of the nonconformity." Thus, cancellation of the whole contract under the UCC is unavailable after Appellants not only failed to reject the contract but rather accepted its terms: (1) paying Mr. Lowe $48,000.00 ten days after they were already made aware of the low inventory levels, (2) continuing to pay off the line of credit for eighteen months, and (3) continuing to operate the business for a few years.

For the same reason, Appellants' contention that Mr. Lowe's alleged bad faith voids the contract also fails. "Every contract or duty [governed by the UCC] imposes an obligation of good faith in its performance and enforcement." Tenn. Code Ann. § 47-1-304. The UCC defines "good faith" as "honesty in fact in the conduct or transaction concerned." Tenn. Code Ann. §47-1-201(b)(20). As Official Comment 1 to Section 47-1-304 explains:

> This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.

Appellants cite no law, nor have we found any, wherein the only remedy for a breach of the duty of good faith is voiding the entire contract. Here, even assuming that Mr. Lowe acted in bad faith, Appellants did not initially seek to void the contract. Instead, they continued operating the business. Under the UCC, damages for the nonconforming goods were the appropriate remedy under these circumstances.

Accordingly, Appellants' real issue, as we perceive it, is whether they should have been afforded a more favorable remedy than the $16,000.00 credit allowed by the trial court in damages as a result of Mr. Lowe's breach.[7] The damages assessed hinged chiefly on

[7] It is unclear what the trial court based its finding of Mr. Lowe's breach on, whether it was due to the breach of the duty of good faith or otherwise. Regardless, the argument that the trial court should have found

witness credibility. As the record reflects, the amount of inventory that was inside J&K before and after Appellants took over the business was thoroughly litigated at trial. According to Ms. Smith's own testimony, Appellants spent between $13,000.00 and $16,000.00 to fully stock the store after they took over the business. The trial court appears to have accredited Ms. Smith's testimony and allowed her a credit of the higher number of her own estimate of the damages for Mr. Lowe's breach. Consequently, the trial court found that Mr. Lowe's breach resulted in damages of only $16,000.00 for Appellants, and the record does not preponderate against these findings.

CONCLUSION

For the above reasons, the judgment of the Chancery Court of Coffee County is affirmed. Costs of this appeal are assessed against Appellants, and their surety, for all of which execution may issue if necessary.

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J. STEVEN STAFFORD, JUDGE

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that Mr. Lowe acted in bad faith is not sustainable because a claim based on a breach of good faith is not a standalone claim.