

Nos. 1-13-2326 & 1-13-3170, consolidated

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ALLEN LATTOF and JANET LATTOF,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellees,	)	Cook County
	)	
v.	)	09 M3 2867
	)	
CAROL SERRANI ANDERSON, individually and	)	Honorable
as Trustee of the Carol Serrani Anderson Trust, THE	)	Frank B. Castiglione,
CAROL SERRANI ANDERSON TRUST, and	)	Judge Presiding.
MARK ANDERSON,	)	
	)	
Defendants-Appellants.	)	

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's award of damages for exterior and interior repairs to a condominium unit was not against the manifest weight of the evidence, and appellants forfeited the argument that appellees lacked standing to seek damages for these repairs. The circuit court did not abuse its discretion in awarding attorney fees in addition to punitive damages. Finally, the circuit court's finding that Mark Anderson conspired to violate the Disclosure Act was not against the manifest weight of the evidence.

¶ 2 Plaintiffs-Appellees Allen and Janet Lattof filed a complaint against defendants-appellants Carol Serrani Anderson, Mark Anderson and the Carol Serrani Anderson Trust (Trust)

Nos. 1-13-2326 & 1-13-3170, cons.

(collectively, defendants), seeking damages for the alleged failure to disclose water leaks in a condominium the Lattofs purchased from the Trust. Following a bench trial, the circuit court entered judgment in favor of the Lattofs, awarding them actual damages, punitive damages and attorney fees and costs. On appeal, defendants contend that (1) the actual damages for repairs to the inside and outside walls were based on speculative and uncertain evidence and, in any event, were the responsibility of the condominium association; (2) the award of both attorney fees and punitive damages constituted an improper double recovery; and (3) the circuit court's finding that Mark conspired with Carol to commit fraud was against the manifest weight of the evidence. Finding no merit to any of these arguments, we affirm the judgment of the circuit court of Cook County.

¶ 3

### BACKGROUND

¶ 4

In 2004, Mark purchased a condominium, unit 901, on the top two floors of a nine-story building at 151 West Wing Street in Arlington Heights. From 2004 until March of 2008, title to the unit was in Mark's name only. Mark, a real estate developer who was involved in the development of the building and who was responsible for sales and marketing, is married to Carol and unit 901 was their primary residence. On March 24, 2008, Mark transferred title to unit 901 to the Trust. Carol is the sole trustee and beneficiary of the Trust. Shortly after the transfer, the unit was listed for sale.

¶ 5

In April 2008 Allen and Janet Lattof agreed to purchase unit 901 from the Trust for \$1,550,000 in cash. Carol, as agent for the Trust, signed a residential real property disclosure report, indicating that she had no knowledge of certain specified defects in the property, including whether she was aware of any leaks.

¶ 6 The real estate contract contained an inspection contingency clause and an inspection was conducted on April 25. As a result of the inspection, the Lattofs informed the Trust it would have to address water damage issues in the eighth floor utility closet and the standing water observed on all three of the unit's balconies. Through its attorney, the Trust responded that the balconies drained within "established construction performance limits." The Trust agreed to remedy the damage in the utility closet.

¶ 7 When the Lattofs insisted that steps be taken to correct the standing water problem, the Trust offered to have the building architect, James Tinaglia, determine whether the standing water on the balconies presented a problem. After Tinaglia wrote to the Lattofs and informed them that the balconies functioned properly and needed no repairs, the Lattofs waived the inspection contingency clause.

¶ 8 The Lattofs closed on the unit on August 27, 2008, but did not move in immediately because they wanted to do some work on the unit. In October 2008, the Lattofs learned that Tinaglia's firm had issued two separate letters, in 2005 and 2006 respectively, to the building's general contractor, Gregory Trapani, regarding water issues with the building's balconies. The 2005 letter stated that the balconies for three units on the ninth floor, including unit 901, which also had an eighth floor balcony, had serious problems related to drainage, improper placement of scuppers (holes at the bottom of the balcony wall for drainage) and surface coating material, and requested repair of the balconies. The 2006 letter again requested that Trapani make the necessary repairs, noting that it had been 12 months and no action had been taken. After obtaining these letters, the Lattofs' attorney contacted the attorney for the Trust, stating that it was clear the Andersons were aware of the ongoing drainage problem and demanding that the balconies be repaired. The Lattofs received no response. The Lattofs moved into the unit in

Nos. 1-13-2326 & 1-13-3170, cons.

November 2008 and began experiencing multiple problems related to water, not just on the balconies, but also at numerous locations inside the unit.

¶ 9 On August 26, 2009, the Lattofs filed suit against the Andersons and the Trust. The three-count amended complaint, filed on July 28, 2010, alleged a violation of the Residential Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/1 et seq. (West 2008)), conspiracy to violate the Disclosure Act, and common law fraud. The Lattofs sought rescission or damages and attorney fees and costs.

¶ 10 At trial, Allen Lattof testified that he and Janet reviewed the disclosure report when they were preparing their offer and the fact that the report did not disclose any problems was a significant factor in their decision to purchase the unit. After moving into the unit, the Lattofs experienced ongoing problems with water-related issues.

¶ 11 There was continuous ponding on all three balconies every time there was a significant rainfall, and the water would get underneath the coating on the balcony floors, causing it to bubble and crack. On one occasion, water came under the balcony doors of both the ninth floor west and eighth floor balconies. Eventually the water on the ninth floor west balcony dripped down to the ceiling of the eighth floor balcony, causing rusty stalactites to form on the beaded plank ceiling.

¶ 12 Water also leaked into the eighth floor utility closet, causing mold and water stains on the drywall. On a fairly regular basis after there had been a rainfall, water would leak in different areas of the family room, both from the ceiling and around the fireplace. There were leaks in the office around the windows and the fireplace. A three-foot seam opened up in the office ceiling and leaked water on at least three occasions.

¶ 13 A light fixture in the unit's powder room leaked water on two separate occasions. After smelling mold in the powder room, the Lattofs hired a contractor who cut a hole in the drywall and discovered that both the drywall and the insulation behind it were black with mold. The mold continued into the ceiling of the powder room. The Lattofs also found a hole above the kitchen ceiling from which water was leaking in and staining the ceiling above the stove. At one point, water started dripping onto the stove.

¶ 14 Although the Lattofs spent a significant amount of money attempting to repair the water damage on the inside of the unit, Allen testified that they were seeking rescission as their primary remedy because (1) the water was intolerable; (2) there was a question as to whether they would have the authority to do the necessary exterior repairs and they could have additional problems if their repairs caused water to leak into another unit instead; and (3) it would be difficult to sell the unit because any disclosure would have to include details from the lawsuit.

¶ 15 Carol testified as an adverse witness for the plaintiffs. Upon being notified of the letter sent by the Lattofs' attorney in October 2008, Carol sent the following email to Trapani, and copied Mark, Tinaglia and the Trust's attorney:

"Words cannot express my anger over this situation. I invested far too much time and energy myself talking to all involved with the balcony situation while I lived at 901. If I were still living there, I would be as dissatisfied as the Lattofs if the problem is reoccurring. I agree with Mark, in that, I am unwilling to have my reputation damaged, and expect the situation to be fully resolved – *all at the builder's expense.*" (Emphasis in original.)

¶ 16 Carol acknowledged that she did not respond directly to the Lattofs and that, as far as she was aware, neither Mark nor the attorney for the Trust responded to them. Carol testified that

Nos. 1-13-2326 & 1-13-3170, cons.

while she and Mark lived in unit 901, the balcony issue had been resolved and she could not believe that something else was happening again with the balconies.

¶ 17 On April 18, 2007, approximately one year prior to the sale, a meeting was held at the building to discuss the problems with the balconies on the ninth floor. Carol and at least one other owner attended. At the meeting, Carol expressed her concerns with the water ponding on her balconies. She also expressed her concern that the ongoing problem with the balconies could damage Mark's reputation because he was one of the building's developers. Carol sent another email to Mark in July 2007 about a problem with the surface material on the floor of one of the balconies and asked him to look at it so that he could notify Trapani.

¶ 18 Carol then testified that between the time she sent the July 2007 email and the time the Lattofs purchased the unit in 2008, Trapani had sent someone in to repair the balconies. However, she acknowledged that in defendants' answers to interrogatories, no contractors were identified as having performed repairs on the balconies. She further acknowledged that at her deposition, she testified that the water was still ponding on the balconies at the time the Lattofs purchased the unit but it was not as bad as it had been.

¶ 19 Carol acknowledged receiving copies of two emails sent by Mark in March 2008, complaining of roof leaks and water damage in their living room and powder room. Carol confirmed that she signed the residential property disclosure report as trustee of the Trust on April 10, 2008, but did not recall whether she discussed the form with Mark before signing it.

¶ 20 Mark and Carol decided to sell Unit 901 in early March. On March 24, 2008, Mark transferred ownership of the property to the Trust. Mark and Carol kept their important papers in a safe deposit box and would review them once a year, in part to make sure that all properties

Nos. 1-13-2326 & 1-13-3170, cons.

they owned were titled in the Trust. Carol said she made a mistake by not noticing until 2008 that unit 901 was in Mark's name when it should have been transferred to the Trust.

¶ 21 Mark also testified as an adverse witness for the plaintiffs. In May 2008, Mark proposed that Tinaglia meet with the Lattofs at unit 901. Mark was concerned that the balcony issue might prevent the closing from going forward. He told Tinaglia that there was a potential contractual issue with the sale of the unit and they needed to be sure there was nothing wrong with the eighth floor balcony.

¶ 22 Mark's relationship with Trapani had deteriorated over time and he also did not have a good relationship with the condominium association. In July 2007, Mark and Carol discussed the issue of the ninth floor west balcony coating bubbling up. Mark told Carol that he would talk to Trapani about it, but he was sure Trapani would not do anything about it because Trapani was not responsive to requests to correct problems at the building. They paid Streich, a contractor, to strip the coating and fix the bubbling problem.

¶ 23 In August 2007, Mark sent Trapani an email telling him that he needed to address the issues multiple owners were having with their balconies. In the email, Mark stated that after asking for years, his ninth floor balcony issue had finally been addressed but the repairs then created an issue with the eighth floor balcony that had not previously existed. Mark acknowledged that in their answers to interrogatories defendants had not disclosed the repairs done by Streich on the ninth floor balcony.

¶ 24 Mark testified that he and Carol had discussions about the possibility of selling the unit starting at least as early as January 2008. Mark signed the deed conveying unit 901 to the Trust on February 15, 2008, although it was not recorded until March 24, 2008. Mark acknowledged that even if a final decision had not been made regarding selling the unit on March 24, he and

Nos. 1-13-2326 & 1-13-3170, cons.

Carol were on their way to making the decision at that point. However, he stated that the filing of the deed was not triggered by the decision to sell the unit. Mark denied preparing the handwritten deed himself although he is listed as the preparer on the document.

¶ 25 At trial, Mark denied that one of the things he and Carol did when they examined the documents in their safe deposit box every year was make sure all of their residential real estate holdings were in the Trust. However, he acknowledged that at his deposition he testified that was, in fact, one of the things they looked for and the documents in the safe deposit box showed that unit 901 was not held by the Trust prior to March 2008.

¶ 26 On March 14, 2008, Mark sent an email to Mary Carpenter, who worked at the building, and copied Carol on the email. The email stated: "I want to report that we have water damage in our living room and half bath." Mark was also part of a group that owned unit 905, which was vacant. On March 18, 2008, Mark sent an email, again with a copy to Carol, to the Wing Street Condo Association. The email was regarding leaks in the roof and stated: "We had leaks in 905 and now we have them in 901, as you are well aware."

¶ 27 Mark testified that he discussed the real property disclosure report with Carol before she signed it on April 10, 2008, but he did not remember what was said. On April 14, 2008, Mark sent an email to the association and copied Trapani on the email but did not copy Carol. The email stated that the association needed to fix the roof, noting there were "major leaks in 905 and in 901."

¶ 28 On cross-examination, Mark explained that the safe deposit box contained envelopes with labels and they did not look inside the envelope for unit 901 every time they reviewed the documents in the box. Mark also testified that the email he sent regarding leaks in the living room and powder room was regarding unit 905, not unit 901. He denied having problems with

Nos. 1-13-2326 & 1-13-3170, cons.

water in unit 901 in March 2008 and claimed he only said that he did because he was extremely frustrated that no one would respond to him and make repairs to unit 905. He had complained to Trapani and to the association and nothing had been done. Nobody was living in unit 905 and Mark believed that the only way he would get a response was if he complained about his own residence, unit 901. Mark also denied that there were any roof leaks in unit 901 on April 14, 2008. Under additional questioning from plaintiffs' counsel, Mark testified that the email statement regarding water damage to the living room related to unit 905 but the statement regarding water damage to the powder room related to both units.

¶ 29 The parties stipulated that designated portions of the evidence depositions of Carpenter, Lorraine Johnson and Marc Emmanuel would be entered into evidence together with their prior affidavits. Carpenter, the property manager for the building from 2004 to March 2008, received multiple reports of water leaks in unit 901 from Mark and Carol. Carpenter went to the unit to inspect leaks approximately 10 to 15 times and remembered seeing leaks in the powder room above the toilet and in the living room above the piano. At her deposition, Carpenter also remembered a leak on the eighth floor but could not recall exactly where it had been. However, in her affidavit, Carpenter attested that there were leaks in the bedrooms, balcony, kitchen, fireplace area, foyer and closets and that the leaks began in 2003 and continued into 2008.

¶ 30 Johnson replaced Carpenter as property manager in March 2008. In the spring of 2008, Carol called Johnson and asked her to come to unit 901 because water was leaking into the unit. Johnson went to the unit and observed water dripping from the doorjamb in the powder room. Carol was very angry and told Johnson they had just had it fixed and it was leaking again. Emmanuel, who had been the building engineer since 2006, accompanied Johnson to the unit and he went into the kitchen to investigate a leak there.

¶ 31 Emmanuel was called to unit 901 on numerous occasions to investigate leaks. Emmanuel recalled seeing water damage in the kitchen, the living room, what he called the second living room, and the powder room, as well as a bubbling up of the floor on the balcony that was directly off the kitchen area. Either Mark or Carol was present each time Emmanuel went to the unit.

¶ 32 After the Lattofs moved into unit 901, Emmanuel saw leaks again in the living room and the powder room, and saw new leaks in the utility closet on the eighth floor. Mark and Carol informed the building management of multiple leaks over the course of the time they lived in unit 901 and Emmanuel investigated the leaks, but the Andersons did not involve the building management in any repairs related to the leaks. Rather, the Andersons hired their own contractors to perform cosmetic repairs and no structural repairs were made.

¶ 33 Harry Allen, a structural engineer, testified as an expert for the Lattofs. Allen was retained in August of 2010 to document where the water was coming in and then to determine how it was coming in and propose a method of repair. At that time, the drywall and insulation had been removed in the powder room and the precast concrete wall panels and steel plates that connect the panels were exposed. Allen observed that the steel plates were all corroded, evidence that there had been prior consistent water intrusion.

¶ 34 Allen explained that the joints between the concrete wall panels are supposed to be sealed with grout and a flexible sealant. Allen observed open gaps above and below the steel plates. During significant rainfalls and especially those accompanied by high winds, the water would work its way through the brick exterior and would enter the unit through the unsealed gaps.

¶ 35 Allen also reviewed the reports of a contractor who had removed a section of the brick exterior to determine how water was leaking in the office windows. The contractor discovered

Nos. 1-13-2326 & 1-13-3170, cons.

another unsealed joint between the concrete wall panels in the office and also found an area where the flashing was installed incorrectly. A building engineer investigated the leak in the family room and determined it was coming from the chimney. That was repaired but then the moisture appeared to move to another area, so additional investigation was needed to determine the source of the moisture in that room. The water in the kitchen was coming from a roof leak.

¶ 36 Allen opined that the water in the family room was either a roof leak or the result of an unsealed joint in the concrete panels. He further believed that the leak in the eighth floor utility closet was the result of an unsealed joint in either the concrete panels or the area where the traffic coating met the wall on the ninth floor balcony. Allen concluded that because he could see the unsealed joints in the powder room and the contractors found unsealed joints in the office, there were most likely unsealed joints in other rooms as well.

¶ 37 Allen measured the pitch of the eighth floor balcony and discovered that the balcony was sloped toward the building instead of away from the building. It took Allen just a few minutes to make this determination. In addition, the scuppers were sloping inward instead of outward. Finally, flashing at the north end of the balcony wall extended beneath the traffic coating, causing water from the wall to be directed underneath the coating.

¶ 38 On the ninth floor south balcony, the surface was also sloping toward the building instead of away, and the scuppers were also sloping inward. Where the traffic coating met the outer wall, it was separating from the doorjamb allowing water to penetrate the unsealed joint. Although Allen did not take any measurements on the ninth floor west balcony, he observed dark stains, an indication of ponding water. He also observed an unsealed joint at the southeast corner of that balcony and concluded that was the cause of the water damage on the ceiling of the eighth floor balcony.

¶ 39 Allen recommended that the brick and cast stone from the exterior of the building be removed so that any open joints in the concrete panels underneath could be sealed, and that the drywall inside the unit also be removed so that the inside edge of those joints could also be sealed. Allen obtained proposals from two different construction companies for the exterior repairs, one for \$227,750 and the other for \$189,750. For the interior repairs, Allen also obtained two proposals, one for \$84,973 and the other for \$41,376. One of the companies that bid on the exterior repairs also quoted \$17,600 to remove the eighth floor balcony wall and replace it where the flashing extended below the traffic coating. One of the companies that bid on the interior repairs also submitted a quote of \$20,824 to repair the three balconies.

¶ 40 On cross-examination, Allen acknowledged that there was no way of knowing how extensive the damage was unless all of the exterior and interior walls were opened up, and if the problems were not as pervasive as Allen suspected, the cost of the repairs could be substantially lower. However, Allen noted that the walls would still have to be removed to check for unsealed joints, and would then have to be replaced even if all of the joints were properly sealed. On redirect, Allen explained that even if there was no evidence of water intrusion for a period of time, there could still be water within the wall cavity and that is why he would recommend that all of the walls be removed.

¶ 41 On May 8, 2013, the circuit court entered a written order, finding in favor of the Lattofs and awarding them \$354,728.92 in actual damages, \$354,728.92 in punitive damages, and reasonable attorney fees and costs. The court found the testimony of Allen Lattof to be credible, convincing and persuasive, while it found the testimony of Mark and Carol Anderson to be lacking in credibility and unpersuasive. The court further found the expert testimony of Henry Allen to be persuasive and gave it substantial weight.

¶ 42 The damages were awarded against the Trust and both Mark and Carol Anderson, with the circuit court finding that the Trust, through Carol as its agent, violated the Disclosure Act because Carol was aware of the material leaks and failed to disclose them, and Mark conspired to violate the Disclosure Act because he knew of the false representations in the disclosure and failed to correct them. The award was comprised of the higher of the two quotes for both interior and exterior work, \$84,973 and \$227,750 respectively, \$20,824 for the repair of the balconies, and \$21,181.92 for the out-of-pocket expenses already incurred by the Lattofs in repairing the leaks.

¶ 43 The circuit court also found that the Lattofs met their burden to prove fraud. However, the court determined that rescission was not an appropriate remedy because the sale of unit 901 was not a sale of a new home by the builder-contractors. Therefore, based on its finding that defendants were guilty of fraud, the court also awarded the Lattofs punitive damages equal to the amount of actual damages.

¶ 44 On September 5, 2013, pursuant to a petition filed by counsel for the Lattofs, the circuit court entered an order awarding attorney fees in the amount of \$203,443.50 and costs in the amount of \$43,247.97 for a total of \$246,691.47. Defendants timely filed this appeal.

¶ 45 ANALYSIS

¶ 46 Defendants first contend that the actual damages awarded for interior and exterior repairs were based on uncertain and speculative evidence. Alternatively, they contend that the Lattofs failed to prove that the Lattofs, rather than the condominium association, would be responsible for the exterior repairs. They do not challenge the award of \$20,824 for the repair of the balconies or \$21,181.92 for out-of-pocket expenses.

¶ 47 When reviewing a trial court's findings of fact in a bench trial, particularly where those findings are based on the credibility of witnesses, this court will defer to such findings unless they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.* at 252. A reviewing court must not substitute its judgment for the trier of fact. *Id.*

¶ 48 In proving damages, the burden is on the plaintiff to establish a reasonable basis for computing damages. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 107 (2006). Damages must be proved with reasonable certainty and cannot be based on conjecture or speculation. *Id.* We will not set aside the assessment of damages by a trial court sitting without a jury unless it is manifestly erroneous. *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266, 278 (1982); *Tully v. McLean*, 409 Ill. App. 3d 659, 680 (2011) (citing *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 311 (1974)). To reverse a finding of damages, a reviewing court must find that the trial judge ignored the evidence, or that the measure of damages was erroneous as a matter of law. *B & Y Heavy Movers, Inc. v. Fluor Constructors, Inc.*, 211 Ill. App. 3d 975, 984 (1991).

¶ 49 Damages need not be proven with mathematical certainty; rather, the evidence must allow the trial court to compute damages within a fair degree of probability. *Doornbos Heating & Air Conditioning, Inc. v. Schlenker*, 403 Ill. App. 3d 468, 487 (2010). Moreover, damages are only speculative if their existence is uncertain, not if the amount is uncertain. *Id.* (citing *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 307 (2005)).

¶ 50 Defendants argue that Allen, the plaintiffs' expert, only testified that the walls needed to be opened up but could not testify regarding the extent of the repairs that would be needed once that was done. Moreover, because Allen also testified that if the damage was not as pervasive as

Nos. 1-13-2326 & 1-13-3170, cons.

he believed, the cost for the repairs could be substantially lower, defendants contend that his testimony was uncertain and speculative and cannot provide a valid basis for an award of damages. We disagree.

¶ 51 The evidence at trial clearly established that there were numerous leaks in unit 901. The trial court specifically found Allen Lattof's testimony to be credible while it found the Andersons' testimony lacking in credibility. Moreover, the testimony of the building employees provided additional evidence of the leaks and the fact that the Andersons were aware of the leaks. Allen was the only expert to testify at trial, and the trial court found his testimony to be persuasive and gave it substantial weight. We cannot say that these findings were against the manifest weight of the evidence.

¶ 52 Allen, an expert in the field of engineering with extensive experience investigating water leaks, inspected the unit on three occasions, reviewed architectural drawings, observed unsealed gaps in one area where the interior walls had been opened up, and reviewed the findings of a contractor who had opened up the walls in another area and also observed unsealed gaps. Thus, Allen's opinion that leaking in other areas was also the result of unsealed gaps had a sound basis and was not speculative or uncertain. Moreover, Allen explained that the only way to be certain there were no additional unsealed gaps would be to remove the walls, which would then have to be replaced whether there were unsealed gaps or not. It is clear that there was no question that damages existed and it was only the amount that could not be determined precisely without first removing all of the remaining walls. But enough evidence was presented to enable the trial court to compute damages within a fair degree of probability. Therefore, the trial court's award of damages for the removal of the exterior and interior walls was not manifestly erroneous.

¶ 53 Defendants alternatively contend that the Lattofs failed to prove damages because the condominium association is responsible for the exterior repairs and most likely the interior repairs as well. No case law is cited in support of this argument. The Lattofs respond that this is, in essence, a standing argument and point out that it was not raised in the trial court. In their reply brief, defendants simply dismiss the standing issue as an attempt on the part of the Lattofs to shift the focus away from their failure to support their claim for damages to the building's common elements.

¶ 54 It is well settled that lack of standing is an affirmative defense, which is the defendant's burden to plead and prove, and is forfeited if not raised in a timely manner in the trial court. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010). The doctrine of standing is designed to ensure that only parties with a real interest in the outcome of a controversy may file suit. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). It requires some injury in fact to a legally cognizable interest. *Id.*

¶ 55 We agree that this is a lack of standing argument and that it has been forfeited. Defendants are not really contending that the Lattofs failed to prove their damages, rather, they are arguing that the Lattofs could not have recovered damages for repairs to the common elements under any circumstances because those repairs are the responsibility of the association, not the unit owners. If defendants believed that the association or the builder or both were responsible for damages the Lattofs sought to impose upon them, they could have pursued third-party claims against those parties, which they failed to do. As noted, the failure to raise this issue in the proceedings below results in forfeiture on appeal.

¶ 56 Further, given the trial court's finding that defendants were guilty of fraud – a finding we discuss below – they are properly chargeable with all damages flowing from their active

Nos. 1-13-2326 & 1-13-3170, cons.

concealment of the multiple water issues affecting the unit. Consequently, defendants' belated attempt to avoid liability for sums necessary to make repairs both inside and outside the property fails.

¶ 57 Defendants next contend that because the trial court awarded punitive damages, the award of attorney fees constitutes an improper double recovery. Defendants rely on *Verdonck v. Scopes*, 226 Ill. App. 3d 484 (1992), for the proposition that attorney fees and punitive damages punish the same conduct and awarding both constitutes an impermissible double recovery. This reliance is misplaced and misconstrues the holding in *Verdonck*.

¶ 58 The plaintiff in *Verdonck* was initially awarded statutory treble damages, punitive damages and attorney fees, although the trial court later vacated the award of attorney fees, finding that an award of attorney fees was not warranted in light of the punitive damages award. *Id.* at 487. This court reinstated the award of attorney fees. *Id.* at 489. The court then turned to the issue of whether the statutory enhancement of actual damages and the common-law remedy of punitive damages served the same function and concluded that to award both statutory treble damages and punitive damages for the same act would result in an impermissible double recovery. *Id.* at 491. The court therefore awarded the plaintiff actual damages plus punitive damages, because that total was larger than the total of statutory treble damages. *Id.* at 492. Thus, the plaintiff in *Verdonck* was ultimately awarded actual damages, punitive damages, and attorney fees and costs, just as the Lattofs were awarded in this case.

¶ 59 We do not agree that the reasoning in *Verdonck* comparing statutory treble damages to punitive damages can be extended to the application urged by defendants, namely, that punitive damages and attorney fees also punish the same conduct and therefore constitute double

Nos. 1-13-2326 & 1-13-3170, cons.

recovery. Our research has not disclosed and defendants have not cited support in Illinois law for such a result.

¶ 60 The Disclosure Act provides that the court may award reasonable attorney fees to the prevailing party. 765 ILCS 77/55 (West 2008). The Act further states that it "is not intended to limit or modify any obligation to disclose \*\*\* that may exist in common law in order to avoid fraud, misrepresentation or deceit in the transaction." 765 ILCS 77/45 (West 2008).

¶ 61 This court rejected an argument, similar to that advanced here, in *Warren v. LeMay*, 142 Ill. App. 3d 550, 582 (1986). Because the award of attorney fees in *Warren* was based on a statute and not on common law, and because the statute provided for attorney fees in addition to the relief provided, the court concluded that an award that included both punitive damages and attorney fees was appropriate. *Id.* Defendants' attempt to distinguish this holding on the basis that the statute involved in *Warren* permitted punitive damages while the Disclosure Act does not is unavailing. The Disclosure Act provides for attorney fees and expressly does not limit plaintiffs to recovery under the Act itself for the failure to disclose material defects.

¶ 62 The Disclosure Act provides that a court *may* award attorney fees (emphasis added) (765 ILCS 77/55 (West 2008)) and, therefore, a decision to award attorney fees is within the sound discretion of the trial court. *Ekl v. Knecht*, 223 Ill. App. 3d 234, 245 (1991). This court has upheld a denial of attorney fees where the punitive damages award was significantly higher than compensatory damages (see *id.* at 243 (ratio between punitive and compensatory damages greater than 15 to 1); *Tague v. Molitor Motor Co.*, 139 Ill. App. 3d 313, 318-19 (1985) (punitive damages equal to approximately 17 times the amount of actual damages)). We cannot say that the trial court abused its discretion here in awarding attorney fees where the punitive damages award was merely equal to the amount of actual damages.

¶ 63 Finally, defendants contend that the trial court's finding that Mark Anderson conspired to violate the Disclosure Act was against the manifest weight of the evidence. They argue that Mark did not ask Tinaglia to mislead the Lattofs about the condition of the balconies and that there is nothing in the circumstances surrounding the transfer of the unit to the Trust to support a claim of conspiracy. Moreover, they claim that the fact that Mark sent emails to the building manager about leaks shortly before the sale proves that he was not participating in a scheme to conceal the leaks. We disagree.

¶ 64 Civil conspiracy, an intentional tort, requires proof that a defendant, " 'knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner.' " *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999) (quoting *Adcock v. Brakegate Ltd.*, 164 Ill. 2d 54, 64 (1994)). Mere knowledge of the fraudulent actions of another is not enough; a defendant must understand the general objectives of the conspiratorial scheme, accept them, and agree to do his part to further those objectives. *Id.* at 134. A conspiracy is almost never susceptible to direct proof and must usually be established through circumstantial evidence and inferences to be drawn from that evidence. *Id.*

¶ 65 The record overwhelmingly supports the trial court's finding that Mark conspired with Carol and the Trust to violate the Disclosure Act. Notwithstanding Mark and Carol's insistence that they simply overlooked the fact that unit 901 had not been transferred to the Trust for the four years it was in Mark's name, the timing of the transfer, right before the property was placed on the market, weighs heavily in favor of an inference that it was transferred so that Mark, a real estate developer, would not be obligated to sign the disclosure report. Carol's expressed concerns over the damage the building's problems could do to Mark's reputation as a real estate developer reinforces this conclusion. Further, Mark's testimony that although he and Carol reviewed the

Nos. 1-13-2326 & 1-13-3170, cons.

documents in the lock box once or twice a year, and one of the stated purposes for this review was to ensure all of their real estate holdings were held by the Trust, they had not opened the marked envelope containing the deed for unit 901 – their primary residence – was simply not credible. Moreover, Mark acknowledged that he reviewed the disclosure report before Carol signed it but claimed that he could not remember what they discussed. The trial court properly rejected this testimony given that Mark, a real estate developer, certainly understood the significance of the disclosure report.

¶ 66 Similarly, the evidence supports the inference that Mark put pressure on Tinaglia to assure the Lattofs that there was no problem with the balconies, a position that directly contradicted the position Tinaglia took in 2005 and 2006. The Andersons submitted no evidence of any repairs to the balconies to fix the problems identified by Tinaglia as early as 2005 with drainage and improperly placed scuppers. Although both Mark and Carol testified that repairs were made to the surface material on at least one balcony, they both acknowledged that they did not disclose the contractor who they claimed performed the work in their interrogatory answers. In August 2007, Mark sent an email to Trapani stating that after years of complaining, the balcony problems had not been fixed and that after Mark had someone make some repairs to his ninth floor balcony, the repairs created additional problems with his eighth floor balcony. There was no evidence presented that any repairs were made between the time of this email and the time the Lattofs were negotiating to buy the unit seven months later. Mark testified that he was concerned that the balcony issue might cause the sale to fall through and that he told Tinaglia there was a potential contractual issue and they needed to be sure there was nothing wrong with the eighth floor balcony. All of this evidence supports the trial court's conclusion that Mark actively participated in the fraud perpetrated on the Lattofs.

¶ 67 Perhaps most egregious is Mark's testimony that the emails he sent to the building manager and the association regarding major leaks in units 901 and 905 right around the time Carol signed the disclosure report were really referring to leaks in only unit 905 and he just pretended to be complaining about unit 901 because he thought he would not get any response unless he complained about the unit he was living in. But then on appeal the defendants argue, in direct contradiction to Mark's testimony, that the fact that he was continuing to complain about the leaks in unit 901 should be viewed by this court as evidence that he could not possibly have participated in a conspiracy to conceal the leaks from the Lattofs. In fact, it is clear from the record that the trial court's finding that Mark conspired to conceal the leaks was overwhelmingly supported by the evidence.

¶ 68 As a final matter, the Lattofs ask that we award attorney fees incurred in defending this appeal and remand to the trial court so that they may file a petition and the trial court can conduct whatever hearing it deems necessary, citing *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 953 (2004). We agree that the Lattofs are entitled to reasonable attorney fees incurred in defending this appeal and remand to the trial court for further proceedings on that issue.

¶ 69

#### CONCLUSION

¶ 70 For the reasons stated, we hold that the circuit court's award of actual damages for the exterior and interior repairs was not against the manifest weight of the evidence, and defendants forfeited the argument that the Lattofs could not recover these damages because the repairs were the responsibility of the condominium association. The circuit court did not abuse its discretion in awarding attorney fees because they were not duplicative of the punitive damages award. Finally, the circuit court's finding that Mark conspired with Carol and the Trust to violate the Disclosure Act was not against the manifest weight of the evidence. This cause is remanded to

Nos. 1-13-2326 & 1-13-3170, cons.

the circuit court for a determination of the reasonable attorney fees incurred by the Lattofs in defending this appeal.

¶ 71            Affirmed and remanded.