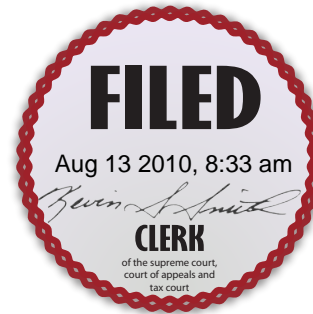


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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BRUCE SWIFT,

Appellant/Defendant,

vs.

ROBERT J. JEKA and ALEXANDRA JEKA,

Appellees/Plaintiffs.

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No. 64A03-1002-PL-52

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APPEAL FROM THE PORTER SUPERIOR COURT  
The Honorable Roger V. Bradford, Judge  
Cause No. 64D01-0307-PL-6230

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**August 13, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant/Defendant Bruce Swift appeals from the trial court's judgment in favor of Appellees/Plaintiffs Robert J. and Alexandra Jeka. Swift contends that the Jekas produced insufficient evidence to establish that he committed fraud or constructive fraud, that the trial court erred in denying his motion to dismiss, and that the trial court erred in awarding the Jekas pretrial interest. We reverse.

### **FACTS AND PROCEDURAL HISTORY**

On April 7, 1995, Swift contacted Mark McClain of Soil Horizons, Inc., requesting a soil investigation at an unimproved lot he owned in the Lakewood Hills, Unit Two development in Porter County ("Lot 51"). The purpose of the testing was to evaluate Lot 51 for the suitability of a septic system. Lot 51 is bisected by a ditch, and McClain determined that the area south and east of the ditch was unsuitable for a septic system due to the presence of fill material. McClain also opined that the area north and west of the ditch appeared to be suitable for the installation of a septic system. McClain faxed a copy of his report to the Porter County Health Department on May 1, 1995. On May 2, 1995, Swift faxed McClain, inquiring whether a conventional or mound septic

system<sup>1</sup> could be installed on Lot 51, and McClain's notes indicate that his reply was "probably [a conventional system] check w/ Health Dept. though." Defendant's Ex. E.

On September 21, 1995, Porter County completed a four-page field investigation report, which noted on page one that a permit had previously been denied to build a septic system on Lot 51 "due to Extensive filling [and] due to the Complexity of the Lot Configuration." Appellee's App. p. 8. On October 25, 1995, Swift called McClain and told him that two installers had told Swift that a septic system could not be installed on Lot 51.

In April of 1996, the Jekas drove by Lot 51 and contacted the realtor listed on the "for sale" sign. The Jekas met with Century 21 Realtor Tammy Garcia at Lot 51 on two occasions, and Garcia showed them various documents at the second meeting. Among the documents Garcia showed the Jekas were the results of McClain's soil test and page four of the field investigation report. No one ever told the Jekas that Lot 51 had been denied a septic system permit the year before, and the Jekas were told, presumably by Garcia, that a conventional septic system could be installed on Lot 51. After the second meeting, the Jekas made an offer to buy Lot 51 and accepted Swift's counteroffer of

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<sup>1</sup> A conventional septic system consists "of a buried concrete septic tank, usually 1000 to 1500 gallon capacity, that holds the solid waste from a home's plumbing waste drains, and a septic drain field, that distributes the waste water to the ground where it disperses through the soil or evaporates." Webster's Online Dictionary, <http://www.websters-dictionary-online.org/definitions/Septic+system?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=Septic+system&sa=Search#906> (last visited July 26, 2010).

In a mound system, the effluent discharges into an artificial mound instead of the existing soil. United States Environmental Protection Agency, Office of Water, Decentralized Systems Technology Fact Sheet, Mound Systems, <http://www.epa.gov/owmitnet/mtb/mound.pdf> (last visited July 26, 2010). "Some soil types are unsuitable for conventional septic tank soil absorption systems. As a result, alternative systems such as the mound system can be used to overcome certain soil and site conditions." *Id.* at 1.

\$26,500.00 on April 26, 1996. Robert would not have purchased Lot 51 if he had known of the prior permit denial.

On May 21, 1996, Swift faxed three pages to the Jeka's bank, Centier Bank. On the cover sheet, Swift described the contents of the fax as follows: "pg. 1 – Porter Co. will give permit subject to engineering survey with topo and drawings of home. pg. 2 – G's Septic Construction service letter after meeting with Porter Co. Health Dept. has determined that a normal septic (not mound) can be placed on property." Joint Ex. 1 p. 7.

Page one of the fax was a proposal from G. Construction, dated January 29, 1996, which read, in part, as follows:

As per three trips to the Porter County Health Department talking with Jackie Reed preliminary septic approval for Lot 51 in Lakewood Hills was granted. With location of house and septic on northern portion of lot no pump or mound system will be required.

An elevation chart of the property with the septic system on it will be required to get a septic permit. This must be done by a licensed engineer.

They suggested Emil Beeg[.]

Emil said approximate cost would be \$700.00.

Joint Ex. 1 p. 8. Page two of the fax was the same fourth page of the field investigation report that Garcia had shown the Jekas, with no indication that anyone had ever been denied a permit to install a septic system on Lot 51. Centier Bank approved a loan to the Jekas in the amount of \$19,800.00 at 8.837 percent annual interest, and, on June 12, 1996, the Jekas and Swift closed on Lot 51.

In the spring of 2002, the Jekas contacted Creative Home Resources, whose president was Chuck White, to build a house on Lot 51. White informed the Jekas that a topographical map of Lot 51 would have to be prepared before a final permit to build a

septic system could be issued, and, to that end, the Jekas hired Emil Beeg Surveying on April 15, 2002. Emil Beeg surveyor Eric Banschbach determined that Lot 51 could support neither a conventional, mound, nor alternative septic system for the three-bedroom house the Jekas had planned to build. In a field investigation report dated April 16 and 17, 2002, the Porter County Health Department concluded that

a septic and well permit will not be issued on this property until a scaled site plan (showing the location of the house, an appropriate sized septic system, ground contours/topo lines and well located at least 50' from the septic field) is submitted to, reviewed, and approved by the Porter County Health Department.

Joint Ex. 2 p. 3.

The Jekas investigated alternatives, but were told that neither a conventional nor mound septic system could be installed on Lot 51. The Porter County Health Department told the Jekas that they could install an alternative septic system so long as there was sufficient land set aside for a conventional or mound system, which was not possible, in case the alternative system failed. At around this time, the Jekas became aware of the field investigation report indicating that Lot 51 had previously been denied a permit to install a septic system.

On July 18, 2003, the Jekas brought suit against Swift, alleging that they had relied to their detriment on his “failure to disclose the facts and misrepresentation” and seeking rescission of the sale of Lot 51. Appellee’s App. p. 2. On May 23, 2007, a bench trial was conducted. After the Jekas had presented their case, the trial court denied Swift’s motion to dismiss on the basis that the Jekas’ lawsuit was barred by the applicable statute of limitations. On November 23, 2009, the trial court ruled in favor of

the Jekas, concluding that Swift had committed fraud and constructive fraud. The trial court found that the Jekas suffered damages of \$900.00 they paid for the Emil Beeg survey, \$150.00 for ten years of homeowners' dues, \$8480.00 for four years of prejudgment interest, \$7500.00 in attorney's fees, the purchase price of \$26,500.00, \$1964.54 in real estate taxes through the end of trial, and real estate taxes from the date of trial to the date of judgment, for a total of \$44,814.54 plus taxes paid since trial.

## **DISCUSSION AND DECISION**

### ***Standard of Review***

Where, as apparently happened here, the trial court *sua sponte* enters specific findings of fact and conclusions, we review its findings and conclusions to determine whether the evidence supports the findings, and whether the findings support the judgment. *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind. Ct. App. 2005). We will set aside the trial court's findings and conclusions only if they are clearly erroneous. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake was made. *Id.* We neither reweigh the evidence nor assess the witnesses' credibility, and consider only the evidence most favorable to the judgment. *Id.* Further, "findings made *sua sponte* control only ... the issues they cover and a general judgment will control as to the issues upon which there are no findings. A general judgment entered with findings will be affirmed if it can be sustained on any legal theory supported by the evidence." *Id.*

### **Whether the Trial Court's Conclusions that Swift Committed Fraud and Constructive Fraud are Supported by Sufficient Evidence**

Swift contends that the trial court's conclusion that he committed actual fraud upon the Jekas is not supported by sufficient evidence.

The elements of actual fraud are: (1) a material representation of a past or existing fact by the party to be charged that; (2) was false; (3) was made with knowledge or reckless ignorance of its falsity; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party's injury. *Youngblood v. Jefferson County Div. of Family & Children*, 838 N.E.2d 1164, 1169-70 (Ind. Ct. App. 2005). Actual fraud may not be based upon representations of future conduct, broken promises, or representations of existing intent that are not executed. *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 155 (Ind. Ct. App. 2005). Proximate cause exists when there is some direct relation between the injury asserted and the injurious conduct alleged. *Holmes v. SIPC*, 503 U.S. 258, 268 (1992).

*Ruse v. Bleeke*, 914 N.E.2d 1, 10-11 (Ind. Ct. App. 2009).

Swift also contends that there is insufficient evidence to permit a conclusion that he committed constructive fraud.

Constructive fraud arises by operation of law when there is a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the actual intent to defraud. *Paramo v. Edwards* (1990), Ind., 563 N.E.2d 595, 598. The elements of constructive fraud are 1) a duty existing by virtue of the relationship between the parties, 2) representations or omissions made in violation of that duty, 3) reliance thereon by the complaining party, 4) injury to the complaining party as a proximate result thereof, and 5) the gaining of an advantage by the party to be charged at the expense of the complaining party. *Nestor v. Kapetanovic* (1991), Ind. App., 573 N.E.2d 457. In constructive fraud, the law infers fraud from the relationship of the parties and the circumstances which surround them. *Comfax Corp. v. North American Van Lines* (1992), Ind. App., 587 N.E.2d 118.

*Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind. Ct. App. 1994), *trans. denied*.

"In order to establish either tort, the complaining party must have had a reasonable right to rely upon the statements made or omitted." *Westfield Ins. Co. v. Yaste, Zent &*

*Rye Agency*, 806 N.E.2d 25, 31 (Ind. Ct. App. 2004), *trans. denied*. Swift contends, *inter alia*, that the evidence does not support a finding that the Jekas reasonably relied on any statements or omissions made by himself or Garcia. While we agree that the record contains some evidence that the Jekas relied on Garcia's representations regarding Lot 51, any such reliance was, as a matter of law, unreasonable. It has long been the law in Indiana that, subject to some exceptions that do not apply here, "the purchaser has no right to rely upon the representations of the vendor as to the quality of the property, where he has a reasonable opportunity of examining the property and judging for himself as to its qualities." *Cagney v. Cuson*, 77 Ind. 494, 497 (1881) (recognized as still good law by *Dickerson v. Strand*, 904 N.E.2d 711, 715 (Ind. Ct. App. 2009)). The record contains no evidence, and the Jekas do not argue, that they were denied a reasonable opportunity to examine Lot 51 for themselves, even though they chose not to avail themselves of that opportunity. Because we are bound by *Cagney* to reverse the trial court's judgment that Swift committed fraud and constructive fraud, we need not address Swift's arguments that the action was barred by the statute of limitations and that the trial court erroneously awarded the Jekas pretrial interest.

We reverse the judgment of the trial court.

DARDEN, J., and BROWN, J., concur.