2012 IL App (1st) 111636-U

FOURTH DIVISION
September 13, 2012

No. 1-11-1636

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATTHEW PETRICK and ANNIE BREITENSTEIN,	)	Appeal from the Circuit Court of Cook County.
Defendants/Appellants/Cross-Appellees,	)	
v.	)	No. 07L11932
KAREN CONTI,	)	The Honorable Lee Preston,
Plaintiff/Appellee/Cross-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concur in the judgment.

Held: In litigation surrounding a failed real estate transaction, defendants sufficiently argued that the trial court erred when entering a directed verdict against them on their common law fraud claim against property seller; due to our disposition on the common law fraud claim, trial court's order regarding attorney's fees and costs pursuant to the "prevailing party" provision in the sales contract, as well as the Disclosure Act, is vacated; on cross-appeal, trial court's decision finding plaintiff's posttrial motion untimely is affirmed; and trial court's judgment in favor of the buyers on the Disclosure Act counterclaim is affirmed.

¶ 1 **ORDER**

¶ 2 This action stems from an intended real estate transaction. Defendants Matthew Petrick

and Annie Breitenstein ("the buyers") entered into a real estate contract to purchase a house owned by plaintiff Karen Conti ("the vendor"). After entering into the contract, the buyers discovered problems in the basement beneath the sunroom, including signs of leaking water, cracks, and displacement of the basement foundation. Eventually, the buyers declared the contract null and void, after which the vendor filed suit against them, alleging, in pertinent part, breach of contract. In return, the buyers filed a countersuit against the vendor, alleging (1) common law fraud, and (2) violation of the Illinois Real Property Disclosure Act ("Disclosure Act") (765 ILCS 77/1, *et seq.* (West 2010)). The buyers' Disclosure Act claim was decided by the trial court, which entered judgment in favor of the buyers. The vendor's breach of contract claim and the buyers' claim for common law fraud were tried to a jury. The jury rendered a verdict for the buyers on the vendor's breach of contract claim. After the close of proofs, the trial court entered a directed verdict against the buyers on their common law fraud claim. The court did not enter an award of damages in favor of the buyers, instead holding that they failed to prove reliance upon the vendor's false representations when entering into the contract. The court also denied the buyers' fee petition, holding that, because both parties were "prevailing parties," neither party was entitled to recover attorney fees or costs.

¶ 3 The buyers appeal, contending: (1) the trial court erred when it entered a directed verdict against the buyers on the common law fraud claim of their counterclaim; (2) the trial court erred when it denied the buyers' fee petition pursuant to the prevailing party provision of the contract; and (3) the trial court abused its discretion when it refused to award the buyers attorney fees and costs under the Disclosure Act and held that the buyers did not suffer actual damages as a result

of the vendor's misrepresentations in her written disclosure report.

¶ 4 The vendor cross-appeals, contending that the trial court erred by: (1) denying the vendor's posttrial motion challenging both the jury verdict and the bench verdict; (2) denying the vendor's motion for summary judgment; and (3) granting judgment in favor of the buyers on the counterclaim for violation of the Disclosure Act.

¶ 5 BACKGROUND

¶ 6 In 2007, the buyers considered purchasing a new home in Oak Park, Illinois. They hired a realtor. The vendor's home at 829 North Kenilworth Drive in Oak Park was on the market at that time. Kris Sagan with Remax in the Village was the vendor's real estate agent.

¶ 7 Before putting the house on the market, Sagan made and suggested various improvements to the properly to make it more attractive for potential buyers. Although she was in the house on numerous occasions, she never went into the basement beneath the sunroom.

¶ 8 In order to sell the house, the vendor executed a Residential Real Property Disclosure Report dated August 29, 2007 ("August disclosure report"), in which she denied that she was aware, in pertinent part, of: any material defects in the basement or foundation of the property, including cracks and bulges; flooding or recurring leakage problems in the crawlspace or basement of the property; and material defects in the walls and floors of the property.

¶ 9 Soon after, the vendor put the house on the market for $799,000. Within a few days, the buyers visited the house. The vendor provided the buyers with the August 29 disclosure report before they made their first offer and before they entered into any agreement to purchase the

property.

¶ 10 On September 15, 2007, the buyers submitted an offer to purchase the house for $729,000. The vendor rejected this offer and made a counteroffer of $790,000. The buyers accepted this offer and the parties entered into a residential real estate contract on September 22, 2007. The contract was conditioned on, and subject to, an attorney review period, an inspection of the property by the buyers with the right to hire a third-party inspector to perform the inspection, and, among other terms, a mortgage contingency conditioned upon the buyers' receipt of a firm written mortgage commitment.

¶ 11 The attorney review clause provides:

> "9. ATTORNEY REVIEW: The respective attorneys for the Parties may approve, disapprove, or make modifications to this Contract, other than stated Purchase Price, within five (5) Business Days after the Date of Acceptance. Disapproval or modification of this Contract shall not be based solely upon stated Purchase Price. Any notice of disapproval or proposed modification(s) by any Party shall be in writing. If written notice is not served within the time specified, this provision shall be deemed waived by the Parties and this Contract shall remain in full force and affect. If prior to the expiration of ten (10) Business Days after Date of Acceptance, written agreement is not reached by the Parties with respect to resolution of proposed modifications, then this Contract shall be

null and void."

Per the terms of the contract, September 22, 2007, is the date of acceptance. September 28, 2007, was five business days from the date of acceptance. It follows, then, that the parties had until September 28, 2007, to propose modifications to the contract under the attorney review clause.

¶ 12 The professional inspections clause provided:

"10. PROFESSIONAL INSPECTIONS: Buyer may secure at Buyer's expense (unless otherwise provided by governmental regulations) a home, radon, environmental, lead-based paint and/or lead-based paint hazards (unless separately waived), and/or wood destroying insect infestation inspection(s) of said Real Estate by one or more licensed or certified inspection service(s). Buyer shall serve written notice upon Seller or Seller's attorney of any defects disclosed by the inspection(s) which are unacceptable to Buyer, together with a copy of the pertinent page(s) of the report(s) within five (5) Business Days (ten (10) calendar days for a lead-based paint and/or lead-based paint hazard inspection) after Date of Acceptance. If written notice is not served within the time specified, this provision shall be deemed waived by the Parties and this Contract shall remain in full force and effect. If prior to the expiration of ten (10) Business Days after Date of Acceptance,

> written agreement is not reached by the Parties with respect to resolution of Inspection, then this Contract shall be null and void. The home inspection shall cover only major components of the Real Estate, including but not limited to, central heating system(s), central cooling system(s), plumbing and well systems, electrical system, roof, walls, windows, ceilings, floors, appliances and foundation. A major component shall be deemed to be in operating condition if it performs the function for which it is intended, regardless of age, and does not constitute a threat to health or safety. The fact that a functioning component may be at the end if its useful life shall not render such component defective for the purpose of this paragraph. Buyer shall indemnify Seller and hold Seller harmless from and against any loss or damage caused by the acts or negligence of Buyer or any person performing any inspection(s). Buyer agrees minor repairs and routine maintenance items are not a part of this contingency. If radon mitigation is performed, Seller shall pay for a retest."

¶ 13 The mortgage contingency clause, which was initialed by both the vendor and the buyers, provided that the buyers had until October 22, 2007, to obtain agreed-upon financing for the purchase of the house and, absent receipt of the agreed-upon financing, the buyers had the right to declare the contract null and void. The mortgage contingency clause of the contract provides,

in pertinent part:

> "11. MORTGAGE CONTINGENCY: Seller has received a completed Loan Status Disclosure * * *. This Contract is contingent upon Buyer obtaining a firm written mortgage commitment * * * on or before October 22, 2007 for a conventional loan of 75% of purchase price or such lesser amount as Buyer elects to take, plus private mortgage insurance (PMI), if required. The interest rate * * * shall not exceed 7.5% per annum, amortized over not less than 30 years. Buyer shall pay loan origination fee and/or discount points not to exceed 0% of the loan amount. * * * Buyer shall make written loan application within five (5) Business Days after Date of Acceptance. Failure to do so shall constitute an act of Default under this Contract. If Buyer, having applied for the loan specified above, is unable to obtain such loan commitment and serves written notice to Seller within the time specified, this Contract shall be null and void. If written notice of inability to obtain such loan commitment is not served within the time specified, Buyer shall be deemed to have waived this contingency and this Contract shall remain in full force and effect. Unless otherwise provided in Paragraph 31 this Contract shall not be contingent upon the sale and/or closing of Buyer's

existing real estate * * *."

¶ 14 After entering into the contract on September 22, 2007, the buyers had the property inspected on September 24, 2007, by Haim Naiditch with Accuspect, Inc. ("Accuspect"). Based on this inspection, Naiditch concluded that the property's condition was overall below average, and he specifically identified a number of defects, including: (1) a major crack in the foundation of the house beneath the sunroom, where that "corner of the house has settled severely. The foundation wall is bowing outward;" (2) the sunroom foundation had significantly settled; and (3) there was active moisture in at least two places in the basement of the house.

¶ 15 At trial, Naiditch testified that, when he inspected the house, there were mattresses and other stored items in the basement beneath the sunroom concealing these issues. When he moved the items, he observed "a significant shifted/bowing foundation wall" in that area, as well as a "major" horizontal crack in the foundation and "actively leaking water" in the foundation crack. He described the foundation crack as three and one half feet in length, and one inch and a half or one inch and a quarter wide. He noted that he had never before seen such a significant foundation crack. He also testified that, when he observed the sunroom above that area, there was "very apparent" slanting, that it was "shifting downward significantly."

¶ 16 Later in the trial, Matthew Petrick, one of the buyers, denied that the slant of the sunroom floor alerted him to the foundation problems. He testified:

"[VENDOR'S ATTORNEY (MR. ADAMSKI):] Q. It was obvious the foundation was sinking, wasn't it?

[MR. PETRICK:] A. Not to me."

¶ 17 After the buyers entered into the contract to purchase the house, they retained Felizia DiGiovanni as their real estate attorney to represent them in purchasing the house. In a September 28, 2007, letter, DiGiovanni proposed modifications to the contract, including, in pertinent part, providing the buyers with: (1) an extension of the attorney review period "for a reasonable time to resolve all issues raised herein;" (2) "[a]ny items raised under the inspection provision of this contract shall be deemed raised under this attorney review provision as well;" (3) a history of repairs at the house; (4) a remedy for the defects noted in the inspection rider attached to the letter, which raised plumbing, electrical, foundation, leakage, the garbage disposal, and radon issues as proposed modifications; and (5) an agreement to certain changes in the mortgage contingency clause.

¶ 18 The vendor's real estate transactional lawyer, Roberto Guzaldo, responded by a letter dated October 10, 2007, accepting some modifications, rejecting others, and not addressing others. Specifically, Guzaldo agreed to the attorney review period modifications; did not respond to a request regarding framed pictures of the house; agreed to the mortgage contingency provisions; and did not agree with the inspection items, noting, "No, seller to address inspection issue under separate letter on 10/11/07."

¶ 19 Meanwhile, the buyers hired Dave Pate, a foundation rehabilitation expert with Dave Pate and Sons, Inc., to assess the foundation on October 1, 2007. After inspecting the foundation, Pate estimated that fixing the foundation issues would cost $35,000.

¶ 20 Soon after, the vendor hired Steve Swanstrom with Armstrong Foundation Repair to assess the property. After inspecting the foundation, Swanstrom estimated that it would cost

$11,000 to shore up the sunroom to stop it from continuing to settle.

¶ 21 Then, the vendor's real estate agent presented the buyers with a memorandum purportedly written by Rick Fujii, a building general contractor. The "Fujii Memorandum," which was later revealed to have been drafted entirely by the vendor's husband, reads:

> "MEMORANDUM
>
> I am a general contractor. I specialize in new buildings and the renovations of older, upscale homes. I have been involved in the construction business for over 29 years.
>
> I am fully licensed and am authorized to do business in Oak Park and in other cities in Illinois. I have done many construction jobs in Oak Park as well as Chicago and other suburbs.
>
> I was asked to inspect and evaluate the sunroom and surrounding area at 829 N. Kenilworth, Oak Park, Illinois. I made my inspection on October 9, 2007.
>
> It is my opinion that there is no structural problem with the sunroom. It does not need to be rebuilt. It sits on a stone foundation. Stone foundations settle shortly after they are constructed. This particular area of the house appears to have settled many, many years ago. The present owners report that there has been no settling for the past 12 years. This is consistent with my experience with stone foundations.

It is highly unlikely that there will be any further settling in future generations.

There is a potential problem with water. It does not concern the settling of the sunroom. It concerns the slope of the terrain and the present gutter at the southwest side of the sunroom.

As a result of the terrain and the gutter, water pools right next to the sunroom and potentially may filter into the basement through the stone foundation.

My recommendation is that you:

1. redirect the terrain so that the water flows away from the house.

2. redirect the gutter so that water moves away from the house.

3. waterproof the basement from the outside.

This will protect the basement from water for generations. Additional concrete will level out the floor if you wish to have it finished.

Rick Fuji

October 11, 2007"

¶ 22 At trial, Rick Fujii testified that he works as a general contractor, but he is not a structural engineer. He testified that he visited the property in 2007 and was later presented with the "Fujii

Memorandum" in question and asked to sign it. He did not write the memorandum, nor did he authorize anyone else to write it on his behalf. Upon reading the memorandum, he refused to sign it, stating that he did not want any part of it. It was not revealed until trial that this memorandum was written by the vendor's husband rather than by Rick Fujii. At trial, the vendor testified that this memorandum was only a draft and that, although she provided it to her real estate agent, she never intended for the buyers to rely on it.

¶ 23 After receiving all of this information, the buyers and the vendor negotiated the sales price, finally agreeing upon a $2500 reduction in the sales price as a remediation credit for the foundation defects.

¶ 24 Eventually, however, the buyers declared the contract null and void due to under paragraphs 9 and 12 of the contract because: (1) the vendor did not accept certain modifications the buyers proposed; and (2) the buyers' lender rejected their loan application.

¶ 25 The vendor filed suit against the buyers for, *inter alia*, breach of contract. The buyers filed a counterclaim alleging common law fraud and violation of the Disclosure Act.

¶ 26 After filing suit against the buyers, the vendor completed an amended residential real property disclosure report dated October 24, 2007, which was admitted into evidence at trial. In this disclosure report, the vendor disclosed that she was aware of "material defects" in the basement or foundation, including cracks and bulges. She handwrote:

> "The southwest corner (sunroom) has settled, which is normal for a house its age. I have been [informed] by one inspector that the foundation wall is bowed. I have been told that

> this, too, is normal and does not present a threat to the structural integrity of the home. In that area, there are several cracks in the wall, where moisture has accumulated. There is not leakage or water entering the home & otherwise the basement is very dry."

¶ 27 Thereafter, the vendor prepared another residential real property disclosure report dated December 14, 2007, which was also admitted into evidence at trial. In this disclosure report, the vendor again disclosed that she was aware of "material defects" in the basement or foundation, including cracks and bulges. She handwrote:

> "The south corner of the basement (under sunroom) shows signs that it settled, probably shortly after it was built. As a precaution, I hired a company (Permaseal) to stabilize the south wall with steel bolts and to seal the walls from any possible water. Permaseal gives a 20-year warranty that runs with the house. In the 12+ years I have owned the house, I have not seen any changes/worsening of cracks or bulges in any areas of the basement, including here."

¶ 28 At the close of the buyers' proofs at trial, the vendors requested a directed verdict on the buyers' common law fraud claim. After hearing arguments from both parties, the trial court granted the vendor's motion for a directed verdict on the fraud claim. In its ruling on the motion, the trial court found that the buyers had failed to prove they relied on the vendor's misrepresentations:

> "THE COURT: The motion for a directive [*sic*] verdict on Count I is granted. I simply don't have clear and convincing evidence of any reasonable reliance on anything that was said when the - - again, the house is open for inspection. That opportunity was taken by the buyers with respect to their heart's content which they took advantage of, and they did have inspectors come out there and look at the property. I don't have clear and convincing evidence."

¶ 29 The trial court also entered judgment in favor of the buyers on the buyers' Disclosure Act claim. Thereafter, the jury returned a verdict for the buyers on the vendor's breach of contract claim, and the trial court entered judgment on the jury verdict the same day.

¶ 30 The buyers appeal, and the vendor cross-appeals.

¶ 31 ANALYSIS

¶ 32 I. The Directed Verdict on the Buyers' Common Law Fraud Claim

¶ 33 The buyers first contend the trial court erred when it entered a directed verdict in favor of the vendor on the buyers' common law fraud claim against the vendor. Specifically, the buyers argue that the court erroneously found that the buyers failed to prove they reasonably relied on the vendor's pre-contract disclosure report which improperly reflected that she did not know of particular problems with the house. The buyers argue that the evidence clearly showed they relied on the vendor's false representations before entering into the contract, that the evidence

clearly showed the vendor knew about the defects in the basement before executing the August disclosure report, and that the vendor attempted to conceal the defect by creating the Fujii memorandum. In the alternative, the buyers contend that the court's entry of a directed verdict was wrong as a matter of law, where, contrary to the court's determination, defendants had no duty to perform an inspection of the house before entering into the contract and instead had the right to rely upon the truthfulness of the disclosure report. For the following reasons, we agree.

¶ 34 " '[V]erdicts ought to be directed and judgments [notwithstanding the verdict] entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Robinson v. Chicago Park District*, 325 Ill. App. 3d 493, 497 (2001), quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967); see also *Harris v. Thompson*, 2012 IL 112525 (2012) ("Although motions for directed verdicts and motions for judgments *n.o.v.* are made at different times, they raise the same questions and are governed by the same rules of law"); *Sullivan v. Edward Hosp.*, 209 Ill. 2d 110, 112 (2004), quoting *Jones v. O'Young*, 154 Ill. 2d 39, 47 (1992) (" 'In directing a verdict, the trial court determines *as a matter of law* that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery' "). "A motion for directed verdict should be granted where there is no evidence demonstrating a substantial factual dispute or where the assessment of the credibility of witnesses or the determination of conflicting evidence is not decisive to the outcome." *Robinson*, 325 Ill. App. 3d at 497, citing *Maple v. Gustafson*, 151 Ill. 2d 445, 453-54 (1992). We review the trial court's decision on a motion for a directed verdict *de novo* because the trial court does

not weigh the evidence or judge the credibility of witnesses. *Robinson*, 325 Ill. App. 3d at 497, citing *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 340 (1998); see also *Moller v. Lipov*, 368 Ill. App. 3d 333, 341 (2006). "The evidence must be reviewed in the light most favorable to the non-moving party, and all inferences will be drawn in favor of the non-moving party." *Dunlap*, 298 Ill. App. 3d at 340.

¶ 35 The elements for a common law fraud claim are: (1) a false statement of material fact; (2) which was known or believed to be false by the person making the statement; (3) intent by the person making the statement to induce another party to act; (4) justified reliance; and (5) damage to the other party resulting from such reliance. *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980).

¶ 36 We hold that the trial court committed reversible error in granting the vendor's motion for a directed verdict. We are of the opinion that, contrary to the trial court's determination, the evidence as reflected by the record and viewed in the light most favorable to the opponent-buyers does not "so overwhelmingly favor[] movant that no contrary verdict based on that evidence could ever stand." See *Robinson*, 325 Ill. App. 3d at 497, quoting *Pedrick*, 37 Ill. 2d at 510. Instead, our review of the record shows that the buyers alleged the vendor made a false statement of material fact with the intention to induce them to enter into the sales contract, that the buyers claim to have relied upon these misrepresentations, and that the buyers were damaged therefrom. See *Soules*, 79 Ill. 2d at 286. Where the buyers clearly made these allegations both in their counterclaim and through evidence adduced at trial, an assessment of the credibility of the witnesses and a determination of conflicting evidence was decisive to the outcome of this case.

See *Robinson*, 325 Ill. App. 3d at 497, citing *Maple*, 151 Ill. 2d at 453-54 ("A motion for a directed verdict should be granted where there is no evidence demonstrating a substantial factual dispute or where the assessment of the credibility of witnesses or the determination of the credibility of witnesses or the determination of conflicting evidence is not decisive to the outcome").

¶ 37 The buyers alleged in count I of their counterclaim that the vendor fraudulently induced them to enter into the contract by falsely representing to them in the August disclosure report that she did not have any knowledge of the "flooding and foundation problems" in the house. On August 29, 2007, the vendor executed a residential real property disclosure report in which she denied she was aware, in pertinent part, of: any material defects in the basement or foundation of the property, including cracks and bulges; flooding or recurring leakage problems in the crawlspace or basement of the property, and material defects in the walls and floors of the property.

¶ 38 It was later discovered, however, that there were major defects in the basement foundation, and that the vendor knew about these defects. In fact, in the trial court's order awarding court filing fees to the buyers, the trial court said:

> "In the case at bar, the testimony and evidence produced at trial establishes that [vendor] violated the Disclosure Act when she failed to disclose material defects in the foundation of her home. On August 29, 2007, [the vendor] completed a Disclosure Report in which she indicated that she was not 'aware of any material

defects in the basement or foundation (including cracks and bulges).' * * * A material defect is defined on the form as 'a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants. . .' 765 ILCS 77/35 (2010). The fourth statement on the Disclosure Report states: "I am aware of material defects in the basement or foundation (including cracks and bulges.)" Next to this statement, [the vendor] placed a check mark in the "NO" column.

However, the inspection report dated September 26, 2007 indicates that in the basement below the sun room, there were signs of settling and water damage. * * * Apparently, the basement wall was 'bowing outward.' * * * In response to questions about the foundation, plaintiff stated in an email on September 26, 2007, that the basement has always "been like that." * * * In that same email, plaintiff stated, 'I am now half recalling that the prior owners disclosed it to me or my inspector spotted it.' * * * Similarly, on October 10, 2007, [the vendor] stated in a letter to her attorney that 'the condition of the basement and sunroom is exactly the same as it was when I purchased the home 12 year [*sic*] ago.' * * * [The vendor] completed two Disclosure Reports after the [buyers]

declared the purchase contract null and void. On October 24, 2007, [the vendor] stated that she was aware of material defects in the basement and foundation. * * * On December 14, 2007, [the vendor] declared that she was aware of material defects in the basement and foundation and further noted that '[i]n the 12+ years I have owned the house I have not seen any changes/worsening of cracks or bulges . . .' * * *

These statements establish that [the vendor] was aware of the defects in the basement and foundation, including cracks and bulges, when she completed the Disclosure Report on August 29, 2007. The Report specifically asks sellers to indicate whether there are cracks and bulges in the basement or foundation. The fact that the cracks and bulges existed for twelve years or more does not absolve a seller from disclosing the existence of such cracks and bulges. As such, [the vendor] violated the Disclosure Act when she stated that she was not aware of any cracks and bulges on the Disclosure Report on August 29, 2007. It is undisputed that defendants learned of the defects in the basement after they entered into the purchase contract. However, a buyer's knowledge of a defect does not relieve a seller from liability under the Disclosure Act. *Hogan*, 333 Ill. App. 3d at 148."

We recognize that the trial court did not believe the buyers relied upon these misrepresentations, stating:

> "In the case at bar, the evidence indicates that the buyers did not rely on the Disclosure Report and hired inspectors to inspect the premises. Knowledge by the purchaser is relevant to the amount of damages awarded to a purchaser who succeeds on a claim against a seller for violating the Disclosure Act. *Hogan*, 333 Ill. App. 3d at 148. Defendants (the buyers) were aware of the defects in the basement within a week of executing the Contract. * * * At trial, defendants stated that they would not have entered into the Contract on September 22, 2007 had [the vendor] properly disclosed the condition of the basement on the August 29, 2007 Disclosure Report. However, the evidence and testimony before the court contradicts [the buyers'] assertion. [The buyers] became aware of the defects in the basement during the Contract's attorney review period and inspection period. Defendants did not declare the Contract null and void when they learned of the defects in the basement; rather, they continued to negotiate the Contract terms with plaintiff. Thus, defendants' speculation that they would not have entered into the Contract, hired an attorney, or hired an inspector, is not supported by the evidence. Because [the buyers]

> did not sufficiently demonstrate the actual damages that they incurred as a result of [the vendor's] violation, the court cannot enter an award for actual damages in favor of [the buyers]. Nevertheless, the Disclosure Act provides that the 'prevailing party' shall recover court costs; as such, the counterplaintiffs' [the buyers'] court filing fees are awarded to [the buyers."

¶ 39 The vendor argues that, even assuming she failed to disclose the defects to the house, the buyers suffered no injury. She insists that the buyers, "pursuant to the contract's clear terms, when they learned about the foundation conditions (which they did during the inspection), they could have immediately declared the contract null and void under either the inspection or attorney review clauses." Instead, she points out, the buyers negotiated with the vendor, agreed to accept a remediation credit, and sought financing before notifying the vendor of their intent to void the sales contract.

¶ 40 The buyers respond that they were unable to terminate the contract as the vendor asserts under the attorney-review or inspection clause upon learning of the defects on September 24, 2007, because the attorney-review clause only provides for termination due to material defects which posed a risk to "health and safety." The buyers contend that, while the defects in question were major, they did not constitute a risk to health and safety. In a similar manner, the buyers respond that they could not terminate the contract under the attorney-review clause, either, because that provision only allows for termination if the parties failed to agree on proposed modifications, which failure to agree had not yet occurred at the time the buyers learned of the

defective basement. Significantly, the buyers maintain that whatever happened after they, in reliance on the vendor's false representations, entered into the purchase contract, is immaterial to the issue at hand. The harm alleged was complete, they argue, on September 22, 2007, when they entered into the binding contract ("What occurred after entering into the Contract could not, and did not, play a role in their decision to enter into the Contract in the first instance"). We agree.

¶ 41 In their amended counterclaim, the buyers alleged that the vendor, as owner of the property in question, had a duty pursuant to the Disclosure Act to disclose material defects in the property to the buyers. The vendor provided the buyers with a disclosure statement. After she provided this disclosure statement, the buyers offered to purchase the property from the vendor. The buyers claimed the vendor "knowingly misrepresented" that she was unaware of flooding or recurring leakage problems in the basement; that she was unaware of material defects in the basement or foundation (including cracks and bulges); and she was unaware of material defects in the walls or floors of the house. They claim she:

> "breached her duty to [the buyers] by failing to disclose and concealing the material defects from [the buyers] in a wrongful effort to induce [the buyers] to entice them into the Contract and to purchase the Property, and: (1) misrepresented her knowledge of the flooding and foundation problems: (a) on the Disclosure Statement that she presented to [the buyers] in 2007 and (b) during discussions with [the buyers'] agents, and (2) actively concealed

> the existence of the flooding and foundation problems from [the buyers]."

The buyers alleged "they reasonably relied on the vendor's misrepresentations to their detriment when they entered into the Contract and continued negotiations thereafter;" that the vendor's misrepresentations damaged the buyers; and that her "representations were knowingly false, willful and malicious."

¶ 42 We agree with the buyers that the damage in question occurred when they entered into the contract on September 22, 2007. The allegations were that the vendor misrepresented the known conditions of the property via the disclosure statement. She presented the false disclosure statement to the buyers prior to their entering into the sales contract. The buyers testified at trial that they relied upon the truthfulness of the vendor's representations in the disclosure statement when making an offer to enter into the sales contract on September 22, 2007.

¶ 43 We find that resolution of the issue of reliance was a question of fact which should rightly have been presented to the jury. At trial, the buyers said they relied on these misrepresentations when entering into the contract. The vendors say the buyers could not reasonably have relied on the misrepresentations. Moreover, the fact that the buyers hired an inspector after entering into the contract does not, to us, prove they did not rely on the misrepresentations before entering into the contract, which is the issue here. Clearly, the buyers did not rely solely on the vendor's misrepresentations after entering into the contract, as they hired an inspector who inspected the property and found major defects in the foundation. The inspections did not occur until after the parties entered into the contract: Haim Naditch performed his inspection on September 24, 2007;

and Dave Pate inspected the property on October 1, 2007. The issue here, however, is whether the buyers relied on the misrepresentations before entering into the contract and were, therefore, fraudulently induced into entering into the contract. Resolution of that issue in this case requires an assessment of the credibility of the witnesses and a determination of conflicting evidence. See *Robinson*, 325 Ill. App. 3d at 497, citing *Maple*, 151 Ill. 2d at 453-54 ("A motion for a directed verdict should be granted where there is no evidence demonstrating a substantial factual dispute or where the assessment of the credibility of witnesses or the determination of the credibility of witnesses or the determination of conflicting evidence is not decisive to the outcome"). This issue, the common law fraud claim of the buyers' counterclaim, should have been presented to the jury. Accordingly, we reverse the trial court's directed verdict and remand for further proceedings in the trial court.

¶ 44 II. The Buyers' Fee Petition Filed Pursuant to the Prevailing Party Provision of the Contract

¶ 45 Next, the buyers contend that, if this court determines, as we have, that the trial court erred when it entered a directed verdict on their common law fraud claim, then we must also find that the buyers are the prevailing party under the prevailing party provision of the contract. If we find they are the prevailing party, argue the buyers, then we should also reverse the trial court's denial of the buyers' fee petition. We disagree.

¶ 46 Following trial, the buyers filed a fee petition, alleging that they were the "prevailing party" in the litigation under paragraph 28, which provides:

> "28. PERFORMANCE: Time is of the essence of this Contract. In any action with respect to this Contract, the Parties are free to pursue any legal remedies at law or in equity and the prevailing Party in litigation shall be entitled to collect reasonable attorney fees and costs from the non-Prevailing Party as ordered by a court of competent Jurisdiction. There shall be no disbursement of earnest money unless Escrowee has been provided written agreement from Seller and Buyer. Absent an agreement relative to the disbursement of earnest money within a reasonable period of time, Escrowee may deposit funds with the Clerk of the Circuit Court by the filing of an action in the nature of interpleader, Escrowee shall be reimbursed from the earnest money for all costs, including reasonable attorney fees, related to the filing of the interpleader action. Seller and Buyer shall indemnify and hold Escrowee harmless from any and all conflicting claims and demands arising under this paragraph."

¶ 47 Under paragraph 28, they argued, the vendor was obligated to reimburse the buyers their reasonable attorney fees and costs. They claimed to have incurred $353,562 in attorney fees and $48,679 in costs, for a total of $402,241. The trial court denied the petition, finding, in pertinent part, that neither party was a "prevailing party" in this litigation. It found:

> "In the case at bar, it is appropriate to find that neither party

> prevailed. This case involves multiple claims and both parties have won and lost on different claims. [Vendor] prevailed on Count I of [the buyers'] Counterclaim. Judgment was entered in favor of defendants on [the vendor's] breach of contract claim and on Count II of [the buyers'] counterclaim. Because neither [vendor] nor [the buyers] are the prevailing party, the parties' petitions for attorney's fees and costs under paragraph 28 of the Contract are denied."

¶ 48 The buyers now argue that "[i]f this Court reverses the directed verdict, [the vendor] will have lost on every single claim in the case, leaving [the buyers] as the only prevailing party. The result is the same if [the buyers] choose not to pursue their fraud claim upon reversal and remand, just as [the vendor's] decision to drop her common law fraud claim has played no part in the determination of who prevailed for purposes of the Contract's prevailing party provision." This court, however, will not engage in the questionable process of attempting to guess whether the parties will continue to pursue their claims upon remand. Our determination here is based solely on the record before us. While we have found that the trial court erred in granting the vendor's directed verdict on the common law fraud claim of the buyers' counterclaim, we have not found that the buyers have prevailed on that count. Rather, we have remanded the cause for the jury to determine whether the buyers reasonably relied on statements made by the vendor. As such, there is no clear "prevailing party" at this point in time.

¶ 49 Accordingly, because we reverse and remand the cause to the jury to decide the common

law fraud issue, which issue was a key part of the trial court's reasoning when it denied the fee petition, we hereby vacate the trial court's denial of the buyers' fee petition. We anticipate that it may once again have opportunity to revisit a fee petition after the determination of the common law fraud issue, and we express no opinion as to whether such petition should be granted or denied.

¶ 50 III. Attorney Fees and Costs Pursuant to the Disclosure Act

¶ 51 Next, the buyers contend that the trial court abused its discretion when it rejected their request for attorney fees and costs under the Disclosure Act. They ask that we reverse the trial court's orders regarding this issue and remand to the trial court for a hearing on the buyers' attorney fees and costs.

¶ 52 Whether and in what amount to award attorney fees is within the sound discretion of the trial court. *Med+Plus Neck and Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861 (2000). On review, we will not disturb its decision absent an abuse of that discretion. *Med+Plus Neck and Back Pain Center, S.C.*, 311 Ill. App. 3d at 861; see also *Miller v. Bizzell*, 311 Ill. App. 3d 971, 976 (2000) (The decision to award or deny attorney fees allowed by statute "lies within the discretion of the trial court, and that court's decision will not be overturned absent an abuse of discretion"). As a reviewing court, we will give considerable deference to the judgment and discretion of the trial court with respect to the amount of the award of attorney fees, and we will only modify a fee award where there has been a clear abuse of discretion. *Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill. App. 3d 743, 758 (1997).

¶ 53 In determining whether to award fees under the Act, the trial court considers: "(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." *Miller*, 311 Ill. App. 3d at 976-77.

¶ 54 All home sellers are required under the Disclosure Act to complete the disclosure report. 765 ILCS 77/20 (West 2010). "The plain language of the statute indicates that, absent specific exceptions, the Disclosure Act applies to any transfer of residential real property." *Skarin Custom Homes, Inc. v. Ross*, 388 Ill. App. 3d 739, 743 (2009). By the disclosure report, a seller must disclose material defects of which she has actual knowledge, but is not obligated to make any specific investigation or inquiry in order to complete the report. *Bauer v. Giannis*, 359 Ill. App. 3d 897, 906 (2005). A seller will be liable to a buyer if she fails to properly disclose material defects on the disclosure report. 765 ILCS 77/55 (West 2010). Section 55 of the Disclosure Act provides, in pertinent part:

> "A person who knowingly violates or fails to perform any duty prescribed by any provision of this Act or who discloses any information on the Residential Real Property Disclosure Report that he knows to be false shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55 (West 2010).

A seller is not liable for any error, inaccuracy, or omission that is made without the seller's knowledge, or where the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected. *Bauer*, 359 Ill. App. 3d at 906. "Accordingly, the Act only attaches liability to knowing violations." *Hogan v. Adams*, 333 Ill. App. 3d 141, 148 (2002).

¶ 55 In count II of their counterclaim, the buyers alleged that the vendor violated the Disclosure Act when she failed to disclose the existence of flooding and foundation problems on the August disclosure report. This count was decided by the trial court, which entered judgment in favor of the buyers, but denied the buyers' motion to recover attorneys fees and costs. In its memorandum order entering judgment in favor of the buyers on their Disclosure Act claim, denying the buyers' actual damages award request, and awarding the buyers' court filing fees, the court found that:

> "the testimony and evidence produced at trial establishes that [the vendor] violated the Disclosure Act when she failed to disclose material defects in the foundation of her home."

It also found, however, that:

> "In the case at bar, the evidence indicates that the buyers did not rely on the Disclosure Report and hired inspectors to inspect the premises. Knowledge by the purchaser is relevant to the amount of damages awarded to a purchaser who succeeds on a claim against a seller for violating the Disclosure Act. *Hogan*, 333

> Ill. App. 3d at 148. Defendants (the buyers) were aware of the defects in the basement within a week of executing the Contract. * * * At trial, defendants stated that they would not have entered into the Contract on September 22, 2007 had [the vendor] properly disclosed the condition of the basement on the August 29, 2007 Disclosure Report. However, the evidence and testimony before the court contradicts [the buyers'] assertion. [The buyers] became aware of the defects in the basement during the Contract's attorney review period and inspection period. Defendants did not declare the Contract null and void when they learned of the defects in the basement; rather, they continued to negotiate the Contract terms with plaintiff. Thus, defendants' speculation that they would not have entered into the Contract, hired an attorney, or hired an inspector, is not supported by the evidence. Because [the buyers] did not sufficiently demonstrate the actual damages that they incurred as a result of [the vendor's] violation, the court cannot enter an award for actual damages in favor of [the buyers]. Nevertheless, the Disclosure Act provides that the 'prevailing party' shall recover court costs; as such, the counterplaintiffs' [the buyers'] court filing fees are awarded to [the buyers."

¶ 56 The court also found:

> "Defendants also seek attorney's fees under the Disclosure Act. Under the Disclosure Act, the court 'may' award reasonable attorney's fees incurred by the prevailing party. Therefore, the court has discretion to award fees under the Disclosure act. See *Miller v. Bizzell*, 311 Ill. App. 3d 971, 976 (4 th Dist. 2000) (the award of attorney's fees under the Disclosure Act is not mandatory; it lies within the discretion of the trial court). Reasonable attorney's fees will not be awarded pursuant to the Disclosure Act because the Court determined that [the buyers] did not sustain any actual damages when [the vendor] violated the Disclosure Act."

¶ 57 Because of our disposition *inter alia* on the common law fraud count requiring that count be submitted to the jury for a determination of whether the buyers relied on the vendor's misrepresentations, we cannot uphold the trial court's denial of the buyers' fee petition as pertaining to the Disclosure Act. While we recognize that a trial court's award of attorney fees in this situation is due our considerable deference, where we have determined that the issue of reliance is one for the trier of fact, where the trier of fact for that issue is rightfully the jury rather than the trial court, and where that issue is so closely intertwined with the trial court's ruling on this fee petition, we must find an abuse of discretion.

¶ 58 We therefore vacate the trial court's denial of attorney fees and its award of court costs. We remand this issue to the trial court for consideration after such time as the common law fraud

count has been determined.[1]

¶ 59 IV. The Cross-Appeal

¶ 60 a. The Timeliness of the Posttrial Motion

¶ 61 We next address the vendor's cross-appeal. Following trial, the vendor filed a posttrial motion. The trial court ruled that this posttrial motion was untimely filed as to all but one section. The vendor appeals, contending the trial court should have considered this motion

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[1]In so doing, however, we caution the buyers, as did the trial court, that any possible fees to be recovered must be reasonable. The trial court noted in its memorandum order denying the buyers' fee petition that:

> "On a final note, the court wishes to express its surprise and outrage that defendants would file a fee petition seeking $479,594.91. This case only involved a simple breach of a real estate contract. The subject property had a value of $790,000 when the parties allegedly entered into the Contract. As [the vendor] correctly notes, the money spent on legal fees could have paid for more than half of the value of the home. Additionally, [the vendor] only sought $185,000 in damages at trial. It is unreasonable to spend nearly half a million dollars defending against such a claim."

because it retained jurisdiction where, although it was filed more than 30 days after the jury verdict on the breach of contract claim, it was filed within 30 days of the bench verdict on the Disclosure Act counterclaim. For the following reasons, we affirm.

¶ 62 The question of whether a posttrial motion was timely filed is a question of law, which review *de novo*. *Herlehy v. Bistersky*, 407 Ill. App. 3d 878, 898 (2011).

¶ 63 On July 27, 2010, the trial court entered judgment after the jury's verdict in favor of the buyers on the vendor's claim for breach of contract. The court entered a directed verdict in favor of the vendor as to Count I (the common law fraud claim) of the counterclaim on July 22, 2010. On September 7, 2010, the court entered judgment in favor of the buyers and against the vendor on Count II (the Disclosure Act claim) of the counterclaim.

¶ 64 Thirty days later, on October 6, 2010, the vendor filed her sole posttrial motion. In that motion, the vendor challenged, in pertinent part, both the July 27 jury verdict on the vendor's breach of contract claim and the September 7 Disclosure Act trial court judgment.

¶ 65 The buyers subsequently filed a motion to strike, arguing that the vendor's posttrial motion was untimely, as she did not file her motion within 30 days of the jury verdict. The vendor responded, arguing that her motion was, in fact, timely because the July 27, 2010, judgment was not final. The applicable date here, argued the vendor, was September 7, 2010, because that was the date of the final judgment in the case.

¶ 66 The trial court, in a memorandum order, denied the vendor's posttrial motion. In so doing, the court found that the posttrial motion was "untimely in so far as it attacks the July 27, 2010 judgment," and, accordingly, denied all sections of the motion which dealt with the

judgment entered on July 27. The court also denied the remaining count, which addressed the judgment entered on September 7. As to that claim, the court noted that the vendor argued the court had erred in granting judgment in favor of the buyers on the Disclosure Act claim because the buyers failed to prove the vendor violated the Disclosure Act and that the buyers suffered no damages from any violation. The vendor also argued that the buyers failed to prove the vendor knowingly made a material misrepresentation. The court denied this section of the motion, stating:

> "The evidence that the court relied upon in its September 7, 2010 decision are sufficiently cited in the written order. For example, in an email on September 26, 2007, [the vendor] stated that the basement has always 'been like t hat.' * * * In that same email, [the vendor] stated, 'I am now half recalling that the prior owners disclosed it to me or my inspector spotted it.' * * * Additionally, the court relied on Disclosure Reports that [the vendor] completed after the [buyers] declared the purchase contract null and void. On October 24, 2007, [the vendor] stated that she was aware of material defects in the basement and foundation. * * * On December 14, 2007, [the vendor] declared that she was aware of material defects in the basement and foundation and further noted that '[i]n the 12+ years I have owned the house I have not seen any changes/ worsening of cracks or

bulges. . .' * * *"

¶ 67 The timing of a posttrial motion following a jury trial is governed by section 2-1202(c) of the Illinois Code of Civil Procedure. It provides, in relevant part:

> "Post-trial motions must be filed within 30 days after the entry of judgment or the discharge of the jury, if no verdict is reached, or within any further time the court may allow within the 30 days or any extensions thereof. A party against whom judgment is entered pursuant to post-trial motion shall have like time after the entry of the judgment within which to file a post-trial motion." 735 ILCS 5/2-1202(c) (West 2010).

¶ 68 The vendor contends that this rule conflicts with section 2-1202(b) of the Code of Civil Procedure that requires a single posttrial motion be filed following a jury case (735 ILCS 5/2-1202(b) (2010). She acknowledges that the trial court "attempted to resolve this conflict" by relying on *Pempek v. Silliker*, 309 Ill. App. 3d 972 (1999), in which this court noted that "our supreme court in *Sears v. Sears*, 85 Ill. 2d 253 (1981), clearly contemplated the possibility of multiple post-trial motions." *Pempek*, 309 Ill. App. 3d at 979-80. The vendor, however, argues that *Pempek* was wrongly decided.

¶ 69 In *Pempek*, the plaintiff sued a building owner for injuries he sustained while working, and the building owner brought a third-party contribution claim against the plaintiff's employer. *Id.* The plaintiff settled with the building owner and his claims were dismissed. *Id.* A jury rendered a verdict regarding the employer's percentage of fault on February 4, 1998. *Id.*

Thereafter, the trial court held a hearing to determine the extent of the employer's liability, and it entered a judgment to that effect on March 25. *Id.* The court then gave the parties until April 23 to file any posttrial motions. *Id.* On April 23, the employer filed a posttrial motion attacking the jury's verdict. *Id.* The trial court denied the employer's posttrial motion on June 9, and the employer filed a notice of appeal on July 9. *Id.*, at 975.

¶ 70 On appeal, this court determined that the posttrial motion was untimely, even though the judgment entered after the jury returned a verdict was not final. *Id.*, at 973. The trial court in *Pempek* entered judgment on the jury's verdict on February 4, 1998, and a hearing was set to determine the extent of a third party's liability. *Id.*, at 975. Therefore, the judgment entered on February 4, 1998, was not final. *Id.* Nonetheless, all posttrial motions attacking that judgment should have been filed within 30 days of February 4, 1998, unless the court extended the deadline prior to that date. *Id*. at 977.

¶ 71 In *Pempek*, this court determined that section 2-1202(c) of the Code does not distinguish between final and non-final judgments. We explained:

> "The fact that the court might enter 'judgment' on a jury verdict and subsequently deny a timely-filed post-trial motion does not necessarily mean that the court has rendered a final judgment in the case. The procedural posture of this case illustrates the point. In Illinois, a judgment is considered final only if it 'finally disposes of the rights of the parties either upon the entire controversy or upon some definite and separate branch thereof.' *Tyler v. Tyler*,

> 230 Ill. App. 3d 1009, 1011 (1992). A final judgment 'decides the controversy between the parties on the merits and fixes their rights, so that, if the judgment is affirmed, nothing remains for the trial court to do but to proceed with the execution.' *Tyler*, 230 Ill. App. 3d at 1011.
>
> Clearly, [the third party] could not have proceeded to execute the judgment entered by the court on February 4, 1998, even if the court had denied a timely-filed post-trial motion that same day."

This court continued:

> "In such a circumstance, the correct procedure would have been for the [third party] to file its post-trial motion promptly after the court entered judgment on the jury trial (*i.e.*., within 30 days) and then, if the motion were denied, wait for the court to enter final judgment . . . before attempting to bring an appeal challenging the jury verdict." *Id.* at 978.

We explained:

> "Alternatively, [the third party] could have sought an extension of the time required for it to file its post-trial motion from the circuit court within 30 days of the entry of judgment, as specifically provided in section 2-1202 of the Code." *Id.*

¶ 72 Here, contrary to the vendor's interpretation, section 2-1202(c) does not require a "final judgment," but rather requires that posttrial motions must be filed within 30 days "after the entry of judgment or the discharge of the jury." 735 ILCS 5/2-1202 (West 2010); *Pempek*, 309 Ill. App. 3d 978; but see *McDonald v. Health Care Service Corporation*, 2012 IL App (2d) 110779, ¶ 4 (2012) (Second district court rejected the *Pempek* court's interpretation of "judgment" pursuant to section 2-1202(c), finding instead that, "contrary to *Pempek*, the 30 days under section 2-1202(c) do not begin until the entry of a final and appealable judgment").

¶ 73 We reject the vendor's assertion that *Pempek* was wrongly decided, and see no reason to depart from the established precedent of this court. The jury verdict in the case at bar was returned on July 27, 2010, and judgment was entered in favor of the buyers and against the vendor on the vendor's breach of contract claim the same day. Based on *Pempek*, all posttrial motions attacking the judgment entered on July 27 should have been filed within 30 days of that day. Because the vendor's posttrial motion was not filed until October 6, 2010, more than 30 days after July 27, 2010, the trial court properly denied the posttrial motion as to those sections pertaining to the July 27, 2010, judgment.

¶ 74 Our state's rules and procedures regarding legal proceedings are not mere suggestions but, instead, are required to be followed by all parties to a cause of action in our courts. See *Trentman v. Kappel*, 333 Ill. App. 3d 440, 441 (2002) (Illinois' set of rules and procedures bind all legal proceedings commenced in its boundaries; these rules are "not aspirational in nature" but "are meant to be followed by all who seek justice in the court system"). We reiterate that, pursuant to *Pempek* and the Code of Civil Procedure, the vendor had the option to either: (a) file

her posttrial motion within 30 days of July 27, 2010, the day judgment was entered on the jury verdict; or (b) within the 30-day timeframe, request an extension of time for which to file a posttrial motion. Because the vendor did neither of these things, her posttrial motion was untimely and, therefore, section 2-1202(c) operated to preclude the trial court from addressing the merits of her posttrial motion pertaining to the July 27 judgment.

¶ 75 b. Denial of the Vendor's Motion for Summary Judgment

¶ 76 Next, the vendor contends that the trial court erred in denying her motion for summary judgment, which she filed prior to trial. Specifically, the vendor argues that the trial court should not have denied her pretrial motion for summary judgment as to the buyers' common law fraud complaint where it later directed a verdict on that count in her favor, because "[a]llowing [the buyers] to argue their baseless fraud complaint so prejudiced the jury that [the vendor] was denied her opportunity to a fair trial." We disagree.

¶ 77 On appeal, we will not review an order denying a motion for summary judgment where the cause has subsequently gone to an evidentiary trial, as the denial of the motion is merged into the trial proceedings. *Greenberger, Kraus & Tenenbaum v. Catalfo*, 293 Ill. App. 3d 88, 93-94 (1997); *Costa v. Keystone Steel & Wire Co.*, 267 Ill. App. 3d 683, 688 (1994).

¶ 78 Nevertheless, the vendor argues that we should address this issue because "by allowing the fraud counterclaim to be argued at trial (even though elements of the claim could not be established as a matter of law, and it should have been ruled out on the summary judgment motion) the court allowed testimony and allegations of fraud to destroy her chances of a fair trial

on the breach of contract claim."

¶ 79 The vendor argues that we should address this issue under the doctrine of plain error if we find, as we have, that she did not properly preserve the issue in her untimely posttrial motion. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court"); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In order to preserve an issue for appeal, a party must first make an objection to the alleged error at trial, and then raise it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988); see also *People v. Allen,* 222 Ill. 2d 340, 352 (2006) (noting that "even constitutional errors can be forfeited"). The plain error doctrine is a narrow and limited exception to the general rule of forfeiture (*People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *Herron*, 215 Ill.2d at 177)), and it "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill.2d at186-87). Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Bowman*, 2012 IL App (1st) 102010 at ¶ 29 (citing *People v. Lewis*, 234 Ill.2d 32, 43 (2009)). "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43.

¶ 80 We reject the vendor's suggestion here because, even if we were to find it proper to address this issue under a plain error analysis as the vendor suggests, we would find no error, as evidenced in our analysis and consideration of the common law fraud issue herein.

¶ 81 c. The Challenge to The Disclosure Act Counterclaim

¶ 82 Finally, the vendor contends that the trial court erred in granting judgment on the Disclosure Act counterclaim in favor of the buyers. Specifically, the vendor argues that the evidence at trial did not show the defects constituted material defects and that, even if they were material defects, the buyers failed to show the vendor understood them to be so when she made the disclosures. We disagree.

¶ 83 The trial court here reached its conclusions after a multi-day trial, in which the trial judge, as the trier of fact, assessed all of the evidence adduced by the parties. " 'Although a trial court's holding is always subject to review, * * * [a court of review] will not disturb a trial court's finding and substitute its own opinion unless the holding of the trial court is manifestly against the weight of the evidence.' *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352, 356 (1967). 'Underlying this rule is the recognition that, especially where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof.' *Id*. The evidence considered by the trier of fact included not only the testimony of the witnesses and the exhibits introduced into evidence, but reasonable inferences supported by the evidence that the trier of fact was free to draw. *People v. Fountain*,

2011 Il App (1st) 083459-B. In our review of the conclusions reached following a bench trial, we do not reweigh the evidence; nor does the conflicting nature of the evidence render the verdict unreasonable. We will not reverse a judgment after a trial if reasonable persons might draw different conclusions from the evidence and a fair question is raised by the proof." *Chicago Title Land Trust Company v. JS II, LLC.*, 2012 IL App (1st) 063420, ¶31 (2012).

¶ 84 All home sellers are required under the Disclosure Act to complete the disclosure report. 765 ILCS 77/20 (West 2010). "The plain language of the statute indicates that, absent specific exceptions, the Disclosure Act applies to any transfer of residential real property." *Skarin Custom Homes, Inc.*, 388 Ill. App. 3d at 743. By the disclosure report, a seller must disclose material defects of which she has actual knowledge, but is not obligated to make any specific investigation or inquiry in order to complete the report. *Bauer*, 359 Ill. App. 3d at 906. A seller will be liable to a buyer if she fails to properly disclose material defects on the disclosure report. 765 ILCS 77/55 (West 2010).

¶ 85 A seller is not liable for any error, inaccuracy, or omission that is made without the seller's knowledge, or where the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected. *Bauer*, 359 Ill. App. 3d at 906. "Accordingly, the Act only attaches liability to knowing violations." *Hogan*, 333 Ill. App. 3d at 148.

¶ 86 A material defect is defined by the Disclosure Act as "a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller

reasonably believes that the condition has been corrected." 765 ILCS 77/35 (West 2010).

¶ 87 Here, the trial court's determination that the vendor violated the Disclosure Act was not against the manifest weight of the evidence. On August 29, 2007, the vendor completed a disclosure report in which she indicated that she was not "aware of any material defects in the basement or foundation (including cracks and bulges)." A material defect is defined on the form itself as "a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected." The fourth statement on the disclosure report is: "I am aware of material defects in the basement or foundation (including cracks and bulges)." Next to this statement, the vendor placed a check mark in the "NO" column.

¶ 88 However, the September 26, 2007, inspection report specifically identified a number of defects, including: (1) a major crack in the foundation of the house beneath the sunroom, and that the "corner of the house has settled severely. The foundation wall is bowing outward;" (2) the sunroom foundation had significantly settled; and (3) there was active moisture in at least two places in the basement of the house.

¶ 89 In response to a question from her realtor about the basement beneath the sunroom, the vendor stated in a September 26, 2007, email which was admitted at trial:

> "The basement corner has always been like that. I am now half recalling that the prior owners disclosed it to me or my inspector spotted it."

In addition, the vendor stated in an October 10, 2007, letter to her attorney which was admitted at trial:

> "Basement: First, the settling of the sunporch was and is apparent at first glance. Anybody spending more than 5 minutes inside or outside the home can see that the sunroom floors tilt slightly to the south and that there had been settling. Therefore, the potential buyers must have seen this prior to placing a bid on the home when they went through the home with their realtor and again with their retained architect.
>
> Second, the condition of the basement and sunroom is exactly the same as it was when I purchased the house 12 year [*sic*] ago. No allowance was demanded or even considered. I understood then and now that a 100 year old house has settling issues and imperfections that are part of its charm."

¶ 90 After the buyers declared the contract null and void, the vendor prepared two separate amended disclosure reports. In the disclosure report dated October 24, 2007, the vendor disclosed that she was aware of "material defects" in the basement or foundation, including cracks and bulges. She handwrote:

> "The southwest corner (sunroom) has settled, which is normal for a house its age. I have been [informed] by one inspector that the foundation wall is bowed. I have been told that

> this, too, is normal and does not present a threat to the structural integrity of the home. In that area, there are several cracks in the wall, where moisture has accumulated. There is not leakage or water entering the home & otherwise the basement is very dry."

¶ 91 Thereafter, the vendor prepared another residential real property disclosure report dated December 14, 2007. In this disclosure report, the vendor again disclosed that she was aware of "material defects" in the basement or foundation, including cracks and bulges. She handwrote:

> "The south corner of the basement (under sunroom) shows signs that it settled, probably shortly after it was built. As a precaution, I hired a company (Permaseal) to stabilize the south wall with steel bolts and to seal the walls from any possible water. Permaseal gives a 20-year warranty that runs with the house. In the 12+ years I have owned the house, I have not seen any changes/worsening of cracks or bulges in any areas of the basement, including here."

¶ 92 The statement in question on the disclosure report is: "I am aware of material defects in the basement or foundation (including cracks and bulges)." Next to this statement, the vendor placed a check mark in the "NO" column. It is clear from the above information that the vendor was aware of and understood there to be cracks and bulges in the basement when she completed the disclosure report on August 29, 2007. In that report, she denied having knowledge of cracks and bulges in the basement or foundation. We agree with the trial court when it stated:

> "The fact that the cracks and bulges existed for twelve years or more does not absolve a seller from disclosing the existence of such cracks and bulges. As such, [the vendor] violated the Disclosure Act when she stated that she was not aware of any cracks and bulges on the Disclosure Report on August 29, 2007."

We find no abuse of discretion here.

¶ 93 The vendor urges us to find that the trial court should not have relied upon the amended October and December disclosure reports in its decision. This is an unnecessary determination, however, where, even without the amended disclosure statements, we would still find no manifest error in the trial court's decision based on the evidence adduced at trial, including that the vendor admitted knowledge of the cracks and bulges in the email to her realtor as well as in a letter to her attorney, which was admitted at trial. The trial court's determination was reasonable. See *Chicago Title Land Trust Company*, 2012 IL App (1 st) 063420, ¶31 ("We will not reverse a judgment after a trial if reasonable persons might draw different conclusions from the evidence and a fair question is raised by the proof"). The court, as the trier of fact, was in the best position to observe the conduct of the witnesses while testifying, to determine their credibility and to weigh the evidence. " 'The evidence considered by the trier of fact included not only the testimony of the witnesses and the exhibits introduced into evidence, but reasonable inferences supported by the evidence that the trier of fact was free to draw.' " *Chicago Title Land Trust Company*, 2012 IL App (1 st) 063420, ¶31, quoting *Fountain*, 2011 Il App (1st) 083459-B.

Accordingly, we affirm the judgment of the trial court which found that the vendor violated the Disclosure Act.

¶ 94 CONCLUSION

¶ 95 For all of the aforementioned reasons, we affirm in part, reverse and remand in part, and vacate in part.

¶ 96 Affirmed in part, reversed and remanded in part, and vacated in part.