FIFTH DIVISION
March 30, 2018

No. 1-16-3100

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| ERIC KASANG and CHRISTINA KASANG, | ) | Appeal from the Circuit Court of Cook County |
| Plaintiffs-Appellees, | ) | |
| v. | ) | No. 13 CH 19477 |
| BEATA GRZESIK and MOM THE BUILDER, INC., | ) | |
| Defendants-Appellants. | ) | Honorable Kathleen Kennedy, Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

## ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) plaintiffs' mortgagee was not a necessary party to the cause of action, (2) defendants were not entitled to a trial by jury, (3) the trial court's finding in favor of plaintiffs was not against the manifest weight of the evidence, (4) the trial court's rescission award was not an abuse of discretion, and (5) the punitive damage award did not violate Illinois common law or federal due process standards.

¶ 2 Following a bench trial, defendants Beata Grzesik (Grzesik) and Mom the Builder, Inc. (Mom the Builder) appeal the order of the circuit court of Cook County entering a judgment in

favor of plaintiffs, Eric and Christina Kasang, on their fraud and contract claims and awarding punitive damages as well as attorney's fees. On appeal, defendants attack the trial court's failure to join plaintiffs' mortgagee, its denial of a trial by jury, the rulings on each of the counts, and the punitive damage award. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This controversy arose out of the sale of the residence located at 44 W. Berkshire Avenue (the property) in the Village of Lombard (Village). In July 2012, Grzesik purchased the property with the intent to remodel and resell it. Throughout the remodeling, Grzesik acted as an agent of her company, Mom the Builder, of which Grzesik was also the president. In November 2012, Grzesik, as seller of the property in question, entered into a real estate contract with the buyers, Eric and Christina Kasang. Prior to the closing, Grzesik provided plaintiffs with a residential real property disclosure report (disclosure report) pursuant to the Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/1 *et seq.* (West 2012)). The disclosure report reflected "the current condition of the premises" but did not include previous problems that the seller "reasonably believe[d] to have been corrected." Grzesik indicated in the disclosure report that she was not aware of flooding or recurring leakage problems in the crawl space or basement. Plaintiffs subsequently hired a home inspector who visited the property prior to closing and stated in his report, "it is apparent there was a flood in the building at one time," (inspection report).

¶ 5 Plaintiffs ultimately purchased the property. Several months later, a massive storm swept through the Village, affecting thousands of residences. Water infiltrated the property and rose through the subbasement and basement, forcing plaintiffs to evacuate. The floodwaters ultimately destroyed the washer and dryer and damaged the furnace, which were all located in

the subbasement. Two months after the storm, after an evening of light rainfall, plaintiffs noticed three or four inches of water in the subbasement. Thereafter, the property continued to take on water despite two sump-pumps actively working to remove the water. Plaintiffs thereafter ceased residing at the property and commenced renting a second home while at the same time making their mortgage payments on the property. Plaintiffs returned to the property twice each week to ensure the sump pumps were working. Over the next two years, the subbasement would periodically take on several inches of water, and in 2015 the subbasement took on about five feet of water following a heavy storm.

¶ 6 Plaintiffs filed the instant lawsuit in the chancery division, alleging violations of the Consumer Fraud and Deceptive Business Practices Act (Fraud Act) (815 ILCS 505/12 *et seq.* (West 2012)), and the Disclosure Act (765 ILCS 77/1 *et seq.* (West 2012)), common law fraud, and in the alternative, contract rescission for a material mistake in fact. Defendants filed an answer and jury demand, denying the allegations, and denying Grzesik acted in her individual capacity. The parties otherwise scarcely reference Mom the Builder, and the trial transcript is devoid of any mention of the company.[1]

¶ 7 Prior to trial, defendants filed a motion to join three additional defendants: plaintiffs' mortgagee, Draper and Kramer Mortgage Co. (Draper and Kramer); Grzesik's real estate attorney, Beata Valente (Valente); and Valente's employer, Dynia and Associates, LLC. Pertinent to this appeal, defendants argued Draper and Kramer was a necessary party because it had an interest in the property and thus in the litigation. The trial court denied defendants' motion.

¶ 8 Plaintiffs amended their complaint, alleging a violation of the Disclosure Act, contract

[1] We acknowledge that plaintiffs contend on appeal that the parties stipulated prior to trial that Grzesik and Mom the Builder shared in liability. We observe, however, that this stipulation was not included in the record.

rescission, breach of the implied warranty of habitability, and in the alternative, negligent misrepresentation. Thereafter, the chancery division transferred the matter to the law division and ordered that a trial be conducted on the law counts, without articulating which claims were subject to the order. The transfer order further stated that, following a trial on the law counts, the matter would return to the chancery division for a trial on the remaining chancery counts. After the transfer order was entered and a jury trial was scheduled for the law counts, plaintiffs moved to voluntarily dismiss their law claims. The law division court granted plaintiffs' motion without prejudice, and stated the chancery court would delineate which counts had been transferred to the law division and subject to voluntary dismissal. [2] Before the chancery court determined which counts were properly before it, plaintiffs filed an amended complaint and moved for leave to amend after filing it. Plaintiffs' motion was granted over defendants' contention that the amended complaint merely recast the law claims as equitable claims by requesting rescission, thereby denying defendants their right to a jury trial. The amended complaint alleged violations of the Fraud Act and Disclosure Act, common law fraud, breach of the implied warranty of habitability, and in the alternative, contract rescission for a material mistake in fact. The relief requested in the amended complaint included (1) rescission, including reimbursement of money under the purchase agreement, plaintiffs' losses suffered from the flood, plaintiffs' rental costs, and funds plaintiffs spent on improvements to the property, (2) punitive damages, and (3) prejudgment and postjudgment interest. Defendants did not renew their request for a jury demand nor did they raise any objections to the matter proceeding as a bench trial. The chancery court thereafter held a bench trial on the aforementioned claims.

¶ 9 At trial, plaintiffs testified they could no longer reside at the property because the

[2] Plaintiffs later refiled their law counts as a cross-claim in a separate action filed by defendants' insurer against both plaintiffs and defendants.

floodwaters became a health hazard to their family. They explained that the mold, a byproduct of the flooding, aggravated Eric and their son's allergies as well as their son's asthma.

¶ 10 Plaintiffs further testified their decision to cease residing at the property was also based on information contained within the two documents they received pursuant to a Freedom of Information Act (FOIA) request: (1) a flood questionnaire prepared by the prior residents, the Dreschels, which Grzesik had received prior to selling the property to plaintiffs (flood questionnaire); and (2) a memorandum drafted by Keith Steiskal (Steiskal), a Village building official, outlining his conversations with Grzesik regarding the flooding problems at the property. According to the flood questionnaire, three months after the Dreschels purchased the property in 1977 and until they donated it in 2008, the premises experienced three major floods and 20-25 minor floods. The questionnaire also described the effects of the flooding problems the Dreschels experienced including major losses and flood mitigation measures taken by them (all of which failed to prevent water infiltration). The second document, Steiskal's memorandum, indicated Steiskal relayed the flooding complaints from the Dreschels to Grzesik and explained that the neighborhood had flooding issues, which seemed to be worse at the property. The memorandum also indicated that in August 2012, Steiskal conducted a conference call with Grzesik and David Gorman, a Village engineer, wherein they discussed measures that could be taken to improve the flooding. Steiskal and Gorman explained that their suggestions could only improve the flooding issues, but would not correct the problem. They further explained that in addition to flooding problems, there were groundwater issues which would force water into the property from underground regardless of any measures Grzesik could take to protect the property.

¶ 11 In August 2012, Steiskal and Gorman visited the property. Steiskal then prepared a list of

improvements Grzesik needed to complete in order to be in minimum compliance with Village requirements to receive a waterproofing certificate. Gorman testified he explained to Grzesik that the measures necessary to receive the waterproofing certificate would help in some rainfall events, but would not protect against flooding in all cases. Gorman further testified that after observing Grzesik's completed improvements, he again relayed to her that the measures were not guaranteed to resolve the flooding issue.

¶ 12 Grzesik testified she hired a reputable construction company to install the many waterproofing measures required by the Village. The company provided Grzesik with a lifetime warranty for the drain tile system it installed, but the warranty did not include a guarantee that the property would not flood. Grzesik further testified the Village approved her improvements and issued her a waterproofing certificate. She believed her improvements had rendered the property waterproof because she "talked to engineers" at the property, she completed the list of improvements drafted by Steiskal, those improvements were inspected and approved by the Village, which issued her a waterproofing certificate, and she never noticed water infiltrating the basement after her improvements were complete. According to Grzesik, her real estate attorney, Valente, advised her that because the flooding issues were resolved, she was not required to disclose them in the disclosure report. In addition, Grzesik testified that when the remaining remodeling work was completed, the Village issued her a certificate of completion. Steiskal understood the certificate of completion to mean the property met the minimum Village requirements and the property was approved for residency.

¶ 13 Valente testified at the trial that she advised Grzesik to disclose the flooding issues in the disclosure report and include any documents regarding improvements. She further advised Grzesik that if she reasonably believed flooding issues were corrected, then she was not

obligated to disclose them. Valente also testified Grzesik was worried that the prospective buyers who were interested in purchasing the property prior to plaintiffs terminated their contract for the purchase of the property upon discovering the flooding issues were not disclosed.

¶ 14 Defendants presented expert witness testimony to establish that the property had effectively been abandoned by plaintiffs. Gregory Pestine (Pestine), an expert in the field of engineering, visited the property in December 2014, and based on his examination of the property, he believed neither the electricity nor the sump pumps were working. He noticed standing water had accumulated in the subbasement, causing moisture buildup, mold growth throughout the interior of the property, and buckling of the wood floors in the living room. He also noticed a disconnected sump pump discharge pipe protruding from the standing water and opined that the property was not being properly maintained. In rebuttal, Eric testified the electricity was on in the property but the airflow for the heating and cooling system on the premises was not working because plaintiffs had not replaced the furnace after the initial flood. He further testified the sump pumps were not working, and the standing water could not be removed, because the sump pump pipes had frozen during the winter.

¶ 15 The trial court issued a memorandum opinion finding in favor of the plaintiffs on all counts, ordering rescission, and awarding damages, attorney's fees, and punitive damages. In ruling defendants violated the Fraud Act, the trial court found Grzesik's false statement in the disclosure report was a deceptive act. The trial court found Grezesik knew there was a history of flooding that had not been corrected and she made the false statement to induce plaintiffs to purchase the property. In ruling defendants violated the Disclosure Act, the trial court found Grzesik had a duty to disclose material defects of which she had actual knowledge and she breached that duty when she knew there was a major uncorrected flooding and water infiltration

problem at the property and failed to disclose it in the disclosure report.

¶ 16 As to the common law fraud count, the trial court found Grzesik knew her response in the disclosure report was false and that it was made with the intent that plaintiffs rely on the disclosure report to believe that there were no flooding problems so they would purchase the property. The trial court also found plaintiffs relied on the disclosure report, as they would not have purchased the property had they known there was an uncorrected flooding problem. In ruling defendants breached the implied warranty of habitability, the trial court found Grzesik reconstructed the property, then sold it to plaintiffs who had an expectation that the property was suitable for habitation. The trial court further found the flooding problem rendered the property unsafe, unsanitary, and unfit for occupancy. The trial court noted plaintiffs have two young children and could not live in a residence susceptible to severe, recurring flooding.

¶ 17 In ruling for plaintiffs on their claim for contract rescission for a material mistake in fact, the trial court found plaintiffs entered into the contract for sale of the property reasonably relying on Grzesik's assertion that the property had no flooding or water infiltration problems. The trial court stated that because such problems existed, the remedy of rescission was appropriate.

¶ 18 The trial court further found plaintiffs suffered actual damages resulting from their reliance on Grzesik's false statement in the disclosure report, and awarded plaintiffs the purchase price of the property ($262,000) plus $71,960 for moving expenses, the cost of temporary accommodations, loss of personal property, and other additional expenses necessitated by the flooding. The trial court also awarded punitive damages in the amount of $100,000, finding Grzesik fraudulently induced plaintiffs to buy the property knowing there were severe flooding problems that would undoubtedly damage plaintiffs' new residence. The trial court further found Grzesik's knowledge of the flooding problems, and her failure to disclose them to plaintiffs

when required by law to do so, indicated a wanton disregard of plaintiffs' rights. Finally, the Fraud Act and Disclosure Act allowed plaintiffs to recover attorney's fees and costs.

¶ 19 Defendants subsequently filed a postjudgment motion for new trial, which the trial court denied. This appeal followed.

## ¶ 20 II. ANALYSIS

¶ 21 On appeal, defendants claim (1) the trial court improperly denied their motion to join a necessary party, (2) the trial court erred by improperly denying them a trial by jury, (3) the trial court's judgment on all counts was against the manifest weight of the evidence, (4) the rescission award was an abuse of discretion, and (5) the punitive damage award is excessive and unconstitutional.

¶ 22 Prior to addressing defendants' claims on appeal, we acknowledge that defendants' brief fails to comply with Illinois Supreme Court Rule 341 (eff. Jan. 1, 2016) in numerous ways. For example, defendants simply define four standards of review and fail to consistently articulate which standard is applicable to each issue. See Ill. S. Ct. R. 341(h)(3) (eff. Jan. 1, 2016). Defendants also, in a portion of their brief, quote the trial court, but fail to cite to the record in violation of Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Furthermore, many of defendants' arguments cite authority for the general rules, but are otherwise devoid of any authority in support of their contentions, in violation of Rule 341(h)(7). *Id.* For example, in one instance, defendants cite to "fourth century Cappadocian Fathers" rather than to any authoritative case law. "A reviewing court is entitled to have the issues clearly defined and supported by pertinent authority and cohesive arguments; it is not merely a repository into which an appellant may 'dump the burden of argument and research,' nor is it the obligation of this court to act as an advocate." *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009) (quoting *Obert v. Saville*, 253

Ill. App. 3d 677, 682 (1993)). Moreover, an issue not clearly defined and sufficiently presented fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is, therefore, forfeited. *In re Estate of Doyle*, 362 Ill. App. 3d 293, 301 (2005). With that in mind, we now address defendants' arguments.

¶ 23 A. Failure to Join Plaintiffs' Mortgagee

¶ 24 On appeal, defendants argue the trial court erred in denying their motion to join plaintiffs' mortgagee, Draper and Kramer, as a necessary party to the cause of action because it had an interest in the property. They further contend the trial court's judgment does not require plaintiffs to satisfy the outstanding balance of the mortgage, and surmise Draper and Kramer will take legal action against them because the property is in an advanced state of degradation in breach of the terms of the mortgage.

¶ 25 A necessary party is one whose presence in the suit is required for any of three reasons: "(1) to protect an interest which the absentee has in the subject matter of the controversy which would be materially affected by a judgment entered in his absence; (2) to reach a decision which will protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy." (Internal quotation marks omitted.) *Consolidated Cable Utilities, Inc. v. City of Aurora*, 108 Ill. App. 3d 1035, 1039 (1982). We review the trial court's denial of defendants' motion to join for an abuse of discretion. *Carrao v. Health Care Service Corp.*, 118 Ill. App. 3d 417, 430 (1983). This standard accords the greatest deference to the trial court, and we do not disrupt the trial court's finding unless it is "clearly against logic." *State Farm Fire and Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000). The question is not whether we agree with the action taken by the trial court, but whether the trial court "acted arbitrarily, without employing conscientious judgment, or whether, in view of all the

circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *Id.*

¶ 26 In this case, defendants claim Draper and Kramer has an interest in the property, but fail to describe how the trial court's judgment could materially affect that interest, and fail to cite a single authority in support of their contention. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 (a failure to cite relevant authority violates Rule 341 and can cause a party to forfeit consideration of the issue). The record, in fact, discloses that Draper and Kramer was served with defendants' motion to join and declined to appear in court or otherwise express an interest in joining the suit. In addition, defendants fail to explain how joinder of Draper and Kramer would affect defendants' interests other than by changing the language of the trial court's judgment to require plaintiffs to satisfy the mortgage, which does not necessitate joinder. See *Consolidated Cable Utilities, Inc.*, 108 Ill. App. 3d at 1039. Furthermore, plaintiffs declined to respond to the motion. Accordingly, based on the record before us, we cannot say the trial court abused its discretion where Draper and Kramer declined to join the suit and joinder would not protect the interests of defendants or plaintiffs. See *Leverton*, 314 Ill. App. 3d at 1083; *Consolidated Cable Utilities, Inc.*, 108 Ill. App. 3d at 1039.

¶ 27 B. Denial of Jury Trial

¶ 28 Defendants argue the trial court improperly denied them a trial by jury where they demanded a jury trial in their answer and the trial court refused to empanel a jury to assess the credibility of the witnesses pursuant to section 2-1111 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1111 (West 2012)). In response, plaintiffs maintain defendants were not entitled to a jury trial because they sought rescission as a remedy for each count. They further observe that defendants failed to request an advisory jury panel pursuant to section 2-1111 of the Code

prior to trial and therefore have forfeited this claim.

¶ 29 We review a litigant's right to a jury trial *de novo*. *Catania v. Local 4250/5050 of the Communications Workers of America*, 359 Ill. App. 3d 718, 722 (2005). Under a *de novo* standard, we perform the same analysis that the trial court would perform. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 20.

¶ 30 It has long been held that a jury trial is never a matter of right in cases before the chancery court. *Keith v. Henkleman*, 173 Ill. 137, 143 (1898); *Flaherty v. McCormick*, 113 Ill. 538, 543 (1885); *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 545 (1993). Additionally, where the matter is heard in chancery, the court may determine all matters, including legal issues (*Bublitz v. Wilkins Buick, Mazda, Suzuki, Inc.*, 377 Ill. App. 3d 781, 786 (2007)), and punitive damages (see *Gambino v. Boulevard Mortgage Co.*, 398 Ill. App. 3d 21, 69-70 (2009)). Furthermore, it is well settled that a party may, by conduct, forfeit its demand for a jury trial by failing to object to proceeding without a jury at the outset of a bench trial. See *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 786-87 (2002); *Power Electric Contractors, Inc., v. Maywood-Proviso State Bank*, 60 Ill. App. 3d 685, 690-91 (1978); *La Salle National Bank v. International Ltd.*, 129 Ill. App. 2d 381, 398 (1970).

¶ 31 Here, the record reflects defendants did not object when the matter was set for a bench trial, thereby forfeiting their right to a jury trial. See *Installco Inc.*, 336 Ill. App. 3d at 786-87; *Power Electric Contractors, Inc.*, 60 Ill. App. 3d at 690-91. While defendants could have requested an advisory jury pursuant to section 2-1111 of the Code, they failed to do so thereby also forfeiting this claim. See 735 ILCS 5/2-1111 (West 2012); *Wells Fargo Bank, N.A. v. Maka*, 2017 IL App (1st) 153010, ¶ 24; *Installco Inc.*, 336 Ill. App. 3d at 786-87. Moreover, even if defendants had appropriately demanded a jury trial, the chancery court is afforded great

discretion when impaneling a jury and the verdict of the jury is merely advisory and not binding upon the court. 735 ILCS 5/2-1111 (West 2012); *Keith*, 173 Ill. at 142-43; *Bublitz*, 377 Ill. App. 3d at 785. For these reasons, we conclude defendants forfeited their right to a jury trial.[3]

¶ 32 C. Judgments of the Trial Court

¶ 33 Defendants challenge the trial court's judgments on each of the five counts, contending they were against the manifest weight of the evidence, and assert the punitive damage award is excessive and unconstitutional. Initially, we observe that while we will only disturb the trial court's judgment following a bench trial when it is against the manifest weight of the evidence (*Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008)), a trial court's determination on contract rescission is reviewed for an abuse of discretion (*23-25 Building Partnership*, 381 Ill. App. 3d at 757). A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent, or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006); *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). A trial court abuses its discretion when its finding is "clearly against logic." *Leverton*, 314 Ill. App. 3d at 1083.

¶ 34 Prior to addressing the merits of defendants' claims, we acknowledge that defendants assert the trial court erred when it entered judgments against Mom the Builder where no evidence was presented to support a finding that Mom the Builder was involved in the purchase, reconstruction, or sale of the property. In response, plaintiffs contend defendants forfeited this

[3] We acknowledge that defendants also argue, or more accurately, assume, that plaintiffs will invoke the doctrines of *res judicata* and collateral estoppel in their newly filed law claims against defendants. We decline to address this issue here where the supporting documents are not properly part of the record on appeal and may not be considered by this court on review. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); Ill. S. Ct. R. 342(a) (eff. Jan 1, 2005); *Pikovski v. 8440-8460 North Skokie Boulevard Condominium Ass'n, Inc.*, 2011 IL App (1st) 103742, ¶ 16 (stating "a reviewing court will not supplement the record on appeal with the documents attached to the appellant's brief on appeal as an appendix"); *Knapp v. Bulun*, 392 Ill. App. 3d 1018, 1027-28 (2009).

argument where they failed to raise the issue in the trial court. Regardless of defendants' forfeiture, plaintiffs maintain that the parties stipulated prior to trial that Grzesik acted as an agent of Mom the Builder at all times and thus shared liability.

¶ 35 It is well established that issues not raised in the trial court are forfeited and cannot be argued for the first time on appeal. *Wells Fargo Bank, N.A.*, 2017 IL App (1st) 153010, ¶ 24; *Bank of New York Mellon*, 2016 IL App (2d) 150712, ¶ 72. Our review of the record reveals that defendants did not raise the issue of Mom the Builder's liability before the trial court. Thus, defendants forfeited review of this issue on appeal. *Wells Fargo Bank, N.A.*, 2017 IL App (1st) 153010, ¶ 24.

¶ 36 Additionally, we note that the agreed stipulation of facts was not included in the record on appeal. An appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error. *Foutch*, 99 Ill. 2d at 391. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. Accordingly, in the absence of a complete record, we presume the trial court heard adequate evidence to support its decision and that its judgment was in conformity with the law. *Id.* This presumption is warranted here where after conducting a bench trial, the trial judge determined that both Grzesik and Mom the Builder were liable. As no evidence was presented at trial expressly relating to Mom the Builder, it necessarily follows that a stipulation must have been entered by the parties prior to trial. Moreover, defendants failed to dispute the existence of the stipulation by failing to file a reply brief. The existence of such a stipulation also explains why defendants did not challenge the judgment against Mom the Builder in the trial court. Furthermore, in their proposed findings of fact following the trial, Grzesik and Mom the Builder suggest both defendants signed the real estate contract, received building permits, and completed

the improvements required by Steiskal. Accordingly, because defendants failed to present a complete record, we must presume the trial court's judgment against Mom the Builder was in conformity with the law and supported by evidence. *Id.* at 391-92.

¶ 37 We now turn to examine the propriety of the judgments entered by the trial court on each of the five counts.

¶ 38 1. The Trial Court's Ruling on the Fraud Act Claim

¶ 39 Defendants first contend the trial court's ruling on the Fraud Act claim was improper, arguing Grzesik's statements in the disclosure report were not deceptive because Grzesik reasonably believed the flooding issues were resolved where she hired licensed professionals who performed extensive waterproofing remediations, the improvements were made at the direction of, and subsequently approved by the Village, which issued Grzesik a waterproofing certificate, and the drain tile system installed by her contractors included a lifetime warranty. Defendants further argue Grzesik was advised by counsel in completing the disclosure report, and plaintiffs failed to present persuasive evidence that Grzesik's deceptive statements in the disclosure report were the proximate cause of their harm.

¶ 40 To prevail on a cause of action under the Fraud Act, a plaintiff must establish: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the occurrence of the deception in the course of conduct involving trade or commerce; (4) actual damage to the plaintiff; and (5) plaintiff's damage was proximately caused by the deception. 815 ILCS 505/2 (West 2012); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002). Defendants make arguments only as to the first and fifth elements.

¶ 41 Based on our review of the record, the evidence supports the trial court's finding that Grzesik's false statement in the disclosure report was deceptive where the evidence demonstrated

the Village officials notified her on multiple occasions that her improvements to the property would only ameliorate, and not resolve, the flooding problem. See *York*, 222 Ill. 2d at 179. Moreover, Grzesik's reliance on her attorney, Valente, in completing the disclosure report is contradicted by Valente's testimony and based on Grzesik's own misrepresentations. Valente testified she initially advised Grzesik to disclose the flooding problem. Valente later relied on Grzesik's statements that the flooding problem was corrected in advising her that disclosing the problem was not necessary. Finally, the trial court's finding that plaintiffs' damages were caused by Grzesik's deception was not arbitrary where plaintiffs testified they would not have purchased a residence if they were aware the flooding problems had not been remediated, and were subsequently forced to leave the property and secure rental accommodations due to the fact the property was uninhabitable. See *id.*

¶ 42 2. The Trial Court's Ruling on the Disclosure Act Claim

¶ 43 Defendants next attack the trial court's ruling on plaintiffs' Disclosure Act claim, asserting Grzesik reasonably believed the flooding issues had been corrected and plaintiffs were notified of the prior flooding issues through the inspection report.

¶ 44 The Disclosure Act requires the seller of residential real property to complete all applicable items in the disclosure documents. 765 ILCS 77/20, 55 (West 2012). The disclosure documents specifically require the seller to represent, to the best of his or her actual knowledge, whether he or she is "aware of flooding or recurring leakage problems in the crawl space or basement." 765 ILCS 77/35 (West 2012). The seller must also disclose material defects of which the seller has actual knowledge. 765 ILCS 77/25(b) (West 2012). If the seller knowingly violates any duty prescribed by the Disclosure Act or discloses any information in the disclosure report that the seller knows to be false, he or she is liable in the amount of actual damages and court

costs, and the court may also award reasonable attorney fees. 765 ILCS 77/55 (West 2012). The seller is not liable for any error in the disclosure report if the error was either (1) "based on a reasonable belief that a material defect or other matter not disclosed had been corrected," or (2) "based on information provided by a public agency or by a licensed engineer *** or by a contractor about matters within the scope of the contractor's occupation and the seller had no knowledge of the error." 765 ILCS 77/25(a) (West 2012).

¶ 45 We conclude the trial court's finding that Grzesik was aware of flooding or recurring leakage problems and failed to disclose them in violation of the Disclosure Act was not against the manifest weight of the evidence where the evidence established the Village officials advised Grzesik that the improvements she made would not resolve the issue, both before and after these measures were taken. See *York*, 222 Ill. 2d at 179.

¶ 46 3. Trial Court's Ruling on the Common Law Fraud Claim

¶ 47 Defendants next attack the trial court's ruling on plaintiffs' common law fraud claim. In addition to attacking each element of the claim, defendants argue the trial court failed to discuss whether plaintiffs' reliance on the disclosure report was justifiable under the circumstances. They contend that since plaintiffs' inspection report mentioned prior flooding at the property, plaintiffs cannot reasonably claim to have relied solely upon the disclosure report as the basis for their decision to purchase the property.

¶ 48 To prove common law fraud, a plaintiff must establish: (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance upon the truth of the statement; and (5) the plaintiff's damages resulted from reliance on the statement. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996).

¶ 49 We conclude the trial court's finding of common law fraud was not against the manifest weight of the evidence where the record establishes that Grzesik was notified by the Village officials of the irreparable flooding problem, Grzesik indicated in the disclosure report that the problem was resolved, Grzesik intended that plaintiffs rely on the disclosure report to determine there was no flooding problem, plaintiffs subsequently relied on the disclosure report in purchasing the property, and the property continued to flood after Grzesik's improvements. See *York*, 222 Ill. 2d at 179; *Connick*, 174 Ill. 2d at 496. With regard to plaintiffs' reliance on the disclosure report, we note defendants are required by law to correctly complete the document. 765 ILCS 77/20, 25(b), 55 (West 2012). Defendants provide no authority to suggest that plaintiffs' reliance on defendants' legal obligation is not justified. Given the ambiguous language in the inspection report, the inspection report did not reveal the extent of the flooding, which the disclosure report directly addresses. Therefore, the trial court's finding that plaintiffs were justified in relying on the disclosure report was not against the manifest weight of the evidence. See *York*, 222 Ill. 2d at 179.

¶ 50 4. The Trial Court's Ruling on the Breach of the Implied Warranty of Habitability Claim

¶ 51 Defendants next attack the trial court's ruling on plaintiffs' claim for breach of the implied warranty of habitability, contending the improvements to the property were made in a workmanlike manner with good quality materials, the Village issued Grzesik a certificate of completion, the property has been certified for occupancy since 1973, and said certification has never been suspended.

¶ 52 The doctrine of implied warranty of habitability is narrowly tailored to protect residential dwellers from latent defects that interfere with the habitability of their residences. *Board of Directors of Bloomfield Club Recreational Ass'n v. Hoffman Group*, 186 Ill. 2d 419, 424 (1999).

To prove a breach of the implied warranty, a plaintiff must establish the residence contained a latent defect which interferes with the inhabitant's reasonable expectation that the residence will be suitable for habitation. *Id.* at 426. The defect must be of such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy. *Glasoe v. Trinkle*, 107 Ill. 2d 1, 13, (1971). Minor housing code violations alone which do not affect habitability will not entitle a buyer to relief. *Id.*

¶ 53 In ruling defendants breached the implied warranty of habitability, the trial court found Grzesik reconstructed the property, then sold it to plaintiffs who had an expectation that the property was suitable for habitation. The trial court further found the flooding problem rendered the property unsafe, unsanitary, and unfit for occupancy. The trial court's determination was based on the evidence presented that plaintiffs have two young children and could not live in a residence susceptible to severe, recurring flooding. Each of the trial court's factual findings are based on facts established in the record. The trial court's ruling is therefore not against the manifest weight of the evidence. See *York*, 222 Ill. 2d at 179; *Glasoe*, 107 Ill. 2d at 13.

¶ 54 5. The Trial Court's Rescission Award

¶ 55 Defendants next attack the trial court's ruling on plaintiffs' alternative claim for rescission for a material mistake in fact, arguing a return to the status quo is impossible where plaintiffs failed to preserve the property by allowing standing water to accumulate, causing black mold to infest the residence.

¶ 56 In order to rescind a contract for a material mistake in fact, a plaintiff must prove (1) a mistake has been made regarding a material feature of the contract, (2) this matter is of such grave consequence that enforcement of the contract would be unconscionable, (3) the plaintiff's mistake occurred despite the exercise of reasonable care, and (4) the other party can be placed in

the status quo. *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539, 548 (1989). The application of rescission is largely left to the discretion of the trial court. *Klucznik v. Nikitopoulos*, 152 Ill. App. 3d 323, 327 (1987). A reviewing court will not disturb that decision unless it clearly resulted from an abuse of discretion. *23-25 Building Partnership*, 381 Ill. App. 3d at 757; *Newton v. Aitken*, 260 Ill. App. 3d 717, 719 (1994).

¶ 57 We find the trial court's ruling was not an abuse of discretion where the record establishes (1) plaintiffs were mistaken about the extent of the flooding problems at the property, (2) plaintiffs could not afford to maintain the property which continually flooded while also paying the mortgage and residential rental costs, (3) plaintiffs reasonably relied on the disclosure report which defendants had a legal obligation to accurately complete, and (4) defendants sold plaintiffs a flood-prone property which they will receive in return. See *Overton v. Kingsbrooke Development, Inc.*, 338 Ill. App. 3d 321, 324-24, 330 (2003) (upholding a rescission award where the defendant declined to disclose pertinent information to the plaintiff, thereby willingly undertaking the risk which ultimately caused the impossibility of a return to the status quo ante, and upholding the offset to the plaintiffs' award for damages the plaintiffs actually caused to the property); *Leverton*, 314 Ill. App. 3d at 1083; *Keller*, 180 Ill. App. 3d at 548; *Cotter v. Parrish*, 166 Ill. App. 3d 836, 838-39, 842 (1988) (holding that in a situation factually similar to this case, the trial court properly awarded rescission and denied the defendants' counterclaim for damages in part because the defendants did not establish that the plaintiffs caused the complained-of damage).

¶ 58 6. The Trial Court's Punitive Damage Award

¶ 59 Defendants argue the trial court's $100,000 punitive damage award is excessive under Illinois law and warrants a new trial. Defendants contend Grzesik's conduct only demonstrates

an error of judgment where they performed extensive water remediation measures with good quality workmanship and materials. They further argue granting the punitive award for the purpose of deterrence is not applicable here where Grzesik no longer reconstructs residences.

¶ 60 Review of a trial court's decision in awarding punitive damages following a bench trial is fourfold. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1137-38 (2004). The first step is whether punitive damages are available as a matter of law for the particular cause of action. *Id.* at 1137. This is a question of law which we review *de novo*. *Id*. The second step is whether the defendant acted willfully, maliciously, or with some other aggravating factor such as to warrant punitive damages. *Id.* at 1137-38. This is a question of fact and is reviewed under a manifest weight of the evidence standard. *Id.* at 1138. Third, the trial court's ultimate decision to impose punitive damages is reviewed for an abuse of discretion. *Id.*; *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 378 (1994). Fourth, we determine whether the punitive award is excessive, taking into consideration three factors: (1) the nature and enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant. *Franz*, 352 Ill. App. 3d at 1138; *Black v. Iovino*, 219 Ill. App. 3d 378, 393 (1991); *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill. App. 3d 703, 712-14 (1983). The trial court's computation of punitive damages, however, is ultimately reviewed under an abuse of discretion standard. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 356-57 (2009). A reviewing court may not alter the award unless it is apparent the award is the result of "passion, partiality, or corruption." *Levy*, 268 Ill. App. 3d at 379.

¶ 61 Following the steps detailed above, we first consider whether punitive damages are available in claims for common law fraud, breach of the implied warranty of habitability, rescission, and violations of the Fraud Act and Disclosure Act. *Franz,* 352 Ill. App. 3d at 1137.

We observe that the Disclosure Act does not allow for an award of punitive damages. 765 ILCS 77/55 (West 2012); see *Woods v. Pence*, 303 Ill. App. 3d 573, 576 (1999). The Fraud Act, however, allows for punitive damages when the defendant's conduct is outrageous or demonstrates a reckless disregard for the rights of others. See 815 ILCS 505/10a(a) (West 2012); *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 132 (2008). Moreover, it is well established that punitive damages may be awarded when torts are committed with fraud or actual malice, or when a defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others. *Cripe v. Leiter*, 291 Ill. App. 3d 155, 159 (1997); *Black*, 219 Ill. App. 3d at 393; *Warren v. LeMay*, 142 Ill. App. 3d 550, 579 (1986). In this case, Grzesik knew of the extent of the flooding issues at the property and was informed by the Village officials that the problem could not be corrected. Grzesik was specifically notified of groundwater which could infiltrate the property notwithstanding rainfall or her improvements. She subsequently unsuccessfully attempted to correct the issue and failed to disclose the problem to plaintiffs. Grzesik's knowledge that the flooding issues could not be corrected and her failure to disclose them when required by law to do so indicates fraudulent conduct and a reckless disregard for the Kasangs' rights. See *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 161 (1986). Punitive damages are therefore available as a matter of law. *Black*, 219 Ill. App. 3d at 393; *Warren*, 142 Ill. App. 3d at 579.

¶ 62 Second, based on the evidence presented at trial and the facts detailed above, we conclude the trial court's finding that Grzesik's actions were willful or malicious was not arbitrary. *York*, 222 Ill. 2d 179. The trial court's finding that punitive damages are warranted is therefore not against the manifest weight of the evidence. See *Franz*, 352 Ill. App. 3d at 1137-38; *York*, 222 Ill. 2d 179. Third, the trial court did not abuse its discretion in awarding punitive

damages where the decision was not "clearly against logic" considering the above facts. *Franz*, 352 Ill. App. 3d at 1138; *Leverton*, 314 Ill. App. 3d at 1083.

¶ 63 Finally, we conclude the trial court did not abuse its discretion in calculating the punitive award where nothing in the record suggests the trial court's award was the product of passion, partiality, or corruption. See *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 177-79 (2008) (upholding an $88,000 punitive damage award where defendants misrepresented to the plaintiffs that the vehicle plaintiffs leased was equipped with a four-wheel-drive system); *Levy*, 268 Ill. App. 3d at 379.

¶ 64 Moreover, the trial court's award complies with the three factors enumerated above. *Black*, 219 Ill. App. 3d at 393. First, the nature and enormity of defendants' wrong supports a punitive award where defendants, at the very least, unreasonably misrepresented the flooding problems associated with the property, prompting plaintiffs to purchase a residence which they could not afford to continually remedy. Plaintiffs were subsequently forced to abandon the property and pay for a rental residence in addition to the mortgage on the property for years during this litigation. Second, while there is no mention of defendants' financial status in the record, a punitive damage award may stand absent such evidence. *Jines v. Seiber*, 193 Ill. App. 3d 390, 394 (1990). Finally, defendants' potential liability is limited where they are not subject to "'multiple claims by numerous persons affected by the wrongdoer's conduct.'" *Hazelwood*, 114 Ill. App. 3d at 713 (quoting Restatement (Second) of Torts § 908 cmt. e (1977)). The trial court therefore did not abuse its discretion in computing the punitive award where the computation complies with the court's three-factor test and was not "clearly against logic." See *Leverton*, 314 Ill. App. 3d at 1083; *Black*, 219 Ill. App. 3d at 393.

¶ 65 *Loitz v. Remington Arms Co. Inc.*, 138 Ill. 2d 404, 415 (1990), relied on by defendants for

the proposition that the facts in this case only support a finding of "error of judgment," is inapposite. *Loitz* involved a shotgun manufacturer which was aware numerous firearms it sold had exploded. *Loitz*, 138 Ill. 2d at 411. The court held this knowledge was insufficient to establish willful conduct where a vast majority of the explosions were caused by high-pressure ammunition rather than a defect in the firearm. *Id.* at 418, 426-27. While the defendant in *Loitz* indicated that high-pressure ammunition was the reason for its failure to act on its knowledge of exploding firearms, defendants here point to no facts sufficient to find Grzesik's knowedge of severe flooding issues and her failure to disclose them anything less than willful conduct. *Id.*

¶ 66 We disagree with defendants that punitive damages for the purpose of deterrence is not applicable here. Punitive damages are imposed not only to deter the conduct of the defendant, but also to deter others from similar conduct. *Tully v. McLean*, 409 Ill. App. 3d 659, 669-70 (2011). Contrary to defendants' assertion, the trial court's punitive damage award will deter other property developers and sellers from fraudulently completing disclosure reports and will deter Grzesik from doing so if she were to reconstruct residences in the future. See *id.*

¶ 67 Based on the foregoing analysis, the trial court's award and computation of punitive damages is not excessive under Illinois law and defendants are not entitled to a new trial. See *York*, 222 Ill 2d at 179; *Franz*, 352 Ill. App. 3d at 1137-38; *Leverton*, 314 Ill App. 3d at 1083; *Black*, 219 Ill. App. 3d at 393.

¶ 68 Defendants next argue the punitive damages award was unconstitutional under the due process clause of the fourteenth amendment.

¶ 69 The United States Supreme Court has developed three guideposts to determine whether an award of punitive damages violates due process: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm suffered by the plaintiff and the amount of punitive

damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). In determining the reprehensibility of a defendant's conduct, the court considers five factors: (1) whether the harm caused was physical as opposed to economic; (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Gore*, 517 U.S. at 575-77. The existence of only one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of any of them renders any award suspect. *Campbell*, 538 U.S. at 419. We apply the above guideposts using a *de novo* standard of review in order to ensure the punitive damage award is based upon the "application of law, rather than a decisionmaker's caprice." *Blount v. Stroud*, 395 Ill. App. 3d 8, 24 (2009).

¶ 70 We find defendants' conduct meets all five of the factors for reprehensibility. See *Campbell*, 538 U.S. at 419. First, the harm inflicted on plaintiffs was not merely economic where plaintiffs were forced to abandon the property after discovering their basement would continue to flood during light rainfalls even after the initial massive storm. Second, regardless of plaintiffs' mold allergies, Grzesik's conduct evinces an indifference to the health and safety of others where rising floodwaters can reach electrical outlets and pose a risk to any member of the Kasang family, especially the young children. Third, plaintiffs were financially vulnerable. They are a young family with two children and, at the time of the sale of the property, had another child on the way. In addition, Eric testified they would not have been able to pay the mortgage on the

property, pay for rent, and continue to replace big ticket items such as a furnace each time the subbasement flooded. Fourth, defendants' conduct was not an isolated incident. Grzesik delivered the same disclosure report to the prospective buyer who was interested in purchasing the property prior to plaintiffs, who subsequently terminated the contract due to Gresik's failure to disclose the flooding. After losing this potential buyer, Grzesik again delivered the disclosure report with the same errors to plaintiffs. Finally, we find Grzesik's actions were more than "mere accidents" given the warnings by Village officials and Grzesik's knowledge of the irreparable flooding issues. Defendants' conduct thus meets all five factors for reprehensible conduct. See *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575-77.

¶ 71 We now turn to the second guidepost directing us to consider the disparity between the harm suffered by the plaintiffs and the amount of punitive damages awarded. See *Gore*, 517 U.S. at 574-75. In other words, we consider the ratio between the compensatory and punitive damages, keeping in mind the Supreme Court's admonishment that "few awards exceeding a single-digit ratio *** will satisfy due process." *Campbell*, 538 U.S. at 425. Here, plaintiffs recovered $397,573 in compensatory damages, which included the rescission award of $303,960, and attorney fees and costs of $93,613. The ratio between compensatory and punitive damages is therefore less than 1:1, far from exceeding a single digit ratio. See *id*. The second guidepost therefore weighs heavily in favor of plaintiffs where the punitive damage award bears a reasonable relationship to the harm suffered by plaintiffs. See *Gore*, 517 U.S. at 574-75, 580-81.

¶ 72 The third and final guidepost, directing us to consider the difference between the punitive award and the possible civil penalties, also weighs heavily in favor of plaintiffs. See *id*. at 574-75, 583-84. In *Gore*, a $2,000,000 penalty was struck down where the maximum civil penalty was $2,000. *Id*. at 583-84. The Court stated the statute failed to provide fair notice that its

provisions might subject the offender to a multimillion dollar penalty. *Id*. at 584. Here, the Disclosure Act does not provide a civil penalty and the Fraud Act limits such penalty to $50,000 per violation. 815 ILCS 505/7(b) (West 2012); 765 ILCS 77/1 *et seq*. (West 2012). In light of the Court's analysis in *Gore* and defendants' failure to address this guidepost, we are not persuaded that a punitive damage award equal to double the civil penalty under the Fraud Act renders the award excessive. See *Gore*, 517 U.S. at 583-84.

¶ 73 Based on our forgoing analysis, we find the trial court's punitive damage award complies with the constitutional standards of due process where defendants' actions demonstrate a high degree of reprehensibility and the punitive award was reasonably related to the harm suffered by plaintiffs. See *Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 574-75, 580-81.

¶ 74 CONCLUSION

¶ 75 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 76 Affirmed.