

**NOTICE**

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2018 IL App (4th) 170212-U

NO. 4-17-0212

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

September 13, 2018  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

RICHARD MESSERLY and RHONDA MESSERLY,	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
v.	)	Macoupin County
ROBERT E. BOEHMKE, SR.,	)	No. 04LM53
Defendant-Appellee.	)	
	)	Honorable
	)	Joshua Aaron Meyer,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Presiding Justice Harris and Justice Turner concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) The trial court’s determination the seller was not aware of material defects in the residential property’s plumbing was not against the manifest weight of the evidence.
- (2) The trial court properly concluded the seller’s failure to complete portions of the residential real property disclosure report did not subject him to liability for all material defects in the property.
- (3) The trial court’s determination the sellers failed to establish the extent of the settlement injuries as they existed around 1998 is manifestly erroneous.
- (4) The trial court erroneously concluded the sellers were required to show the cost to repair the settlement injuries around 1998.
- (5) The matter must be remanded for the trial court to determine, based on the evidence of record, whether the 2010 repair estimates directly relate to the settlement injuries and then enter appropriate orders consistent with that determination.

¶ 2 In September 1998, plaintiffs, Richard and Rhonda Messerly, purchased from defendant, Robert E. Boehmke Sr., a residential property located at 105 Shelby Street, Gillespie, Illinois. Within the year following their purchase, plaintiffs filed a complaint against defendant, alleging he violated the Residential Real Property Disclosure Act (Act) (765 ILCS 77/1 to 65 (West 1998)). After many years of litigation and delay for health-related reasons, the matter proceeded to a bench trial. See *Messerly v. Boehmke*, 2014 IL App (4th) 130397, 8 N.E.3d 57 (prior appeal reversing an award of summary judgment in defendant’s favor). Plaintiffs now appeal from the decision following that trial. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 A. Complaint

¶ 5 In their third amended complaint, plaintiffs alleged they agreed to purchase the residential property in reliance on a residential real property disclosure report (disclosure report) provided by defendant. See 765 ILCS 77/35 (West 1998) (specifying the required disclosure report form). After purchasing the property, plaintiffs discovered the (1) “plumbing system in the property was seriously defective so as to require repairs in excess of \$15,000 but less than \$50,000” and (2) “foundation and walls of the premises were and are unstable and continue to settle, sink[,] and move causing additional damages to the premises so as to require repairs.”

¶ 6 Plaintiffs asserted defendant violated the Act as the disclosure report was incomplete and statements made therein were false. Specifically, plaintiffs alleged defendant (1) “in question [No.] 8 answered that he was not aware of material defects in the plumbing system[] but did not disclose that there was a defect in the property;” and (2) “in reply to question [No.]

17[] did not disclose that he had previously filed a claim for mine subsidence and that he was aware of mine subsidence, settlement, sliding, upheaval[,] or other earthy stability effects on the premises.” Plaintiffs further asserted defendant “knew about the nature and extent of the material defects[] but did not disclose them in writing as was required [by the Act].” Plaintiffs maintained they would not have purchased the property if they had been correctly advised as to its actual condition. They requested judgment for over \$50,000 plus court costs and reasonable attorney fees.

¶ 7 **B. Bench Trial**

¶ 8 In March 2016, the trial court conducted a two-day bench trial. The following is a summary of the evidence presented.

¶ 9 In 1964, defendant purchased the property from a contractor who built the residence located thereon. Over the years, defendant hired the contractor to do other plumbing and furnace work to the property. Defendant testified he did not personally do any plumbing work to the property.

¶ 10 In 1991, defendant observed water entering the residence through a window well. In investigating the situation, defendant discovered a crack. Defendant testified the crack did not allow water to enter into the residence. Defendant’s late wife made a claim with their insurance company for mine subsidence.

¶ 11 In August 1991, Bernard Meredith, a consulting adjuster with the Illinois Mine Subsidence Insurance Fund, visited the property to conduct an investigation. In a written report, Meredith noted he observed two vertical cracks in the south concrete basement wall, minor cracks in the concrete slab basement floor, cracks in the exterior brick veneer of the north side of

the garage and over the garage doors, and settling of the concrete front porch. Meredith attached photographs of the damage to his report. Meredith found the residence was located in an area where the coal underneath had not been removed, the residence appeared to be level, and the neighborhood did not reveal any evidence of mine subsidence. Based on his observations and findings, Meredith recommended defendant's mine-subsidence claim be denied because the damages resulted from some type of ground movement rather than mine subsidence. Meredith testified he could not opine as to whether the damage he observed amounted to structural or stability defects. When specifically asked whether cracks in the wall and flooring amounted to structural defects, Meredith responded: "If you show me a piece of concrete, I'm going to show you a crack." Meredith indicated cracks in concrete do not necessarily equate to structural defects.

¶ 12 On October 30, 1991, defendant's insurance company sent defendant a letter indicating it was denying his claim because the damage occurred from "settling" rather than mine subsidence, which was a loss specifically excluded from coverage in his insurance policy. Defendant acknowledged being informed his claim was denied because "the cracks in the basement floor were the result of settling."

¶ 13 In 1998, defendant placed the residential property for sale, and plaintiffs expressed interest in its purchase. Defendant completed a disclosure report. In the disclosure report, defendant answered "no" to question No. 8, which asked if he was "aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool)." Defendant answered "no" to question No. 6, which asked if he was "aware of material defects in the walls or floors." Defendant

answered “yes” to question No. 4, which states, “I am aware of material defects in the basement or foundation (including cracks and bulges).” In the space provided to explain his affirmative answer, defendant wrote, “no damages from water in basement from crack.” Defendant did not answer question Nos. 17 through 22. Question No. 17 asked if defendant was “aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.”

¶ 14 Plaintiffs received the disclosure report. Rhonda visited the property twice, and Richard visited the property once. Plaintiffs testified the water to the residence was turned off during their visits. Defendant testified he did not turn off the water. Plaintiffs did not obtain a home inspection.

¶ 15 In September 1998, plaintiffs purchased the residential property from defendant for \$85,000. Shortly after moving into the residence, plaintiffs began noticing issues with the plumbing and foundation. Richard also became unemployed and then remained unemployed for approximately ten years. Richard testified he was unable to make any significant repairs to the property due to his financial situation.

¶ 16 With respect to the plumbing issues, Rhonda reported observing water pouring out of the ceiling tiles and into the basement after the upstairs bathroom was used on the night they moved into the residence. She also observed the basement shower leaked onto the carpet and nearby wall after being used. Rhonda contacted defendant by telephone and informed him of the plumbing issues. Rhonda testified defendant indicated he was unaware of any issues with the upstairs bathroom but he had a means to fix the issue in the basement bathroom. According to Rhonda, defendant told her to “go through the ceiling tile and take an extended socket and turn

some kind of piping up there in order to tighten it up for the showers.” Defendant acknowledged speaking with Rhonda concerning a reported leak in the basement shower. Defendant initially testified he told Rhonda she had to simply turn the shower head towards the shower wall when in use. Defendant later testified he told Rhonda the shower likely need a new washer, which would require a socket to complete the change. Defendant asserted he never told Rhonda she had to remove overhead panels and reach behind the shower to complete the repair.

¶ 17 Plaintiffs reported later experiencing additional issues with the property’s plumbing, including a foul odor emanating from the furnace, the upstairs toilet leaking, and corrosion of a faucet in the upstairs bathroom. Rhonda contacted a plumber and the Illinois Department of Public Health. The plumber visited the residence and fixed various plumbing issues. In February 1999, Robert Schafer, a plumbing inspector with the Illinois Department of Public Health, conducted a plumbing inspection and prepared a written report. The inspection resulted in a finding of 20 plumbing violations.

¶ 18 In 2015, Phillip McDonald, a licensed plumbing contractor, plumber, and certified plumbing inspector, reviewed Schafer’s 1999 plumbing inspection report and then visited the property. While visiting the property, McDonald observed most but not all of the plumbing violations outlined by Schafer. McDonald recommended all plumbing violations detailed in Schafer’s 1999 report be corrected. He prepared a single-expense estimate for all repairs at a cost of \$22,080.

¶ 19 After moving into the residence, plaintiffs also reported observing issues with the foundation. Rhonda reported observing cracks in the basement, which allowed water to enter into the residence after a rainfall. Rhonda also observed cracks inside and outside the garage. Richard

reported observing a crack on the brick wall outside the garage. Defendant testified he was unaware of cracks in the basement walls, with the exception of the one he disclosed on the disclosure report. Defendant also testified he was unaware of any cracks in the exterior bricks at the time of the sale but “[t]here might have been some around the [garage] door.”

¶ 20 After observing the cracks, plaintiffs contacted their insurance company and made a mine-subsidence claim. In spring 2000, Allen Costello, a geologist with the Illinois Mine Subsidence Insurance Fund, commenced an investigation into plaintiffs’ claim. A field specialist assisting Costello prepared a damage report. In the damage report, the field specialist noted (1) “[m]ost of the damage viewed during my investigation \*\*\* is also listed in [Meredith’s 1991 report];” (2) “[t]he photos of the cracks back then \*\*\* look the same today;” (3) “[t]he photo of the front porch dropping in 1991 looks about the same today;” and (4) “[t]here may be some new damage to the north brick wall, but that looks about all.” In fall 2000, Costello completed his investigation and prepared a causation report. Costello concluded the damages to the property were not due to mine subsidence but rather “a result of the indigenous soil limitations in concert with the construction practices employed.” The report also noted the “damages, if not properly repaired, would only worsen.” Costello testified he could not opine as to when the damage occurred or whether the damages amounted to a material defect.

¶ 21 In August 2010, Tony Schult, a senior project estimator with Helitech Foundation Repair and Waterproofing, visited the property to prepare a repair estimate. Schult testified Helitech Foundation Repair and Waterproofing “specialize[d] in \*\*\* foundation repair, waterproofing from the standpoint of settlement.” Schult determined the front right wall of the property had “horizontal movement,” which required the installation of five helical tiebacks at a

cost of \$7533. Schult determined the property had “vertical (settlement) movement,” which required the installation of 13 standard helical piers at a cost of \$26,867. Schulz determined nine cracks in the basement wall, which totaled approximately 68 linear feet, required epoxy/urethane injections and three of those cracks required additional carbon fiber filler at a total cost of \$4940. Schult determined the property allowed water into the basement, which required a drainage system be installed around its perimeter at a cost of \$9865. Schult testified “settlement” was a “progressive” problem. That is, the damages associated with settlement would continue to worsen if they were not corrected. Schult testified he was unable to testify as to either the condition of the property in 1998 or what the cost to repair would have been at that time.

¶ 22 C. The Parties’ Written Memorandums

¶ 23 Following the bench trial, the parties submitted written memorandums. Plaintiffs argued defendant violated section 20 of the Act (765 ILCS 77/20 (West 1998) (“[a] seller of residential real property shall complete all applicable items in the [disclosure report]”)) by failing to answer question Nos. 17 through 22 of the disclosure report, which made him “responsible for all material defects in the property,” including those defects in the property’s plumbing. Plaintiffs also argued defendant violated the Act by failing to disclose his knowledge of all material defects in the property’s plumbing and foundation. Plaintiffs requested damages in the amount of the repair estimates, costs of suit, and reasonable attorneys fees.

¶ 24 In response, defendant acknowledged his failure to complete question Nos. 17 through 22 of the disclosure report was a violation of the Act but argued he should not be held liable for that violation because plaintiffs failed to produce evidence showing he was aware of a material defect in the property relating to those questions. In so arguing, defendant asserted the

evidence suggesting he had knowledge of defects caused by settlement was insufficient to establish he had knowledge of *material* defects caused by settlement. Defendant further argued plaintiffs did not establish he had knowledge of material defects in the property's plumbing and foundation. Defendant addressed plaintiffs' request for damages only as it related to the alleged plumbing defects, arguing, to the extent his knowledge of the defect in the basement shower could be considered material, plaintiffs failed to prove damages as McDonald's estimate was not itemized.

¶ 25 D. Memorandum of Opinion and Order

¶ 26 In April 2016, the trial court issued a memorandum of opinion and order. With respect to the alleged plumbing defects, the court found the evidence demonstrated defendant knew of a defect in the basement shower when he completed the disclosure report, and that defect amounted to "a leaky basement shower that could be fixed by changing a washer in the handle of the shower faucet." The court concluded the defect was "not a 'material' defect that would have a substantial adverse effect on the value of the property." As to the evidence of additional defects in the plumbing that could be considered material, the court found plaintiffs failed to show defendant had knowledge of those defects when he completed the disclosure report. The court further found, even if a violation occurred, plaintiffs failed to sufficiently prove the extent of damages in 1998 or a reasonable basis for it to assess damages because (1) McDonald's estimate was not itemized and (2) no evidence showed the cost of plumbing repairs in 1998 or any time period close to 1998.

¶ 27 With respect to the alleged "settlement defects," the trial court found defendant violated section 20 of the Act (765 ILCS 77/20 (West 1998)) by not answering question No. 17

and failing to adequately answer question No. 4 of the disclosure report. In so finding, the court rejected defendant's argument suggesting plaintiffs were required "to prove that the settlement defects were 'material,' " finding "that whether the defect was material or not is irrelevant." The court found plaintiffs "showed that a settlement defect existed [at the time defendant completed the disclosure report][,] and that [d]efendant was aware of it." After finding a violation occurred, the court turned to the issue of damages. The court noted Schult testified he did not know the condition of the property in 1998 or what the cost to repair it would be at that time. Based on this evidence, the court found it was unable to "assess the extent of damages and an appropriate amount to repair those damages on or about [the date defendant completed the disclosure report]." The court held plaintiffs "failed to meet their burden of proving what the actual damages were on or around [the date defendant completed the disclosure report] and a reasonable basis for [it] to calculate what the dollar amount of those damages would have been on or around [that time]."

¶ 28 The trial court concluded its written order as follows:

"This [c]ourt[] believes [p]laintiffs do currently have major issues with their home in Gillespie, Illinois. They will have to spend considerate sums to fix those problems. This [c]ourt also understands the reasons [p]laintiffs presented for taking so long to bring this case to trial. None of this changes the burden of proof required by Illinois Law. Plaintiffs failed to meet their burden of proof at trial and [j]udgment is entered in favor of [d]efendant. Parties are to pay their own costs and fees."

¶ 29

#### E. Posttrial Motion

¶ 30

In May 2016, plaintiffs filed a posttrial motion. As to the trial court's denial of damages for the injuries caused by settlement, plaintiffs argued the court erroneously concluded they had to show the extent of the injuries in 1998 and what the cost to repair would be at that time. In so arguing, plaintiffs acknowledged they had an affirmative duty to mitigate their damages but maintained (1) defendant failed to raise the failure to mitigate damages at trial and (2) the evidence showed they were financially unable to repair the residence at the time of purchase or any time thereafter. Plaintiffs suggested the court's rationale for denying recovery effectively found they failed to mitigate damages by not having the property repaired earlier. Plaintiffs further maintained they presented sufficient evidence to show the extent and continuing nature of the injuries sustained by settlement and a reasonable cost to repair the property. As to the court's findings concerning the plumbing defects, plaintiffs argued defendant was subject to liability both because he was strictly liable for any material defects in the property due to his failure to complete the disclosure report and because the evidence showed he failed to disclose his knowledge of material defects in the plumbing. Plaintiffs also maintained they sufficiently established damages.

¶ 31

In response, defendant argued plaintiffs failed to establish he was aware of material defects in the property or resulting damages. With respect to settlement damages, defendant asserted even though "the [trial] court properly found \*\*\* that the failure to answer question [No.] 17 was a technical violation of the Act," plaintiffs were not entitled to relief because they failed to "prove the condition of the property at the time of the transfer in 1998," which "[a]ffects the issue of damages for which [he] would be responsible." Defendant

suggested plaintiffs’ request for damages was denied not because they failed to mitigate damages but rather due to the “lack of evidence to determine the actual damages that would have been the basis of [his] knowledge of undisclosed defects in 1998.”

¶ 32 F. Decision and Order on Plaintiffs’ Posttrial Motion

¶ 33 Following a February 2017 hearing, the trial court denied plaintiffs’ posttrial motion. In part, the court rejected plaintiffs’ argument suggesting defendant’s failure to complete the disclosure report subjected him to liability for every material defect in the property, concluding it would defeat the purpose of the Act by imposing liability for material defects properly disclosed. As to its prior findings concerning settlement damages, the court indicated it recognized plaintiffs did not previously have the money for repairs. The court stated it denied relief not because plaintiffs failed to mitigate damages but rather because they failed to show (1) the condition of the property in 1998 or a reasonable time thereafter and (2) a reasonable basis to estimate the cost to repair in 1998 or a reasonable time thereafter. The court expressed concern with the notion of someone filing suit and then waiting an extended period of time to seek relief for the purpose of allowing damages to significantly increase.

¶ 34 This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 On appeal, plaintiffs argue we should reverse the trial court’s judgment to the extent it refused to (1) impose liability and award damages for the plumbing defects in the property and (2) award damages for the injuries caused by settlement. Defendant disagrees.

¶ 37 A. The Act

¶ 38 The Act requires a seller of residential real property to provide a prospective

buyer with a disclosure report. 765 ILCS 77/25 (West 1998). The disclosure report is intended to afford the prospective buyer with information about certain conditions and material defects in the property to which the seller has actual knowledge. 765 ILCS 77/35 (West 1998). A “material defect” is defined as “a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants of the residential real property unless the seller reasonably believes that the condition has been corrected.” *Id.*

¶ 39 A form disclosure report is prescribed by statute. 765 ILCS 77/35 (West 1998). At the time it was completed in this case, the form disclosure report listed 22 specific conditions or material defects and asked the seller to certify whether he or she was aware of the presence of those conditions or defects. *Id.*

¶ 40 Section 20 of the Act (765 ILCS 77/20 (West 1998)) mandates the “seller of residential real property shall complete all applicable items in the [disclosure report].” A seller violates the Act where he or she (1) “knowingly \*\*\* fails to perform any duty prescribed by any provision of this Act,” or (2) “discloses any information on the [disclosure report] that he [or she] knows to be false.” 765 ILCS 77/55 (West 1998). Where a violation is established after the conveyance of the residential property, the seller “shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.” *Id.*

¶ 41 B. Plumbing Defects

¶ 42 Plaintiffs assert we should reverse the trial court’s judgment to the extent it failed to impose liability and award damages for the plumbing defects in the property. Specifically,

plaintiffs contend defendant is liable because he failed to (1) disclose his knowledge of material defects in the property's plumbing and (2) complete the disclosure report.

¶ 43 Plaintiffs argue defendant is subject to liability because he failed to disclose his knowledge of material defects in the property's plumbing. That is, plaintiffs assert the trial court's determination to the contrary is against the manifest weight of the evidence. In support, plaintiffs point to Rhonda's account of the leak in the basement shower and its necessary repairs as well as their testimony indicating the water was turned off when they viewed the property prior to closing. Plaintiffs also highlight McDonald's testimony indicating he found several plumbing violations when visiting the property and suggest those violations are necessarily material defects because they would be required to disclose them if they sold the property in the future without first correcting the violations.

¶ 44 Whether a seller knew of a material defect at the time he completed the disclosure report is a question of fact to be determined by the trial court. *Curtis Investment Firm, Ltd. Partnership v. Schuch*, 321 Ill. App. 3d 197, 201, 746 N.E.2d 1233, 1237 (2001)). The trial court's determination will not be reversed on appeal unless it is against the manifest weight of the evidence. *Id.* "A judgment is against the manifest weight of the evidence where the opposite conclusion is apparent or where findings appear to be arbitrary, unreasonable, or not based upon the evidence." *Butler v. Harris*, 2014 IL App (5th) 130163, ¶ 36, 13 N.E.3d 380.

¶ 45 The trial court found defendant was aware of a defect in the basement shower, and that defect amounted to "a leaky basement shower that could be fixed by changing a washer in the handle of the shower faucet." The court determined defendant was not required to disclose the defect because it was "not a 'material' defect that would have a substantial adverse effect on

the value of the property.” While plaintiffs point to Rhonda’s account of the leak and its necessary repairs as well as their testimony indicating the water was turned off when they viewed the property prior to closing, they fail to recognize the court also had before it defendant’s conflicting testimony describing the leak as a simple fix and denying plaintiffs’ claims the water was turned off when they viewed the property. The court found defendant’s testimony credible, and we decline to disturb that finding. The court also found, to the extent the additional defects in the plumbing could be considered material, plaintiffs failed to show defendant had knowledge of those defects when he completed the disclosure report. Plaintiffs do not point to any evidence on appeal to suggest defendant was aware of these additional defects in the property’s plumbing. Plaintiffs have failed to show the court’s determination is against the manifest weight of the evidence.

¶ 46 As an alternative basis to establish liability, plaintiffs briefly argue defendant’s failure to answer all questions in the disclosure report subjects him to mandatory liability for all material defects in the property. In support, plaintiffs rely on a portion of our prior decision in this case, wherein we noted “the plain language of the Act subjects sellers who fail to comply with a duty under the Act to mandatory liability.” *Messerly*, 2014 IL App (4th) 130397, ¶ 56. Plaintiffs fail to recognize, however, our prior comment was in response to defendant’s argument suggesting plaintiffs were required to show a “causal connection” between the damages they allegedly suffered from settlement and him leaving question No. 17 blank to establish liability under the Act. *Id.* We did not hold defendant’s failure to answer question Nos. 17 through 22 subjected him to mandatory liability for material defects unrelated to those questions. Plaintiffs have failed to otherwise provide any authority or persuasive argument suggesting the legislature

intended such a result.

¶ 47 Because plaintiffs have failed to persuade the trial court erred in concluding defendant was not liable for any defects in the property's plumbing, we need not address the court's findings concerning damages on this issue.

¶ 48 C. Sufficiency of Proof of Settlement Damages

¶ 49 Plaintiffs assert we should reverse the trial court's judgment to the extent it failed to award damages for the injuries caused by settlement. Specifically, plaintiffs contend the court incorrectly concluded damages were to be assessed as they existed in 1998, which in effect found them accountable for failing to mitigate damages. Plaintiffs further maintain they presented sufficient evidence to show the extent and continuing nature of their injuries and a reasonable cost to repair the property.

¶ 50 As an initial matter, defendant asserts because this court may affirm the trial court's judgment on any basis supported by the record (see *Grady v. Sikorski*, 349 Ill. App. 3d 774, 779, 812 N.E.2d 457, 461 (2004)), we should affirm the trial court's judgment because plaintiffs failed to establish he was aware of a material defect caused by settlement. Whether plaintiffs were required to show defendant was aware of a material defect caused by settlement is a question of law, subject to *de novo* review. See *Kalkman v. Nedved*, 2013 IL App (3d) 120800, ¶ 11, 991 N.E.2d 889.

¶ 51 To resolve defendant's argument, we turn to the Act. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Curtis Investment Firm, Ltd. Partnership*, 321 Ill. App. 3d at 199. "[T]he language used by the legislature is the best indication of legislative intent." *Hogan v. Adams*, 333 Ill. App. 3d 141,

146, 775 N.E.2d 217, 221 (2002). Where the statutory language is clear, it will be given effect without resorting to other aids of construction. *Curtis Investment Firm, Ltd. Partnership*, 321 Ill. App. 3d at 199.

¶ 52 As previously indicated, section 20 of the Act (765 ILCS 77/20 (West 1998)) requires the seller of residential real property to “complete all applicable items” in the disclosure report. Section 55 of the Act (765 ILCS 77/55 (West 1998)) provides, in part, “[a] person who knowingly violates or fails to perform any duty prescribed by any provision of this Act \*\*\* shall be liable in the amount of actual damages and court costs, and the court may award reasonable attorney fees incurred by the prevailing party.”

¶ 53 Defendant had a statutory duty to complete all applicable items in the disclosure report. Defendant failed to answer question No. 17 of the disclosure report, which asked if he was “aware of mine subsidence, underground pits, settlement, sliding, upheaval, or other earth stability defects on the premises.” Defendant’s failure to perform his duty amounted to a violation of the Act. Under these circumstances, plaintiffs were not required to show defendant was aware of a material defect caused by settlement. Defendant’s argument does not provide an alternative basis to affirm the trial court’s judgment.

¶ 54 After establishing a violation of the Act, plaintiffs were entitled to “actual damages.” *Id.* To establish actual damages, plaintiffs were required to present evidence showing (1) injuries sustained by defendant’s violation and (2) a reasonable basis to award damages. See generally *Northwest Commerce Bank v. Continental Data Forms, Inc.*, 233 Ill. App. 3d 124, 129-130, 598 N.E.2d 446, 450 (1992) (“[T]he plaintiff must prove damages to a reasonable degree of certainty and evidence cannot be remote, speculative, or uncertain.”). A trial court’s findings

concerning the assessment of damages will not be reversed on appeal unless they are manifestly erroneous. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543, 662 N.E.2d 1248, 1256 (1996).

¶ 55 The trial court, in determining a violation occurred, made a factual finding “that a settlement defect existed [at the time defendant completed the disclosure report] and that [d]efendant was aware of it.” That is, the court found plaintiffs were injured by defendant’s violation of the Act: the failure to respond to question No. 17 of the disclosure report. Although the evidence showed a violation of the Act and a resulting injury, the trial court determined it was unable to award damages because plaintiffs failed to establish (1) the extent of the injuries as they existed around 1998 or (2) a reasonable basis to estimate the cost to repair at that time.

¶ 56 In 1991, a consulting adjuster with the Illinois Mine Subsidence Insurance Fund prepared a written report detailing the injuries to the property. Based on that report, defendant’s insurance company denied defendant’s claim for mine subsidence concluding the injuries occurred from “settling.” After moving into the residence, plaintiffs observed issues with the property’s foundation and then made a claim with their insurance company. A damage report prepared in the spring of 2000 noted the injuries to the property largely mirrored the injuries reported in 1991. Contrary to the trial court’s finding, we find the undisputed evidence established the extent of the injuries as they existed around 1998.

¶ 57 The undisputed evidence further established the injuries were such that they would continue to worsen if not property repaired. In fact, defendant conceded at oral argument the injuries had increased over time. Plaintiffs presented testimony indicating they were financially unable to make repairs until approximately 2010. Defendant acknowledged he did not allege damages should be reduced due to plaintiffs’ failure to mitigate damages. See *Holland v.*

*Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 213, 992 N.E.2d 43 (“The failure to mitigate damages is an affirmative defense that must be pleaded and proved by the defendant.”). At the hearing on the posttrial motion, the trial court accepted plaintiffs’ assertion they were not financially capable to complete the repairs prior to 2010. Given the nature of the injuries and the fact plaintiffs could not mitigate damages prior to 2010, we find the cost to repair around 1998 is irrelevant.

¶ 58 Plaintiffs presented evidence of the extent of the injuries and costs to repair in 2010. Defendant did not (1) dispute the cost of restoration was the appropriate measure of damages or (2) present conflicting testimony or evidence to call into doubt plaintiffs’ evidence. Given its prior findings, the trial court did reach the issue of whether the 2010 repair estimates directly related to the injuries caused by settlement. We therefore must remand for the court to make a determination on that issue based on the evidence of record. If the court determines a portion of the repair estimates directly relate to the injuries caused by settlement, the court should enter an order awarding damages in that amount, plus costs, and then exercise its discretion in determining whether to award reasonable attorney fees (765 ILCS 77/55 (West 1998)).

¶ 59 As a final matter, the trial court expressed concern with the notion of someone filing suit and then waiting an extended period of time to seek relief for the purpose of allowing damages to significantly increase. That concern, however, should generally be alleviated by an injured party’s duty to mitigate damages. See *Holland*, 2013 IL App (5th) 110560, ¶ 213 (“The duty to mitigate damages requires an injured party to exercise reasonable diligence and ordinary care in trying to minimize his damages.”). The record in this case does not present any indication

plaintiffs caused delay for the purpose of increasing damages. In fact, the court stated it understood “the reasons [p]laintiffs presented for taking so long to bring this case to trial.” We note, however, the length of time would be an appropriate consideration if the court determines the circumstances are such that attorney fees may be warranted.

¶ 60

### III. CONCLUSION

¶ 61 We affirm the portion of the trial court’s judgment finding defendant was not liable for any damages relating to the property’s plumbing but reverse the portion finding plaintiffs failed to prove settlement damages. We remand for the trial court to determine, based on the evidence of record, whether the 2010 repair estimates directly relate to the injuries caused by settlement and then enter appropriate orders consistent with that determination.

¶ 62

Affirmed in part and reversed in part; cause remanded.