No. 2—10—0809
Order filed June 20, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SKARIN CUSTOM HOMES, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 07—L—302
	)	
JOSEPH ROSS and STEPHANIE ROSS,	)	
	)	Honorable
Defendants-Appellees and Cross-Appellants.	)	John T. Elsner,
	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: On plaintiff's claim for breach of contract and violation of the Illinois Residential Real Property Disclosure Act (765 ILCS 77/1 *et seq*. (West 2006)), the trial court did not err in granting the defendants' motion for a directed finding or in denying the defendants' motion for attorney fees and costs.

The plaintiff, Skarin Custom Homes, brought this action against the defendants, Joseph and Stephanie Ross, asserting claims for breach of contract and breach of the Illinois Residential Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/1 *et seq*. (West 2006)). On June 29, 2010, following the close of the plaintiff's case at trial, the trial court granted the defendants' motion for a directed finding. The plaintiff appeals from that order. On October 12, 2010, the trial court denied

the defendants' posttrial motion for attorney fees and costs. The defendants cross-appeal from that order. We affirm.

On March 10, 2006, the parties entered into a residential real estate contract for the sale of property located at 2S500 Arrowhead in Wheaton from the defendants to the plaintiff. Prior to the plaintiff's purchase of the property, the defendants completed a residential real property disclosure report as required by section 35 of the Disclosure Act (765 ILCS 77/35 (West 2006)). In their disclosure report, the defendants indicated that they were "aware of flooding or recurring leakage problems" in the basement of the house. The defendants explained that there was "some seepage in basement during heavy rains." On March 31, 2006, the parties closed on the contract and the plaintiff took possession of the property. Following the closing, the plaintiff allegedly discovered that there was a history of severe flooding in the basement of the house and elsewhere on the property.

The plaintiff's original complaint, filed March 29, 2007, sought recovery for breach of contract, breach of the Disclosure Act, and common law fraud. The claims were premised on allegations that the defendants failed to disclose that there was a history of flooding in the basement of the house and elsewhere on the property. The defendants moved to strike the plaintiff's original complaint pursuant to section 2—615 of the Code of Civil Procedure (Code) (735 ILCS 5/2—615 (West 2006)). Ultimately, the trial court dismissed with prejudice the plaintiff's claim for fraud but granted the plaintiff leave to replead its claims for breach of contract and of the Disclosure Act.

On October 15, 2007, the plaintiff filed an amended two-count complaint. Count one, for breach of contract, alleged that the defendants breached the real estate contract by failing to disclose in their residential real property disclosure report the severe flooding problems in the basement of the home and on the property. Count two, for breach of the Disclosure Act, alleged that the

defendants breached the Disclosure Act by disclosing only "some seepage in the basement during heavy rains" when they had actual knowledge of severe flooding of several feet of water in the basement.

On November 2, 2007, the defendants filed a 2—619 motion to dismiss. In that motion, the defendants argued that the plaintiff's claims were barred by other affirmative matter (735 ILCS 5/2—619(a)(9) (West 2006)). Specifically, the defendants pointed out that in its amended complaint, the plaintiff acknowledged that its original intent in purchasing the property had been to tear down the house, build a new house, and sell the property for profit. The defendants argued that, if both parties to a real estate contract know that the buyer intends to raze the only structure located thereon and redevelop the property, the Disclosure Act serves no purpose and is inapplicable to the transaction. Accordingly, the defendants argued that because the Disclosure Act was inapplicable and because both claims were based on a failure to disclose under the Act, both claims must be dismissed with prejudice.

On December 20, 2007, following a hearing, the trial court granted the defendants' motion to dismiss. The trial court found that the plaintiff's intent to raze the home on the property at issue removed the transaction from the realm of the Disclosure Act. The trial court further determined that because both claims were based on the defendants' alleged failure to disclose, that both counts should be dismissed with prejudice. The plaintiff appealed from that order. On appeal, this court held that the trial court erred in dismissing the plaintiff's complaint because, regardless of the plaintiff's intent to raze the home, the Disclosure Act was applicable to the transaction at issue. See *Skarin Custom Homes v. Ross*, 388 Ill. App. 3d 739, 743-44 (2009). Accordingly, the case was remanded for additional proceedings. *Id.* at 746.

On remand, the case proceeded to trial, which commenced on June 29, 2010. At trial, the plaintiff called Joseph Ross to testify as an adverse party pursuant to section 2—1102 of the Code (735 ILCS 5/2—1102 (West 2008)). Ross testified that he and his wife were joint owners of the property conveyed to the plaintiff via the March 10, 2006, contract. He acknowledged that, in the disclosure report he completed pursuant to the Disclosure Act, he was required to disclose problems that he reasonably believed were ongoing.

Ross was shown photographs marked as Exhibit 3, which showed the subject property and the houses on either side in 1996. He acknowledged that the photograph showed that part of the subject property's driveway and the sideyard was under water. However, his basement did not flood in 1996. Ross was also shown photographs marked as Exhibit 4, which showed the subject property and the house to the south in 2001. The photograph showed that part of the subject property's driveway was under water. Ross testified that he never told the plaintiff that the Arrowhead subdivision had flooded in the past.

Ross testified that the land around the subject home had also flooded in 1990. Shortly after that flooding, the county spent between three and five million dollars on storm sewer improvements to divert water from the Arrowhead golf course, which had drained into the subject property's subdivision, away from the subdivision. Ross also testified that water backed up in the laundry tub in his basement in 1997 or 1998. The back-up was the result of roots in the sanitary sewer system. Roto-Rooter replaced the sewer line from the house to the street. He had no further problems with the sanitary sewer after that line was replaced.

Ross further testified that the basement of the subject home flooded in 2001 during a heavy rain. Water entered through a basement window well. There was two feet of water in his basement. He did not disclose that information on the disclosure report. He disclosed only that there was some

seepage in the basement during heavy rains due to the porousness of the concrete walls. He believed that the seepage was the only issue with the basement. Following the flooding in 2001, he raised the height of the window well, through which the water had entered, by three inches. He never hired an engineer or other expert to determine whether raising the window well would resolve the flooding issue.

Thereafter, the parties agreed that the defendants could incorporate their case in chief in the plaintiff's case in chief without waiver of a motion for directed finding. Ross testified on his own behalf that he and his wife lived in the house from 1990 until October 2005. After the 1990 flood on his property, the county replaced the storm water system that ran along his property. The county replaced a 36-inch culvert with a 48- or 54-inch culvert. The county also installed two additional drains on the property, one near the front and one near the back. These drains were visible. The plaintiff had never asked Ross about the drains.

In 1996, there was 14 inches of rain in a 24-hour period but his basement did not flood. In 2001, there was extensive rain within a four-hour period. Water was entering the basement through a southwest window well. Within 30 minutes after the storm stopped, there was no standing water on his property. There was one or two feet of water in his basement. He believed it all came in through the lowest window well. There were four window wells in his basement and the one the water entered was three inches lower than the rest. After the flooding, he raised that window well three inches so that it was at the same level as the other window wells. Although there were periods of heavy rainfall between October 13, 2001 and March 31, 2006, there was no further flooding into the basement. At the time he completed the disclosure report he did not believe there was a flooding problem in the basement. There had been no flooding in the previous five years so he did not think it was recurring. He did not disclose the 2001 flood because he believed he had resolved the issue

by raising the window well. He did not disclose the sewer back-up in 1997/1998 because he believed Roto-Rooter had resolved the issue.

The plaintiff testified through its sole proprietor, James Skarin. Skarin testified that he had been in the business of building residential homes for 21 years and had been self-employed for six years. The closing on the subject property occurred on March 31, 2006. Ross had never discussed any flooding issues with him. After he purchased the property but prior to redevelopment he went around to all the neighbors to let them know his intentions. One of the neighbors, Mr. Babcock, gave him some photographs showing the subject property with surrounding flooding, Exhibits 3 and 4. The first time he was aware of flooding was when he received the photographs. The defendants had not informed him about flooding in 1990, 1996, or 2001.

Skarin further testified that he was not concerned about the seepage in the basement, which was disclosed, because there was a noticeable crack in the foundation and such cracks were easily repaired. Prior to closing he questioned the defendants about the storm water sewer drains in their backyard. The defendants told him that when it rained water ran across the property but that it dissipated within a few minutes. The defendants did not mention any flooding issues.

He received the photographs from Babcock within a week or two after closing. After he saw Exhibits 3 and 4, it was his opinion that the property was not a good candidate for redevelopment. He thought it would be very difficult to explain to a new buyer that periodically the street was going to have 30 inches of water in it and that you would not be able to park in the driveway. In October 2006, after a heavy rain, he went to the property but could not get to it because it was surrounded by waist-high water. Because it was in the middle of the night, he could not take photographs. However, the flooding was similar to that depicted in Babcock's photographs.

Skarin purchased the property for $405,000 and sold it in 2009 to a third party for $346,000. When he offered the property for sale, he disclosed that there was flooding. He completed his disclosure report on May 8, 2009, prior to the defendants answering the interrogatories in this case. He disclosed that there had been no flooding since he purchased the property but that he had discovered that there had been flooding in the past. His disclosure indicated that the basement flooded in 1996, because that was when he thought it had flooded. He later learned that the basement flooded in 2001. He never would have purchased the property if he had known about the flooding. He could rebuild the house and put the foundation 20 feet higher but he could never prevent the flooding around the property.

Skarin testified that he decided to fix the property and then resell it. He incurred a $104,097.90 loss in making improvements to and selling the property. He submitted an exhibit itemizing the expenses. There were two other expenses: (1) interest expense on the loan that he had to take to purchase the subject property and (2) legal fees and expert fees. He testified that he incurred a total loss of $219,997.84.

Skarin also testified that before he purchased the property he checked the flood maps and the property was not in a flood plain. He noticed the storm water sewers on the property and asked the defendants about them, but he did not consult an engineer. He did not have any professional inspections on the property or hire an attorney for the closing. He acknowledged that no water entered the basement during the heavy rainfall in 2006. He did not know if leaves were blocking the storm sewers during that event. He did not intend to buy property that floods. The basement of the home had never flooded during the time he owned the property.

Skarin acknowledged that in the verified complaint filed October 15, 2007, the plaintiff alleged that it had been unable to sell the property and that the major drawback cited by potential

purchasers was the history of severe flooding in the basement. However, no one ever directly told him that the history of flooding was a drawback. He disclosed the possibility of flooding to potential purchasers and he assumed that was why he did not get any offers. He listed the home for sale by owner in early 2007 and ultimately with Remax Suburban on May 11, 2009. He acknowledged that between the time he learned of the flooding and the time he listed the property with Remax, the real estate market "tanked." When he sold the property, on July 24, 2009, he did not inform the new buyer that he was suing the defendants for breach of contract or breach of the Disclosure Act.

Thomas Burke testified that he has a Ph.D. in civil engineering and that he specializes in the movement and collection of water. The plaintiff hired him to review the storm water system on the subject property and determine the likelihood of flooding in the basement. This was a common task that was performed in his profession. As part of his study, he reviewed a land survey and the topography to find out where the water went once it left the property and to see what obstructions were downstream.

Burke testified that once the storm sewers reach capacity, the water will take an "overland flow route." With respect to the subject property, the water would flow north across the property, from the southwest corner, and then turn east and flow across the northern portion of the property to the east toward Arrowhead Drive. There were no evident obstructions downstream of the property but there were culverts, which were considered a restriction. After water flowed over the subject property going east, it went northeast, then east again, then turned north, went under Menomini Drive and continued north towards Blackhawk Drive. Once the water reached Menomini Drive and filled the culvert, it had to build up in elevation and overtop Menomini Drive before it would continue flowing. Menomini Drive acted as an unintended dam. The lowest grade adjacent to the subject property was 741.43 feet above sea level. However, the water level had to reach 742.5 feet to get

over Menomini Drive. Any elevations less than that could be under water. Water had to be up against the house over a foot high to get Menomini Drive to "overtop." This was above the top of the foundation, which was only at 742.25 feet. The basement would flood if the water level was higher than that of the foundation.

Burke further testified that his understanding was that the basement flooded in 1996 due to a sewer back-up and it flooded in 2001 due to outside water flowing into the basement. In his opinion, based on the elevation of the house, the overland flow routes and the sizes of the sewers and culverts, the basement would have flooded in July 1996 because there were 8 to 10 inches of rainfall in a 24-hour period. Thousands of basements flooded in Du Page County during that rainfall. The basement also would have flooded in October 2001, due to the four inches of rainfall within a 60- to 90-minute time frame. Burke opined that all future significant rainfall events, where the overland flow paths were needed to convey runoff, would cause the basement to flood. Raising one of the window wells three inches would not change his opinion. It was not reasonable to assert that the flooding problem in the basement had been remediated or repaired by raising the window well.

On cross-examination, Burke testified that he was not aware that there had been sewer improvements in the subject part of the Arrowhead subdivision. However, if the county had intended to improve the storm sewer system, he would find it hard to believe that it would leave a 12- or 18-inch culvert under Menomini Drive. Even if storm sewer improvements had been made, the storm sewer would not be able to handle the amount of rain that fell in July 1996 or October 2001. Burke testified that even if the homeowner stated that the basement was bone dry in July 1996, he would still opine that the basement had flooded. He acknowledged that he had not reviewed historical rainfall data before concluding that the basement flooded in July 1996. However, he had done enough work in Du Page County to know that the July 1996 rainfall was an extreme

event—it was a 100-year storm. The rainfall in October 2001 was between a 10- and 100-year rainfall event.

The plaintiff entered an evidence deposition of Robert Headrick. Headrick was an expert in the area of real estate appraisal. Headrick testified that the value of the house, as of July 24, 2009, was $382,000. This was based on comparable recent sales in the neighborhood. It did not take into account the flooding issue on the property. It was easier to find comparables without flooding issues. Headrick acknowledged that the plaintiff sold the subject property for $346,000. Headrick opined that the diminution in value of the property due to the flooding was $36,000. On cross-examination, Headrick acknowledged that when appraising properties with detrimental conditions, it is standard procedure to first determine whether a detrimental condition even exists. He did not determine whether there was an actual flooding issue on the subject property. Nor did he talk to the new buyer to determine whether or not the alleged history of flooding factored into the purchase price. In July 2009, the market for single family homes in Wheaton priced between $300,000 and $400,000 had a 10-month plus inventory. He acknowledged that it was a strong buyer's market at that time.

Thereafter, the defendants made a motion for a directed finding. The defendants argued that the plaintiff had not made a *prima facie* showing of each of the elements of the alleged causes of action. Specifically, the defendants argued that the plaintiff had not proved a knowing violation of the Disclosure Act. In other words, the plaintiff had not shown that it was unreasonable to believe that there was no history of flooding. The defendants further argued that the plaintiff had not established damages because the basement had not flooded while it owned the property.

The plaintiff requested that the trial court reserve its ruling based upon the parties trial briefs. The plaintiff argued that it was not reasonable for the defendants to believe that raising the window well would resolve the flooding problem. The plaintiff argued that this was not an appropriate case

to grant a motion for directed finding. The plaintiff requested that the parties be allowed to file trial briefs and argue the position as to the manifest weight of the evidence.

On June 29, 2010, following argument, the trial court denied the plaintiff's request to file trial briefs and granted the defendants' motion for directed finding. The trial court found that the basement flooded in 1990, 1996, and 2001. Following the 1990 flood, the county improved the storm sewer system. In 1996, there was a back-up, but the sewer line was rodded out and the problem did not recur. In 2001, water flooded the basement through a window well. The height of the window well was raised and there had not been flooding since.

The trial court noted that the "reason the plaintiff [gave] for not developing the property [was] that the rain in 1996 caused standing water on the street and driveway." The trial court also noted that the plaintiff disclosed the same three events in his disclosure report to the subsequent buyer and the plaintiff claimed that the issues had been remedied. The trial court stated that if the issues had been remedied, it was done so by the defendants. Therefore, the trial court found that the plaintiff had not shown that the defendants knowingly violated the Disclosure Act.

In addition, the trial court found that there had been no damages because the house had not flooded while the plaintiff owned it. The trial court also stated that if the subsequent buyer knew of the flooding and purchased the house anyway, there were no damages. If the subsequent buyer did not know of the flooding when he purchased the house, then there were also no damages. Finally, the trial court noted that the house had sold for $15,000 less than the list price within a two-week time frame when there was a 10-month inventory of similar houses for sale.

On July 28, 2010, the defendants filed a motion for attorney fees and costs. The defendants argued that they were entitled to fee shifting under section 55 of the Disclosure Act (765 ILCS 77/55 (West 2008)) because the plaintiff engaged in knowing misconduct. The defendants argued that a

showing of bad faith was enough to satisfy that standard. The defendants argued that the pleadings and subsequent conduct during the litigation demonstrated the plaintiff's bad faith. The defendants also argued that they were entitled to fee shifting under paragraph 18 of the contract. Pursuant to paragraph 18, "[t]he prevailing party in litigation shall be entitled to collect reasonable attorney fees and costs from the losing party as ordered by a court of competent jurisdiction." The defendants argued that because they were the prevailing parties in this litigation, they were entitled to have their reasonable attorney fees and costs assessed against the plaintiff.

On September 29, 2010, a hearing was held on the motion for attorney fees and costs. On October 12, 2010, the trial court issued a written order denying the motion. The trial court noted that the evidence showed that there was flooding on the property and that this was sufficient to preclude a finding of "bad faith" on the part of the plaintiff. The trial court stated that in the absence of "bad faith" it lacked discretion to award damages.

On July 28, 2010, the plaintiff filed a timely notice of appeal. On October 25, 2010, the defendants filed a timely notice of cross-appeal. On appeal, the plaintiff argues that the trial court erred in granting the defendants' motion for a directed finding. Specifically, the plaintiff argues that it proved the defendants breached the contract and knowingly violated the Disclosure Act by failing to report known instances of flooding when there was no reasonable basis for them to believe that the flooding problems had been corrected. The plaintiff further argues that it proved damages resulting from the violation of the Disclosure Act. On cross-appeal, the defendants argue that the trial court erred in denying their motion for attorney fees and costs. We will first address the plaintiff's appeal.

Section 2—1110 of the Code (735 ILCS 5/2—1110 (West 2008)) provides that in cases tried without a jury, a defendant may move for a finding or judgment in his favor at the close of the

plaintiff's case. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275 (2003). In ruling on such a motion, the trial court must engage in a two-prong analysis:

> "First, the court must determine, as a matter of law, whether the plaintiff has presented a *prima facie* case. A plaintiff establishes a *prima facie* case by proffering at least 'some evidence on every element essential to [the plaintiff's underlying] cause of action.' [Citation.] If the plaintiff has failed to meet this burden, the court should grant the motion and enter judgment in the defendant's favor. [Citation.] Because a determination that a plaintiff has failed to present a *prima facie* case is a question of law, the circuit court's ruling is reviewed *de novo* on appeal. [Citation.]
>
> If, however, the circuit court determines that the plaintiff has presented a *prima facie* case, the court then moves to the second prong of the inquiry. In its role as the finder of fact, the court must consider the totality of the evidence presented, including any evidence which is favorable to the defendant. Contrary to the *Pedrick* standard, which governs a motion for directed verdict during a jury trial (*Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494 *** (1967)), under section 2—1110 the court is not to view the evidence in the light most favorable to the plaintiff. [Citation.] Rather, the circuit court must weigh all the evidence, determine the credibility of the witnesses, and draw reasonable inferences therefrom. [Citation.] This weighing process may result in the negation of some of the evidence presented by the plaintiff. After weighing the quality of all of the evidence, both that presented by the plaintiff and that presented by the defendant, the court should determine, applying the standard of proof required for the underlying cause, whether sufficient evidence remains to establish the plaintiff's *prima facie* case. If the circuit court finds that sufficient evidence has been presented to establish the plaintiff's *prima facie* case, the court should

> deny the defendant's motion and proceed with the trial. [Citation.] If, however, the court determines that the evidence warrants a finding in favor of the defendant, it should grant the defendant's motion and enter a judgment dismissing the action. [Citation.] A reviewing court will not reverse the circuit court's ruling on appeal unless it is contrary to the manifest weight of the evidence. [Citation.]" *Id.* at 275-76.

A judgment is against the manifest weight of the evidence only if the opposite conclusion is apparent or when findings appear to be arbitrary, unreasonable, or not based on the evidence presented at trial. *Fox v. Heimann*, 375 Ill. App. 3d 35, 46 (2007). The trial court's findings of fact are entitled to deference and a reviewing court may not reweigh the evidence or substitute its judgment for that of the trial court. *Id.* "A judgment will not be overturned merely because the reviewing court might disagree with the judgment or might have come to a different conclusion." *Id.*

Under the Disclosure Act, a seller of real property must provide prospective buyers with a written report disclosing certain conditions of the property. 765 ILCS 77/20 (West 2004). One of the required disclosures is whether the seller is "aware of flooding or recurring leakage problems in the crawl space or basement." 765 ILCS 77/35 (West 2004). Section 55 of the Disclosure Act provides that one who knowingly violates the Act, or discloses information on the report known to be false, is liable for actual damages and court costs. 765 ILCS 77/55 (West 2004). However, the Disclosure Act also provides that the seller is not liable for error, inaccuracy, or omission of any information delivered pursuant to the Act if the seller had no knowledge of such or if the error, inaccuracy, or omission was based on a reasonable belief that a material defect had been corrected. 765 ILCS 77/25(a) (West 2004). The reasonableness of any such belief is generally a question of fact. *Woods v. Pence*, 303 Ill. App. 3d 573, 577 (1999).

The plaintiff argues that it proved that the defendants violated the Disclosure Act by not disclosing incidents of flooding in the basement. The plaintiff argues that the property flooded in 1990, 1996, 1997 or 1998, and 2001, and that the defendants violated the Act by not disclosing those events. The trial court stated in its oral ruling that water entered the basement in 1990, 1996, and 2001. The trial court's finding that water entered the basement in 1990 was against the manifest weight of the evidence. The only testimony concerning possible flooding in 1990 was from the defendant, Joseph Ross. He specifically testified that the surrounding property flooded in 1990 but he did not testify that his basement flooded. The trial court found that the basement flooded in 1996 due to a sewer back-up. However, the testimony showed that the sewer back-up was in 1997 or 1998 and the trial court was clearly referencing that event. Although there was conflicting evidence as to whether the basement flooded in 1996 during a severe rainstorm, the trial court did not reference that event and implicitly found that the basement did not flood in 1996. Joseph Ross, the owner who lived in the house in 1996, testified that the basement did not flood. The trial court apparently found this testimony credible and we decline to disturb that determination. *Fox*, 375 Ill. App. 3d at 46 (the trial court is in a superior position to make credibility determinations). Finally, the trial court found that the basement flooded in 2001 due to water entering one of the four basement window wells. Accordingly, the trial court's finding, that the basement flooded once in 1997/1998 and once in 2001, is not against the manifest weight of the evidence. The defendants' failure to disclose the flooding would be a violation of the Disclosure Act if the defendants did not have a reasonable belief that the cause of the flooding had been corrected. 765 ILCS 77/25 (West 2006).

In the present case, the trial court found, after weighing the evidence and considering the credibility of the witnesses, that the plaintiff had not shown that the defendants knowingly violated the Act. In other words, the trial court found that the defendants reasonably believed that the

flooding issues had been corrected. We cannot say that this determination was against the manifest weight of the evidence. The basement flooded in 1997/1998 due to a sanitary sewer back-up into the laundry tub. Relative to that event, Joseph Ross testified that it occurred because there were roots in the sanitary sewer system. The sewer line was replaced and there were no further back-ups after that repair. The flooding in 2001 through one of the four basement window wells was due to four inches of rain falling within 60 to 90 minutes. The window well was raised three inches and the basement has not flooded since that repair. Even Skarin testified that the basement had never flooded while the plaintiff owned the property. Moreover, even if the basement flooded in 1990 as found by the trial court, there was evidence that, shortly thereafter, Du Page County made significant improvements to the storm water sewer system on the defendants' property. Based on the foregoing, we cannot say that an opposite conclusion than that reached by the trial court, that the defendants reasonably believed the flooding issues were corrected, is clearly evident. *Id.*

The plaintiff argues that the defendants could not have reasonably believed that the flooding problems were resolved. The plaintiff references Skarin's testimony that there was waist-high water surrounding the property after a severe rainstorm in October 2006. However, "the question is not whether the area had flooding problems, but whether the [subject home] had flooding problems." *Connor v. Merrill Lynch Realty, Inc.*, 220 Ill. App. 3d 522, 530 (1991). Skarin testified that the basement of the house did not flood during the October rainstorm. He also testified that when he saw the neighbor's photos, taken in 1996 and 2000 (Exhibits 3 and 4), showing flooding in the street and surrounding the property, he decided that the property was not suitable for redevelopment. Skarin opined that he could rebuild the house and put the foundation 20 feet higher but he could never prevent the flooding around the property. Unfortunately for the plaintiff, the disclosure report form only required disclosure of the flooding in the basement of the home, and not flooding of the

surrounding yard or street. Thus, the defendants were not required to disclose the history of flooding in the street or the surrounding yard. *Id.*

The plaintiff relies on *Rolando v. Pence*, 331 Ill. App. 3d 40 (2002), in arguing that the defendants' belief that the flooding issues had been resolved was unreasonable. In *Rolando*, this court affirmed the trial court's determination that, due to substantial evidence of repeated leaking problems with a roof, and the defendant's unsatisfactory attempts at repairing the leaks, the defendants could not have reasonably believed that the problems with the roof had been resolved. *Id.* at 46. This court held that it was not unreasonable for the trial court to find that there was substantial evidence of chronic leaking problems where the evidence showed a series of leaking problems over a 3- to 3 ½-year period of time. *Id.* at 46. This court also held that the trial court did not err in finding that the homeowners' repairs were insufficient where the homeowner merely applied silicone to the affected areas of the roof and a structural engineer testified that there was no reasonable basis to believe that such repairs would permanently stop the leaks. *Id.* at 47.

Rolando is easily distinguished from the present case. Here, there was not chronic flooding in the basement. There was a sewer back-up into the laundry tub in 1997 or 1998 and the basement flooded once in 2001. After the flood in 2001, the defendants raised the window well and there has been no further flooding in the basement since that time. We acknowledge that Burke testified that raising the window well would not resolve the flooding issue. However, in *Rolando*, the roof continued to leak after the sale of the home, supporting the structural engineer's determination that the repairs were insufficient. In this case, the basement has not flooded since the window well was raised in 2001. Moreover, although Burke opined that the basement would flood anytime overland water flow routes would be needed, the property did not flood when there was "waist-high water" surrounding the property in 2006. Thus, we find the plaintiff's reliance on *Rolando* unpersuasive.

We similarly find the plaintiff's reliance on *Woods v. Pence*, 303 Ill. App. 3d 573 (1999) (involving chronic leak in roof for three years in a row), unpersuasive.

The plaintiff also relies on *Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257 (1979), for the proposition that a homeowner's belief that a defect had been corrected is only reasonable if an expert had performed tests or surveys relative to the defect. However, *Lyons* does not stand for such a broad proposition. In *Lyons*, the reviewing court, affirming the trial court's judgment, held that it was unreasonable for the sellers to believe that the property at issue was connected to the city's sanitary sewer system. *Id.* at 261. The evidence showed that a contractor hired by the sellers stated that he was not sure, one way or the other, whether the property was connected to the city's sanitary sewer and the contractor had not performed any tests to make such a determination. *Id.* Despite the plaintiff's insinuation, the *Lyons* court did not hold that a seller's belief as to whether a material defect has been corrected is only reasonable if based on tests or surveys of the property performed by an expert. It held only that, under the facts in that case, the seller had no reasonable basis to believe its property was connected to the sanitary sewer because the contractor stated that he was not sure of the issue and a simple dye test would have settled the question. *Id.*

Finally, we note that the plaintiff argues that the trial court misinterpreted his disclosure report. We agree. In its oral ruling, the trial court stated that when the plaintiff sold the property to the subsequent purchaser, the plaintiff disclosed the flooding events on the disclosure report and stated that they had been remedied. The trial court reasoned that if the flooding issues were remedied, as conceded by the plaintiff, then they were actually remedied by the defendants. The plaintiff argues that it disclosed only one instance of flooding and did not concede that it had been remedied. Specifically, the plaintiff disclosed:

> "I have owned the property since 03/31/2006. After I purchased the property, I became aware of an event in 08/1996 where water entered the basement through the basement windows. I discussed this fact with prior owner (Ross) subsequent to my purchase. Mr. Ross stated that the problem had been corrected by work performed by Du Page County. I am not aware of any flooding into the basement in this manner since 08/1996."

Skarin testified that at the time he completed the disclosure report, there had not yet been discovery in this case. He later learned that the flooding through the basement window occurred in 2001, not 1996. This was the only event he was aware of at the time.

We agree that the plaintiff had not conceded that the flooding issue had been resolved. In the disclosure it stated only that "Mr. Ross stated that the problem had been corrected." Nonetheless, the fact that the trial court misinterpreted the disclosure report is not a basis for reversal because we need not rely on the trial court's reasoning to affirm its ultimate decision. *Kibort v. Westrom*, 371 Ill. App. 3d 247, 251 (2007) (stating that "[o]n appeal, the reviewing court is not bound by the trial court's reasoning and it may sustain the trial court's decision on any basis appearing in the record"). We affirm because, regardless of the trial court's exact reasoning, the manifest weight of the evidence supports a determination that there had been isolated instances of flooding in the basement of the subject home and that the defendants reasonably believed that the flooding issues had been corrected. Based on our determination, we need not address the plaintiff's arguments on appeal related to whether it proved damages. Additionally, because the plaintiff failed to establish a knowing violation of the Disclosure Act, his claim for breach of contract necessarily fails.

On cross-appeal, the defendants argue that the trial court erred in denying their motion for attorney fees and costs. In their motion, the defendants argued that they were entitled to attorney fees

and costs under section 55 of the Disclosure Act (765 ILCS 77/55 (West 2008)) and also under paragraph 18 of the real estate sales contract.

The award of fees under section 55 of the Disclosure Act lies within the sound discretion of the trial court and its determination will not be reversed on appeal absent an abuse of that discretion. *Miller v. Bizzell*, 311 Ill. App. 3d 971, 976 (2000). In exercising its discretion on whether to award attorney fees under the Disclosure Act, the trial court should consider factors consistent with Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). *Id.* Factors consistent with Rule 137 include: "(1) the degree of bad faith by the opposing party, (2) whether an award of fees would deter others from acting under similar circumstances, and (3) the relative merits of the parties' positions." *Id.* at 976-77.

The defendants, relying on *Krautsack v. Anderson*, 223 Ill. 2d 541 (2006), argue that they should not be limited by Rule 137 in establishing the plaintiff's bad faith. In *Krautsack*, our supreme court held that a defendant could recover attorney fees and costs under section 10(a)(c) of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/10a(c) (West 2008)) if there was a finding that the plaintiff acted in bad faith. *Id.* at 559. The court further held that a prevailing defendant should not be limited by Rule 137 in establishing a plaintiff's bad faith but should consider "all asserted instances of bad-faith conduct by a litigant or the litigant's attorney during the course of the litigation." *Id.* at 562. In the present case, the defendants argue that there was evidence that the plaintiff acted in bad faith during the course of the litigation.

Nonetheless, we need not decide whether the reasoning in *Krautsack* similarly applies to an award of attorney fees and costs under the Disclosure Act. The trial court clearly found that the plaintiff did not act in bad faith. We have conducted our own review of the pleadings and the

asserted instances of bad faith during the course of the litigation and we cannot say that the trial court abused its discretion in denying the defendants' motion for attorney fees and costs.

First, we cannot say that the plaintiff filed its claim in bad faith. It is undisputed that the defendants did not disclose that the basement of the subject property flooded in 2001. Whether this was a violation of the Disclosure Act was a question of fact for the trier of fact because it turned on whether the defendants reasonably believed that the flooding issue had been resolved. *Woods*, 303 Ill. App. 3d at 577; 765 ILCS 77/25 (West 2008). Furthermore, although the property had not flooded while the plaintiff owned it, the plaintiff was justified in asserting that damages could be measured by the property's diminished value, due to the potential for future flooding. See *Kitzes v. Home Depot, U.S.A., Inc.*, 374 Ill. App. 3d 1053, 1063 (2007) (actual damages for violation of the Consumer Fraud Act could be measured by a decrease in property value); *Woods*, 303 Ill. App. 3d at 577 (defects in a home can be reflected in the purchase price of the house).

The defendants point out that the plaintiff's October 15, 2007, amended complaint alleged that it had been unable to sell the property and that "one of the major drawbacks cited by potential purchasers is the history of severe flooding in the basement." The defendants argue that, as indicative of the plaintiff's knowing misconduct, Skarin acknowledged at trial that no potential purchaser ever explicitly made such a statement. However, Skarin testified at trial that at the time the amended complaint was prepared, he believed that statement was true. He testified that he had discussed the property with numerous potential purchasers and after disclosing and discussing the flooding issues, no one made any offers. He reasonably believed, therefore, that the flooding issues were a major drawback. Accordingly, we find the defendants' claim that bad faith is demonstrated in the plaintiff's pleadings to be without merit.

Second, the defendants' asserted instances of bad faith during the course of the litigation are not supported by the record. The defendants argue that in early 2010, Skarin falsely informed the plaintiff's experts that the basement flooded in 1996, even though Joseph Ross's deposition testimony was to the contrary. The defendants argue that the experts' opinions were based on this allegedly false assumption. However, this does not demonstrate bad faith. Based on the photos from the neighbor, which showed the surrounding property flooded in 1996, we cannot say it was unreasonable for Skarin to believe that the basement had flooded, despite Ross's testimony. Moreover, Burke's opinion that the basement flooded in 1996 was not based on information relayed by Skarin. Burke testified that his opinion was based on the elevation of the house, the overland flow routes, the sizes of the sewers and the culverts, and the fact that there was 8 to 10 inches of rainfall in a 24-hour period. Additionally, any misinformation did not skew Headrick's opinion because he testified as to the fair market value of the house both with and without any flooding issues.

Finally, the defendants argue that most indicative of the plaintiff's bad faith was that it incorporated information disclosed by the defendants in its own disclosure in May 2009 and never informed the subsequent buyer about this litigation or the neighborhood's history of flooding. However, Skarin testified at trial that he disclosed all he knew at the time he completed the disclosure report in May 2009, which was prior to discovery in this case. He disclosed that after he purchased the home he had a conversation with Ross concerning flooding in the basement through a window well. He further disclosed that Ross informed him that the problem had been corrected. Because Skarin disclosed what he knew at the time, the disclosure report to the subsequent buyer cannot form a basis for a finding of bad faith. Additionally, the defendants have not cited any

authority to show that the plaintiff was under a legal obligation to inform the subsequent purchaser of this lawsuit or the neighborhood's history of flooding.

The defendants also argue that they are entitled to attorney fees and costs pursuant to paragraph 18 of the real estate sales contract. Paragraph 18 provides, in part, as follows:

> "In the event of default by Seller or Buyer, the Parties are free to pursue any legal remedies at law or in equity. The prevailing Party in litigation shall be entitled to collect reasonable attorney fees and costs from the losing Party as ordered by a court of competent jurisdiction."

We must strictly construe a contractual provision for attorney fees. *Chapman v. Engel*, 372 Ill. App. 3d 84, 87 (2007). That is, we construe the fee-shifting provision "to mean nothing more—but also nothing less—than the letter of the text." *Erlenbush v. Largent*, 353 Ill. App.3d 949, 952 (2004). The construction of a contract's fee-shifting provision presents a question of law, which we review *de novo*. *Bjork v. Draper*, 381 Ill. App. 3d 528, 544 (2008).

In *Chapman*, the court construed an identical fee-shifting provision as that contained in Paragraph 18 of the parties' contract. The court held that the fee-shifting provision required a "default by Seller or Buyer" before attorney fees could be awarded to the prevailing party. *Chapman*, 372 Ill. App. 3d at 87. We agree with that interpretation of the fee-shifting provision. In the present case, neither the plaintiff nor the defendants defaulted on the contract. As such, the defendants' claim for attorney fees and costs under the contract necessarily fails. *Id.*

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.