VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 13th day of January, 2022.

Present: All the Justices

Joshua M. Payne, et al., Appellants,

against Record No. 201235
Circuit Court No. CL18000343-00

Danville Doctors Building, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Danville.

Joshua M. Payne and Dr. Aijt Chauhan appeal the trial court's judgment in favor of Danville Doctors Building ("Danville Doctors") for $200,000 and $42,500 in attorney fees. Finding none of the assignments of error persuasive, we affirm the trial court's rulings.

I.

The parties presented conflicting evidence to the trial court sitting as factfinder. Because Danville Doctors prevailed at trial, "we recite the relevant facts in the light most favorable" to Danville Doctors and presume the factfinder accepted any reasonable inferences from those facts. *See Nichols Constr. Corp. v. Virginia Mach. Tool Co.*, 276 Va. 81, 84 (2008).

On October 9, 2017, Payne signed a Commercial Purchase Agreement with Danville Doctors to purchase two buildings. The contract listed "Josh Payne and/or assigns" as the "Purchaser" and also identified Chauhan as a "Purchaser." *See* 1 J.A. at 5, 12; 2 *id.* at 247. Both Payne and Chauhan signed the agreement. The Purchase Agreement stated a purchase price of $700,000, required a deposit of $25,000 to be held in escrow, and set closing for January 9, 2018. The Purchase Agreement provided for a feasibility period of 60 days after its execution, during which the buyers could inspect the property, perform tests, seek zoning information, and apply for financing. Paragraph 4(C) stated:

> If Purchaser is not satisfied in its sole and absolute discretion with all aspects of the Property (including zoning) or the Materials, or has not obtained financing upon terms and conditions

> satisfactory to Purchaser, then Purchaser shall have the right, upon written notice to Seller prior to the expiration of the Feasibility Period, to terminate this Agreement, in which event the Deposit shall be refunded in full to Purchaser and the parties shall have no further obligation or liability to one another . . . .

1 *id.* at 7.

Paragraph 6 of the Purchase Agreement added that the buyers' obligations were "further subject to Purchaser determining in its sole and absolute discretion that all of the conditions set forth in this Paragraph 6 have been satisfied or waived in writing by Purchaser." *Id.* If any of the conditions in paragraph 6 were not satisfied or waived, "Purchaser may give written notice to Seller terminating this Agreement on or before Settlement, in which event the Deposit shall be refunded in full to Purchaser and the parties shall have no further obligation or liability to one another." *Id.* The first condition in paragraph 6 provided: "All the representations and warranties of Seller made herein shall have been true when made and shall be true and correct as of Settlement, with no material changes therein." *Id.*

The representations and warranties made by Danville Doctors were, in turn, contained in paragraph 7 of the Purchase Agreement and included the following:

> To the best of Seller's actual knowledge, no toxic or hazardous materials (as said terms are defined in any applicable federal or state laws) have been used, discharged or stored on or about the Property in violation of said laws, and to the best of Seller's knowledge, no such toxic or hazardous materials are now or will be at Settlement located on or below the surface of the Property.

Id. at 8.

Paragraph 13 addressed default, and paragraph 13(A) specifically addressed default by the buyer. The first part of paragraph 13(A) on page 5 of the Purchase Agreement was crossed out and initialed with the notation, "<u>See</u> substituted language on Addendum." *See id.* at 9-10. The addendum stated,

> Paragraph 13. Default
>
> The following language is substituted:
>
> Upon default by the Purchaser except for any material breach of any of the provisions contained herein, the Sellers shall be entitled to retain Purchaser's deposit in the amount of $25,000. [sic], and may avail itself of all remedies available to it in law or in equity including the right of specific performance.

Id. at 15. The rest of paragraph 13(A), which continued onto page 6 of the agreement, along with paragraphs 13(B), 13(C), and 13(D), was not crossed out.

The crossed-out language in paragraph 13(A) provided that the seller's sole remedy in the event of the buyer's default was to terminate the Purchase Agreement and retain the deposit. The portion of paragraph 13(A) that was not crossed out stated that "Seller hereby specifically waives the right to seek specific performance of this Agreement by Purchaser or any other remedy at law or in equity" except those necessary to enforce the indemnity provisions. *See id.* at 10.

Paragraphs 13(B) and 13(C), which were also not crossed out, provided that (i) the purchaser's options in the event of seller's default were to seek specific performance of the Purchase Agreement or to terminate it and receive a refund of the deposit and attorney fees and costs in filing any specific performance action and that (ii) prior to any termination, the non-defaulting party shall provide notice of default and an opportunity to cure the default within 10 days prior to sending a written notice of termination. Paragraph 13(D) stated that the defaulting party was also liable for the brokerage fees and incorporated a listing agreement between the seller and a realty company. That listing agreement contained an addendum stating that the buildings "may contain materials containing asbestos." 2 *id.* at 600.

On October 27, 2017, M.R. Dishman & Sons, Inc. sent a report from an asbestos investigation that it had done in both buildings. The report found some asbestos in some tiles and caulking in the buildings. The contractor that Payne had hired to do renovations to the buildings forwarded the report to Payne in November 2017. No evidence suggested that, prior to the closing date, Payne had ever forwarded this report to Danville Doctors or had in any other manner alerted Danville Doctors to the discovery of asbestos. At trial, Payne and Chauhan conceded that they never did so.

Despite the closing date in the Purchase Agreement being January 9, 2018, the parties agreed to attempt an early closing on November 20, 2017. Payne did not show up for the closing, but Chauhan was present along with the settling attorney, the agents for both parties, and a representative of Danville Doctors. Chauhan and Payne had determined that they "wanted to purchase the building," and Chauhan had gone to the November 20 closing to conclude that transaction and become the owner, along with Payne, of the two buildings. *See id.* at 444, 460-61. The closing, however, did not occur on November 20.

On December 18, 2017, after the failed closing, the parties had a meeting in which Payne and Chauhan informed Danville Doctors that they would not be going forward with the purchase. Neither of them, however, said anything about asbestos. Instead, they only offered recent medical events to justify not proceeding with the sale.[1] Payne and Chauhan later testified at the February 2020 trial that they did not mention the asbestos because they did not want to disappoint their friends at Danville Doctors.

After Payne and Chauhan refused to close, Danville Doctors asked them to sign a letter stating that they would not proceed to closing so that Danville Doctors could relist the property. In response, Payne and Chauhan stated that they would not be closing on the property and that they "felt it was fair and reasonable to have half the deposit returned due to unforeseen circumstances." *Id.* at 603. They left the matter unresolved based upon their assumption that Danville Doctors would "do what is right." *See id.* at 603. At trial, the parties gave conflicting testimony as to whether they had agreed to terminate the contract or to return half of the security deposit. Payne and Chauhan said they had agreed to both; Danville Doctors said it had agreed to neither.

On January 30, 2018, Danville Doctors sent a letter to Payne and Chauhan demanding payment of the security deposit to it by the realty company and asking for a payment for expenses related to closing. The letter reserved the right to seek damages if the property sold for less than $700,000 and to seek specific performance of the Purchase Agreement "as set forth in that agreement." *Id.* at 576. In May 2018, Danville Doctors sued Payne and Chauhan seeking specific performance of the Purchase Agreement, an award of the security deposit, an order requiring Payne and Chauhan to pay the brokerage fee, and an award of attorney fees.

While the litigation was pending, Danville Doctors relisted the property and sold it in November 2018 for $500,000. The new purchaser hired a contractor to perform the remediation services. The building permits estimated the aggregate remediation cost to be $60,052. The trial court thereafter conducted a bench trial to resolve the remaining disputed issues of material fact.

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[1] Payne claimed that he had missed the November 20 closing because he had been hospitalized after suffering from a "Transient Ischemic Attack or a mini stroke." 2 J.A. at 349-50. Chauhan also testified as to his own hospitalization from a stroke, which has caused him to "still have difficulty with [his] hands and legs." *Id.* at 455.

In a brief order, the trial court entered judgment in favor of Danville Doctors for $200,000, as well as $42,500 in attorney fees.

II.

On appeal, Payne and Chauhan assign error to the trial court's judgment on several grounds. They argue that the trial court erred by:

- finding that they had breached the Purchase Agreement and not finding that the parties voluntarily terminated the Purchase Agreement;
- awarding and calculating damages; and
- awarding attorney fees.[2]

We review de novo the trial court's interpretation of a contract. *Callison v. Glick*, 297 Va. 275, 293 (2019). On factual issues, however, we will "afford [the trial court's] decree the same weight as a jury verdict and uphold [its] findings unless they are plainly wrong or without evidence to support them," and as earlier noted, we view the facts in the light most favorable to the prevailing party below. *Davis v. Holsten*, 270 Va. 389, 397-98 (2005).

A.

We find no fault with the trial court's finding that Payne and Chauhan breached the Purchase Agreement by failing to close on the transaction. At no time before the closing did Payne and Chauhan notify Danville Doctors in writing of the asbestos problem or provide Danville Doctors with an opportunity to address the issue. Instead, Payne and Chauhan relied on health issues as the only justification for not fulfilling their obligation to proceed to closing. Danville Doctors had no obligation to provide a default notice or an opportunity to cure because it did not attempt to terminate the contract for default. The Purchase Agreement required the notice of default only "[p]rior to any termination" for default. 1 J.A. at 10.

We also reject the argument by Payne and Chauhan that paragraph 6 gave them the discretion to terminate the Purchase Agreement. Sufficient evidence supports the inference that Payne and Chauhan never determined that the presence of asbestos was the real reason for their decision to abandon the closing. The only reasons they offered for doing so were health reasons.

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[2] Payne and Chauhan do not address in their appellate briefs the question whether Chauhan was a proper party. *See* Appellant's Br. at 3, 10. We thus consider the issue abandoned. *See Jenkins v. Commonwealth*, 244 Va. 445, 451 (1992) (holding that when a party fails to "brief[] or argue[]" assigned errors, this Court "will not consider them").

Payne and Chauhan testified that they chose to say nothing about asbestos prior to termination because they did not want to upset existing friendships. The trial court, however, was entitled to weigh this testimony, discredit it, and find that asbestos was an after-the-fact justification for their failing to close the transaction and pay the purchase price.

Payne and Chauhan characterize the parties' conduct as a rescission or an accord and satisfaction. The trial court did not err in rejecting these alternative characterizations. Rescission is an equitable remedy that is within a trial court's sound discretion, not an agreement of the parties. *See Miller v. Reynolds*, 216 Va. 852, 856 (1976). Accord and satisfaction is an affirmative defense for which the defendant bears the burden of proof. *See* 1 Craig D. Johnston, Virginia Practice Series: Trial Handbook for Virginia Lawyers § 9:5, at 229-30 (2021 ed.). An accord and satisfaction "is founded on contract embracing an offer and acceptance" and requires the party alleging it to prove that the debtor intended his offer as satisfaction and that "such intention [was] clearly made known to the creditor and accepted by the creditor in accordance with the debtor's intention." *Virginia-Carolina Elec. Works, Inc. v. Cooper*, 192 Va. 78, 80-81 (1951). Danville Doctors specifically denied ever agreeing to allow Payne and Chauhan to terminate the Purchase Agreement or to abandon their duties under it. The trial court was entitled to believe this testimony.

B.

According to Payne and Chauhan, the Purchase Agreement forbade an award of damages and limited Danville Doctors to only one remedy: termination of the contract and retention of the security deposit. This is so, they argue, because the Purchase Agreement was ambiguous regarding the availability of a damages award, and therefore, the canon of contra proferentem applies to preclude it. The trial court correctly rejected this argument.

"An instrument will be deemed unambiguous if its provisions are capable of only one reasonable construction. Conversely, it will be deemed ambiguous if its language admits of being understood in more than one way or refers to two or more things at the same time." *RECP IV WG Land Inv'rs L.L.C. v. Capital One Bank (USA), N.A.*, 295 Va. 268, 283 (2018) (alterations and citation omitted). When the terms of a contract are unambiguous, we "need not resort to extrinsic evidence or to the canons of construction that are applicable to ambiguous contracts," including the canon of contra proferentem. *Appalachian Reg'l Healthcare v. Cunningham*, 294 Va. 363, 371 n.7 (2017).

In the Purchase Agreement, only the first part of paragraph 13(A) was crossed out and initialed with a note to see the substituted language of the addendum. *See* 1 J.A. at 9-10. The waiver of specific performance and other remedies was part of the provision that was not crossed out, *see id.*, but the addendum specifically provided a "substituted" paragraph addressing the scenario of default by Payne, *see id.* at 15. That replacement paragraph stated that Danville Doctors, in the event of the buyers' default, could retain the security deposit and "avail itself of all remedies available to it in law or in equity including the right of specific performance." *Id.*

Even if the second half of paragraph 13(A) were not intended to be specifically crossed out, the addendum still provided a complete substitution of that paragraph that supersedes the original paragraph. The only logical interpretation of this amendment is that it served as a complete substitution for the entirety of at least paragraph 13(A) addressing Danville Doctors's remedies in the event of the buyers' default. Thus, the trial court did not err in interpreting the Purchase Agreement to allow for the award of benefit-of-the-bargain damages.

Regarding the calculation of these damages, Payne and Chauhan frame the debate in part as a question of specific performance. Specific performance, however, "is an equitable remedy. A suit in equity for specific performance is distinct from an action at law for breach of contract." *Denton v. Browntown Valley Assocs., Inc.*, 294 Va. 76, 82 (2017). The initial complaint sought an order of specific performance that required the buyers "to complete the purchase" by paying the $700,000 purchase price, *see* 1 J.A. at 3, but the trial court made no such award and did not award damages under the equitable clean-up doctrine. *See generally Nagle v. Newton*, 63 Va. (22 Gratt.) 814, 821 (1872). Instead, the court awarded common-law, benefit-of-the-bargain damages for breach of contract.[3]

Payne and Chauhan also argue that Danville Doctors failed to prove benefit-of-the-bargain damages with "reasonable certainty," Appellants' Br. at 32 (citation omitted), because the successful damage calculation (breached-contract price less substitute-buyer price) failed to take into account the cost of asbestos remediation ultimately incurred by the substitute buyer. The argument seems simple on the surface: The substitute sale for $500,000 was really a sale for $560,052 because the substitute buyer paid $60,052 for the remediation work and that expense

[3] The parties stipulated at trial that the buildings had sold for $500,000 to another buyer. Therefore, specific performance was no longer an available remedy at the time of trial. *See Fairfax Cnty. Redev. & Hous. Auth. v. Riekse*, 281 Va. 441, 447 (2011) (collecting cases).

was legally the responsibility of the seller — just as it was under the earlier contract with Payne and Chauhan. Thus, they conclude, comparing apples to apples, Danville Doctors's benefit-of-the-bargain damages should have been $700,000 less $560,052 not $500,000.

This assertion is unconvincing, however, because it fails to address the conceptual predicate underlying the argument — that if the Payne-Chauhan closing had taken place, Danville Doctors would have had a legal obligation to pay any asbestos remediation costs associated with the property. We see this assumption as highly debatable. Danville Doctors never warranted that the property was free of asbestos. To the contrary, the listing agreement disclosed that asbestos "may" be on the property, 2 J.A. at 600, and the Purchase Agreement stated that Danville Doctors did not know one way or the other. The best that Danville Doctors could warrant was that it had no "actual knowledge" of any hazardous materials on the property. *See id.* at 552. The evidence at trial proved that, at the time of the early closing date, Payne knew of the asbestos contamination, but Danville Doctors did not. Nor did they inform Danville Doctors that they had discovered asbestos in the building, thereby making the no-actual-knowledge warranty untrue. Danville Doctors first learned of the asbestos problem in October 2019.

We will not resolve this dispute, however, because Payne and Chauhan did not make any arguments before the trial court as to the calculation of damages. Nor did they argue that the damage calculations must take the remediation cost into account. A party's failure to "afford the trial court the opportunity to rule intelligently on the issue" results in the waiver of that issue on appeal. *Riner v. Commonwealth*, 268 Va. 296, 325 (2004); *see Nusbaum v. Berlin*, 273 Va. 385, 402-03 (2007). What is more, their briefs on appeal treat the topic in a cursory fashion, *see* Appellants' Br. at 31-32, and fail to unpack it at an adequate level of advocacy for us to act upon it. *See generally Coward v. Wellmont Health Sys.*, 295 Va. 351, 367 (2018). We thus decline to hold that the trial court erred in its calculation of damages.

C.

Regarding attorney fees, the Purchase Agreement stated: "*Nothing herein* shall prevent either party from seeking a judicial determination regarding any default; provided however, the court shall award the expenses of attorney's fees and court costs to the prevailing party in any such action." 1 J.A. at 10 (emphasis added). Payne and Chauhan argue that the contract only authorized an award of attorney fees if the non-breaching party had provided a notice of default

and an opportunity to cure. The requirement for notice of default and an opportunity to cure, however, only applied "[p]rior to any termination" for default. *Id.* As noted previously, Danville Doctors never sought to terminate the Purchase Agreement for default. Thus, the trial court correctly interpreted the Purchase Agreement to allow for prevailing-party attorney fees in this case.

III.

For these reasons, we affirm the trial court's judgment in this case.

This order shall be certified to the Circuit Court of the City of Danville.

A Copy,

Teste:

Clerk