Circuit Court for Montgomery County
Case No. 457535V

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 0465

September Term, 2022

YIFAT LEVY-YURISTA

v.

ALBERT FINGER ET AL.

Nazarian,
Leahy,
Friedman,

JJ.

Opinion by Leahy, J.

Filed: July 28, 2023

*This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

**During the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Shortly after moving into their new home in July of 2018, Albert Finger and his wife, Lilly Goldman ("Appellees" and "Buyers" below), sustained significant floodwater damage in their basement and garage. Appellees purchased the house, located on Potomac Avenue in Silver Spring, Maryland ("the Property"), from Yifat Levy-Yurista ("Appellant") and her business partner, Ilan Lagziel (collectively "Homeowners").[1] Prior to the sale, the Homeowners executed a Property Disclosure Statement listing the conditions of the Property as required under Maryland Code (1974, 2015 Repl. Vol.), Real Property Article ("RP"), § 10-702(c)(1)(i), but failed to disclose, among other things, the Property's history of flooding and recent repairs that evidenced leaks or moisture in the basement and garage.

As a result of these events, Appellees filed a three-count complaint against Homeowners in the Circuit Court for Montgomery County, Maryland, alleging fraud, negligent and intentional misrepresentation, and violation of the Consumer Protection Act ("CPA"), Maryland Code (1975, 2013 Repl. Vol.), Commercial Law Article ("CL"), §§ 13-101 *et seq*. Over the course of a three-day trial beginning on February 28, 2020, Appellees presented evidence of expenses they incurred as a direct result of repairing the Property from the water damage, including the costs to make the Property flood-proof, totaling $125,495.05. Appellees also presented evidence that it would cost an estimated $38,100 to finish the repairs in the basement.

[1] Mr. Lagziel is not a party to this appeal. On March 28, 2018, the circuit court issued an order of default against Mr. Lagziel after he failed to respond to Appellees' complaint.

After finding Mr. Lagziel and Appellant jointly and severally liable for fraud, negligent and intentional misrepresentation, and violating the CPA, the court awarded Appellees compensatory damages in the amount of $163,595.05 plus $137,200 in attorneys' fees, for a total of $300,795.05. Appellant noted a timely appeal.

In her briefing, Appellant sets forth one question for our review, which we have sub-divided and rephrased as follows based on the arguments that she presents on appeal:[2]

I. Did the trial court err in awarding Appellees compensatory damages for fraud and misrepresentation even though Appellees presented no evidence at trial of the fair market value of the Property, with and without the alleged defects, at the time of sale?

II. Did the trial court err in awarding Appellees compensatory damages for violation of the CPA?

III. Did the trial court abuse its discretion in awarding Appellees $137,000 in attorneys' fees?

For the reasons set forth in this opinion, we hold that the court did not err in awarding Appellees compensatory damages in the amount of $163,595.05 as a result of Appellant's tortious conduct. In fraudulent or negligent misrepresentation actions in which a plaintiff has purchased property that is not what it was represented to be, the "aim of compensation ... is to put the buyer, as nearly as practicable," in the position that the buyer would have been had there been no fraud or misrepresentation. *Beardmore v. T.D. Burgess Co.*, 245 Md. 387, 390 (1967). To that end, Maryland follows the "flexible theory of

[2] Appellant's brief states the question presented as follows: "Did the trial court err by entering an award of compensatory damages and attorney[s'] fees in favor of Appellees for claims based upon misrepresentations even though Appellees did not offer any evidence to support such an award?"

damages" which permits a plaintiff to select between different methods of recovery. The first method, referred to as the "out of pocket" test, permits a plaintiff to recover actual loses and is typically measured by "the value of the [Property] as represented less its actual value at the time of sale." *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 505 (1971). The second method, known as the "benefit-of-the-bargain" test, "put[s] the defrauded party in the same financial position as if the fraudulent representations had in fact been true" and is typically measured by "the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true." *Goldstein v. Miles*, 159 Md. App. 403, 422-23 (2004) (citations omitted). However, under the "benefit-of-the-bargain" test, the damages may also be measured by the "cost-to-conform" the property to obtain the benefit of what was promised. *Hinkle*, 262 Md. at 511-11. Maryland's flexible approach also permits that a plaintiff may recover under both the "out-of-pocket" and "benefit-of-the-bargain" measure of damages, *Goldstein*, 159 Md. App. at 425, as long as the plaintiff presents competent, non-overlapping evidence to support each measure of damages, *see e.g.*, *id.* at 408 ('holding that benefit-of-the-bargain damages are obtainable for such tortious conduct but only where there is in fact an enforceable bargain."). In this case, the trial court correctly awarded Appellees the cost-to-conform to the benefit of what was promised based on the costs of repairing the basement from the water damage and the remedial measures performed on the Property to prevent future flooding.

With respect to the CPA claim, we hold that the trial court did not err in awarding compensatory damages under the CPA because the CPA expressly permits recovery for "injury or loss sustained . . . as the result of a practice prohibited by this title." CL § 13-408(a). Finally, we also discern no abuse of discretion in the court's decision to award Appellees attorneys' fees in the amount of $137,200 because attorneys' fees were available under the section 13-408(b) of the CPA *and* pursuant to the fee-shifting provision contained in Appellees' sales contract. Accordingly, we affirm the court's award of damages incurred from, among other things, damage to Appellees' personal property.

BACKGROUND

On May 8, 2018, Mr. Finger and Ms. Goldman entered into a sales contract with the Homeowners to purchase the Property for $1,050,000. Homeowners advertised that the Property had, among other things, a "finished" basement with a "[s]eparate apartment area" that included a "large living area with designer floor tile, [] recessed LED lighting" and "an open floor plan with ample storage." The basement especially appealed to Mr. Finger because he "build[s] guitars" for a living, which requires "a lot of room" and "control [of] the humidity" as the wood used "retains a lot of humidity and moisture" that affects the "resonance" of the instrument. During negotiations leading to the purchase and sale of the Property, Buyers specifically inquired about any history of flooding or water penetration to the Property. Mr. Lagziel and Ms. Levy-Yurista repeatedly denied any problems or history of flooding.

The Contract

Paragraph 23(A) of the sales contract contained, in relevant part, a fee-shifting provision for legal expenses as follows:

> In any action or proceeding between Buyer and Seller based, in whole or in part, upon the performance or nonperformance of the terms and conditions of this Contract, including but not limited to, breach of contract, negligence, **misrepresentation or fraud**, the prevailing party in such action or proceeding **shall be entitled to receive reasonable Legal Expenses** from the other party as determined by the Court or arbitrator.

(Emphasis added).

In addition to the contract, the parties signed a "Notice to Buyer and Seller of Obligations Under Maryland's Single Family Residential Property Condition and Disclosure Law." Sellers are required, under RP § 10-702, to provide buyers with either (1) a written statement *disclosing* any defects in the condition of the property *or* (2) a written statement *disclaiming* any representations or warranties as to the condition of the property. RP § 10-702(c)(1). The Homeowners chose disclosure and executed the required Property Disclosure Statement. The disclosure form presented, among other things, a series of yes-or-no questions regarding the condition of the Property. Checking the box "no" underneath the questions below, the Homeowners denied having actual knowledge of the following:[3]

> 2. Basement: Any leaks or evidence of moisture?
> 3. Roof: Any leaks or evidence of moisture?
>
> * * *

[3] Ms. Levy-Yurista signed the disclosure form on April 24, 2018, and Mr. Lagziel signed it on April 28, 2018. The Appellees signed the form on May 8, 2018.

12. Exterior Drainage: Does water stand on the property for more than 24 hours after a heavy rain?

* * *

19. Are there any other material defects, including latent defects, affecting the physical condition of the Property?

The Inspection Report

On May 12, 2018, Buyers retained Faro Systems, Inc. ("Faro") to inspect the Property and issue a report. Under the section entitled "significant defects," the report listed "26 items" that included, among other things, water stains on the rear interior wall of the garage, visible cracks in the material installed on some of the walls, inadequate shingles on the roof, loose stained wood siding, deficient electrical wiring throughout the house, and non-functional radiant heating tiles in the master bathroom. Although the report found "no visible evidence of water penetration from the roof at this time," it was inconclusive with respect to any evidence of moisture or water penetration in the basement because "most of the structural components [were] concealed" under "finished surfaces."

On May 23, 2018, Buyers received an email written by Mr. Lagziel that stated, "[d]ue to heavy rain and misplacing of the downspout floor extension, water penetrated between a small gap of the house wall and the pathway." A few weeks later, Mr. Finger "was riding [his] bike through the neighborhood" and noticed "some cars parked at the house." When Mr. Finger attempted to enter the Property through the side gate, he was stopped by Mr. Lagziel. At trial, Mr. Finger testified that he observed "some guys with a Shop-Vac[] . . . taking some things out of the basement[,]" and asked Mr. Lagziel "what was going on[.]" Mr. Lagziel, however, refused to allow Mr. Finger to see the basement

because, Mr. Lagziel told Mr. Finger, Buyers "didn't own the house yet." Instead of arguing, Mr. Finger "got back on the bike and rode home." Ms. Levy-Yurista was not present at this meeting.

After this incident, Mr. Finger testified that Buyers "were going to pull out of the deal" when Homeowners requested a sit-down meeting. In June 2018, Mr. Finger, the Homeowners, and their realtors, met at the Property to discuss Buyers' concerns with the inspection report, the email about the water penetration, and Mr. Finger's personal observation of a Shop-Vac being removed from the Property. During this meeting, Mr. Finger specifically inquired about any history of water intrusion in the basement because of his profession building guitars. Mr. Finger explained that he "was going to work [in the basement]" and "needed to be able to control the environment and [he] couldn't have a bunch of water." Mr. Lagziel assured Mr. Finger—in the presence of Ms. Levy-Yurista—that "there hadn't been a problem" with any moisture, leaks, or flooding in the basement or garage. With respect to the May 23 email regarding water penetration to the Property, Mr. Lagziel reassured Mr. Finger that it was nothing more than "a small leak at the top of the stairs" that "you could clean up with a paper towel" and promised "to take care of it."

Buyers decided to proceed with the sale. Prior to closing, Mr. Finger conducted a final walk-through of the Property with his real estate agent, during which Mr. Finger encountered Ms. Levy-Yurista "in the master bathroom working on the floors," and asked her "if there were any problems with the basement" to which she replied that "there had been no flooding."

The Flooding Events

On June 29, 2018, the parties closed on the Property, and Buyers moved into their new house in or about the first week of July 2018. Shortly thereafter, Mr. Finger testified that when it rained, water appeared "at the bottom of the stairs" leading down into the basement instead of "at the top of the stairs" as previously indicated by the Homeowners, who had described the water penetration as "a small leak at the top of the stairs" that "you could clean up with a paper towel." On July 22, 2018, while Ms. Goldman was out of town, the basement and garage flooded with "a foot" of water in the garage after experiencing intermittent rainfall.

Then, on July 25, 2018—three days later—the basement and garage flooded again, this time with water levels reaching approximately "six to eight inches" in the basement and several feet of water in the garage. Mr. Finger testified that "inches" of water accumulated in the backyard, taking "a week or so before it started to dry out." Ms. Goldman, who had returned home, took photos and videos of the scene, which she described as a "waterfall . . . coming over the retaining wall into the [garage], and filling up the floor of the garage" with "brown water."

As discussed in more detail below, Buyers subsequently hired, among others, a landscape architect and waterproofing experts to re-design their backyard and construct barriers around their home to prevent future flooding.

The Complaint

As a result of these events, on November 7, 2018, Buyers filed their initial complaint against the Homeowners in the Circuit Court for Montgomery County, Maryland. Ms.

Levy-Yurista filed an answer on June 7, 2019, denying any liability. An amended, three-count complaint was filed on January 15, 2020. In Count I, for "Fraud – Concealment, Inducement, Misrepresentation, Deceit," Buyers alleged that Homeowners "falsely represented on the executed Disclosure Statement that there were no leaks or evidence of moisture" in the basement or on the roof and that the Property did not have standing water for more than 24 hours. In Count II, for "Negligent Misrepresentation," Buyers asserted that the Homeowners failed "to accurately disclose the drainage, flooding, and leaking issues with the Property when they completed the Disclosure Statement," and, as alleged under Count I, reasserted that Buyers justifiably relied on these false assertions and suffered damages proximately caused by them. In Count III, Buyers contended that the Homeowners violated the CPA by, among other things, "ma[king] false representations that consumer realty was of a particular standard, quality, grade, style, or model which it is not." Buyers requested judgment against the defendants in excess of $250,000.00, and as punitive damages, they requested three times the actual damages award, plus attorneys' fees and court costs.

On February 13, 2020, Ms. Levy-Yurista responded to the amended complaint. Mr. Lagziel, however, failed to respond to either complaint and, upon motion by Buyers, on March 28, 2019, the court issued an order of default against him. In doing so, the court postponed the *ex parte* proof hearing for damages and default judgment until after the trial involving Ms. Levy-Yurista.

The Trial

The case was tried to the circuit court beginning on February 28, 2020. On appeal, Ms. Levy-Yurista challenges the sufficiency of evidence to support the damages awarded as well as the court's alleged failure to apply the correct damages formula. Indeed, she states in her brief that "the facts of the case and liability are not in dispute." Accordingly, our summary of the trial record focuses on the evidence of damages presented by parties rather than a comprehensive review of the trial proceedings.

Evidence Presented by Buyers

At trial, Buyers called eight witnesses to testify and introduced 38 exhibits into evidence that included a Damages Summary Chart created by Ms. Goldman, listing Buyers' total expenses.

1. ServiceMaster Restore

After the first flood, Mr. Finger testified that he engaged ServiceMaster Residential/Commercial Services, L.P., d/b/a ServiceMaster and Restoration of Arlington/Bethesda/Chantilly ("ServiceMaster") for water remediation services. ServiceMaster arrived on July 25, 2018, and placed fans and removed portions of the drywall to help to air-out the basement. Removing the drywall revealed evidence of prior water intrusion, including rusted and corroded conduits in the wall that were not visible during the home inspection conducted by Faro. The invoice for ServiceMaster, introduced into evidence, showed an estimated cost of $3,440.96.

2. U-Haul, Home Depot & Ace Hardware

On July 25, 2018—shortly after ServiceMaster left the Property—Buyers' basement flooded again, this time with much deeper water intrusion, as water levels reached "six to eight inches" in the basement and over a foot in the garage. Short term remedial efforts to minimize the water damage included renting a U-Haul truck to store the items removed from the basement, gasoline for the U-Haul, and the purchase of sandbags from Home Depot "to build little bumpers around [the] brand new house." Mr. Finger introduced into evidence receipts for the supplies listed above for a total amount of $1,253.40.

3. JES Foundation Repair

Mr. Finger had contacted JES Construction, LLC, d/b/a JES Foundation Repair ("JES") weeks before the flood on July 25 to investigate the water penetration issue located on the stairs, which is reflected in JES's initial contract dated July 14, 2018. This contract, introduced into evidence, contained an estimated cost of $10,969.20 and reflected a $2,193.84 deposit made on the same day. After inspecting the flood damage from July 25th, however, JES provided Buyers a new estimate of $67,775.94 to waterproof the basement.

Buyers called Christopher Mclaughlin, a sales manager at JES, to testify at trial as to the scope of the work performed by JES and provide expert testimony regarding the remedial measures required to prevent future flooding. Mr. Mclaughlin explained that JES's work was extensive, and exhibits introduced at trial showed that JES's work included, among other things, installing a SafeDri triple submersible pump system, a yard well, drain tile with the basement gutter, drain tile in the yard, electrical work and upgrade,

concrete replacement, basement gutter and debris removal, a cross-seal wall system, and freeze guards. He testified that JES amended the contract, adding $14,310 to include additional work for installing new egress windows, an egress window ledge, and well ducts, along with removal work of then existing structures. Buyers introduced into evidence five payments to JES in the following amounts: $2,193.84 (first deposit on initial contract), $13,555 (second deposit on amended contract), $2,862 (deposit for egress windows), $47,162.09 (payment made towards balance on the amended contract), and $6,413.60[4] (payment for remaining balance on JES contract) for a total amount of $71,586.53.

4. Top to Bottom Services

Buyers also employed Top to Bottom Services, LLC ("Top to Bottom"), whose Director of Field Services, Matthew Kaufman, inspected the Property after the floods and concluded that there was "substantial and significant water entry." Mr. Kaufman testified as an expert at trial in home inspections. He related that he conducted a "full home inspection," and opined that the inspection report conducted prior to the sale by Faro Systems, Inc. "was substantially within the standards of practice for home inspection in the State of Maryland[.]" Although Mr. Kaufman might have identified different items in the inspection, he noted that the prior home inspector did not have the benefit of knowing about

[4] Before JES could begin their work, however, the basement and garage needed to be accessible, which required disassembling the downstairs kitchen and bathroom. Consequently, Plaintiffs introduced into evidence a check for $675 addressed to Yohalmo Asosa, whom they hired to assist them moving furniture and other items from the basement to prepare for JES.

the history of flooding and did not have access to the exposed foundation walls, which depicted signs of "active and ongoing moisture issues."

5. Craig Richmond Landscape Architects and Smoot Landscapes

Buyers called Craig Richmond, owner and manager of Craig Richmond Landscape Architects, to the stand. Mr. Richmond testified that the Buyers hired him to design and supervise the implementation of his landscape plan. Buyers introduced into evidence checks made payable to Mr. Richmond that totaled $2,450 for his services. The landscape plan designed by Mr. Richmond was implemented by Smoot Landscapes ("Smoot"). The court ultimately awarded a total of $34,300 for Smoot's services.

6. Other Costs

Mr. Finger testified to additional services and costs associated with the flooding. For example, Buyers had to pay for electrical work that was required "to upgrade the electrical supply to the garage and to the basement." He introduced into evidence a check for $1,650 made payable to LV Electric that reflected the total amount paid for that work. He also testified that, following the second flood on July 28, 2018, he stored all of the items removed from the basement at Public Storage. Buyers introduced into evidence 33 receipts from Public Storage that totaled $9,840.

7. Garay General Construction, LLC

Mr. Finger testified that there still was work required in the basement to "finish it" but that Buyers "ran out of money." He explained that "financially, it's pretty much broke us in half," compelling Mr. Finger "to sell a . . . pretty [significant] guitar collection." Without objection, Buyers introduced into evidence a proposal from Garay General

Construction, LLC, dated July 23, 2019, that estimated it would cost $38,100 to put the basement "back to the way it was" before the flooding which included "tear[ing] out a portion of the backyard to put tanks in to store some of the water that would get backed up" and putting "the drywall back and paint[ing] the drywall."

8. Robert Szabo

Buyers' neighbor, Robert Szabo, testified at trial that water intrusions in the basement garage occurred on "many occasions" while the Homeowners owned the Property. He explained that he "became close friends" with Mr. Lagziel and "also got to know Yifat" when they purchased the Property in 2016. During their friendship, Mr. Szabo witnessed—and helped Mr. Lagziel clean up—water from the basement on at least "two separate occasions." The first occasion occurred in July 2017. Mr. Szabo observed "cascading waves [of water] over the driveway," flowing down into the basement where it accumulated up to "4 to 6" inches and "up to a foot high" in the garage and assisted "Ilan and his crew" in trying to remove it. The second incident occurred in August 2017 when Mr. Lagziel was out of town. While watching the Property for Mr. Lagziel, after a day of heavy rainfall, Mr. Szabo saw "waves and waves of water cascading down the driveway, coming over both the edges, going right down into" the garage. He testified that he "spent the entire night until sunrise getting water out of that place."

At the close of Buyers' case, Ms. Levy-Yurista moved for judgment on all three counts, arguing, among other things, that Buyers failed to prove damages in any measurable way permitted under Maryland law. Citing to *Hall v. Lovell Regency Homes*

Ltd. P'ship, 121 Md. App. 1 (1998), Ms. Levy-Yurista's counsel argued that Buyers failed to present evidence of the property's diminution in value. According to counsel, the damages calculation set forth in *Hall* requires evidence "about the actual value [of the Property] at the time of purchase" and the diminution in value of the Property, and such evidence was not presented by Buyers' case. In response, Buyers cited to *Hinkle v. Rockville Motor Co.*, 262 Md. 502 (1971), and *Beardmore v. T.D. Burgess Co.*, 245 Md. 387 (1967), and argued that Maryland follows a "flexible theory of damages" that permits recovery for "the cost of necessary repairs" under the "cost to conform" test. Agreeing with Buyers, the court denied Ms. Levy-Yurista's motion for judgment.

Evidence Presented by Ms. Levy-Yurista

1. Ms. Levy-Yurista

Ms. Levy-Yurista testified twice, once when called as an adverse witness by Buyers, and again in her own case. Ms. Levy-Yurista related that, after practicing law in Israel, she moved to the United States where she "made [a] living renovating house[s] and selling them" for a profit with Mr. Lagziel. She and Mr. Lagziel "flipped" approximately seven houses together and owned four condominiums in Maryland. In February 2016, she and Mr. Lagziel purchased the Property on Potomac Avenue for $348,000. With respect to the July 2017 flood that Mr. Szabo described, Ms. Levy-Yurista admitted she "kn[e]w about a water incident that Ilan conveyed to me" but believed Mr. Lagziel "addressed the problem." Ms. Levy-Yurista denied, among other things, actual knowledge of the August 2017 incident. She explained that she never disclosed the July 2017 water incident to Buyers

"[b]ecause there [was] no evidence of leaks or moisture . . . at the time I signed the contract" as it had been "nine full months" since the last water incident.

2. Basement Solutions

Ms. Levy-Yurista called Michael Bartkowiak from Basement Solutions, LLC, to testify about the waterproofing work done on the Property prior to the sale. Mr. Bartkowiak explained that, in 2018, at the bequest of the Homeowners, Basement Solutions visited the Property twice, installing window-well drains and a sump pump to address the water intrusion. The work done by Basement Solutions was under warranty; however, Mr. Bartkowiak testified that Buyers did not contact him regarding the work done or the warranty.

At the close of the trial on March 2, 2022, Ms. Levy-Yurista renewed her motion for judgment, reiterating her argument that Buyers failed to prove damages because no evidence of the Property's actual value at the time of purchase or its diminution in value was introduced at trial. The court denied the motion. Still, during closing arguments, Ms. Levy-Yurista pressed that Buyers failed to show an actual injury or loss by any legally accepted measure of damages—*i.e.*, the "out-of-pocket" and "benefit-of-the-bargain" tests referenced in *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1 (1998). Buyers argued that they suffered a "compensable injury in the form of what it cost to remediate the flooding condition" and presented "ample testimony as to what these repair damages are." At the close of arguments, the court took the matter under advisement.

The Court's Ruling

On April 13, 2022, the judge issued a comprehensive and detailed oral ruling (spanning 45 pages of transcript) from the bench. First, the court found both Ms. Levy-Yurista and Mr. Lagziel liable for fraud and negligent misrepresentation. Specifically, the court found that the Homeowners "had actual knowledge as to the issues with the water in the basement and as such [] made a false statement of material fact" or "concealed a material fact that was required to be disclosed." The court determined that the Homeowners "made these statements with the intent that the [Buyers] would rely on those statements." With respect to Buyers' claim under the CPA, the court found that the Homeowners "made a false and misleading oral and written statement that had the capacity, tendency, or effect of deceiving or misleading" and held them liable under the Act.

Next, the court addressed damages. The judge disagreed with Ms. Levy-Yurista's argument, relying on *Hall*, that Buyers failed to demonstrate that they sustained actual injuries and losses by legally accepted measures of damages. The judge found that the circumstances in *Hall*, that informed that court's holding that the homeowner failed to present legally sufficient evidence to allow the jury to award fair market value damages, were "readily distinguishable":

> the court in *Hall* indicated that[,] in tort actions founded on misrepresentations[,] the aim of compensation is to put the buyer as nearly [as] practical in the position he would have been [in] had he not been defrauded. . . .
>
> Maryland Law . . . applies a [flexible measure] of damages that allows the plaintiff to choose between the two tests for damages which is the

> difference between . . . the purchase price the buyer had paid and the actual value of the property on the day it was sold.
>
> The other acceptable measure of damages for misrepresentation is the benefit [-]of [-] the [-] bargain t[est,] in which damages are the difference between the actual value of the property at the time of making the contract and the value it would have possessed if the representations had been true. Hall [121 Md. App.] at 12. It is from this language . . . that defendant suggests that [Buyers] are not entitled to recover for out[-] of [-]pocket expenses or costs to repair. A careful reading [of *Hall*] however shows that the Court was merely setting forth the facts of the case and the damages that [the plaintiffs] sought in that case[.] Soon thereafter in [*Hall*] the court states [that] because the homeowners maintain that the defects in the properties could not be cured, they did not introduce cost [-] to [-] repair evidence and instead sought to recover contract and warranty damages for diminution in the fair market values of the properties caused by [the defendant's] breach under the out [-] of [-] pocket or benefit [-] of [-] the bargain test. Hall 13 through 14.
>
> It is clear from other cases that Hall is limited to the facts of the case and that the requested damages by plaintiff in Hall[;] it does not stand for the proposition that a homeowner cannot be awarded repair costs when making a claim under contract, misrepresentation, or the Consumer Protection Act.

The judge then cited *Hinkle v. Rockville Motor Co.*, 262 Md. 502 (1971), and *Goldstein v. Miles*, 159 Md. App. 403 (2004), for the proposition that "the cost to conform measure of damages is a permissible alternative formula for computing damages." The judge harkened back to language in the *Hall* opinion, where this Court recognized cost-to-conform damages as an acceptable measure, explaining that under both tort and contract remedies, the measure of damages as the cost of repairing or remedying the defective performance under the contract, are one and the same. Consequently, the court found that Buyers were "entitled to damages that equate to out of pocket expenses as they have been sufficiently proven which in this case is $163,595.05." In reaching this amount, the court relied on the "exhibit prepared by [Ms.] Goldman summarizing expenses." The court did not award

Buyers punitive damages, however, finding that the Homeowners' conduct did not "rise[] to the level of deliberate wrongdoing or evil motive" demonstrating the element of malice required to recover punitive damages.

Finally, the Court considered Buyer's request for attorneys' fees. Prior to the announcement of the court's ruling, on March 1, 2022, Buyers' counsel submitted an amended certificate and affidavit of attorneys' fees that requested $199,333.29 for fees. In considering "the Rule 2-703(f)(3) factors," the court addressed the request as follows:

> The Court finds that the hourly rates charged by plaintiff[s'] counsel are reasonable and that the experience, reputation and ability of the plaintiff[s'] attorneys are consistent with the rates they charge. The Court is mindful that . . . the plaintiff[s] had no choice but to litigate if they hoped to recover their damages.
>
> This case was not particularly undesirable nor was there any evidence presented that there were time limitations imposed on the lawyers by the clients or the circumstances. There is no indication that taking this case precluded the attorneys from other employment. The Court recognizes that the plaintiff[s'] attorneys [were] required to prepare for trial multiple times due to COVID circumstances.
>
> The Court thoroughly reviewed the invoices presented by plaintiff[s'] counsel[.] [P]laintiff[s'] counsel engaged in what we call block billing. Although block billing is in no way improper in relation to a fee petition[,] such practices make it difficult for the Court to determine exactly how much time was spent on various tasks identified as being performed on any given day. Based on the review of the block billing entries [on] the time spent, and the labor involved, and the various tasks, [the billing entries] were excessive and redundant at times given the somewhat narrow facts and issues relevant to this residential wet basement case. . . .
>
> * * *
>
> Accordingly, the Court finds it's reasonable and appropriate under all the circumstances to award plaintiff[s] their legal fees in a little in excess of approximately two thirds of the total amount of invoices. The Court therefore enters judgment in favor of the plaintiff[s] in $137,200.00 for attorney's fees.

On April 19, 2022, the court entered judgments against Ms. Levy-Yurista and Mr. Lagziel, *ex parte*, in the following amounts: $163,595.05 for compensatory damages and $137,200.00 for attorneys' fees for a total amount of $300,795.05.

On May 15, 2022, Ms. Levy-Yurista noted an appeal.

STANDARD OF REVIEW

Pursuant to Maryland Rule 8-131(c), "[w]hen an action has been tried without a jury," we will review "the case on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous" and "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c).

DISCUSSION

I.

Damages Recoverable for Fraud & Misrepresentation

A. Parties' Contentions

On appeal, Appellant does not challenge the trial court's determinations regarding fraud, negligent misrepresentation, or violation of the CPA; instead, she argues that "[t]his is not simply a case of inadequate proof of damages; it is a case of total failure to prove damages." Appellant argues that "[u]nder Maryland's 'flexible' measure of damages," Appellees must "choose between two tests to calculate and measure damages arising out of allegations of fraudulent or negligent misrepresentations: the 'out of pocket' test and the 'benefit of the bargain' test." Appellant posits that the out-of-pocket test is the preferred

test in "fraudulent or negligent misrepresentations actions that involved the purchase of real property." However, based on her interpretation of *Hall*, that the out-of-pocket test is limited to "the difference between the amount of the purchase price the buyer has paid and the actual value of the property on the date it was sold," 121 Md. App. at 12, Appellant asserts that the out-of-pocket test is "inapplicable to the facts of this case" because "the Property has not been sold and is still owned by Appellees," According to Appellant, the benefit-of-the-bargain test is applicable to the present case, and, therefore, Appellees were required "to establish the difference between the fair market values of the Property with and without defects at a given point in time." Instead, "Appellees chose to present evidence that would be relevant to establish damages in a breach of contract case[.]"

Appellees respond that Appellant incorrectly argues that *Hall* limits out-of-pocket expenses in fraud and misrepresentation cases to the difference between the amount of the purchase price the buyer has paid and the actual value of the property on the date it was sold. They argue that *Hall* is distinguishable because in that case, the homeowners asked for the loss in fair market value of their home as a damage remedy but failed to present sufficient evidence of the fair value of their property with and without the defects. Accordingly, Appellees contend that in *Hall*, this Court "did *not* state that loss of fair market value was the *only* means of proving damages, [but] simply that such evidence was required when such damages were being sought." (Emphasis supplied by Appellees).

Appellees urge that the instant case "is akin to *Hinkle* and *Beardmore*" because, as in those cases, they sought and presented sufficient evidence of repair and cost-to-conform

damages and did not seek to recover for loss of fair market value. Appellees maintain they presented "extensive evidence" at trial of their expenditures, remediation, waterproofing, electrical repairs, and landscape redesign necessary to repair the Property, along with an estimate from Garay General Construction, LLC, required "to put their basement back in its original finished condition." Appellees highlight that "Appellant did not refute any of the evidence regarding any of the damages" they presented in the circuit court.

In reply, Appellant insists that "'[c]ost of repair' and 'cost to conform' damages are not appropriate and are not acceptable damages for cases founded in misrepresentation and fraud." (Emphasis supplied by Appellant). According to Appellant, because Appellees chose to pursue claims in tort, not contract, Appellees cannot recover damages based on the evidence of repair and restoration costs introduced at trial. Appellant acknowledges that *Beardmore* allows for an alternative measure of damages in deceit cases where the aggrieved party's property value is worth more than he paid for it, but contends that Appellees, like the plaintiff in *Beardmore*, failed to establish that their home was worth more than the purchase price.

B. Maryland's "Flexible Theory" of Damages

In *Hinkle v. Rockville Motor Co.*, the Supreme Court of Maryland[5] formally recognized Maryland's "flexible theory" of damages in fraud and misrepresentation cases

[5] During the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

in order to dispel "confusion in regard to the measure of damages allowable in this State[.]" 262 Md. 502, 504-05 (1971). The Court explained:

> **A majority of States will allow the plaintiffs to recover the 'benefit of his bargain' if sufficiently proved**. The theory is to compensate the plaintiff as though the transaction had been carried out as represented. 37 AM. JUR. 2d *Fraud & Deceit* s 353 (1968); 37 C.J.S. Fraud s 143 b. (2) (1943); Note, *Measure Of Damages For Fraud And Deceit*, 47 VA. L. REV. 1209 (1961).
>
> **Other States restrict the plaintiff to his 'out of pocket' losses.** The classic formula is the value of the object as represented less its actual value at the time of sale. The theory is to return the plaintiff economically to the position he was in prior to the fraudulent transaction thus allowing him recoupment of actual losses but not expected gain. This rigid limitation on the nature of recovery is often explained as being required because the action is one of tort rather than contract and that it has always been recognized that tort remedies are designed to compensate for actual harm suffered. 37 AM. JUR. 2d *Fraud & Deceit* s 355 (1968); 37 C.J.S. *Fraud* s 143 b.(3)(1943).
>
> **A review of the Maryland cases rather indicates that Maryland is one of those States which has not adopted a rigid stand as far as adopting one of the above theories to the exclusion of the other. Both theories have been used and approved in Maryland**.

Id. (emphasis added) (cleaned up). The *Hinkle* Court also adopted four "conclusions" or "rules as a guide for the proper measure of damages," first articulated by the Supreme Court of Oregon in *Selman v. Shirley*, 85 P.2d 384, 394 (Or. 1938). They are:

> (1) If the defrauded party is content with the recovery of only the amount that he actually lost, his damages will be measured under that rule;
>
> (2) if the fraudulent representation also amounted to a warranty, recovery may be had for loss of the bargain because a fraud accompanied by a broken promise should cost the wrongdoer as much as the latter alone;
>
> (3) where the circumstances disclosed by the proof are so vague as to cast virtually no light upon the value of the property had it conformed to the representations, the court will award damages equal only to the loss sustained; and

> (4) where the damages under the benefit-of-the-bargain rule are proved with sufficient certainty, that rule will be employed.

Id. at 511-12 (quoting *Selman*, 85 P.2d at 294) (cleaned up). We later clarified in *Goldstein v. Miles*, however, that the description of these four "conclusions" as "four alternative methods available to an injured party in ascertaining damages arising from an action for fraud and deceit" is "misleading." 159 Md. App. 403, 424 (2004) (quoting *Aeropesca Ltd. v. Butler Aviation Int'l, Inc.*, 44 Md. App. 610, 630 (1980)). We explained:

> The third conclusion is not an option for the plaintiff to choose but an instruction to the trial court to "award damages equal only to the loss sustained" when "the circumstances ... are so vague as to cast virtually no light upon the value of the property had it conformed to the representations . . . ." In other words, it instructs the court to award damages in accordance with conclusion (1), when the "vague" circumstances described in conclusion (3) prevail.
>
> Conclusion (4) performs the same role for conclusion (2) that conclusion (3) performs for conclusion (1). While conclusion (3) permits the recovery of actual losses under conclusion (1) when "circumstances disclosed by the proof are so vague" that no value can be assigned to "the property had it conformed to the representations," conclusion (4) permits the recovery of benefit-of-the-bargain damages under conclusion (2) when damages "are proved with sufficient certainty." **In short, while conclusions (1) and (2) spell out two alternative measures of damages—out-of-pocket expenses and benefit-of-the-bargain damages—conclusions (3) and (4) define the evidential circumstances under which either or both may be obtained.**

Id. at 424-25 (quoting *Hinkle*, 262 Md. at 511-12) (emphasis added) (cleaned up). In other words, the flexibility theory "thus presents two, not four types of damages: 'actual loss' and 'benefit-of-the-bargain'" and "[i]ts four conclusions instruct when one or both of these measures of damages are available to an injured party." *Id.* at 425 (citing CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 121, at 454 (1935)).

In the instant case, the trial court appropriately awarded Appellees both "out-of-pocket" *and* the "benefit-of-the-bargain" damages. As we explain below, our caselaw instructs not only that recovering under both theories is permissible under the appropriate circumstances, but also that there are more ways than one to calculate the traditional "out-of-pocket" and "benefit-of-the-bargain" damages in cases involving fraud and deceit in the sale of property.

i. "Out-of-Pocket" Damages

The "out-of-pocket" test permits a plaintiff to recover his or her actual losses and is typically measured by "the value of the [Property] as represented less its actual value at the time of sale." *Hinkle v. Rockville Motor Co.*, 262 Md. 502, 505 (1971). Unlike the benefit-of-the-bargain measure of damages, a plaintiff cannot recover for any expected gain. *Id.* In *Dassing v. Fred Frederick Motors, Inc.*, for example, the plaintiffs bought from the defendants a 1961 Plymouth station wagon for $2,633, which the defendants had fraudulently represented to be "new and unused[.]" 240 Md. 621, 623 (1965). Plaintiffs discovered that the car was used and brought suit and claimed compensatory damages of $3,000. *Id.* At trial, the plaintiffs presented proof that, on the application for transfer of title from the defendants to the plaintiffs, the purchase price of the station wagon was $2,300. However, the plaintiffs only witness as to damages was the testimony of one of the defendants, who testified that the dealers' list price for a new car of the same make and model as the one sold to the plaintiffs was approximately $3,350 in 1961. *Id.* at 623. He also testified that on the date the plaintiffs purchased the station wagon, the price of a new car of the same model and type would be about $2,900 to $3,000, but was not asked his

opinion as to the value of the used car which the plaintiffs purchased. *Id.* at 623-24. The trial court directed a verdict in favor of the defendants, and the appeal followed. The Supreme Court of Maryland affirmed, holding that the plaintiffs "did not produce any testimony, expert or otherwise, as to the actual value of this used 1961 model car at the time it was purchased by them" and "did not show what were their 'out of pocket' damages suffered as a consequence of the alleged fraud[.]" *Id.* at 624. *See also Kalb v. Vega*, 56 Md. App. 653 (1983) (holding that the plaintiff could not recover for fraud and misrepresentation for the purchase of 98 shares of stock because he presented no evidence at trial "of the value of [the defendant]'s 98 shares at the time he sold them to [plaintiff] other than the $6,000 purchase price.")

ii. "Benefit-of-the-Bargain"/ Cost-to-Conform Damages

Recovery under the traditional benefit-of-the-bargain formula "put[s] the defrauded party in the same financial position as if the fraudulent representations had in fact been true . . . by awarding as damages the difference between the actual value of the property at the time of making the contract and the value that it would have possessed if the representations had been true." *Goldstein*, 159 Md. App. at 422-23 (cleaned up). In the case of *Beardmore v. T.D. Burgess Co.*, 245 Md. 387 (1967), the trial court's ruling highlights the problem in adhering to an inflexible doctrine of damage recovery in fraud and deceit cases.

In *Beardmore*, the plaintiffs brought a tort action based on allegations of fraud and deceit after the defendants falsely represented that the house they sold plaintiffs had a public water and sewer connection. *Id.* at 388-89. At trial, the plaintiffs attempted to present evidence via the testimony of a plumber that the cost of connecting the property to

a public sewer system would be $600. *Id.* at 389. The defendants objected on the ground that, "if the [plaintiffs] proved deceit, the only damages to which they would be entitled would be the difference between the price paid and the fair market value of the property, as it actually was, at the time of the sale." *Id.* The trial court sustained the defendants' objection on the ground that "there was no evidence as to any such difference in value" of the properties with the sewer and water connection and, therefore, the plaintiffs could not recover damages. *Id.* The Maryland Supreme Court disagreed and reversed, applying the flexible measure of damages to permit the plaintiffs to recover the cost of connecting the property with the sewer system. *Id.* at 390, 392. The Court reasoned that:

> **The aim of compensation in tort cases of this nature is to put the buyer, as nearly as practicable, in the position he would have been had he not been defrauded.** Here, the property is worth as much or more than the price he paid for it, even without the sewer connection. If, under the general rule which has been followed in this State, the appellants could recover only the difference between the purchase price and the actual value of the property on the date it was sold, the appellants, as the trial court ruled, can recover nothing, although, whether they wish to do so or not, they are required by municipal law to connect the property with the sewer system at their expense. **They would be out of pocket by this amount, and the appellees, the assumed wrongdoers, would be relieved from paying compensation. Such a result, in our opinion, would be fundamentally unjust.** Nor, we think, is that result required even under the general Maryland rule.

Beardmore, 245 Md. at 390 (emphasis added).[6]

[6] The Court quoted, approvingly, the Restatement (Second) Torts § 549 which states the measure of damages for fraudulent misrepresentations as follows:

> 'The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages under the

(Continued)

The Court in *Hinkle* affirmed the "cost-to-conform" measure of damages articulated in *Beardmore* as "a permissible alternative formula for computing damages of the 'benefit of the bargain' nature which in some cases can be more efficient and direct than the broader classic formula." *Hinkle*, 262 Md. at 511 (citing 37 AM. JUR. 2d, § 357 (1968)). In *Hinkle*, the buyer of an automobile, which had been represented to be new, but which had, in fact, been driven over 2,000 miles and been in an accident, brought suit against the dealer for fraud. *Id.* at 503. At trial, buyer's expert testified that "the effects of the accident could be remedied and the car returned to new car condition" for $800 in repairs. *Id.* at 504. The trial court, however, directed a verdict in favor of the auto-dealer because of the buyer's "failure to produce evidence in regard to the automobile's actual value at the time of the sale[.]" *Id.* at 504. On appeal, the Court surveyed the history of Maryland law addressing damages recoverable in tort actions for fraud and deceit, and explained:

> . . . . [T]his Court has never taken a rigid stand in adopting one theory of damages to the exclusion of all others but has rather employed a flexible approach. **The idea that this Court would preclude all but "out of pocket" remedies in fraud and deceit cases in order to preserve a conceptual gulf**

> rule stated in [§] 525 is the pecuniary loss which results from the falsity of the matter misrepresented, including.
> (a) the difference between the value of the thing bought, sold or exchanged and its purchase price or the value of the thing exchanged for it, and
> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the truth of the representation.

Beardmore v. T. D. Burgess Co., 245 Md. 387, 391 (1967) (quoting RESTATEMENT OF TORTS § 549 (1938)). We note that the Restatement (Second) of Torts contains the exact the same language today. *See* RESTATEMENT (SECOND) OF TORTS § 549 (1977). As the Court pointed out in *Beardmore*, consequential damages suffered as a result of a purchaser's reliance on a misrepresentation, under the Restatement, are considered as an additional, independent loss. *Id.*

> **between tort and contract actions is further negated** by the following statement made in *Webster v. Woolford*, 81 Md. 329, 330 (1895) . . . :
>
> > "The action, it is true, is in the nature of an action for tort (deceit), **but it is a tort founded on a breach of contract (in regard to the sale of property)**, and, there being no question as to exemplary damages, **the rule as to measure of damages is the same as in cases for breach of contract in regard to the sale of property**."

Hinkle, 262 Md. at 510 (emphasis added). The Court rejected the auto-dealer's argument advocating, essentially, a rule that allowed recovery under only one measure or formula to the exclusion of all others. *Id.* at 509 (citing *Dassing v. Fred Frederick Motors, Inc.*, 240 Md. 621 (1965)). In comparing the facts of *Beardmore* to those presented in *Hinkle*, the Court noted that:

> There was no alternative remedy in *Beardmore* because it involved land which is unique and not subject to replacement. Here, an automobile, which can be replaced, is involved so that [the defendant] should have the opportunity to show if possible that it could replace [the plaintiff's] automobile with a new one of the same make and model as originally represented at a lesser cost than the $800 required for repair of the one in question.

Id. at 511. The *Hinkle* Court reversed the trial court's ruling, explaining:

> The present situation is materially different from the *Dassing* case where the plaintiffs failed to prove any damages. Hinkle has shown, prima facie, the existence of measurable damages by providing expert testimony to the effect that it would require an expenditure of $800 on his part in order to put the automobile in new car condition as it was represented. **This 'cost to conform' measure of damages is a permissible alternative formula for computing damages of the 'benefit of bargain' nature which in some cases can be more efficient and direct than the broader classic formula.** 37 Am.Jur.2d s 357 (1968). This 'cost to conform' measure of damages was approved in *Beardmore*, *supra*.

Id. at 511 (emphasis added). Accordingly, the Court held that "[plaintiff's] evidence in regard to the cost of necessary repairs demonstrated the existence of damages and provided an adequate measure upon which they could be predicated." *Id.* at 513.

iii. Hall v. Lovell Regency Homes Ltd. P'ship

In *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1, 13 (1998), we observed that, in that case "the contract, tort [including negligent misrepresentation and fraud] and warranty damages sought by the homeowners and potentially recoverable by them were essentially identical." The homeowners in *Hall* experienced flooding and water accumulation in and around their homes following heavy rains or snow. *Id.* at 6. They sued the builder of their homes, alleging counts of negligence, negligent misrepresentation, breach of implied and express warranties, fraud, breach of contract, and violation of the CPA. *Id.* at 6-8. They sought damages under the benefit-of-the-bargain test for the loss in fair market value of their homes because, according to their expert, "the defects in their properties were irreparable and their properties were uninhabitable" such that "the present fair market value of each family's property was zero[.]" *Id.* at 7-8. The expert witness conceded during cross examination, however, that he did not obtain estimates of repair costs or any information about comparable sales of properties in that neighborhood because he "considered that the defects in the properties could not be cured[.]" *Id.* On direct examination, when one of the homeowners was asked whether he knew the market value of his home, the homeowner estimated that his house would be worth around $220,000 to

$230,000 without the defects. *Id.* at 9. The trial court found this evidence to be too speculative to establish the present fair market values of the properties.[7] *Id.* at 19.

At the close of trial, the circuit court concluded the homeowners were not entitled to a jury instruction on damages for loss in fair market value because "the homeowners' evidence was not legally sufficient to permit the jury to award contract, warranty, or tort damages for loss in fair market value measured under an 'out of pocket' or 'benefit of the bargain' test." *Id.* On appeal, we affirmed the trial court's ruling because the homeowners (1) maintained that the injury to their property was permanent or unrepairable, and (2) sought to recover damages only for the diminution in the fair market values of their properties but failed to introduce evidence of the value of their properties with and without the defects. *Id.* at 13-14, 20-22. We expounded:

> [U]nder the "benefit of the bargain" test, a plaintiff may be compensated for the lost benefit of his bargain by receipt of a sum in damages equal to the difference between the value of the property in its "as represented" condition and the value of the property in its "as actually existed" condition. A plaintiff seeking damages under the "benefit of the bargain" test might present evidence showing that, but for the defendant's misrepresentation, he now would own property worth "x" when in fact he now owns property worth "x minus y." Alternatively, he might present evidence showing that, but for the defendant's misrepresentation, he would have purchased property worth "x" when in fact he purchased property worth only "x minus y." (In the latter case, "out of pocket" damages and "benefit of the bargain" damages would be the same.)

[7] We agreed with the trial court, noting that "[t]here was no evidence from Mr. Harcum, or from any extrinsic source showing that Mr. Harcum was familiar with or had any knowledge about the non-defective properties in the neighborhood that were similar to his property and, further, that he was informed about sales of any such properties and the sums for which the properties had been sold." *Hall*, 121 Md. App. at 20.

Id. at 21. We upheld the trial court's ruling that the jury could not have determined the *loss in fair market value damages* under either the "out-of-pocket" test or "benefit-of-the-bargain" test without evidence of the fair market values of the properties either with or without the defects at the time of purchase. *Id.* at 22.

C. Analysis

Applying the foregoing precepts, we find no merit in Appellant's contentions on appeal and affirm the trial court's award of damages. At the start, we note that Appellant conceded during oral arguments and in her brief that Appellees presented evidence of damages recoverable under a breach of contract action—namely, the costs of repairing the basement after the floods. Appellant contends, however, that because the Appellees plead only tort actions, they cannot recover these damages. We disagree. To be sure, Appellees did not plead a cause of action for breach of contract; instead, they sued Appellant and her co-defendant under theories of tort liability for fraud and misrepresentation. As emphasized in *Hinkle*, however, fraud and misrepresentation are "tort[s] founded on a breach of contract (in regard to the sale of property), and . . . the rule as to measure of damages is the same as in cases for breach of contract in regard to the sale of property." *Hinkle*, 262 Md. at 510. (quoting *Webster v. Woolford*, 81 Md. 329, 330 (1895)). Accordingly, the court in *Hinkle* permitted "'cost to conform' measure of damages [a]s a permissible alternative formula for computing damages of the 'benefit of bargain' nature which in some cases can be more efficient and direct than the broader classic formula." *Id.* at 511.

Though Appellant does not contest liability in this case, we take note that Appellees' allegations of fraud and misrepresentation are clearly "founded on a breach of contract (in regard to the sale of property)." *Id.* Appellant and her co-defendant checked "no" on the Residential Property Condition Disclosure form representing, for example, that they had no actual knowledge of "Basement: Any leaks or evidence of moisture" and "water stand[ing] on the property for more than 24 hours after a heavy rain[.]" During the final walk-through prior to closing, Mr. Finger asked Appellant, in the presence of the real estate agent, "if there were any problems with the basement" to which she replied that "there had been no flooding."

We also hold that the circuit court was correct in rejecting Appellant's misinterpretation of *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1 (1998), to support her arguments that: (1) Appellees could only recover either "benefit-of-the-bargain" damages or "out-of-pocket" damages but not both; and (2) that to recover under either measure of damages, Appellant was required to present evidence of the actual values of the Property at the time of sale, with and without the defects. In *Hall*, the homeowners sought damages under the benefit-of-the-bargain test *only* for the loss in fair market value of their homes because, according to their expert, "the defects in their properties were irreparable and their properties were uninhabitable." *Id.* at 7-8. We observed in that case that the homeowners could not recover damages under other available damage theories because they did not present any evidence of any repair costs. *Id.* at 13-14. We did not overrule the controlling precedent in *Hinkle* (nor could we!), that instructs that a

"[plaintiff's] evidence in regard to the cost of necessary repairs demonstrate[s] the existence of damages and provide[s] an adequate measure upon which they c[an] be predicated." *Hinkle*, 262 Md. at 513. Here, Appellees maintained at trial that the damage to their property was repairable, and they did not seek any damages representing the loss in fair market value of their home. Appellees presented more than sufficient evidence of the costs to repair and conform their home to obtain the benefit of what was promised – a dry home without damage from flooding. Consequently, we reject Appellant's contention that this "is a case of total failure to prove damages."

In this case, Appellees relied to their detriment upon Appellant's promise that the Property was not susceptible to flooding and contained no history of prior flood damage. Appellees, however, received a house that was highly susceptible to flooding, had evidence of prior flood damage, and flooded twice within a period of three days. As such, Appellees were entitled to "cost-to-conform" damages, including: (1) the cost of repairing the damage from the flooding (*e.g.*, expenses for ServiceMaster Restore, Home Depot, Ace Hardware, and Garay General Construction, LLC); and (2) the cost of conforming the property to prevent future flooding, as they were promised (*e.g.*, JES Foundation Repair, Craig Richmond Landscape Architects, Smoot Landscapes, and LV Electric). Appellees presented legally sufficient evidence of all three damages at trial and they were not challenged. We therefore conclude that the trial court did not err in awarding Appellees damages in the amount of $163,595.05, reflecting the cost to repair and conform the Property.

II.

Damages Recoverable Under CPA

A. Parties' Contentions

Appellant argues that, like the plaintiff in *Hall*, "Appellees failure to present or prove the evidence required to calculate damages for misrepresentation and fraud are fatal to a claim" under the CPA. In other words, Appellees' failure to establish damages under either the benefit-of-the-bargain or the out-of-pocket tests likewise precluded any recovery under the CPA. Appellees respond that their right to recover for injury and loss under the CPA is not limited by *Hall* because they presented sufficient evidence at trial of the costs of repairs and the cost to conform their basement to its original represented condition, which represented their actual losses.

B. Damages for "injury or loss sustained"

Section 13-408(a) of the CPA creates a private right of action "to recover for injury or loss sustained . . . as the result of a practice prohibited" by the CPA. CL § 13-408(a). In *Citaramanis v. Hallowell*, the Supreme Court of Maryland held that "[i]t is manifest from the language employed in § 13-408(a) that the General Assembly intended that a plaintiff pursuing a private action under the CPA prove actual 'injury or loss sustained.'" 328 Md. 142, 151 (1992) (quoting *Golt v. Phillips*, 308 Md. 1, 12 (1986); *see also Golt*, 308 Md. at 12 ("This private **remedy is purely compensatory**; . . . Thus, in determining the damages due to the consumer, we must look only to **his actual loss or injury** caused by the unfair or deceptive trade practices."). The Court explained that the damages due

under the CPA for "injury and loss" include those damages that "will compensate the injured party for the injury sustained due to the defendant's acts **and for indirect consequences of such acts**." *Citaramanis*, 328 Md. at 153-54 (emphasis added). To be sure, damages under the CPA are limited to "actual injury or loss" that is "objectively identifiable" and "measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers' misrepresentation." *Lloyd v. General Motors Corp.*, 397 Md. 108, 143 (2007) (citing *Golt*, 308 Md. at 11-14)).

It is evident from the language of the CPA, *Citaramanis*, and *Golt*, and *Lloyd*, *supra*, that successful plaintiffs may recover their *actual losses*, including direct and consequential damages under the CPA. In *Golt v. Phillips*, for example, the plaintiff sued his landlords for misrepresentation in violation of the CPA for, among other things, "advertising and renting an unlicensed apartment." 308 Md. 1, 6-7 (1986). There, the plaintiff agreed to move into an apartment in Baltimore City upon the landlords' promise that, prior to the move-in date, certain cleaning and repairs would be done. *Id.* at 5. When the plaintiff took possession of the property, however, the landlords had failed to compete the requested repairs. *Id.* The Baltimore City Department of Housing and Community Development conducted an inspection of the apartment which revealed numerous housing code violations, including, among other things, lack of toilet facilities, defective door locks, and lack of fire exits. *Id.* at 5-6. Additionally, the inspector discovered that the landlords did not possess the appropriate license to lease the building as a multiple-family dwelling unit and ordered the landlords to either correct the violations or discontinue use of the dwelling

as a multi-family unit. *Id.* Instead of correcting the enumerated violations, the landlords decided to evict the plaintiff, who was forced to move into another, more expensive, apartment, and refused to return $173 out of the plaintiff's $200 security deposit. *Id.* at 6. The plaintiff sued and, although the district court held that the landlords improperly withheld the plaintiff's security deposit, it denied relief under the CPA because "Golt inspected the dwelling unit before entering the lease agreement and thus 'knew what the premises looked like.'" *Golt*, 308 Md. at 6. On appeal, our Supreme Court reversed, in part, and concluded that the landlords' advertisement for an apartment in which they were not licensed to rent was misleading in violation of the CPA, thus entitling the plaintiff to relief. *Id.* at 8-9. With respect to damages, the Court held that the plaintiff's "actual loss is comprised of **restitutionary and consequential damages**" including "restitution for the three months of rent paid for the unlicensed apartment" and "consequential damages, such as the cost of moving from the premises to substitute housing, and the difference in cost between reasonable substitute housing and the rental charged for the remainder" of his lease with the landlord. *Id.* at 13-14 (emphasis added).

In *Citaramanis v. Hallowell*, by contrast, the plaintiffs rented a house from the respondent-homeowners for a period of one year and during that time, the plaintiffs did not complain about the condition of the home, and, even though the respondent increased the rent, they extended the tenancy beyond the first year. 328 Md. 142, 144-45 (1992). After the plaintiffs informed the respondents that they planned to move, they learned that the respondents did not have a license to use the house as rental property. *Id.* at 145. Armed

with that information, the plaintiffs filed a complaint alleging that the respondents had engaged in unfair and deceptive trade practices prohibited by the CPA and requested the return of all the rent they paid during their tenancy. *Id.* Relying on the reasoning articulated in *Golt*, the circuit court granted the plaintiffs' motion for summary judgment as the respondents did not dispute that they failed to obtain a license to rent. *Id.* at 145-46. On appeal, we reversed, and the Supreme Court affirmed our decision, holding that "the damages due to the consumer under [CL § 13-408(a)] are for 'injury and loss'—such as will compensate the injured party for the injury sustained due to the defendant's acts and for indirect consequences of such acts." *Id.* at 153-54. Unlike the plaintiff in *Golt*, who incurred moving expenses and an increase in rent when the landlords decided not to obtain a license, the *Citaramanis* plaintiffs neither claimed that they received less than the full benefit of their agreement nor incurred any costs as a result of the respondents' failure to obtain a license. *Id.* at 146-47, 149. Thus, they had not proven any actual loss or injury under the CPA, but were permitted the opportunity to do so on remand. *Id.* at 159, 164.

C. Analysis

Appellant contends that the Appellees' failure to prove damages under the benefit-of-the-bargain or the out-of-pocket tests is "fatal" to their claim under the CPA. By parity of reasoning, therefore, our holding above—that Appellees presented sufficient evidence to recover the cost of repairs under the "cost-to-conform" measure of damages for fraud and misrepresentation—should be fatal to Appellant's contention. However, we must observe that even if Appellees failed to prove their *damages* under Maryland's flexible

approach, they could still recover the actual losses they suffered from the misrepresentations that were proven. As noted, the CPA "provides a remedy to the consumer for many forms of misrepresentation not covered by the traditional theories of tort liability for deceit" that includes recovery of "compensatory" damages for the plaintiff's "actual loss[es]" and any consequential damages as a result of the violation. *See Citaramanis*, 328 Md. at 153-54; *Golt*, 308 Md. at 12; *Lloyd*, 397 Md. at 149. And once again, clearly Appellant's analogy to *Hall* is misplaced. Indeed, in *Hall* we concluded that the plaintiffs could not recover under the CPA because "the homeowners could not prove that they had sustained an actual injury or loss by any legally accepted measure of damages. *Hall*, 121 Md. App. at 27.

III.

Attorneys' Fees

Lastly, Appellant argues that the award of attorneys' fees was "improper" in this case because the court lacked sufficient evidence to sustain an award of damages permitted under Maryland law. At no point does Appellant argue that the award of attorneys' fees was excessive or unreasonable. Appellees do not address attorneys' fees in their brief.

Maryland Rule 2-705 "applies to a claim for an award of attorneys' fees attributable to litigation in a circuit court pursuant to a contractual provision permitting an award of attorneys' fees to the prevailing party in litigation arising out of the contract." Md. Rule 2-705(a). "We review a trial court's award of attorneys' fees under an abuse of discretion standard." *Monmouth Meadows Homeowners Ass'n, Inc. v. Hamilton*, 416 Md. 325, 332

(2010) (citation omitted); *see also SunTrust Bank v. Goldman*, 201 Md. App. 390, 397 (2011). "[W]hen there are contract provisions requiring the award of attorneys' fees to the prevailing party, the amount of the fees to be award[ed] is 'within the sound discretion of the trial court,'" *Monmouth Meadows*, 416 Md. at 333 (quoting *Myers v. Kayhoe*, 391 Md. 188, 207 (2006)), and its award "will not be overturned unless clearly erroneous." *Myers*, 391 Md. at 207. In general, the party seeking an award of fees must prove the amount and reasonableness of fees to some degree of reasonable certainty. *Bd. of Trs., Cmty. Coll. of Balt. Cnty. v. Patient First Corp.*, 444 Md. 452, 485 (2015).

The CPA permits a court, in its discretion, to award "reasonable attorney's fees" to [a]ny person who brings an action to recover for injury or loss . . . who is awarded damages." CL § 13-408(b); *see also Citaramanis*, 328 Md. at 154 ("Additionally, the CPA permits the award of attorney's fees to any person who is awarded damages under § 13-408(a).").

As noted, the trial court awarded Appellees attorneys' fees in the amount of $137,200 pursuant to the parties' fee-shifting provision in the sales contract and under the CPA. Appellant does not dispute that the parties' contract contained a fee-shifting provision providing for attorneys' fees in the event of litigation or that attorneys' fees are not recoverable under the CPA. Instead, Appellant argues only that, because Appellees failed to establish sufficient evidence to sustain an award of damages, the attorneys' fees were "improper." Accordingly, our holdings that the court did not err in awarding Appellees damages under their negligent misrepresentation and CPA claims have mooted

Appellant's attorneys' fees argument on appeal. Briefly, however, we note that the trial court conducted a thorough analysis of the factors listed under Maryland Rule 2-703(f)(3), and then *reduced by one-third* the amount of attorneys' fees requested at trial from $199,333.29 to $137,200 due to "excessive and redundant" block billing practices. We discern no error in how the court calculated attorneys' fees in this case. Accordingly, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.