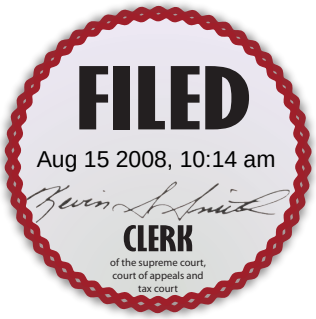

ATTORNEYS FOR APPELLANTS:

DERICK W. STEELE
MARK A. MCCANN
McCann Peelle
Kokomo, Indiana

ATTORNEY FOR APPELLEES:

DAVID A. COX
Bayliff, Harrigan, Cord, Maugans & Cox, P.C.
Kokomo, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RONALD R. MOTE and CARRIE J. MOTE, Appellants-Defendants, vs. JESS A. WILKINSON and TRACY E. WILKINSON, Appellees-Plaintiffs.	)))))))))))	No. 34A05-0804-CV-229

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0505-PL-488

August 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Ronald R. Mote and Carrie J. Mote (the "Motes") appeal the trial court's judgment in favor of Jess A. Wilkinson and Tracy E. Wilkinson (the "Wilkinsons") on the Wilkinsons' complaint alleging fraud in the sale of the Motes' home. The Motes raise several issues, of which we find the following dispositive: whether the trial court erred when it found that the Motes committed fraud by making a material misrepresentation as to the condition of the septic system, which was made with knowledge or reckless ignorance of its falsity.

We vacate and remand.

FACTS AND PROCEDURAL HISTORY

The Motes owned a home located at 1705 Pleasant Drive in Kokomo, Indiana, in which they resided from 1992 until 2003. For some time prior to and after February 2002, the Motes experienced trouble flushing the toilets and using the washing machine in the home. In February 2002, the Motes contacted Dick Blazer, a licensed installer of septic systems, for an opinion regarding the condition of their septic system. Blazer went to the property and inspected the backyard area where the septic system was located. While there, Blazer observed standing water in the backyard, and after using a probe, he determined that most of the septic field was full of water. According to State Board of Health standards, a septic system is in failure if any one of the following is present: (1) water is backing up into the house; (2) water is coming to the ground surface level; or (3) the underground water table is contaminated. *Tr*. at 89. Blazer concluded that the first two criteria were present at the Motes' home, which indicated a failed septic system.

Blazer called the Motes and informed them of this and that the only way to fix the problem was to install a new septic system. The Motes authorized Blazer to retain a soil

scientist to take soil samples and determine what would be necessary to solve the problems with the septic system. The soil scientist took four soil borings from different areas and issued a report, which concluded that the farm field next to the Motes' house was the only suitable location for installing a new septic system. Blazer told the Motes of the results of the report and gave them an estimate for installation of a new system. They told Blazer they would think about it and contact him at a later date.

Some time after Blazer's inspection of the property, the Motes had the septic system pumped out by a sewer and excavating company. The Motes also contacted Roto-Rooter, and at their suggestion, Mr. Mote dug in his backyard to locate the junction box to determine if tree roots were causing his drains to work slowly. Mr. Mote discovered that the tank was plugged, and he was able to unclog it. The Motes eventually contacted Blazer and told him that no further services were required because Mr. Mote had found a plug in the system, which was removed and solved the problems they were having. *Tr*. at 98.

During late spring or early summer of 2002, the Motes called David Cole, a licensed septic system installer and excavator, to inquire about having a perimeter drain installed in the backyard around the septic leach field. When Cole came to look at the property, Mr. Mote informed him that the toilets flushed slowly after heavy rains, but that when it was dry, the septic system worked fine. He did not tell Cole that Blazer had advised that the septic system was in failure and needed to be replaced. The day that Cole visited the property, it was warm and dry, and he did not observe any standing water in the yard. Cole did not do any probing of the ground or any other inspection of the septic system and did not go inside the residence. Cole was not asked to give any opinion with regard to the septic system, and

based upon his observations, he concluded that a perimeter drain would not benefit the property.

The Motes listed their property for sale sometime in late 2002 or early 2003. In the spring of 2003, the Wilkinsons looked at the property as prospective buyers. They walked through the home and around the property several times. On one such occasion, Mr. Wilkinson used the toilet and noticed that it flushed slowly. He inquired to Mr. Mote about this, and Mr. Mote told him that the toilets flushed slowly after a hard rain. Before making an offer to purchase the property, the Wilkinsons were given a "Seller's Residential Real Estate Sales Disclosure," which had been completed by the Motes. On this form, the Motes had noted that the "septic field/bed" was not defective. *Appellants' App*. at 23.

On May 22, 2003, the Wilkinsons made an offer to purchase the property, which included a requirement that the Motes provide a "satisfactory septic/well/water test." *Id*. at 27. Later the same day, the Motes made a counter-offer, which provided that, "[s]eller will not provide a well/septic or water test." *Id*. at 29. Prior to the closing on the property, Bruce Moss of Moss Well Drilling, Inc. performed an inspection on the well at the residence pursuant to a request by Remax Realty, which was the company used by both the Motes and the Wilkinsons. Moss reported that the well system was in adequate working order, and although his report referenced a septic inspection, he did not inspect the property's septic system.

The closing took place on June 25, 2003, and the Wilkinsons took possession of the property approximately twenty-five days after closing. Before the Wilkinsons moved into the residence, they did extensive remodeling of the kitchen. When they did move in, they

experienced trouble with the septic system. The toilets did not flush properly, and sewer water backed up in the sinks, baths, and shower when they did laundry. Because of this, the Wilkinsons had the septic tank pumped on August 31 and November 25, 2003. The problems persisted, so they contacted Gary Hudson, who was the soil scientist who took the soil samples previously on the property, to inspect the property. Hudson advised the Wilkinsons that he had previously taken the soil samples in February 2002 and that Blazer had inspected the system at that time. The Wilkinsons then contacted Blazer, who told them that the septic system was in failure at the time he inspected it in February 2002. The Wilkinsons contacted the Motes about the septic problems, and Mr. Mote told them the only problems he experienced were slow flushing toilets after a heavy rain. He did not relay any of the information that Blazer had conveyed to him regarding the failed septic system.

The Wilkinsons filed a complaint against the Motes on May 31, 2005, alleging fraud in the sale of the property. A bench trial was held on November 9, 2007, and the trial court entered findings of fact and conclusions thereon after taking the matter under advisement. The trial court found in favor of the Wilkinsons and ordered the Motes to pay $21,275.00, plus $6,095.50 in attorney fees. The Motes now appeal.

DISCUSSION AND DECISION

When a trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A), we apply the following two-tiered standard of review: (1) whether the evidence supports the findings; and (2) whether the findings support the judgment. *Fields v. Conforti*, 868 N.E.2d 507, 512 (Ind. Ct. App. 2007); *In re Guardianship of Knepper*, 856 N.E.2d 150, 153 (Ind. Ct. App. 2006), *trans. denied* (2007). We will set aside the trial

court's findings and conclusions only if they are clearly erroneous. *Fields*, 868 N.E.2d at 512; *In re Knepper*, 856 N.E.2d at 153. Findings are clearly erroneous when the record contains no facts to support them directly or by inference. *Fields*, 868 N.E.2d at 512. A judgment is clearly erroneous if the trial court's conclusions do not support the judgment. *Quillen v. Quillen*, 671 N.E.2d 98, 102 (Ind. 1996). "We give due regard to the trial court's ability to assess the credibility of witnesses." *Fields*, 868 N.E.2d at 512. We do not reweigh the evidence, and we consider the evidence most favorable to the judgment and all reasonable inferences drawn therefrom. *Id*. (citing *Yoon v. Yoon*, 711 N.E.2d 1265, 1268 (Ind. 1999)).

The Motes argue that the trial court erred in entering judgment in favor of the Wilkinsons because there was no evidence that they knew of any existing defect in the septic system at the time of closing. They contend that they had corrected any past problems with the septic system and had no knowledge of any other problems. They claim that the trial court did not make a finding that there was a known defect at the time of closing, and therefore, they did not have knowledge of any defect at that time and cannot be held liable to the Wilkinsons for any misrepresentations made.

To constitute a valid claim for fraud, a plaintiff must prove that there was a material misrepresentation of past or existing facts made with knowledge or reckless ignorance of its falsity, and the misrepresentation caused reliance to the detriment of the person relying upon it. *Fimbel v. DeClark*, 695 N.E.2d 125, 127 (Ind. Ct. App. 1998), *trans. denied*. "'[T]he failure to disclose all material facts by one on whom the law imposes a duty to disclose constitutes actionable fraud.'" *Id*. (quoting *The First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370, 1372 (Ind. Ct. App. 1998)). Generally, a seller is not bound to disclose any

material facts unless a relationship exists for which the law imposes a duty of disclosure. *Id*. A duty to disclose has been found "where the buyer makes inquiries about a condition on, the qualities of, or the characteristics of the property." *Id*. When a buyer makes such inquiries, "it becomes incumbent upon the seller to fully declare any and all problems associated with the subject of the inquiry." *Id*.

Here, in its findings and conclusions, the trial court made the following conclusion: "The court does find credible [Mr.] Mote's testimony that he reasonably believed the system's problems had been fixed because of . . . Cole's observations or [Mr.] Mote's own efforts to repair the system." *Appellants' App*. at 18. This conclusion is not consistent with many of the trial court's other conclusions or its judgment that the Motes committed fraud because based on this conclusion, if Mr. Mote reasonably believed that the septic system's problems had been fixed, any misrepresentations made by the Motes could not have been made with knowledge or reckless ignorance of their falsity. Because of this inconsistency, we vacate the trial court's judgment and remand for clarification to the trial court to either enter new findings of fact and conclusions consistent with its original judgment or to enter a new judgment based upon the original findings of fact and conclusions.

Vacated and remanded.

BAILEY, J., concurs.

FRIEDLANDER, J., concurs in result with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

RONALD R. MOTE and CARRIE J. MOTE, Appellants-Defendants, vs. JESS A. WILKINSON and TRACY E. WILKINSON Appellees - Plaintiffs.	))))))))))))	No. 34A05-0804-CV-229

FRIEDLANDER, Judge, concurring in result.

I agree with the Majority's decision to remand this matter in light of Conclusion 7, concerning Mr. Mote's belief that he had fixed the septic problem – but not without reservations. As I read it, the Majority's opinion indicates that if the questionable conclusion of law remains unchanged, then judgment in favor of the Wilkinsons is sustainable. I cannot go that far, as I believe this places too much emphasis on a single, incongruous conclusion of law.

The trial court issued fifty-eight findings of fact and fifteen conclusions of law. In the findings of fact, the trial court set out in detail the history of the Motes' problems with their septic system. In fact, reading the extensive findings and conclusions in their entirety, the sentence in question sticks out like a sore thumb because it is so inconsistent with all the rest. The Findings lay out the facts exactly as alleged by the Wilkinsons, and certainly in a manner

that supports their cause of action. In passing, I observe with interest the equivocal nature of Finding 22, i.e., "After finding the septic tank, Mr. Mote *maintains* that he removed paper blocking the line from the residence to the interior septic tank." *Appellants' Appendix* at 11 (emphasis supplied). Notably, the court did not *find* that Mote removed an obstruction. More to the point of my concern, however, I note that the general tenor of the conclusions of law is decidedly in keeping with the findings of fact being in the Wilkinsons' favor. After setting out the applicable legal standard in Conclusions 1, 2, 3, and 4, the trial court concludes the Motes were guilty of "material misrepresentation" (or some form thereof) in Conclusions 5, 6, and 8 and "failing to disclose" in Conclusion 5. *Id*. at 16-17. Swimming against this significant tide is the single, anomalous sentence in Conclusion 7 upon which remand is based.

With all of that said, I can agree with the Majority that the trial court needs to clarify how this sentence in Conclusion 7 squares with the decision in favor of the Wilkinsons – if indeed it does. If, however, upon remand, the trial court does not materially change its position in this regard, I am more reluctant than my colleagues to now state unequivocally that this single sentence will negate the rest of the Findings and Conclusions, which strongly support the trial court's judgment.