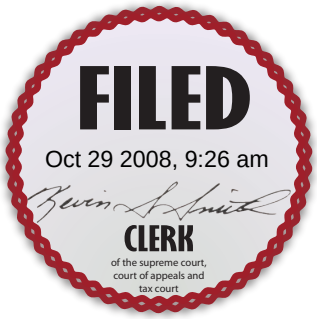

ATTORNEYS FOR APPELLANTS:

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

October 29, 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MEMORANDUM DECISION - NOT FOR PUBLICATION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. This is the second time this appeal has been before this court. We previously vacated the trial court's findings and conclusions and remanded for the trial court to enter amended findings. It has done so, and we now reach the merits of this appeal. The Motes raise several issues, of which we find the following restated issue 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.[1]

We affirm.

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 of 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

[1] Although both the Appellants and the Appellees dedicate a significant portion of the argument in their briefs to discussing whether the Motes committed fraud under IC 32-21-5-11 through their disclosure regarding the condition of the septic system made in the "Seller's Residential Real Estate Sales Disclosure," we note that any errors or omissions in the disclosures made on the form played no part in the trial court's decision and likewise play no part in our decision on this matter.

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, which was owned by a third party, 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. 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.

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 filed a notice of appeal, and briefs were submitted by both parties. Because we noted an inconsistency in the trial court's original findings and conclusions, we vacated the trial court's judgment and remanded to the trial court for clarification 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. After receiving amended findings and conclusions from the trial court consistent with the original judgment, we now reach the merits of the Motes' 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)).

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), *trans. denied*). 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*.

The trial court, in its findings and conclusions, determined that when Mr. Wilkinson inquired about the slow flushing toilets on the walk-through of the house, this created a duty upon the Motes to disclose the information they knew regarding the condition and operation of the septic system. It also concluded that the Motes materially misrepresented the condition of the septic system by failing to disclose the full extent of the failure of the septic system and that this material misrepresentation was made with knowledge or reckless ignorance of its falsity. The trial court also determined that the Motes could not rely upon Cole's observation that he did not see a failed septic system, as he did not perform any septic inspection. Further, the trial court did not find merit in Mr. Mote's testimony that he believed the system to be fixed because of Cole's observations or his own efforts to repair it.

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.

The evidence presented supported the trial court's finding that the Motes had actual knowledge of the problems with the septic system. After experiencing trouble flushing the toilets and using the washing machine in the home, the Motes contacted Blazer to inspect the system. Blazer performed an inspection, determined that the Motes' septic system was in failure, and told them that the only solution was to install a new system. The Motes did not have a new system installed prior to the sale of the property. Instead of doing so, Mr. Mote maintained that he located the junction box and removed a plug in the system. Even after doing this, the Motes still experienced the same problems with the slow flush rate of the toilets.

Further, after the inspection by Blazer, the Motes contacted Cole to come to the property to see about installing a perimeter drain. While there, Cole did not inspect the septic system, did not do any probing of the ground, or go inside of the residence. The Motes informed Cole that the toilets flushed slowly after a heavy rain, but did not inform him of Blazer's opinion regarding the failure of the septic system. From his observations, Cole did not conclude that the septic system was in failure or express any opinion as to the function of the septic system at that time and only indicated to the Motes that a perimeter drain would not benefit the property. Therefore, the Motes could not rely upon Cole's lack of a conclusion as to the failure of the system to insulate them from knowledge of such condition, as Cole did not perform any inspection. The trial court did not err in concluding that the Motes had knowledge of the condition of the septic system and that it was in failure.

The Motes also argue that they did not have a duty to disclose all of the past problems with their septic system. They contend that the inquiry by the Wilkinsons regarding the flush rate of the toilet did not trigger any obligation to disclose this information about the septic system. The Motes rely on *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370 (Ind. Ct. App. 1998), *trans. denied*, in which this court held that the seller had no duty to disclose the building's entire water history to the buyer when asked about visible interior water damage. *Id*. at 1374. When asked about the damage, the seller truthfully responded that it was caused by a broken water heater, but did not mention previous externally-generated water damage due to a heavy flood that had been repaired. *Id*. at 1373-74. This court concluded that there was no evidence that the seller's answer was inaccurate, and the buyer did not inquire about any water damage that was externally caused. *Id*. Therefore, the seller did not have a duty to disclose the building's entire water history and was only required to disclose the cause of the damage about which the buyer inquired. *Id*. at 1374.

Here, the evidence presented demonstrated that during a tour of the Motes' home, after using the toilet and noticing that it "wouldn't flush," Mr. Wilkinson inquired about the slow flush rate of the toilet. *Tr*. at 16-17. Mr. Mote responded that the toilets flushed slowly after a heavy rain, but did not mention any other problems the Motes had experienced with the septic system or that Blazer had told them that the system was in failure. Although the slow flush rate of the toilets may have been partially caused by heavy rains, the Motes were also aware that the septic system was in failure, that the only solution for the problem was to install a new system, and that they had not done so. The Motes were also aware that the slow flush rate of the toilets was caused by the failed septic system, as that was the reason why

they contacted Blazer in the first place. We, therefore, conclude that the present case is distinguishable from *Schuyler* because, although in that case the seller did disclose the cause of the damage about which the buyer inquired, in this case, the Motes did not disclose the full reason why the toilets flushed slowly. The evidence supported the trial court's findings, and the trial court did not err in concluding that the Motes had a duty to disclose the failed septic system, and, by failing to disclose this information, they materially misrepresented the condition of the septic system.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.