IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 19, 2007 Session

KENNETH BARRETT v. FRANK VANN dba FRANK VANN CONSTRUCTION COMPANY, ET AL.

Appeal from the Circuit Court for Roane County
No. 13219 Russell E. Simmons, Jr., Judge

No. E2006-01283-COA-R3-CV - FILED AUGUST 29, 2007

The plaintiff, Kenneth Barrett, entered into a written contract with Frank Vann, doing business as Frank Vann Construction Company ("Vann"), for Vann to construct a parking area on the plaintiff's property and to re-pave the plaintiff's driveway. It was later discovered that a retaining wall would be necessary to support the parking area due to the steep slope of the plaintiff's property. Vann suggested to the plaintiff that he use Matt Johnson, doing business as ProGreen Landscaping & Lawn Maintenance ("Johnson"), to build the wall. Johnson agreed to build it. After the wall was completed, it began to collapse. This prompted the plaintiff to file suit. A jury returned a money verdict against Vann and Johnson for violating the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 (Supp. 2006) ("the TCPA"). The jury also found Vann guilty of breach of contract. When, as to Vann, the jury returned separate monetary verdicts for the TCPA violation and the breach of contract, the trial court required the plaintiff to elect between the two monetary awards. Under compulsion, the plaintiff chose the damage award under the TCPA. The trial court then trebled the TCPA damages and awarded the plaintiff a part of his request for attorney's fees. The plaintiff and Vann both raise issues on appeal. We modify the trial court's judgment. As modified, it is affirmed. This case is remanded to the trial court with instructions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

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

Karen G. Crutchfield and Joshua A. Wolfe, Knoxville, Tennessee, for the appellant, Frank Vann dba Frank Vann Construction Company.

William Allen, Oak Ridge, Tennessee, for the appellee, Kenneth Barrett.

OPINION

I.

In his complaint, the plaintiff alleged that he contracted with Vann to design and construct a driveway and parking area at the plaintiff's home. Once the project began, Vann discovered that a retaining wall would have to be built. Vann secured the services of Johnson to build the wall. After Johnson constructed the wall, Vann determined that it was not sufficiently high to provide the necessary lateral support. Vann then utilized Steve Harper doing business as Greens Keeper to increase the height of the retaining wall. The plaintiff paid Vann $12,800 when the project was completed. The plaintiff also paid $2,800 to Johnson and $2,000 to Harper. The complaint continues as follows:

> Within two weeks of completion, the retaining wall started pulling away at the base. Plaintiff Barrett contacted defendant Vann, who agreed to make repairs. Defendant Johnson came to the site thereafter for inspection on two occasions.
>
> Plaintiff Barrett has repeatedly asked defendants Vann and Johnson to make repairs to the retaining wall, but no repairs have been made.
>
> The retaining wall is now sliding away and fill dirt is washing away through the cracks and holes in the wall. The integrity of the retaining wall has created a danger to people and property and requires repair or reconstruction.
>
> Upon information and belief, the retaining wall was constructed with many rotten crossties, without proper use of "deadman" supports, without proper fill and drainage, and without properly overlapping of crossties. The defective methods and materials in the construction of the retaining wall are the proximate causes of the collapse of the retaining wall.
>
> The actions of defendants in the design and construction of a defective retaining wall constitute a breach of contract.
>
> Defendants Vann and Johnson owed plaintiff a duty of care to properly design and construct the retaining wall. The retaining wall was not designed or constructed in a workmanlike manner and defendants' negligent acts are the proximate cause of damages to plaintiff.

> The acts of defendants in the defective design and construction of the retaining wall are grossly negligent and plaintiff is entitled to punitive damages.
>
> The acts and practices of defendant Vann were unfair or deceptive, affected the conduct of trade and commerce, and, therefore, violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104, including but not limited to: Failing to obtain a license as a home improvement contractor; designing a retaining wall that he knew or should have known would not meet minimum standards of good workmanship and that would not meet the purpose for which it was constructed.
>
> The acts and practices of defendant Johnson were unfair or deceptive, affected the conduct of trade and commerce, and, therefore, violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104, including but not limited to: Using crossties in deteriorating condition; constructing a retaining wall that he knew or should have known would not meet minimum standards of good workmanship and would not meet the purposes for which it was constructed.

The plaintiff sought compensatory damages for breach of contract, negligence, and/or gross negligence, as well as punitive damages. The plaintiff also asked for compensatory damages for a violation of the TCPA as well as treble damages and attorney's fees pursuant to the TCPA.

Vann answered the complaint and denied any liability to the plaintiff. Vann acknowledged that he entered into a contract with the plaintiff for the construction of a driveway and parking area. However, Vann denied any contractual relationship with the plaintiff for the construction of a retaining wall. Vann denied contracting with Johnson or Harper to build such a wall. Vann claimed it was the plaintiff who contracted with Johnson and Harper to have the retaining wall constructed, and, if the plaintiff had been damaged by the construction of the wall, it was Johnson and/or Harper who was liable.

Johnson answered the complaint and likewise denied any liability to the plaintiff. Johnson stated he originally was hired to compact dirt at the site. Johnson then was asked to construct a retaining wall to specifications established by Vann and the plaintiff. Johnson claimed he made recommendations to Vann and the plaintiff, but that these recommendations were rejected because of their cost. Johnson claimed he constructed the retaining wall in accordance with the specifications of Vann and the plaintiff, and that

> someone thereafter apparently doubled the height of the wall causing additional pressure. Such liability extends to the party constructing the addition to the wall.

A trial took place in January 2006, with the plaintiff being the first witness.[1] The plaintiff testified that he saw an advertisement in a local paper for Vann's company. The plaintiff met with Vann and told him he wanted a parking pad so he could park a truck or boat on the pad. He also told Vann he wanted the driveway redone with concrete. Due to the incline of the plaintiff's property, he asked Vann if the pad could be constructed with fill dirt and without the necessity of constructing a retaining wall. Vann assured the plaintiff that he could do the job without having to build a retaining wall. Vann submitted a proposal to the plaintiff which was signed by the parties.

When Vann started work on the project, a lot of fill dirt was dumped in the plaintiff's back yard. The trucks that delivered the fill dirt were heavy and damaged the plaintiff's driveway. After the fill dirt had been dumped in the plaintiff's back yard and his driveway damaged, Vann told the plaintiff there was a "problem." According to the plaintiff, Vann told him that several trees needed to be cut down and the stumps removed before the project could continue. Vann then told the plaintiff that he could get someone to cut down the trees and remove the stumps, but by the time that was completed, he, *i.e.*, Vann, would be working on another project and would not be able to return until "next spring." Plaintiff testified that at this point, he was put between "a rock and a hard spot" because his driveway had been broken up by the dump trucks and his back yard was covered with fill dirt. Vann then recommended an alternative solution, with that alternative solution being the construction of a retaining wall. Vann made this recommendation even though the plaintiff, according to the latter, had told Vann before the project started that he did not want a retaining wall. Vann informed the plaintiff that Johnson, who had been delivering the fill dirt to the property, could build the retaining wall. The next day Vann called the plaintiff and told him that Johnson would build the retaining wall for $2,800. The plaintiff claims that he asked Vann if the retaining wall was "going to be constructed right," and Vann stated that it would be.

Construction of the retaining wall began on October 8. The plaintiff testified to the following conversation which took place a few days later:

> [W]hen I got home from work that evening I walked down the hill. I was wanting to see how far they had gotten along on the retaining wall.
>
> And I walked up behind Mr. Vann and I heard him telling one of the guys working on the retaining wall, he said, "We don't need a foundation. Hurry up. Let's go."
>
> So I asked Mr. Vann, "What do you mean we don't need a foundation?" And he turned around to me and he said, "Well, we don't need one because the way this wall is going to be built the deadmen is what holds the retaining wall in place."

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[1] The only pre-trial stipulation was that Vann did not have either a general contractor's license or a home improvement contractor's license.

Some time after this conversation took place, the plaintiff asked Vann why he was not using a vibrating compactor to compact the fill dirt, as Vann had indicated he would on the parties' written contract. Vann responded that a vibrating compactor was not needed because the bobcat would be sufficient to compact the fill dirt. The plaintiff testified that on several occasions while the retaining wall was being constructed, both Vann and Johnson assured him that it was being built correctly.

After Johnson completed the retaining wall, Vann told the plaintiff there was another "problem." Vann then explained to the plaintiff that the retaining wall needed to be higher and he would get Johnson "out here and do it." The plaintiff responded that he did not want Johnson to do it because Johnson had told the plaintiff that he would pick up trash and debris that Johnson and his employees had left at the work site, but Johnson never did. Vann then obtained several bids from other contractors and eventually Vann and the plaintiff decided to use Steve Harper, who bid $2,000 to complete the job of increasing the height of the retaining wall.

The plaintiff thought everything "looked good" when the project was first completed. However, less than two weeks later, the plaintiff noticed his boat, which was on the parking pad, was leaning to one side. The plaintiff noticed that the fill dirt

> had sunk down quite a bit. . . . So I walked down below the retaining wall and you can already see where it's starting to push out towards the – I had a cedar tree right there and you could see that was pushing toward the cedar tree. . . . I got my tape. I went down there. I counted about six rows up on the cross-ties and I measured over from the cross-ties to the cedar tree and took a measurement to see what the distance was. . . . [O]n Sunday night and into Monday it was supposed to rain. I was wanting to see how much it moved. And when I got home Monday, the 17th, I went down there and took a measurement and it's almost moved three inches in twenty-four hours.

The plaintiff stated that he then called Vann, whom the plaintiff considered to be the "general contractor" on the job. Thirty minutes later, Johnson showed up at the house and took some measurements. The plaintiff had several conversations with Vann over the next couple of days and Vann attempted to make some repairs, but Vann eventually told the plaintiff that he and Johnson would need a whole weekend to complete the necessary repairs. By that time, the weather was turning very cold and the plaintiff never heard from either Vann or Johnson after December 3. The plaintiff testified that by February, the retaining wall had moved to the point that it was almost touching the cedar tree and some of the cross-ties were exposed and they were "rotten."

The following spring, the plaintiff contacted an attorney who sent a letter to Vann and Johnson asking if they were going to repair the retaining wall. There was no response by either man. Thereafter, the plaintiff retained the services of an engineer to determine if the retaining wall could

be fixed. The engineer concluded that the entire retaining wall would have to be replaced. By the time of trial, the "whole back of the [retaining wall was] pushing against the cedar tree . . . ."

When asked why he sued Vann under the TCPA, the plaintiff explained:

> I think Mr. Vann deceived me when he told me he could build this parking pad without a retaining wall. It's like switch and bait [sic].
>
> He dumped fill dirt in the backyard, broke up my driveway, and then he wants a retaining wall. This benefits Mr. Vann because it saves him fifty to seventy-five truck loads of fill dirt.
>
> I also think he mislead [sic] me when he said he could build this wall and brings in contractors, made me believe that these contractors knew how to build a retaining wall. I think that's unfair and deceptive.

On cross-examination, the plaintiff acknowledged that he had no problems with Vann's work on the driveway. However, the plaintiff did point out that the parking pad was starting to "fall in" because the retaining wall was collapsing.

According to the plaintiff, the written contact he had with Vann does not provide for a retaining wall because when that contract was entered into, Vann said that he could build the parking pad without such a wall.

The plaintiff stated that he assumed Johnson was working for Vann because Johnson already was on the work site using a bobcat when Vann told the plaintiff that a retaining wall would be needed. The plaintiff added that he still considered Johnson to be working as a subcontractor for Vann when Johnson was building the retaining wall.

On cross examination by Johnson,[2] the plaintiff stated that he had a verbal agreement with Vann for the construction of the retaining wall, but he acknowledged that he had no such verbal agreement with Johnson.

The next witness was Noel Peterson, an engineer with a bachelor of science degree in civil engineering from the University of Tennessee. Peterson worked for several years with the Tennessee Department of Transportation and currently works with an engineering firm in Oak Ridge. Peterson is registered as a professional engineer in Tennessee, Georgia, and West Virginia. He also is licensed as a professional land surveyor in Tennessee and Kentucky. Peterson's position at the

[2] Johnson represented himself at trial.

engineering firm is vice president in charge of civil engineering and surveying. Prior to completing his engineering degree, Peterson worked almost 10 years as a carpenter and building contractor.[3]

Peterson provides estimates in the normal course of his business to homeowners who are having work done on their houses. In his job as a civil engineer, Peterson has designed retaining walls and is familiar with the industry standards for building such walls. Peterson prepared an estimate to replace the retaining wall on the plaintiff's property. Peterson's total revised estimate for removing the existing retaining wall and constructing a new one was $44,866.[4] Peterson acknowledged that he revised his original estimate to include replacing the plaintiff's driveway. Peterson explained the reason for including a new driveway as follows:

> In my original estimate I had estimated half loaded trucks to haul in the materials. . . . [R]eally there was no guarantee that [the lower weight with using half-loaded trucks] would be sufficient to make sure the driveway wasn't damaged. And the extra haul costs would pretty well offset the savings of trying to preserve the driveway.

Peterson added that if full-loaded trucks are used, then replacement of the driveway "will be needed." If half-loaded trucks are used, replacement of the driveway "might" be needed.

Peterson examined the retaining wall to determine what caused it to fail in the first place and whether it could be fixed. According to Peterson, the retaining wall failed because

> there was no physical restraint to keep the wall from sliding. I had determined that it was a sliding failure of the wall, due to the lack of deadmen, which is a timber that is perpendicular to the face of the wall and extends into the fill of the wall and it's something to restrain the wall from moving.

Peterson added that another problem with the retaining wall was that the corners of the timbers were not laced together; this deficiency also would contribute to the wall sliding. Peterson added that interlacing the timbers was something that a contractor should know to do when building a retaining wall.[5] Peterson concluded that the bottom portion of the retaining wall did not meet industry

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[3] Vann objected to Peterson's qualifications as an expert witness and Vann's attorney conducted a voir dire examination of Peterson outside of the presence of the jury. Following this examination, the trial court overruled Vann's objection to Peterson's qualification as an expert witness. No issue is made on this appeal as to this ruling by the trial court.

[4] The expert who testified on Vann's behalf at trial estimated that the retaining wall could be replaced for a total cost of $26,865.

[5] Peterson pointed out that the top of the retaining wall which was built by Harper did have the interlacing timbers and deadmen. The bottom portion of the retaining wall built by Johnson did not.

standards. Peterson also stated that, because of the lack of deadmen and interlacing timbers, the retaining wall eventually would have failed even if the height of the wall had not been raised after the lower portion was built.

The final witness for the plaintiff was his neighbor, Katherine Wentworth. In lieu of Ms. Wentworth testifying, the parties stipulated that she would have testified as follows:

> [Ms. Wentworth] was [the plaintiff's] neighbor on the east side of his house. He talked with her about his proposed project, and she gave approval for fill dirt to be sloped over her property line.
>
> After the retaining wall was built she went to look at the retaining wall and saw it was buckled out substantially.
>
> Her children played in the woods behind [the plaintiff's] house and she became concerned for their safety while playing in [the plaintiff's] yard.

Following the conclusion of the plaintiff's proof, Vann moved for a directed verdict on all claims. One claim was dismissed,[6] but the claims before us on this appeal proceeded.

Vann testified that he has been in business since 1979. He described the evolution of Frank Vann Construction Company as follows:

> [I started mowing people's lawns and from] there I started making contact with house builders doing their yards; seeding, strawing, planting shrubs. Gradually moving into digging basements, backfilling, residential work for houses, which led right on into the commercial.
>
> Now we're basically – we do commercial work, but I don't limit it as such because I remember where I come from so I have many, many customers from the past that will call us if they've got something that they need done and somebody that I know, we do it.

Vann explained that his company does not build retaining walls, except for the one that was constructed at Vann's personal residence.

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[6] There was considerable disagreement prior to and during trial about whether the Tennessee Home Improvement Licensing Act, T.C.A. § 62-37-101 (1997), *et seq.*, applied to this case and, if so, whether Vann violated that Act. The trial court granted Vann's motion for directed verdict on this particular claim, and the dismissal of that claim is not at issue on appeal. We note that effective July 1, 2007, T.C.A. § 62-37-101, *et seq.* was repealed and replaced by T.C.A. § 62-6-501, *et seq*. *See* 2007 Tenn. Pub. Acts ch. 460.

Vann stated that when he first was contacted by the plaintiff, the plaintiff told him that he wanted a 25 foot by 25 foot pad built in his back yard to utilize for parking a boat or a truck. Vann denied the plaintiff told him he did not want a retaining wall built. Vann claimed initially "there was no mentioning of any retaining walls." Vann stated that the plaintiff knew part of his driveway would be damaged by the trucks and that is why everything had to be brought in at the beginning so the driveway could then be redone.

When the project started, Vann contacted Johnson and asked him if he could level off the fill dirt that was being brought onto the plaintiff's property. Johnson said he was available and could do that work. A couple of days into the project, the plaintiff informed Vann that he wanted the pad parallel to the driveway and, according to Vann, "immediately everything change[d]." Vann stated that in order for the pad to be located parallel to the driveway, which was very close to the property line, a retaining wall was necessary. Vann and the plaintiff began measuring various portions of the property and by that time Johnson had completed leveling off the fill dirt. Vann told the plaintiff that he could not construct a retaining wall, but perhaps Johnson could. The plaintiff then began talking with Johnson and Johnson said he would submit a proposal. Vann denied telling the plaintiff that having a retaining wall built would make Vann's efforts less costly in that a lot less fill dirt would be needed. In any event, according to Vann, he relayed the message to the plaintiff that Johnson could build the retaining wall for $2,800, and the plaintiff told Vann to have Johnson begin the project.

Vann claimed that his involvement with the retaining wall was very limited. He acknowledged telling Johnson's employees that they needed to move the footing of the retaining wall up thirty-six inches. Another time he told Johnson's employees that the cross-ties needed to go into the bank in order to prevent fill dirt from coming out the side of the retaining wall. Vann stated that he did not supervise Johnson's employees. According to him, he received no monetary compensation with respect to the construction of the retaining wall.

When Johnson completed the retaining wall, the plaintiff did not like how it looked cosmetically. There was a steep slope because the retaining wall was a lot lower than where the pad was going to be located. Vann stated that the plaintiff's options at this point were to "keep it as is, still seed and straw, granted it's steep, or he could choose to raise the wall higher." The plaintiff decided to raise the height of the retaining wall. The plaintiff informed Vann that he did not want to deal with Johnson anymore, so Vann indicated that he would obtain some estimates from other contractors. Vann obtained three estimates and the plaintiff chose Steve Harper, who had quoted a price of $2,000.

After everything was completed, it rained for several days. Vann then received a telephone call from the plaintiff who informed him that the retaining wall had moved. Vann inspected the retaining wall and confirmed that there had been some movement. Vann told the plaintiff that some settlement was to be expected and to call him if it got worse. After yet more rainy days, the plaintiff called Vann and told him that the retaining wall had moved even more. Vann called Johnson and told him the retaining wall was moving. Johnson then inspected the retaining wall and told Vann

"Yes, it is moving, but it should be okay. It's spiked together. It should be okay." Unfortunately, the retaining wall continued to move. Vann suggested to Johnson that he place a tarp over the retaining wall so rainwater would not make matters worse, and Johnson did that. Vann denied offering to repair the retaining wall, but Vann did tell the plaintiff he would assist Johnson with repairs if needed. Vann added that he did not repair the retaining wall because he was not responsible for building the wall in the first place.

Harper was called as a witness by Vann. Harper testified that Vann called him and asked him if he would provide an estimate for finishing a retaining wall. Harper went to the plaintiff's property and thereafter provided a $2,000 estimate to Vann for finishing the retaining wall. The plaintiff paid Harper for his work on the retaining wall. When completing the retaining wall, Harper only spoke with Vann and had no conversations with the plaintiff. Vann told Harper the basics of what needed to be done, and Harper did that. Several months after the retaining wall was completed, Vann called Harper and asked him to go out to the plaintiff's property and look at the retaining wall. Harper went to the plaintiff's property and observed that the bottom part of the wall was buckling. That was not the part of the wall that Harper had built. Vann asked Harper what he thought would be required to fix the wall. Harper told him that "[i]t would have to be torn down and rebuilt, start over."

Vann claimed he was not a general contractor on this project and the plaintiff never asked him to be a general contractor.

Johnson also testified at trial. Johnson stated that he has been in business for five years and has provided landscaping services for twelve years. Johnson has "been building retaining walls for seven or eights years. . . . I built twenty last year at least." Johnson stated that he initially was contacted by Vann to compact fill dirt that had been dumped onto the plaintiff's property. On the second day of compacting the dirt, Vann came up to him and stated he did not think "this is going to come up right." Vann suggested they may need a retaining wall and indicated that he would talk to the plaintiff about the situation. Then, according to Johnson,

> that evening [the plaintiff] came home. He was talking with Mr. Vann. I was compacting the fill dirt. As I finished up, Frank called me over. He said, "Hey, Matt, come on over and talk about the wall."
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> I went over, talked about the wall. . . . I started talking about how we would construct the retaining wall, how we would use deadmen throughout it.
>
> And really we just talked about the amount of cross-ties is what we were really aiming for just to try to get a – you know, how many cross-ties do you think it would take. . . . [F]rom the area I could rough[ly] estimate about how many cross-ties, about a hundred. So I just – you know, I told him that I would give him an estimate. You

> know, I didn't really specifically say it to anybody; not to Mr. Vann or [the plaintiff].
>
> I guess I pretty much considered myself working for Mr. Vann at that point. I thought the wall was going to be for Mr. Vann.
>
> I went – so anyway, I went home that evening. I worked up an estimate. Basically just taking the numbers and just putting it to pen and paper and making sure I was accurate on everything.
>
> So I called and I said – I called Mr. Vann. I said, "It's going to be about twenty-eight hundred dollars for me to do this wall." At that point I waited for him to call me back and give me the go ahead. He called back. He said, "Yeah, we want to go ahead with the wall. . . ."
>
> And really at that time, the only thing that I bid the wall for was just – you know, all that had was the labor and material. I didn't figure in any deadmen really. I didn't figure in – I just figured a hundred cross-ties.
>
> I didn't think the wall was going to be that tall. I didn't think we were talking about a fifteen-foot tall wall, as you can see in the picture, or however tall it is. You know, I thought we were talking six, seven feet; just something fairly small.
>
> You know, it's a lot different when you're building a much taller wall. The requirements for the footer and the base of it are a lot different. . . .

When construction of the retaining wall began, Johnson was working at another construction site. One of Johnson's employees, Curt Williams ("Williams"), began constructing the retaining wall. Johnson had, however, specifically showed Williams where the footer was to be placed. Several hours into the project, Johnson received a telephone call from Williams who explained that Vann wanted the location of the footer moved "back three or four feet." Johnson explained that moving the footer was a "significant point. That is a huge problem with the wall is to move it back like that." Johnson then told Williams to do what Vann wanted, "it's Frank's job. He's the man." When Johnson arrived at the work site later that day, neither he nor Williams were satisfied with the wall. According to Johnson,

> I went to Frank. I said, "Look, this is a pretty serious thing here. You know, you've moved the footer up on the fill dirt. At this point I don't feel comfortable building the wall anymore."

> "If you don't like the way I do things on my job, you can get off and do something else." That was the response that I got. In fact, I heard that same response a couple of times. Every time I said something. . . .
>
> [T]he next time we were walking on it, we talked about putting – you know, we were ready to put – after that two or three rows we were ready to put some deadmen in it. "No, no deadmen." We weren't allowed – you know, "We're not going to waste any material on deadmen." . . . I talked to Frank about the deadmen. He said he didn't want any deadmen.

Johnson claimed that he tried to explain the problem to the plaintiff, but the plaintiff responded that Vann was the contractor and he had complete confidence in Vann.

The jury was provided with a Jury Verdict Form which contained several questions to be answered by the jury. In response to the questions, the jury found: (1) that Vann was the general contractor for the construction project on the plaintiff's property, and Johnson was a subcontractor; (2) the plaintiff proved by a preponderance of the evidence that Vann breached the contract with the plaintiff by not building the retaining wall in a workmanlike manner; (3) the plaintiff proved by a preponderance of the evidence that his compensatory damages for the breach of contract was $9,300; (4) the plaintiff did not establish that he was entitled to punitive damages; (5) the plaintiff did not establish by a preponderance of the evidence that Johnson was in breach of contract; (6) the plaintiff proved by a preponderance of the evidence that Vann committed an unfair or deceptive practice in violation of the TCPA and the plaintiff was entitled to damages from Vann in the amount of $4,000; and (7) the plaintiff proved by a preponderance of the evidence that Johnson committed an unfair or deceptive practice in violation of the TCPA and the plaintiff was entitled to damages from Johnson in the amount of $3,800. The jury's answers on the verdict form also reveal how the jury itemized the damages with regard to the verdict against Vann. Specifically, as to the breach of contract claim, the jury awarded damages equal to "$7,300 - pad refund" and "$2,000 - Mr. Harper's work," for a total judgment of $9,300. When the jury awarded damages against Vann for the TCPA violation, the jury awarded "$4,000 [for] tear out and removal."

The trial court then entered a final judgment incorporating the jury's findings. The final judgment provides, in relevant part, as follows:

> The jury that heard this case awarded the plaintiff a judgment against defendant Frank Vann in the amount of $9,300 for breach of contract and $4,000 for violating the Tennessee Consumer Protection Act (TCPA). The jury awarded the plaintiff a judgment against defendant Matt Johnson of $3,800 for violating the TCPA. The jury found the plaintiff was not entitled to punitive damages.

> Plaintiff presented clear and convincing evidence that the defendants' actions were unfair and deceptive in violation of the Tennessee Consumer Protection Act. The defendants' actions were done willfully and knowingly and the plaintiff should recover treble damages. In particular, the defendants constructed a retaining wall for the plaintiff that they knew was defective by failing to place deadmen in the structure; that each defendant tried to blame the other, but both defendants were experienced and had to know that what they were doing was unfair and deceptive to the consumer who had no idea how to build a retaining wall; that because of defendants' actions, the retaining wall failed causing loss to the plaintiff; and that neither defendant attempted to remedy the situation, and, therefore, showed bad faith.
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> The plaintiff is entitled to an award of reasonable attorneys fees and costs pursuant to the TCPA.
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> Defendant Vann attempted to settle the matter once litigation began by trying to mediate the case and by giving an offer of settlement.
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> A certain amount of litigation was caused by the plaintiff changing its expert witness's opinion on the value and insisting on preparing for litigation with two experts while only one was necessary and only one was used at trial.
>
> The only evidence presented to the court concerning a reasonable hourly rate to be awarded to plaintiff's attorney was $200 per hour.
>
> The jury awarded $4,000 against defendant Vann for violation of [the] TCPA, which is almost half of what that defendant offered to settle for.
>
> Based on the *Hamilton v. T & W of Knoxville, Inc.*,[7] case, the attorney fees and costs should end on the date of the offer of judgment, July 28, 2005.
>
> The attorney fees and costs should be apportioned fifty-one percent (51%) against defendant Vann, and forty-nine percent (49%) against defendant Johnson.

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[7] The citation to this case is ***Hamilton v. T & W of Knoxville, Inc.***, No. E2003-02004-COA-R3-CV, 2004 WL 948384 (Tenn. Ct. App. E.S., filed May 4, 2004), *no appl. perm. appeal filed*.

> Attorney fees total $11,130 and costs total $1,421.
>
> The plaintiff cannot combine the damages awarded for breach of contract and the TCPA violation. Therefore, the plaintiff must choose between a judgment against defendant Vann for breach of contract, or against Defendant Vann and defendant Johnson for violation of the TCPA. . . . In this case, plaintiff must choose between the verdict against defendant Vann for breach of contract without attorney fees; or the verdict against both defendants for violating [the] TCPA with attorney fees and costs.
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> The plaintiff has chosen to take a judgment against both defendants for violation of [the] TCPA.
>
> It is hereby ORDERED that the plaintiff shall receive judgment as follows:
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> 1. The jury award of $4,000 against Defendant Vann shall be trebled to $12,000;
>
> 2. The jury award of $3,800 against Defendant Johnson shall be trebled to $11,400;
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> 3. Defendant Vann shall pay plaintiff's attorney fees in the amount of $5,676.30, and costs in the amount of $724.71;
>
> 4. Defendant Johnson shall pay plaintiff's attorney fees in the amount of $5,453.70, and costs on the amount of $696.29;
>
> 5. Court costs shall be assessed proportionately against the defendants as stated above.

(Paragraph numbering in original partially omitted).

II.

Vann appeals[8] raising the following issues: (1) whether the trial court erred when it denied Vann's motion for summary judgment and motion for directed verdict on the plaintiff's TCPA claim; (2) whether the trial court erred when it denied Vann's motion for summary judgment and motion for directed verdict on the plaintiff's breach of contract claim; (3) whether the trial court erred when

[8] Johnson did not appeal or file a brief.

it found a willful and knowing violation of the TCPA; and (4) whether a new trial is required because the trial court's jury instructions and jury verdict form were improper.

The plaintiff also appeals raising two issues. First, the plaintiff claims the trial court erred when it required him to elect between damages awarded for breach of contract and damages awarded for violation of the TCPA because those damage awards were for separate and distinct causes of action. Second, the plaintiff claims the trial court abused its discretion by limiting the award of attorney's fees and costs to those incurred prior to the date of the Tenn. R. Civ. P. 68 offer of judgment, when the amount of damages the jury awarded exceeded the amount of the offer of judgment. Pursuant to ***Killingsworth v. Ted Russell Ford, Inc.***, 205 S.W.3d 406 (Tenn. 2006), the plaintiff requests this Court award his attorney's fees incurred on appeal.

III.

The appropriate standard of review following a jury trial is set forth in ***Ballard v. Serodino, Inc.***, No. E2004-02656-COA-R3-CV, 2005 WL 2860279 (Tenn. Ct. App. E.S., filed October 31, 2005), *no appl. perm appeal filed*. We stated:

> Our standard of review after a trial court approves a jury's verdict is limited to determining whether the record contains any material evidence to support the jury's verdict. Tenn. R. App. P. 13(d). *See also* ***Washington v. 822 Corp.***, 43 S.W.3d 491, 494 (Tenn. Ct. App. 2000). The process of ascertaining the evidentiary support for a jury's verdict is extremely deferential to the verdict. *See* ***Kelley v. Johns***, 96 S.W.3d 189, 194-95 (Tenn. Ct. App. 2002). This narrow search for *any* material evidence is a procedural safeguard to a litigant's constitutional right of trial by jury; thus, it "requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict." ***D.M. Rose & Co. v. Snyder***, 206 S.W.2d 897, 901 (Tenn. 1947); *see* ***Kelley***, 96 S.W.3d at 194. This Court is not permitted to second-guess the jury's findings by reweighing the evidence to decide where it preponderates or to make our own credibility determinations. *See* ***Electric Power Bd. of Chattanooga v. St. Joseph Structural Valley Steel Corp.***, 691 S.W.2d 522, 526 (Tenn. 1985).

Ballard, 2005 WL 2860279, at *3 (emphasis in original).

IV.

We first will discuss the issues raised by Vann, beginning with his claim that the trial court erred when it denied his motion for summary judgment on the plaintiff's breach of contract and TCPA claims. In ***Corley v. Metro. Gov't. of Nashville and Davidson County***, No. M2004-02851-COA-R3-CV, 2006 WL 845999 (Tenn. Ct. App. M.S., filed March 31, 2006), *no appl. perm. appeal filed*, we rejected an identical issue insofar as the defendant claimed on appeal from a jury verdict for the plaintiff that the trial court should have granted its motion for summary judgment. We held:

> Metro additionally seeks to raise as an issue on appeal the denial of its motion for summary judgment. We find the issue without merit. When the trial court denies a motion for summary judgment upon the finding of a genuine issue as to a material fact, that ruling is not reviewable when there has been a judgment rendered after a trial on the merits. *Hobson v. First State Bank*, 777 S.W.2d 24, 32 (Tenn. Ct. App. 1989) (citing *Mullins v. Precision Rubber Products*, 671 S.W.2d 496, 498 (Tenn. Ct. App. 1984); *Tate v. County of Monroe*, 578 S.W.2d 642, 644 (Tenn. Ct. App. 1978)).

Corley, 2006 WL 845999, at * 3 (footnote omitted). We adhere to ***Corley*** and conclude that Vann's assertion on appeal from a jury verdict for the plaintiff that the trial court should have granted his motion for summary judgment on the plaintiff's breach of contract and TCPA claims is not reviewable.

The next issue is whether the trial court erred when it denied Vann's motion for a directed verdict on the plaintiff's breach of contract and TCPA claims. We discussed the relevant standard of review for the denial of a directed verdict in ***Moore v. Johnson***, No. E2000-00385-COA-R3-CV, 2000 WL 1424930 (Tenn. Ct. App. E.S., filed September 26, 2000), *perm app. denied March 19, 2001*. According to ***Moore***,

> [w]e review the trial court's denial of the defendant's motion for a judgment in accordance with his motion for a directed verdict as we would a denial of a directed verdict motion. ***Holmes v. Wilson***, 551 S.W.2d 682, 685 (Tenn. 1977). A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. ***Eaton v. McLain***, 891 S.W.2d 587, 590 (Tenn. 1994). We must take the strongest legitimate view of the evidence favoring the opponent of the motion. ***Id***. In addition, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. ***Id***.
>
> In performing its function as a thirteenth juror, a trial court must weigh the evidence to determine if the court is independently satisfied

> with the jury's verdict. ***Ridings v. Norfolk S. Ry. Co.***, 894 S.W.2d 281, 288 (Tenn. Ct. App. 1994). When a trial court has approved a verdict, our review is limited to a determination of whether there is material evidence to support the verdict. *See* Tenn. R. App. P. 13(d); *see also* ***Shivers v. Ramsey***, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996).

Moore, 2000 WL 1424930, at *1-2.

Because the trial court approved the jury's verdict against Vann, we must determine if there is any material evidence to support the verdict. In so doing, we must "take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict." ***Ballard***, 2005 WL 2860279, at *3.

After applying the appropriate standard of review, we hold that there is an abundance of material evidence to support the verdict of the jury. There unquestionably was a contract between the plaintiff and Vann. The written contract was for the construction of a parking pad and to have the driveway paved over in concrete. There was material evidence that the building of a retaining wall was necessary for the construction of the parking pad. There is evidence to support a determination that the written contract between the plaintiff and Vann was orally modified to include the retaining wall. We reject Vann's contention that the building of the retaining wall was not a contractual obligation assumed by him simply because the initial written contract made no mention of a retaining wall. There is material evidence that Vann's conduct after the written contract was entered into created a contractual obligation to ensure that the retaining wall would be constructed and that it would be constructed in a workmanlike manner. The jury's finding that Vann breached the contract is affirmed.

The next issue is whether there is material evidence to support the jury's verdict that Vann violated the TCPA. In ***Holladay v. Speed***, 208 S.W.3d 408 (Tenn. Ct. App. 2005), following a trial, the court concluded that the defendant had not violated the TCPA. ***Id***. at 412. The defendant, Charles Speed, was a licensed general contractor who constructed a home using an external insulation and finish system ("EIFS"). The proof at trial established, *inter alia*, that the defendant failed to inspect the EIFS system, that the defendant had no knowledge of EIFS systems, and the EIFS system was not properly installed and did not meet residential construction industry standards. ***Id***. at 417-18. We reversed the trial court's determination that there was no TCPA violation. We found sufficient evidence of an intentional deception under the TCPA:

> [D]espite having no experience with or knowledge of EIFS installation, Mr. Speed failed to review the EIFS manufacturer's recommendations and changed the architectural plans, removing flashings that were required by both the plans and industry standards. He assured Ms. Holladay, however, that the Asphodel property had

> been "constructed in accordance with accepted homebuilding practices" and that it had been "inspected by ... trained personnel." It was not.
>
> It is clear to this Court that the foregoing constitutes a deceptive act for the purposes of the Tennessee Consumer Protection Act. . . .

Id. at 418. *See also* ***Hopper v. Moling***, No. W2004-02410-COA-R3-CV, 2005 WL 2077650 (Tenn. Ct. App. W.S., filed August 26, 2005), *no appl. perm. appeal filed* (affirming an award of attorney's fees under the TCPA against an unlicensed home improvement contractor who entered into an agreement with the homeowner to make certain improvements, where there were numerous problems associated with the contractor's work).

We reject Vann's argument that the TCPA does not apply to him because he was not in the "business or trade of constructing retaining walls" and, therefore, the present case involves purely an isolated or casual transaction excluded from coverage of the TCPA. Vann initially agreed to construct a parking pad and a new driveway for the plaintiff. It was then discovered that a retaining wall would be necessary to complete the original undertaking and Vann had significant control over the construction of the retaining wall. All of these undertakings by Vann were part of his construction and home improvement business.

There is material evidence supporting the jury's verdict that Vann's actions were deceptive and unfair and in violation of the TCPA. There was material evidence that Vann was deceptive at the outset when he indicated the parking pad could be installed without a retaining wall being built. There was material evidence that Vann had significant input into how the retaining wall was being constructed and he knew the retaining wall was defective because no deadmen were being used. There was material evidence that despite his knowledge that the retaining wall was being constructed in an unworkmanlike manner, Vann repeatedly assured the plaintiff that the wall was constructed properly and in accordance with industry standards, which it clearly was not. All of these actions by Vann support the jury's verdict as to a violation of the TCPA.

Vann's next issue is a collateral attack on the trial court's finding of a willful and knowing violation of the TCPA. Vann argues that the jury's finding that the plaintiff was not entitled to punitive damages prohibits the trial court from finding a willful and knowing violation of the TCPA. In further support of this argument, Vann points out that, as with punitive damages, treble damage awards under the TCPA are intended to be punitive. *See* ***Miller v. United Automax***, 166 S.W.3d 692, 697 (Tenn. 2005). Vann then claims that since one form of punishment – punitive damages – was rejected by the jury, the trial court erred when it meted out the other form of punishment – treble damages under the TCPA.

In ***Murvin v. Cofer***, 968 S.W.2d 304 (Tenn. Ct. App. 1997), the trial court found a willful and knowing violation of the TCPA and awarded enhanced damages. On appeal to this Court, we determined that the TCPA was not applicable to that case and vacated the enhanced damages award.

Id. at 309. The plaintiff then argued that because the trial court found a willful and knowing violation of the TCPA, even if the enhanced damages award could not be sustained under the TCPA, the enhanced award should nevertheless be sustained as punitive damages which were sought when the complaint originally was filed. ***Id***. at 311. We disagreed, stating as follows:

> It is true that the trial court specifically found a "willful or knowing violation of the Act," as contemplated in T.C.A. § 47-18-109(a)(3). While "willful" is not defined in the Act, "knowing" is. It is defined as
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> > . . . actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a reasonable person would have known or would have had reason to know of the falsity or deception.
>
> T.C.A. § 47-18-103(6). The plaintiffs argue that this finding necessarily means that the court found facts that would justify an award of punitive damages. We do not believe that this is *necessarily* true.
>
> In Tennessee, it is clear that punitive damages are "restrict[ed] . . . to cases involving only the most egregious of wrongs." *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). A court may "award punitive damages only if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." *Id*. Such an award is only appropriate when the necessary conduct has been shown "by clear and convincing evidence." *Id*.
>
> We cannot say that the trial court's findings under T.C.A. § 47-18-109(a)(3) satisfy the quality or quantity of proof required under *Hodges* to sustain an award of punitive damages. Since there was no evidence of the defendants' financial condition, the trial court was not in a position to evaluate this aspect of the punitive damages inquiry. Under *Hodges*, generally speaking, this is one factor that a fact finder should consider when a request for punitive damages has been made. *Id*. Furthermore, the trial court did not indicate whether it found, by "clear and convincing evidence," the egregious conduct required by *Hodges*. We cannot extrapolate the trial court's findings regarding the defendants' intentional misrepresentations into the requisite finding of egregious conduct contemplated by *Hodges*.

> Accordingly, we vacate so much of the trial court's judgment as adds additional damages . . . under T.C.A. § 47-18-109(a)(3). Since the Act does not apply and since we cannot say that there is a factual predicate for punitive damages, we cannot sustain this portion of the trial court's award.
>
> While the trial court did not make findings that would sustain an award of punitive damages, we recognize that it did make findings that clearly reflect its determination that the defendants were guilty of intentional misrepresentations. In view of this finding and in view of the fact that the parties and the trial court were understandably focused on the Act, we hold that it is appropriate to remand this case to the trial court to hold a hearing to determine whether the plaintiffs are entitled to punitive damages. . . .

Murvin, 968 S.W.2d at 311-312 (emphasis in original).

Murvin makes clear that the standard for awarding treble damages under the TCPA and the standard for awarding punitive damages are different. If a finding that there was conduct sufficient to award treble damages under the TCPA cannot automatically translate into a finding sufficient to award punitive damages, then the converse likewise would be true; that is, a finding that there was no conduct sufficient to award punitive damages under the elevated standard does not automatically mean that there was no conduct sufficient to award treble damages under the standard set forth in the TCPA. Accordingly, we conclude that the jury's determination that the plaintiff failed to establish either the quality or quantity of proof necessary to sustain an award of punitive damages does not, as a matter of law, preclude the trial court from finding a willful and knowing violation of the TCPA.

Vann's final issue challenges the trial court's jury instructions and the jury verdict form. Among other things, Vann claims the jury verdict form was improper because it did not give the jury the option of determining that there was no contract at all between the plaintiff and either Vann or Johnson to build the retaining wall. Vann also argues that the jury instructions were improper because the jury was not asked whether Johnson was an independent contractor of Vann.

In ***Johnson v. Tennessee Farmers Mut. Ins. Co.***, 205 S.W.3d 365 (Tenn. 2006), the Supreme Court offered the following guidance for reviewing a challenge to jury instructions:

> A trial court should instruct the jury upon every issue of fact and theory of the case that is raised by the pleadings and is supported by the proof. *Street v. Calvert*, 541 S.W.2d 576, 584 (Tenn. 1976); *Spellmeyer v. Tenn. Farmers Mut. Ins. Co.*, 879 S.W.2d 843, 846 (Tenn. Ct. App. 1993). "Where a special instruction that has been requested is a correct statement of the law, is not included in the

> general charge, and is supported by the evidence introduced at trial, the trial court should give the instruction." *Spellmeyer*, 879 S.W.2d at 846. Reversal of a judgment is appropriate, however, only when the improper denial of a request for a special jury instruction has prejudiced the rights of the requesting party. *Id*. It is not sufficient that refusal to grant the requested instruction *may* have affected the result; "[i]t must affirmatively appear that it did in fact do so." *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992). Tennessee courts view the jury charge in its entirety and consider the charge as a whole in order to determine whether the trial judge committed prejudicial error. *Id*. It is not error to deny a requested instruction if its substance is covered in the general charge. *Id*. at 445.

Johnson, 205 S.W.3d at 372 (emphasis in original).

The proof at trial simply does not support a conclusion that no contract whatsoever existed for the construction of the retaining wall, and the jury was specifically asked whether a contract existed between the plaintiff and Johnson, and the jury indicated that no such contract existed. It necessarily follows that because there was a contract for the subject work and there was no contract between the plaintiff and Johnson, then there must have been a contract between the plaintiff and Vann and the jury so found.

The jury verdict form asked the jury if Vann breached "his contract with the plaintiff as a general contractor by not building the retaining wall in a workmanlike manner." Even though the jury found that Vann was a general contractor, there was abundant proof offered at trial to support a determination that Vann breached his contractual obligation to the plaintiff regardless of any general contractor status.[9] In other words, even if Vann was not deemed the general contractor for the project, there is substantial and material evidence to support an independent finding of liability on the part of Vann based upon his own conduct and participation in the construction of the retaining wall. Contrary to Vann's assertions on appeal, this case is not just about Vann being held liable for Johnson's defective work on the retaining wall.

We have carefully reviewed the jury instructions and the jury verdict form in light of the proof offered at trial. After considering the various challenges to those instructions, we find no error in the charge that could be considered prejudicial to Vann. Vann also has not established that any potential error, even if one existed, "affirmatively" affected the result. ***Johnson***, 205 S.W.3d at 372.

In summary, as to the numerous issues raised by Vann on this appeal, we conclude that the trial court committed no error and the jury's verdict is supported by material evidence. All of these issues are found adverse to Vann and the judgment of the trial court as to these issues is affirmed.

[9] There likewise was abundant proof that Vann breached his contractual obligations as the general contractor.

V.

As noted previously, the plaintiff raises two issues on appeal. Specifically, the plaintiff claims that the trial court erred when it required him to elect between the damages found by the jury on the breach of contract and those awarded for the TCPA violation. The plaintiff's second issue is a challenge to the amount of attorney's fees awarded by the trial court under the TCPA.

The plaintiff's first issue requires an examination of the election of remedies doctrine. In ***Miller v. United Automax***, 166 S.W.3d 692 (Tenn. 2005), the Supreme Court discussed the election of remedies doctrine as follows:

> Tennessee Rule of Civil Procedure 8.01 "grants a plaintiff wide latitude in pleading alternative claims for relief and pursuing an array of theories of recovery in a single action." *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 906 (Tenn. 1999). This allows Plaintiffs to seek redress both under common law and under the Tennessee Consumer Protection Act. However, in certain circumstances, a plaintiff is required to elect between remedies.
>
> > The election of remedies doctrine has two general applications: (1) a plaintiff may be estopped from pursuing additional remedies once a plaintiff has made a choice to pursue a specific remedy in another forum or lawsuit, and (2) a plaintiff may be forced to elect between different remedies "where the remedies are so inconsistent or repugnant that pursuit of one necessarily involves negation of the other."
>
> *Forbes v. Wilson County Emergency Dist. 911 Bd.*, 966 S.W.2d 417, 421 (Tenn. 1998) (internal citations omitted). "For election of remedies to apply, the two remedies sought must be truly repugnant to one another." *Allied Sound, Inc. v. Neely*, 909 S.W.2d 815, 822 (Tenn. Ct. App. 1995). *The purpose behind the election of remedies doctrine is to prevent "double redress" for a single wrong. Forbes*, 966 S.W.2d at 421.

Miller, 166 S.W.3d at 696-97 (emphasis added).

Applying the election of remedies doctrine, a plaintiff cannot recover punitive damages under a common law claim as well as treble damages under the TCPA. This is because both types of damages, while predicated on findings of somewhat different elements, are both considered punitive, and allowing recovery for both would result in double redress for a single wrong. ***Concrete Spaces, Inc. v. Sender***, 2 S.W.3d 901, 906 (Tenn. 1999). However, the Court in ***Miller*** concluded that a

plaintiff could recover punitive damages under a common law claim and attorney's fees under the TCPA. The reason for this was because the purpose for an award of attorney's fees was different than the purpose behind punitive damages, and an award of both attorney's fees and punitive damages would not be duplicative. ***Miller***, 166 S.W.3d at 697.

In ***Hall v. Hamblen***, No. M2002-00562-COA-R3-CV, 2004 WL 1838180 (Tenn. Ct. App. M.S., filed August 16, 2004), *no appl. perm appeal filed*, this Court discussed the interrelationship between breach of contract claims and TCPA claims as follows:

> [T]o establish a right to recover under the TCPA, a plaintiff must show the defendant engaged in unfair or deceptive acts, as specified in the Act, that caused plaintiff an ascertainable loss.[10] *Myint*, 970 S.W.2d at 926; *Milliken v. Crye-Leike Realtors*, No. M1999-00071-COA-R3-CV, 2001 WL 747638, at *6 (Tenn. Ct. App. July 5, 2001) (perm. app. denied Dec. 10, 2001).
>
> Breach of contract and violation of the TCPA are two different causes of action, and proof of the existence of one does not necessarily establish the existence of the other. Every breach of contract, or failure to perform a contract, is not a violation of the TCPA. A party bringing a TCPA action must prove that there was some deception, misrepresentation or unfairness, regardless of any breach of contract. *Hamer v. Harris*, No. M2002-00220-COA-R3-CV, 2002 WL 31469213, at *1, (Tenn. Ct. App. Nov. 6, 2002), (perm. app. denied Feb. 18, 2003).

Hall, 2004 WL 1838180, at *4 (footnote in the original).

As explained in ***Hall***, a breach of contract claim and a TCPA claim are distinctly different causes of action. This is far different from the situation involving punitive damages and enhanced damages under the TCPA which are both intended to be punitive. Thus, allowing recovery for breach of contract and a TCPA violation will not run afoul of the election of remedies doctrine so long as the plaintiff is not receiving "'double redress' for the same wrong." ***Miller***, 166 S.W.3d at 697 (citing ***Forbes***, 966 S.W.2d at 421). The question in the present case then becomes whether the damages awarded to the plaintiff for the breach of contract and the TCPA violation were for the same wrong. As discussed earlier in this opinion, when the jury returned its verdict on the breach of contract claim against Vann, it awarded damages equal to "$7,300 [for] pad refund" and "$2,000 [for] Mr. Harper's work," for a total of $9,300. The jury also explained that its award for the TCPA violation against Vann in the amount of $4,000 was for "tear out and removal" of the defective retaining wall. It thus is clear that the damages awarded by the jury for breach of contract were

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[10] The plaintiff must also show that the acts or practices took place in the conduct of any trade or commerce in this state. *Myint*, 970 S.W.2d at 926.

distinct from the damages it awarded for the TCPA violation. Therefore, allowing recovery for both claims would not result in double redress for the same wrong and the trial court erred when it required the plaintiff to choose between the two recoveries. The judgment for the plaintiff against Vann is hereby modified to reflect a judgment for breach of contract in the amount of $9,300, plus a judgment in the amount of $4,000 for a violation of the TCPA. Because we previously affirmed the trebling of the TCPA damage award, the net final award should be $9,300 for the breach of contract claim, and an additional $12,000 for the TCPA violation, for a combined total of $21,300.

The next issue is the plaintiff's claim that the trial court erred when it limited the amount of attorney's fees awarded under the TCPA. The trial court limited the amount of attorney's fees to the time period before Vann made a Tenn. R. Civ. P. 68 offer of judgment in the amount of $7,500, which admittedly was less than the total judgment received by the plaintiff. We discussed a similar issue in ***Hamilton v. T & W of Knoxville, Inc.***, No. E2003-02004-COA-R3-CV, 2004 WL 948384 (Tenn. Ct. App. E.S., filed May 4, 2004), *no appl. perm. appeal filed*, where the plaintiff claimed the trial court improperly considered a $3,000 offer of judgment when limiting an attorney's fee award under the TCPA to $5,000. We stated:

> A determination of reasonable attorney's fees and costs is necessarily a discretionary inquiry. *United Med. Corp of Tenn. V. Hohenwald Bank & Trust Co.*, 703 S.W.2d 133, 137 (Tenn. 1986); *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998); *see also* Tenn. R. Civ. P. 54.04(2). As there is no fixed mathematical rule in this jurisdiction for determining reasonable fees and costs, an appellate court will normally defer to a trial court's award of attorney's fees unless there is "a showing of an abuse of [the trial court's] discretion." *Threadgill v. Threadgill*[,] 740 S.W.2d 419, 426 (Tenn. Ct. App. 1987); *see also Sanders*, 989 S.W.2d at 345. . . . A reasonable attorney's fee is determined in accordance with [the] Tenn. Code of Professional Responsibility . . . .
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> * * *
>
> [T]he Plaintiff argues that the fee of $5000.00 was based on the fact that the trial court improperly considered the Defendant's offer of judgment for $3000.00. . . . We think an offer may be considered by the trial judge in the common-sense exercise of discretion, together and with emphasis upon the factors enumerated in DR 2-106. We cannot find that the trial judge abused his discretion in awarding an attorney's fee less than the amount requested.

Hamilton, 2004 WL 948384, at *4, 5.

In the present case, we adhere to our holding in ***Hamilton***, *i.e.*, that a trial court may consider an offer of judgment in the exercise of its discretion when awarding attorney's fees under the TCPA. That being said, we cannot conclude that the trial court abused its discretion when it awarded the plaintiff attorney's fees of $11,130.

The final matter is the plaintiff's request for attorney's fees incurred on this appeal. In ***Killingsworth v. Ted Russell Ford, Inc.***, 205 S.W.3d 406 (Tenn. 2006), the Supreme Court stated:

> [T]he TCPA allows an award of attorney's fees to a plaintiff only where the trial court has found that one of the Act's provisions "has been violated." Tenn. Code Ann. § 47-18-109(e)(1). If an appeal ensues, the wronged plaintiff's monetary judgment is at risk of being consumed by the resulting appellate attorney's fees unless they are also subject to being awarded. A plaintiff successful at trial is therefore at risk of being "de-remedied" if unable to collect his or her reasonable appellate legal fees. Given the broad remedial goals our legislature determined to pursue with the TCPA, we do not think the General Assembly intended that result. As this Court has previously recognized, a potential award of attorney's fees under the TCPA is intended to make the prosecution of such claims economically viable to a plaintiff. *Miller v. United Automax*, 166 S.W.3d 692, 697 (Tenn. 2005) (citing *Killingsworth*, 104 S.W.3d at 535). The same concern with economic viability applies equally to appellate attorney's fees.
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> We hold, therefore, that a plaintiff may be awarded reasonable attorney's fees incurred during an appeal on a claim brought under the TCPA where one or more of the TCPA's provisions has been violated. . . .

Killingsworth, 205 S.W.3d at 410.

Exercising our discretion and in light of the purpose behind an award of attorney's fees on appeal in a TCPA case, we grant the plaintiff's request for attorney's fees on appeal. On remand, the trial court is to conduct a hearing to determine the reasonable amount of attorney's fees and expenses incurred by the plaintiff on this appeal.

VI.

The judgment of the trial court is modified, and, as such, is affirmed. This cause is remanded to the trial court for further proceedings consistent with this opinion and for collection of the costs below, as permitted by law. Costs on appeal are taxed to the appellant, Frank Vann dba Frank Vann Construction Company.

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CHARLES D. SUSANO, JR., JUDGE