

the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2002)). The plaintiffs also appeal the December 29, 2010, judgment of the circuit court of Jackson County that denied the plaintiffs' request for damages after finding that defendant Lila L. Klasek violated the Residential Real Property Disclosure Act (765 ILCS 77/1 to 99 (West 2002)). For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 On December 30, 2003, the plaintiffs filed a four-count complaint against the defendants, after purchasing a house with termite damage. Count I alleges that defendant Lila Klasek, the seller of the home, violated the Residential Real Property Disclosure Act (Disclosure Act) (765 ILCS 77/1 to 99 (West 2002)). Count II is inapplicable here, as it relates to defendant Mike Smith, who is not a party to this appeal. Count III alleges that defendant Jane Butcher, Lila Klasek's real estate agent, violated the Real Estate License Act of 2000 (225 ILCS 454/1-1 to 999-99 (West 2002)). Count IV alleges that Butcher violated the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 to 12 (West 2002)). After a jury trial in this case, the jury returned a verdict in favor of both Klasek and Butcher. On appeal, this court found that the plaintiffs were entitled to a new bench trial on all of the counts because a jury trial was not allowed under any of the above statutes. See *Anderson v. Klasek*, 393 Ill. App. 3d 219, 224-25 (2009).

¶ 5 A bench trial was held on December 20, 21, and 22, 2010. Testimony and evidence at the trial which is relevant to our disposition of this appeal was as follows. Plaintiff Dr. Kenneth B. Anderson (Ken) testified that he and his wife, Lois, were looking to purchase a home in Carbondale in the summer of 2003. They first looked at the subject residence on July 18, 2003. While walking outside, Ken discovered termite bait stations in the ground. The same day, Ken reviewed a disclosure statement pursuant to the Disclosure Act (765 ILCS 77/1 to 99 (West 2002)), which defendant Lila Klasek had filled out three days prior.

Question 19 of the statement provides: "I am aware of a structural defect caused by previous infestations of termites or other wood boring insects." Klasek answered "no" to this question.

¶ 6 Evidence in the record reveals that the home was initially listed at \$199,950 and that the plaintiffs made a counteroffer, contingent upon an inspection of the home. On July 26, 2003, Mike Smith conducted that inspection in the presence of Ken and his real estate agent, Leslie Pankey. At the bench trial, the parties stipulated to Smith's jury trial testimony. Smith's testimony reveals that during the inspection, he found live termites as well as old and new termite tubes in the basement and in the crawl space of the home. Smith testified that he poked a hole in a fresh termite tube, "and we had hundreds of worker termites exit at that point." Smith confirmed that Ken and Pankey saw the termites. Smith testified that he was not a termite expert and his inspection was limited to only the visible areas. Accordingly, Smith advised Ken to obtain a termite professional to conduct a thorough inspection so the extent of the damage could be determined.

¶ 7 Ken testified that he wrote a letter to Leslie Pankey two days after the inspection, to be forwarded to defendants Klasek and Butcher. In the letter, Ken noted "significant issues with the house" that were not apparent during the initial walk-through, including, *inter alia*, live termite infestation. To that regard, Ken stated as follows:

"Termite tracks and live termites were found in the basement and crawl-space. I understand that the house is under contract and the seller should contact the contractor immediately to control the problem—regardless of whom the ultimate buyer is. A thorough inspection and report of findings should be requested from the seller."

Ken added:

"Termite *damage* will have to be professionally assessed and the cost of maintaining termite control taken into account. Clearly the house has a termite problem that is not under control." (Former emphasis added; later emphasis in original.)

¶ 8 Ken testified that, per Pankey's recommendation, he reduced his offer in a subsequent letter dated August 4, 2003. In the letter, he reiterated: Live termites were found. The house must be treated and the source of the termites found and eliminated." In addition to the termites, Ken delineated several other items which were not in satisfactory condition. Accordingly, Ken reduced his offer to \$185,000 for the home. The final acceptance of \$186,000 occurred on September 17, 2003. The residential sales contract specifies that the contract is contingent upon a satisfactory inspection for wood-destroying insects, "by Buyer or, by a licensed contractor and/or inspector of Buyer[']s choice, at Buyer[']s expense."

¶ 9 Ken testified that, although he was aware of the live termites, he did not believe there was any damage to the house because Lila Klasek denied such damage on the disclosure statement. Moreover, he averred that he relied on Klasek's disclosure statement in making his decision to purchase the house and that he would have never done so had he known of any termite damage. However, on cross-examination, Ken acknowledged that Mike Smith's home inspection report states that termite damage was noted in the bathroom walls by the termite inspector. Ken also conceded that although the sales contract was contingent upon a satisfactory inspection facilitated by him as the buyer, he never took the initiative to do so. Rather, an inspection was conducted by Terminix at the request of defendant Klasek. As the record shows, that inspection occurred on August 26, 2003. As of the execution of the sales contract on September 17, 2003, Ken had not seen the inspection report for himself. He testified that Leslie Pankey assured him that, per defendant Butcher, the inspection had been done, that everything was fine, and that Butcher would deliver the report at closing.

¶ 10 Ken testified that problems began after closing on October 17, 2003. That evening, Ken noticed that a portion of the floor in the master bedroom was spongy. The same evening, he reviewed reports from Terminix, dated August 25 and 26, 2003, as well as a document from Terminix illustrating a floor plan of the home, all of which indicate numerous

areas of termite damage. Although Ken knew that Butcher was bringing these reports to closing, he admitted that he never asked to review them before the closing concluded. He explained that he arrived at the bank that day and signed all of the necessary documents. Subsequently, Leslie Pankey arrived, along with Butcher, who signed documents in Klasek's stead because Klasek had already moved to Nebraska. Ken testified that after the documents were signed, Butcher congratulated him for buying the house and handed him the keys, the garage door openers, and some papers which Butcher allegedly identified as the termite contract on the home. Ken denied being told that the papers were in fact the inspection reports, and therefore felt no need to review the documents at that time.

¶ 11 Eric Haney testified that he is employed as a service manager for Terminix, which had been contracted with defendant Klasek since January 28, 1998, when an initial visual inspection for both termites and damage was conducted. Exhibit 1.1.1 is the ensuing report from that inspection, which indicates that live termites and termite damage were discovered. The report is signed by defendant Klasek. Haney also testified pursuant to exhibit 1.2.1, which is a record from Klasek's Terminix file dated June 6, 2003. The document contains a handwritten note which says, "Needs someone to go look at damage to wall for repair purposes." Haney testified that when he responded to Klasek's home on July 15, 2003, he discovered termite damage in a closet above a crawl space and informed Klasek of the damage. Exhibit 1.3.1 is a Terminix report, signed by Klasek and dated August 15, 2003, which indicates substantial structural and drywall damage. In spite of the indicated damage, the exhibit provides that no visible termite activity was present on that date. Haney testified pursuant to exhibit 1.5.1, which is an inspection report hazard survey signed by Klasek and dated August 26, 2003, which specifies several areas of termite damage. Exhibit 1.7.1 is a wood-destroying-insect report graph dated August 26, 2003. The exhibit shows multiple areas of damage and it is also signed by Klasek.

¶ 12 Defendant Klasek acknowledged the 1998 Terminix contract which she signed. She testified that she learned of termite damage, "perhaps in 1998 or '97." Klasek reported that she did not have the damage repaired. In spite of this testimony, Klasek admitted to answering "no" to question 19 of the disclosure statement. She reasoned that she did so because Eric Haney and a man named "John" from Terminix were in her home when she was filling out the statement on July 15, 2003. Klasek testified that when she asked them how to answer question 19, they instructed her to answer "no" and because "[t]hey were the experts," she "took their word for that." Klasek insisted that Eric Haney told her that there was no damage to her house. When confronted with Mike Smith's inspection report indicating termite damage to the bathroom wall, Klasek responded that Smith must have "had me confused with someone else." Nevertheless, Klasek admitted to knowing about live termites in her home and that she requested an inspection. She also admitted to signing multiple Terminix reports which indicated substantial termite damage. Klasek noted that she gave some of the Terminix reports to Butcher directly and gave others to the receptionist at the office when Butcher was unavailable.

¶ 13 Defendant Butcher testified that she has worked for Century 21 since 1995. Butcher's broker, Elaine Melby, introduced her to Lila Klasek in June 2003, when Klasek became interested in selling her home. Butcher testified that during the initial walk-through of the house, Melby noticed pinholes on the bedroom wall and advised Klasek to have it checked out. Klasek responded that she would contact Terminix. Butcher confirmed that she was present when Klasek filled out the disclosure statement on July 15, 2003, three days before the plaintiffs first saw the house. She noted that Eric Haney from Terminix was also present that day. Butcher corroborated Klasek's testimony that when Klasek asked Haney how to answer question 19 of the disclosure statement, Haney replied, "No, no, you don't have any damage." Butcher testified that Haney also told Klasek that there were no live termites in

the home. Accordingly, Butcher was very surprised after Mike Smith's inspection, when she learned that there was, in fact, an infestation of live termites.

¶ 14 When questioned whether she received Smith's inspection report, Butcher replied that she received some of it from Leslie Pankey. Butcher did not recall receiving the portion of the report which indicated termite damage to the bathroom wall. She explained that it is a common real estate practice to only send or receive certain pages of inspection reports. Butcher acknowledged that she received Ken's letters regarding the live termite infestation. She testified that she subsequently assured Pankey that Klasek had contacted Terminix and the termites had been eradicated.

¶ 15 Butcher testified that about a week to 10 days before closing, Leslie Pankey began asking her for a clearance letter from Terminix. At that point, Butcher had received no such letter, so she called both Terminix and Klasek several times in search of it. Butcher explained that Terminix could not locate the information and she was unable to reach Klasek. The day before closing, however, Butcher received the documents from Terminix. Butcher testified that exhibit 1.6.1, known as the clearance letter, was on the top, followed by exhibits 1.7.1 and 1.4.1, respectively. She testified that she was not alerted to any damage upon receipt of the documents. Exhibit 1.6.1 has a check-the-box option which states: "Damage from wood destroying insects was noted in the following area(s)." This is followed by blank lines where the inspector is to specify any damage. As Butcher explained, the box is not checked, nor is there any description of damage on the designated lines. Butcher testified that exhibit 1.6.1 is the form with which she is most familiar, and it is the first document she saw. Accordingly, once Butcher saw that there was no damage indicated on 1.6.1, she did not look closely at the subsequent documents 1.7.1 and 1.4.1.

¶ 16 Although exhibit 1.4.1 has a box checked which indicates "[e]vidence of subterranean termite activity or subterranean termite damage in 3 or more separate areas of the structure,"

and several areas are written on blanks at the bottom of the exhibit, followed by the words "damage by termites," Butcher testified that she was not alerted to any substantial structural damage, given the contents of exhibit 1.6.1. She added that she was under the impression that Terminix was required to report any damage, no matter how small. Butcher assumed that the areas specified on 1.4.1 were repeats of the areas where shelter tubes were found, as noted on 1.6.1. She testified that she called Leslie Pankey and told her that she received the clearance letter from Terminix, after which they both agreed that Butcher would just bring it to closing the next day.

¶ 17 The parties stipulated to the jury trial testimony of John Tarr, a Terminix employee who inspected the house and filled out, *inter alia*, exhibits 1.4.1, 1.6.1, and 1.7.1. Tarr identified exhibit 1.6.1 as the clearance letter used by real estate agents. He agreed that he noted on the letter that shelter tubes were found in several locations, which were specified on corresponding blanks at the bottom of the document. Tarr testified that, in spite of the shelter tubes he found, there were no active termites and no treatment was recommended, both of which are noted on 1.6.1. Tarr admitted that he did not denote the damaged areas on 1.6.1 and attributed the omission as "human error on my part."

¶ 18 Butcher confirmed that she attended closing on October 27, 2003. Klasek was not present, but had previously signed the necessary documents and mailed them to Butcher for closing. As Klasek's designated agent, Butcher signed the remaining documents. Butcher testified that when she arrived at closing, Ken was in another room signing mortgage documents, after which he joined her and Pankey at a conference table. Contrary to Ken's testimony, Butcher stated that prior to any transfer of funds and before Ken signed a PTAX form to file along with the deed, she opened up her file folder and handed Ken three documents which she identified as the clearance letter and termite report. Butcher testified that nobody requested or suggested a review of the termite documents before the completion

of closing.

¶ 19 At the close of the plaintiffs' case, defendant Butcher's counsel submitted to the circuit court a written motion for a judgment at the close of the plaintiffs' evidence, pursuant to section 2-1110 of the Code (735 ILCS 5/2-1110 (West 2002)). Defendant Klasek's counsel submitted a separate oral motion based on the same statute and all parties presented arguments accordingly. The circuit court allowed defendant Butcher's motion on both counts relative to her and denied defendant Klasek's motion based on evidence that Klasek answered question 19 of the disclosure statement incorrectly. At the conclusion of the trial, the circuit court found that the plaintiffs proved that defendant Klasek violated the Disclosure Act (765 ILCS 77/1 to 99 (West 2002)), due to Klasek's incorrect response to number 19 on the disclosure statement. In spite of this violation, however, the circuit court denied the plaintiffs' request for damages "based upon the facts and circumstances in this proceeding and the existing case law." The same was memorialized in the circuit court's judgment, which was filed on December 29, 2010. The plaintiffs filed a timely notice of appeal. Additional facts will be added as necessary in our analysis of the issues.

¶ 20

ANALYSIS

¶ 21

I. Defendant Jane Butcher

¶ 22 The first issue on appeal is whether the circuit court erred by allowing defendant Jane Butcher's motion for a judgment at the close of the plaintiffs' evidence, pursuant to section 2-1110 of the Code (735 ILCS 5/2-1110 (West 2002)). "On review, this court must uphold the circuit court's resolution of defendants' motion for judgment in their favor at the close of plaintiffs' case in a nonjury civil action unless the decision is against the manifest weight of the evidence." *Newcombe v. Sundara*, 274 Ill. App. 3d 590, 594 (1995). "A finding is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly evident or the finding is palpably erroneous." *Id.*

¶ 23

A. Real Estate License Act of 2000

¶ 24 The plaintiffs first allege that the circuit court erred by allowing Butcher's section 2-1110 motion (735 ILCS 5/2-1110 (West 2002)) because the evidence shows that Butcher violated the Real Estate License Act of 2000 (Real Estate License Act) (225 ILCS 454/1-1 to 999-99 (West 2002)). Section 15-25 of the Real Estate License Act provides:

"A licensee engaged by a seller client shall timely disclose to customers who are prospective buyers all latent material adverse facts pertaining to the physical condition of the property that are *actually known* by the licensee and that could not be discovered by a reasonably diligent inspection of the property by the customer."
(Emphasis added.) 225 ILCS 454/15-25 (West 2002).

¶ 25 Here, there were indeed latent material defects regarding the home, namely substantial termite damage. While the *extent* of that damage could not have been discovered by a reasonably diligent inspection by the plaintiffs, we note plaintiff Ken Anderson's testimony that on the night of closing he discovered that the bedroom floor was spongy. He testified that a day or two before closing he made a final walk-through of the home but did not discover the spongy floor or any other damage because the final walk-through was not for a structural inspection, but "[t]o see if it had been cleaned out to our satisfaction." We note that because Ken was able to discover the spongy floor on the night of closing, he could have just as easily discovered it by a reasonably diligent inspection of the home when he did the final walk-through just prior to closing, which in turn would have or should have prompted the plaintiffs to order their own professional inspection, pursuant to the sales contract, to find out the extent of the damage. We are additionally mindful that the plaintiffs were aware of the termite problem early on and wrote letters referencing the termites and requesting an assessment of the termite damage.

¶ 26 In addition to the plaintiffs' ability to discover any latent damage pursuant to a

reasonably diligent inspection, we find evidence in the record which indicates that Butcher had no actual knowledge of the termite damage. John Tarr admitted his error in omitting the damage from the clearance letter. Butcher testified that the clearance letter, which was the form with which she is most familiar, is the first document she saw. Butcher explained that since the clearance letter indicated no damage, she looked less carefully at the remaining pages and was not alerted to any material damage. The plaintiffs argue that Butcher had the termite report in her hands at least 24 hours prior to closing and therefore could have timely disclosed the damage to them. We disagree. One cannot disclose what one does not know. Although there was conflicting testimony regarding Butcher's knowledge, it is not the duty of this court to assess the credibility of the witnesses. See *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 273 (1992). Moreover, if there is any evidence in the record to support the circuit court's findings, we will not disturb those findings on review. See *Vulcan Metal Products, Inc. v. Schultz*, 180 Ill. App. 3d 67, 74 (1989). Based on the evidence before us, we cannot say that a conclusion opposite to that of the circuit court is clearly evident or that the finding is palpably erroneous. See *Newcombe*, 274 Ill. App. 3d at 594. Accordingly, it was not against the manifest weight of the evidence for the circuit court to allow defendant Butcher's motion for a judgment at the close of the plaintiffs' evidence, with regard to the count alleging a violation of the Real Estate License Act (225 ILCS 454/1-1 to 999-99 (West 2002)).

¶ 27 B. Consumer Fraud and Deceptive Business Practices Act

¶ 28 In addition to their allegations regarding the Real Estate License Act (225 ILCS 454/1-1 to 999-99 (West 2002)), the plaintiffs also allege that the circuit court erred by allowing Butcher's section 2-1110 motion (735 ILCS 5/2-1110 (West 2002)) because the evidence shows that Butcher violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 to 12 (West 2002)).

"The elements of a private cause of action for damages based on a violation of the [Consumer Fraud] Act are: (1) a deceptive act or practice; (2) intent by the defendant that the plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; and (4) the plaintiff's injury was proximately caused by the fraud complained of." *Rockford Memorial Hosp. v. Havrilesko*, 368 Ill. App. 3d 115, 121 (2006).

¶ 29 As previously discussed, there is evidence in the record which indicates that Butcher had no actual knowledge of the termite damage prior to closing. Without such knowledge, there could not have been a deceptive act by Butcher, nor an intent on her part that the plaintiffs rely on any deception. Accordingly, it was not against the manifest weight of the evidence for the circuit court to allow Butcher's motion for a judgment at the close of the plaintiffs' evidence, with regard to the count alleging a violation of the Consumer Fraud Act (815 ILCS 505/1 to 12 (West 2002)).

¶ 30 *II. Defendant Lila Klasek*

¶ 31 A. Damages for Disclosure Act Violation

¶ 32 The final issue on appeal is whether the circuit court erred by not awarding money damages to the plaintiffs after finding that defendant Klasek violated the Disclosure Act (765 ILCS 77/1 to 99 (West 2002)). The circuit court's decision regarding an award of damages will not be disturbed by this court unless that decision is against the manifest weight of the evidence. See *Doe v. Chand*, 335 Ill. App. 3d 809, 822 (2002). "Section 55 of the Disclosure Act provides that one who knowingly violates the Act, or discloses information on the report *known to be false*, is liable for actual damages and court costs." (Emphasis added.) *Woods v. Pence*, 303 Ill. App. 3d 573, 576 (1999) (citing 765 ILCS 77/55 (West 1996)). Moreover, section 30 charges the seller with the responsibility of supplementing the disclosure statement if the seller subsequently learns of an error, inaccuracy, or omission in

any prior disclosure document. See 765 ILCS 77/30 (West 2002). However, the buyer's knowledge of a defect is relevant in the circuit court's determination of the amount of damages to award. See *Hogan v. Adams*, 333 Ill. App. 3d 141, 148 (2002).

¶ 33 Here, we find defendant Klasek indeed violated the Disclosure Act (765 ILCS 77/1 to 99 (West 2002)) by answering "no" to question 19 on the disclosure statement. Klasek testified that she was informed of termite damage in the home "perhaps in 1998 or '97." Moreover, Klasek signed multiple Terminix reports which clearly demonstrate substantial termite damage in various areas of the home. We also find, however, that the plaintiffs had knowledge of the defect prior to closing on the purchase. The plaintiffs emphasize the distinction between their knowledge of live termites and their knowledge of structural damage caused by termites. They readily concede that they were aware of a live termite infestation at the residence. However, they argue that they were unaware of any termite damage until after closing on the home. We disagree.

¶ 34 Contrary to the plaintiffs' assertions, there is evidence that they were aware of termite damage to the home prior to closing. As mentioned above, the inspection report of the plaintiffs' own home inspector, Mike Smith, clearly states that there was termite damage to the bathroom walls. Smith testified that after the inspection he urged Ken to obtain a termite professional to do a thorough inspection and determine the extent of the damage. Ken speculated at trial that because Smith is not a termite inspector, he must have obtained the information about the damage to the bathroom walls from Klasek. However, the specifics of Smith's knowledge are of no consequence here. Rather, the relevant inquiry is what the plaintiffs knew.

¶ 35 To that regard, armed with the findings from Mike Smith's home inspection, Ken wrote letters to his agent, Leslie Pankey, in which he raised the concerns about, *inter alia*, the termites and termite damage to the home. In his July 28, 2003, letter, Ken specified that

the "[t]ermite *damage* will have to be professionally assessed." (Emphasis added.) Moreover, the residential sales contract of September 17, 2003, was contingent upon the completion of a satisfactory inspection for wood-destroying insects by the plaintiffs or by a licensed contractor or inspector of the plaintiffs' choice, at the plaintiffs' expense. Yet, in spite of all he knew and all of the concerns raised with his agent, Ken proceeded in closing on the purchase without exercising these contractual rights or availing himself of the report of the inspection which was initiated by defendant Klasek. While Ken did not become aware of the *extent* of the damage until after reviewing the Terminix reports and commencing repairs, he nevertheless had sufficient knowledge about *some* damage, which should have prompted him to insist on a review of the reports before closing. Had he done so, he could have cancelled the contract and avoided the damage. Because of the plaintiffs' knowledge of the defect prior to purchasing the home, we find it was not against the manifest weight of the evidence for the circuit court to deny the plaintiffs' request for damages. See *Hogan v. Adams*, 333 Ill. App. 3d 141, 148 (2002).

¶ 36

CONCLUSION

¶ 37 For the foregoing reasons, we affirm both the December 22, 2010, order of the circuit court that allowed defendant Butcher's motion for a judgment at the close of the plaintiffs' evidence and the December 29, 2010, judgment that denied the plaintiffs' request for damages.

¶ 38 Affirmed.