

**Virginia Code Commission
Meeting Materials
December 5, 2022**

VIRGINIA CODE COMMISSION

Monday, November 21, 2022 - 10:00 a.m.

Senate Room A - Pocahontas Building

DRAFT

Meeting Minutes

Members Present: John. S. Edwards, Jennifer L. McClellan, Malfourd W. Trumbo, Ward L. Armstrong, Charles S. Sharp, Nicole S. Cheuk, Christopher R. Nolen, Richard E. Gardner, Amigo R. Wade

Members Absent: James A. Leftwich, Wren M. Williams, Steven Popps

Staff Present: Holly Trice, Anne Bloomsburg, Nikki Clemons, Division of Legislative Services; Maryanne Horch, Senate IT; Brian Kennedy, LexisNexis; Tom Lisk, ALAC

Call to order: Senator Edwards, chair, called the meeting to order at 10:09 a.m. A quorum of the Commission was present in person.

Election of Vice Chair: Senator Edwards welcomed Judge Gardiner to the Commission. Delegate Leftwich was nominated for Vice Chair, but not present at the meeting. The election of Vice Chair was tabled until the next Code Commission meeting.

Review and approval of October 3, 2022, meeting minutes: Chair Edwards asked for a motion to approve the draft October 2022 meeting minutes. A motion was made, properly seconded, and a voice vote was conducted. The motion carried.

Publication of the Code of Virginia: 2022 Review: *Brian Kennedy, LexisNexis*

Mr. Kennedy reviewed the situation as he presented it to the Commission at the October 3, 2022, meeting. Mr. Kennedy reiterated that there were issues in the data transfer between the Division of Legislative Automated Services (DLAS) and LexisNexis, which led to significant delays with updating the Law Portal with the correct information from the 2022 session.

Mr. Kennedy stressed that what happened during this data transfer was not typical and that LexisNexis has been working to prepare the data transfer for the Special Session and implementing fixes to ensure the issues do not happen again. LexisNexis issued 12 reprints of supplements for the Code of Virginia, which are scheduled to be delivered in the next week.

Senator Edwards asked what date the Special Session data was required to be delivered. Mr. Wade stated that the contract with LexisNexis for a regular session requires that the data be transferred by June 23 of each year, but that data from a special session should be delivered "within a reasonable amount of time." Mr. Wade stated that during the Commission's last meeting, LexisNexis said that testing of the data transfer fixes would take place in the spring. Mr. Wade asked if the Special Session data transfer would act as a test of fixes implemented in lieu of that spring testing. Mr. Kennedy said it would and that the spring time testing was suggested before LexisNexis knew that there would be the Special Session data transfer to act as a test run.

Senator Edwards asked Mr. Wade to expand on the work that Division of Legislative Services (DLS) staff had to do to fix the corrupt data transfer. Mr. Wade shared that 18 DLS staff members manually went through every chapter of the Acts of Assembly and checked it against the data sent. The process took three to four days. Mr. Kennedy said that DLS staff effort was heroic but hopefully will not be needed again.

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Mr. Trumbo asked if Mr. Kennedy had heard from any practicing attorneys who tried to use the Law Portal when the data was incorrect. Mr. Kennedy said they had not heard from any. Senator McClellan asked if there was any kind of notice on the Law Portal that there were issues, and Mr. Wade said that there was. The note on the Law Portal alerted users that the data may not be correct and directed people to the Acts of Assembly. The Law Portal was correct by July 18. Mr. Trumbo voiced concern that rural attorneys without ready access to the Internet and may have to rely on print copies of the Code of Virginia would not know that the print materials sent were incorrect. Mr. Kennedy assured that the replacement pamphlets had been sent out and should arrive in the next week and that LexisNexis had not received any notice of people having issues.

Senator McClellan asked how the ongoing Special Session would affect the transfer of the data and if Special Session would end once regular session began in the New Year. Mr. Wade said that that issue was uncharted territory and that DLS would conduct research and report back to the Commission at a future meeting. Ms. Trice said that once DLS receives the data from LexisNexis, the sections will be set out twice in the Law Portal until the Special Session laws take effect.

Mr. Kennedy expressed appreciation at everyone's understanding with the issues and shared that LexisNexis decided to not increase the price of replacement volumes this year as amends for the problems. LexisNexis recommended that the Commission replace volumes 1A, 2B, 5A, 7B, and 9A of the Code of Virginia in the next batch of replacement volumes.

A motion was made to approve the suggested replacement volumes, properly seconded, and a roll call vote was conducted. The motion carried.

Motion to Adopt the Public Notice Work Group's recommendations	Yea	Nay	Abstain	Absent
Ward Armstrong	1			
Nicole Cheuk	1			
Judge Gardiner	1			
James Leftwich				1
Jennifer McClellan	1			
Christopher R. Nolen			1	
Steven Popps				1
Charles S. Sharp	1			
Malfourd W. Trumbo	1			
Amigo R. Wade	1			
Wren Williams				1

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John Edwards	1			
Total	8		1	3

Administrative Law Advisory Committee (ALAC) End of the Year Report: *Tom Lisk, ALAC*

Mr. Lisk presented ALAC's end of the year report. The report included the committee's work on the current executive review process. The committee met with the Office of Regulatory Management and discussed the ongoing work to streamline the regulatory process, and intends to continue that work in the next year.

The committee also reported on the Harmless Doctrine Workgroup, following *Chesapeake Hospital Authority v. State Health Commissioner*. The workgroup suggested amending § 2.2-4027 of the Code of Virginia to conform the reference to harmless error in the Administrative Process Act (APA) with federal and other state laws. ALAC lacked a quorum at the final meeting so did not take a formal vote on the draft amendments. Senator Edwards asked if there was a formal definition of what constituted a harmless error. Mr. Lisk said that lies in the discretion of the court and that harmless discretion has been undefined for quite some time. Judge Sharp asked if the Commission had the authority to make the proposed amendments and Mr. Lisk said because the amendment would be in the APA, the Commission had authority. Judge Sharp asked if stakeholders weighed in on this and Mr. Lisk said that members of ALAC represent state agencies, the Supreme Court, the Office of the Attorney General, and private practitioners who all weighed in on the issue.

Judge Trumbo noted that most of the Commission members who are present at the meeting are not members of the General Assembly who would have to advocate for a bill to make the amendments, and suggested tabling the issue until the next meeting. The Commission agreed, and Mr. Lisk said ALAC would look into what extents courts in Virginia have tried to define harmless error for the next meeting.

Other business:

Mr. Wade clarified an issue regarding workgroup decisions. At the October meeting, the Commission voted to accept and made a motion on public notice workgroup decisions. These decisions were sent to the Senate and House committee chairs. Mr. Wade clarified that these were sent as recommendations of the Commission and that these recommendations would not count towards the Commission's bill introduction limit.

Public comment, adjournment: Senator Edwards opened the floor for public comment. There was no public comment.

Adjourn: Chair Edwards asked for a motion to adjourn the meeting. The motion was made, properly seconded, and a voice vote was conducted. The motion carried.

Chair Edwards adjourned the meeting adjourned at 11:13 a.m.

Next meeting: December 5, 2022, 10:00 am.

§ 2.2-4027. Issues on review.

The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions, (iii) observance of required procedure ~~where any failure therein is not mere harmless error~~, and (iv) the substantiality of the evidentiary support for findings of fact. The determination of such fact issue shall be made upon the whole evidentiary record provided by the agency if its proceeding was required to be conducted as provided in § 2.2-4009 or 2.2-4020 or, as to subjects exempted from those sections, pursuant to constitutional requirement or statutory provisions for opportunity for an agency record of and decision upon the evidence therein. In addressing any of the issues of law or fact set forth above, the court shall consider whether any error is a harmless error.

In addition to any other judicial review provided by law, a small business, as defined in subsection A of § 2.2-4007.1, that is adversely affected or aggrieved by final agency action shall be entitled to judicial review of compliance with the requirements of subdivision A 2 of § 2.2-4007.04 and § 2.2-4007.1 within one year following the date of final agency action.

When the decision on review is to be made on the agency record, the duty of the court with respect to issues of fact shall be to determine whether there was substantial evidence in the agency record to support the agency decision. The duty of the court with respect to the issues of law shall be to review the agency decision de novo. The court shall enter judgment in accordance with § 2.2-4029.

Where there is no agency record so required and made, any necessary facts in controversy shall be determined by the court upon the basis of the agency file, minutes, and records of its proceedings under § 2.2-4007.01 or 2.2-4019 as augmented, if need be, by the agency pursuant to order of the court or supplemented by any allowable and necessary proofs adduced in court except that the function of the court shall be to determine only whether the result reached by the agency could reasonably be said, on all such proofs, to be within the scope of the legal authority of the agency.

Whether the fact issues are reviewed on the agency record or one made in the review action, the court shall take due account of the presumption of official regularity, the experience and specialized competence of the agency, and the purposes of the basic law under which the agency has acted.



Positive

As of: December 1, 2022 5:49 PM Z

Forbes v. Rapp

Supreme Court of Virginia

April 22, 2005, Decided

Record No. 041722

Reporter

269 Va. 374 *; 611 S.E.2d 592 **; 2005 Va. LEXIS 47 ***

BRUCE FORBES v. RAYMOND E. RAPP, TRUSTEE,
HARRISONBURG PHYSICIANS FOR
ANESTHESIOLOGY, INC., ETC., ET AL.

Prior History: [***1] FROM THE CIRCUIT COURT OF
ROCKINGHAM COUNTY. John J. McGrath, Jr., Judge.

Core Terms

auction, damages, mitigate, purchase property, expert
testimony, re-auction, bid, fair market value, per acre,
deposit, real estate, admitting, timber

Case Summary

Procedural Posture

Plaintiff, the high bidder at a public auction, sued
defendant property owner, seeking to rescind the
contract for the sale of land and to recover his deposit.
The owner counterclaimed for breach of that contract.
The Circuit Court of Rockingham County, Virginia,
awarded no damages to the bidder on his complaint and
awarded damages to the owner on his counterclaim.
The bidder appealed.

Overview

The bidder notified the owner that he was withdrawing
his offer to purchase the property because the property
did not have a deeded right of way. The chancellor held
that the bidder breached his contract, rejected his claim
that the owner failed to mitigate damages, and awarded
the owner damages based on the difference between
the final bid and land's fair market value. The appellate
court held that the bidder failed to prove that the owner
did not mitigate damages as there was no evidence that
marketing the property in the way he advocated would
have resulted in a higher price and the chancellor was
not required to accept his testimony about an offer he
received for the land since it was not in writing and the
offeror later backed out. A licensed auctioneer should

not have been allowed to testify that real estate
auctioned a second time sold at a lower price as this
testimony lacked an adequate foundation; his stating a
figure "off the top of his head" as to the percentage at
which the sales price would decrease upon a re-auction
was speculative. However, the admission of the
testimony was harmless error as it was an unnecessary
rebuttal to a defense that was not proved.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of
Review > Clearly Erroneous Review

Civil Procedure > ... > Standards of
Review > Substantial Evidence > General Overview

HN1 [📄] Trials, Bench Trials

As a chancellor who hears evidence ore tenus
evaluates the witnesses' testimony and their credibility,
his judgment is entitled to the same weight as a jury
verdict. An appellate court will not set aside the
chancellor's judgment on appeal unless it is plainly
wrong or without evidence to support it. [Va. Code Ann.](#)
[§ 8.01-680.](#)

Contracts Law > Remedies > Damages > Avoidable
Consequences

Real Property Law > Purchase & Sale > Contracts

of Sale > General Overview

Contracts Law > Breach > General Overview

Real Property

Law > ... > Remedies > Damages > General Overview

Real Property Law > ... > Damages > Measurement of Damages > Duty to Mitigate

[HN2](#) **Damages, Avoidable Consequences**

The Virginia Supreme Court has long recognized the obligation of an injured party to mitigate damages. Thus, when a purchaser has breached a contract for the sale of real estate, the seller nonetheless has the duty of making reasonable efforts to mitigate damages resulting from the breach, and to the extent that the seller fails to do so, he may not recover the additional damages incurred.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

Contracts Law > Remedies > Damages > Avoidable Consequences

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

[HN3](#) **Affirmative Defenses, Burdens of Proof**

An assertion that an injured party has failed to mitigate damages is an affirmative defense. The party asserting this defense bears the burden of proof on that issue.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

[HN4](#) **Standards of Review, Abuse of Discretion**

Before expert testimony may be admitted in a civil case to assist the fact finder, that testimony must meet certain requirements, including the requirement of an adequate factual foundation. [Va. Code Ann. §§ 8.01-401.1](#) and -401.3. Generally, the decision whether to admit expert testimony is a matter committed to the chancellor's sound discretion, and an appellate court will reject the chancellor's determination in this regard only when the record shows an abuse of that discretion.

Evidence > Admissibility > Expert Witnesses

Evidence > ... > Testimony > Expert Witnesses > General Overview

[HN5](#) **Admissibility, Expert Witnesses**

Expert testimony is inadmissible if it is speculative or based on assumptions that have an insufficient factual basis. Expert testimony is also inadmissible when an expert has not considered all variables bearing on the inferences to be drawn from the facts presented.

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > Harmless Error Rule

Civil Procedure > ... > Standards of Review > Harmless & Invited Errors > General Overview

[HN6](#) **Harmless & Invited Errors, Harmless Error Rule**

Under the doctrine of harmless error, an appellate court will affirm the circuit court's judgment when the appellate court can conclude that the error at issue could not have affected the circuit court's result.

Counsel: *Mark D. Obenshain* (*Timothy E. Cupp*; *Keeler Obenshain, Cupp & Cupp*, on briefs), for appellant.

Glenn M. Hodge (*Kimberly B. Wilkins*; *Wharton, Aldhizer & Weaver*, on brief), for appellee Raymond E. Rapp, Trustee, Harrisonburg Physicians for Anesthesiology, Inc., etc., et al.

Judges: PRESENT: Hassell, C. J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Compton, S.J.
OPINION BY JUSTICE BARBARA MILANO KEENAN.

Opinion by: BARBARA MILANO KEENAN

Opinion

[*376] [593]** In this appeal, we consider whether the chancellor erred: 1) in awarding damages to a property owner for breach of a contract for the sale of land offered at public auction; and 2) in admitting certain expert testimony.

The following facts are undisputed. In the spring of 2003, Raymond E. Rapp hired Bland Land Company (BLC) to sell about 143 acres of undeveloped mountain land in Rockingham County (the property) at a public auction. ¹ BLC produced and distributed a brochure containing photographs, maps, and a description of the property that stated it was "to be sold by a trustee under special warranty, with a deeded right of way." Bruce Forbes, an adjoining landowner, received a copy of the brochure before the auction and decided to attend.

[2]** BLC held the auction on May 17, 2003. Before the auction, Gerald C. Bland, owner of BLC, circulated and read aloud a document entitled "Rapp Auction Sale Announcements." One of the announcements stated, "Included with the property is an appurtenant right of way over and across the existing access road we all used this morning[.]"

[*377] At the end of the auction, Forbes was the high bidder for the property at \$3,600 per acre, for a total bid price of \$514,944. Gregory S. Kellam was the second-highest bidder at \$3,550 per acre. Forbes tendered a ten percent deposit and signed an acknowledgment agreeing to purchase the property. Under the auction terms, Forbes agreed to **[**594]** settle on the property on or before June 17, 2003, and to pay a penalty for any delay.

Forbes later unsuccessfully tried to reach an agreement to sell the property to Kellam. On June 30, 2003, Forbes, by counsel, notified Rapp that he was withdrawing his offer to purchase the property and demanded the return of his deposit. Forbes stated that

his withdrawal was based on "misrepresentations regarding the existence of a deeded right of way to the property and ... the ability to subdivide the property." Rapp eventually **[***3]** sold the property to Kellam for \$400,000.

Forbes filed an amended bill of complaint against Rapp, BLC, and Bland (collectively, the defendants) seeking rescission of Forbes' contract to purchase the property and the return of his deposit. In the alternative, Forbes sought damages for breach of contract or breach of an "implied understanding" that his deposit would be returned if the parties failed to reach an agreement. He also claimed that the defendants wrongfully converted his deposit. Forbes' claims were based on allegations that the property did not have a deeded right of way, and that the defendants' representations in the brochure and auction sale announcements were false and misleading. He sought compensatory damages equal to his \$51,490 deposit and punitive damages of \$250,000.

In response, Rapp filed an answer and a cross-bill for breach of contract against Forbes. ² Rapp alleged that Forbes breached his express written agreement to purchase the property when he failed to close on the property and informed Rapp that he did not intend to complete the transaction. Rapp sought damages of \$114,900, the difference between Forbes' bid price and the amount received in the **[***4]** sale to Kellam.

The chancellor heard the evidence in a bench trial. The majority of the evidence addressed the value of the property and whether Rapp failed to mitigate damages incurred as a result of Forbes' alleged contract breach. Forbes presented the testimony of his son, **[*378]** Jeffrey C. Forbes (Jeffrey), who stated that the property contained timber worth at least \$150,000, and that the property was worth between \$1,000 and \$1,500 per acre, excluding the timber value.

Forbes testified that he was surprised that the bidding for the property exceeded \$2,000 per acre, but that the property was worth \$3,600 per acre to him as protection for his adjoining land. Forbes agreed with Jeffrey's valuation of the timber on the property. Forbes also presented testimony from Dean M. Nichols, one of his attorneys, and Kevin Williams, his agent, who both stated that Kellam had been willing to pay Forbes **[***5]** \$450,000 for the property.

¹ Harrisonburg Physicians for Anesthesiology, Inc., Profit Sharing Plan Earmark Investment Trust No. (1) owned the property. Rapp sold the property in his capacity as trustee.

² BLC and Bland filed an answer, special plea in bar, and interpleader action. They are not parties to this appeal.

Rapp presented testimony from various witnesses. Kellam testified he originally hoped to purchase the property for \$300,000, and that he intended to make no higher bid than \$380,000, but that he nevertheless made a final bid of \$3,550 per acre, or about \$505,000. Kellam stated that he negotiated with Forbes to purchase the property after the auction and that, although he indicated an interest in paying about \$450,000 for the property, he never made a written offer. Kellam also stated that Bland approached him about purchasing the property after Forbes refused to complete the sale, and that Kellam ultimately purchased the property for \$400,000.

Rapp also presented the expert testimony of Michael W. Pugh, a certified real estate appraiser. Pugh testified that he appraised the property and determined that it had a fair market value of \$415,000. He stated that this figure represented an accepted range for fair market value of plus or minus ten percent, as is customary in the field of real estate appraisal. Pugh acknowledged that he did not assign value to any timber on the property.

Regarding Rapp's efforts to mitigate damages, Bland testified that **[***6]** the only effort he made on Rapp's behalf after Forbes refused to complete the sale was to contact Kellam about purchasing the property. Bland also stated that he was "astounded" at the high **[**595]** price Forbes had bid for the property, and that he advised Rapp to sell the property to Kellam for \$400,000 because Bland thought that this price was still "high as a kite."

Rapp presented the expert testimony of George R. Heatwole, a licensed auctioneer and real estate broker, who had auctioned about 100 properties per year over the past 25 or more years. Over Forbes' objection, the chancellor asked Heatwole to relate his experience re-auctioning real estate that had not settled after a first auction. Heatwole replied that in such instances, his experience has been that the real estate sold at a lower price at a second auction.

[*379] The following exchange then occurred between Heatwole and Rapp's counsel:


Q: Can you quantify whether it's significantly less or close to the same price, but less?

A: Well, it happens so infrequently and, you know, my experience has been, gosh, a, a figure off the top of my head would be 10 to 20 percent less at least, but it happens so infrequently that **[***7]** I, I don't have a basis.


Forbes objected to this testimony, arguing that it was speculative. The chancellor overruled the objection. Heatwole further testified that auctioneers in Virginia generally agree that it is not a good practice to re-auction property that has failed to close, and that he would recommend against doing so. David A. Penrod, one of Rapp's attorneys, also testified that he advised Rapp that putting the property up for auction a second time would be "a bad idea."


At the conclusion of the evidence, the chancellor held that Forbes wrongfully breached his contract to purchase the property from Rapp. The chancellor found that Forbes' testimony was "totally lacking in credibility," and that Forbes' conduct after the auction "was a continual pattern of acting in bad faith." The chancellor concluded that the fair market value of the property was \$415,000, and awarded Rapp judgment on the cross-bill in the amount of \$99,944.00, the difference between Forbes' final bid and the fair market value, plus interest. The chancellor entered a final judgment order reflecting this award and dismissing all Forbes' claims against the defendants. Forbes appeals.

Forbes argues **[***8]** that the chancellor erred in awarding judgment to Rapp because Rapp failed to mitigate his damages. According to Forbes, Rapp should have re-auctioned the property, advertised the property for sale to the general public, placed the property with a "multiple listing service," or contacted other bidders in addition to Kellam. Forbes asserts that the record shows that Rapp did not obtain a reasonable price for the property, because Kellam previously had offered a much higher price to both Forbes and Rapp. Forbes also argues that the chancellor erred in admitting Heatwole's testimony because it was speculative and Heatwole was unfamiliar with the facts surrounding the auction at which Forbes purchased the property.

In considering the merits of these arguments, we apply an established standard of review. [HN1](#)  The chancellor, who heard the evidence **[*380]** ore tenus, evaluated the witnesses' testimony and their credibility. See [Shooting Point, L.L.C. v. Wescoat](#), 265 Va. 256, 264, 576 S.E. 2d 497, 501 (2003); [Tauber v. Commonwealth](#), 263 Va. 520, 526, 562 S.E. 2d 118, 120 (2002). Thus, his judgment is entitled to the same weight as a jury verdict. [The Dunbar Group, LLC v. Tignor](#), 267 Va. 361, 366-67, 593 S.E. 2d 216, 219 (2004); **[***9]** [Chesterfield Meadows Shopping Ctr. Assocs., L.P. v. Smith](#), 264 Va. 350, 355, 568 S.E. 2d 676, 679 (2002). We will not set aside the chancellor's

judgment on appeal unless it is plainly wrong or without evidence to support it. [Code § 8.01-680](#); [Tignor, 267 Va. at 367, 593 S.E. 2d at 219](#); [Shooting Point, 265 Va. at 264, 576 S.E. 2d at 501](#).


We first consider Forbes' argument that Rapp failed to mitigate his damages. [HN2](#)  We have long recognized the obligation of an injured party to mitigate damages. Thus, when a purchaser has breached a contract for the sale of real estate, the seller nonetheless has the duty of making reasonable efforts to mitigate damages resulting from the breach, and to the extent that the seller fails to do so, he may not recover the additional damages incurred. [Lawrence v. Wirth, 226 Va. 408, 412, 309 S.E. 2d 315, 317 \(1983\)](#); [\[**596\] Haywood v. Massie, 188 Va. 176, 182, 49 S.E. 2d 281, 284 \(1948\)](#); [Restatement \(Second\) of Contracts § 350, cmt. b. \(1981\)](#); Charles T. McCormick, Handbook on the Law of Damages § 33 (1935); [\[***10\] see Jennings v. Realty Developers, Inc., 210 Va. 476, 483, 171 S.E. 2d 829, 834-35 \(1970\)](#).


[HN3](#)  An assertion that an injured party has failed to mitigate damages is an affirmative defense. See [R.K. Chevrolet, Inc. v. Bank of the Commonwealth, 256 Va. 74, 77, 501 S.E. 2d 769, 771 \(1998\)](#); [Stohlman v. S&B Ltd. P'ship, 249 Va. 251, 256, 454 S.E. 2d 923, 926 \(1995\)](#); [Marefield Meadows, Inc. v. Lorenz, 245 Va. 255, 266, 427 S.E. 2d 363, 369, 9 Va. Law Rep. 974 \(1993\)](#). In the present case, Forbes, as the party asserting this defense, bore the burden of proof on that issue. See [R.K. Chevrolet, 256 Va. at 77, 501 S.E. 2d at 771](#); [Stohlman, 249 Va. at 256, 454 S.E. 2d at 926](#); [Marefield Meadows, 245 Va. at 266, 427 S.E. 2d at 369](#).

We conclude that Forbes did not satisfy his evidentiary burden. First, he failed to present any evidence that marketing the property in the manner he advocated would have resulted in a higher purchase price for the property. Second, the chancellor was not required to accept Forbes' testimony that Kellam had offered \$450,000 for the property as evidence of the property's [\[***11\]](#) value, because Kellam testified that he had not made a written offer at that [\[*381\]](#) price and ultimately had concluded that "it wasn't a deal that I was interested in."

In the absence of further evidence from Forbes, the chancellor found that the fair market value of the property was \$415,000, which was supported by Pugh's expert testimony. This amount surpassed the valuation placed on the property by Forbes' son, Jeffrey, whose highest estimate of the combined timber value and land

value of the property was \$364,500. Moreover, Forbes had testified that the property was worth between \$250,000 and \$300,000. Therefore, Forbes' own evidence showed that Rapp sold the property for more than its fair market value. Based on this record, we hold that the chancellor did not err in rejecting Forbes' claim that Rapp failed to mitigate his damages.


We next consider Forbes' argument that the chancellor erred in admitting Heatwole's testimony. [HN4](#)  Before expert testimony may be admitted in a civil case to assist the fact finder, that testimony must meet certain requirements, including the requirement of an adequate factual foundation. [Countryside Corp. v. Taylor, 263 Va. 549, 553, 561 S.E. 2d 680, 682 \(2002\)](#); [\[***12\] John v. Im, 263 Va. 315, 319-20, 559 S.E. 2d 694, 696 \(2002\)](#); see [Code §§ 8.01-401.1](#) and [-401.3](#). Generally, the decision whether to admit expert testimony is a matter committed to the chancellor's sound discretion, and we will reject the chancellor's determination in this regard only when the record shows an abuse of that discretion. [John, 263 Va. at 320, 559 S.E. 2d at 696](#); [Virginia Elec. & Power Co. v. Dungee, 258 Va. 235, 258, 520 S.E. 2d 164, 177 \(1999\)](#).

[HN5](#)  Expert testimony is inadmissible if it is speculative or based on assumptions that have an insufficient factual basis. [Countryside Corp., 263 Va. at 553, 561 S.E. 2d at 682](#); [John, 263 Va. at 320, 559 S.E. 2d at 696](#); [Keese v. Donigan, 259 Va. 157, 161, 524 S.E. 2d 645, 648 \(2000\)](#); [Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 166, 458 S.E. 2d 462, 466 \(1995\)](#). Expert testimony is also inadmissible when an expert has not considered all variables bearing on the inferences to be drawn from the facts presented. [Countryside Corp., 263 Va. at 553, 561 S.E. 2d at 682](#); [\[***13\] John, 263 Va. at 320, 559 S.E. 2d at 696](#); [ITT Hartford Group, Inc. v. Virginia Fin. Assocs., Inc., 258 Va. 193, 201, 520 S.E. 2d 355, 359 \(1999\)](#).

We agree with Forbes that certain portions of Heatwole's testimony were inadmissible because they were speculative and lacked an adequate factual foundation. Heatwole improperly was allowed to testify that real estate auctioned a second time sold at a lower price, [\[*382\]](#) without being required to consider whether the facts presented here would have led to a different conclusion concerning the expected price at a re-auction. Also, in attempting to fix a percentage at which a purchase price generally might be expected to decrease upon a re-auction, Heatwole effectively conceded that he lacked a factual basis for rendering such an opinion but nevertheless [\[**597\]](#) stated a

figure "off the top of [his] head."

We disagree, however, with Forbes' contention that the improper admission of these portions of Heatwole's testimony requires reversal of the chancellor's judgment.

[HN6](#)  Under the doctrine of harmless error, we will affirm the circuit court's judgment when we can conclude that the error at issue could not have affected the [***14] court's result. [Blue Stone Land Co., Inc. v. Neff](#), 259 Va. 273, 279, 526 S.E. 2d 517, 519 (2000); [Rhoades v. Painter](#), 234 Va. 20, 24, 360 S.E. 2d 174, 176, 4 Va. Law Rep. 418 (1987); see [Holmes v. LG Marion Corp.](#), 258 Va. 473, 483, 521 S.E. 2d 528, 535 (1999).

Heatwole's testimony was relevant to show that Rapp did not fail to mitigate his damages by declining to re-auction the property. However, because Forbes did not present evidence that Rapp would likely have obtained a higher price if he had re-auctioned the property, Heatwole's testimony merely served as an unnecessary rebuttal to a defense that was not proved. Thus, we hold that the chancellor's error in admitting this evidence was harmless because it could not have affected the result that he reached in this case.

For these reasons, we will affirm the chancellor's judgment.

Affirmed.