WILLIAM J. NEWTON AND ELAINE NEWTON

VERSUS

DR. GENE LEWIS DONGIEUX, SR. AND RHONDA BARRAS DONGIEUX

NO. 13-CA-776

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 651-798, DIVISION "N"
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

June 24, 2014

MARC E. JOHNSON
JUDGE

Panel composed of Judges Fredericka Homberg Wicker, Jude G. Gravois, Marc E. Johnson, Robert A. Chaisson, and Stephen J. Windhorst

WICKER, J., DISSENTS WITH REASONS
GRAVOIS, J. DISSENTS FOR THE REASONS ASSIGNED BY WICKER, J.

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REVERSED

In this redhibition case, Defendants/sellers, Gene Dongieux, Sr. and Rhonda Dongieux, appeal a judgment finding them liable to Plaintiffs/purchasers, William Newton and Elaine Newton, for damages in the amount of $50,815.00 and attorney's fees in the amount of $42,182.50, plus court costs and judicial interest. For the reasons that follow, we reverse.

FACTS & PROCEDURAL HISTORY

Plaintiffs, the Newtons, filed a petition for damages on October 9, 2007 seeking damages in redhibition and breach of contract. They alleged that Defendants, the Dongieuxes,[1] failed to disclose the extent of flooding around the pool and failed to disclose that the carport area flooded. The Newtons further alleged that the Dongieuxes failed to complete the agreed upon repairs prior to the

[1] At the time of trial, the Dongieuxes had divorced and Rhonda Dongieux's name had changed to Rhonda Lorio. For ease of party identification, we will refer to Rhonda throughout this appeal as Ms. Dongieux.

Newtons taking possession of the property. The Newtons sought redhibitory damages, specific performance for the terms of the contract, and attorney's fees.[2]

The matter proceeded to a bench trial on March 25, 2013. The record shows that in December 2006, Mrs. Newton was on a Christmas tour of homes in River Ridge when she fell in love with the home at 228 Garden Rd., owned by the Dongieuxes. Although the house was not for sale, Mrs. Newton expressed her desire to purchase the home to Ms. Dongieux. After several conversations, the Dongieuxes indicated they would sell the home for $1.4 million. Without any negotiations, the Newtons agreed to purchase the home for the requested price.

On February 5, 2007, the parties executed a property disclosure. On the property disclosure form, the Dongieuxes checked yes to question number four under "Section 1: Land," which asked, "Has any flooding, water intrusion, accumulation, or drainage problem been experienced with respect to the land? If yes, indicate the nature and frequency of the defect at the end of this section." The Dongieuxes explained on the form that "during a very hard rain, the backyard ponds water. Drains quickly." Under "Section 3: Structure," the Dongieuxes answered no to question 12, which asked, "Has any structure on the property ever taken water by flooding (rising water or otherwise)?"

At some point after signing the property disclosure form and prior to the Act of Sale, Mrs. Newton asked Ms. Dongieux about the "ponding" problem. According to Mrs. Newton, Ms. Dongieux explained that when it rained hard, a puddle formed where the sidewalks meet in the backyard by the pool. Ms. Dongieux testified that she gave Mrs. Newton the example of when she was having a birthday party for a friend and it rained before the party. Ms. Dongieux explained to Mrs. Newton that it stopped raining two hours before the party, during

[2] The trial court denied Plaintiffs' claim for breach of contract. Plaintiffs did not answer this appeal; thus, the breach of contract claim is not before us on appeal.

which time the water drained but left a puddle where the sidewalks crossed. Ms. Dongieux indicated that she was able to soak up the remaining puddle with a beach towel. Mrs. Newton testified that she was satisfied with this answer and did not obtain a specific inspection regarding the ponding or drainage in the backyard. Mr. Newton likewise stated that he was satisfied with the explanation, as relayed by his wife after she spoke with Ms. Dongieux, and did not seek a specific inspection regarding the ponding issue.

On February 15 and 16, 2007, the parties executed an agreement to purchase or sell. The agreement contained a waiver of redhibition clause that indicated the property was to be sold "AS IS" with a full waiver of redhibition of rights as explained in an attached addendum, which was also signed by all parties.

On February 21, 2007, the Newtons had the property inspected by Robyn Bordelon, a licensed home inspector with House Call Home Inspection. Ms. Bordelon testified that she was not hired to inspect any issues regarding any flooding or ponding in the backyard, but rather her inspection was limited to the area directly around the foundation of the home and cabana area.

Also, on February 23, 2007, the Newtons had the pool inspected by Kevin Brouphy. Mr. Brouphy testified that he inspected the decking of the pool, the surface of the pool and the pool equipment. He stated that he noted a few things, but nothing exorbitant. He explained that he did not inspect the elevation of the pool or the grading around the pool and was not qualified to give an opinion about the elevation or grading.

The parties proceeded to the Act of Sale on April 30, 2007. The Act of Sale contained an express waiver of redhibition, which the Newtons acknowledged by signing immediately beneath the waiver clause. Although the Act of Sale occurred in April, the Newtons did not move into the house until after the end of June

because of an agreement between the parties that allowed the Dongieuxes to stay in the home until then.

The Newtons testified that on the day they received the keys to the property, it started raining and the backyard flooded. They explained that water drained into the pool and the carport behind the cabana flooded. They subsequently learned that the pool was eight to nine inches below the surrounding ground, so the water drained into the pool during a hard rain. In an attempt to alleviate the pool problem, the Newtons explored installing drainage, but discovered subsurface drains already existed. The Newtons ultimately had to raise the pool eight or nine inches, at a cost of $45,065.00.

To fix the carport flooding, the Newtons had to raise the slab approximately two and a half to three inches, at a cost of $4,600.00. While raising the slab, the Newtons learned that the stairs in the carport that led to the upstairs apartment were rotted from water exposure and had to be fixed. Since this remedial work, the Newtons have not experienced any flooding in the carport.

At the conclusion of trial, the trial court took the matter under advisement. It issued a written judgment on May 16, 2013 in favor of the Newtons for their redhibition claim, but denied their breach of contract claim. The trial court awarded $50,815.00 in damages, which included $1,150.00 for pool cleaning, $45,065.00 for raising the pool, and $4,600.00 for leveling the carport slab. It also awarded the Newtons attorney's fees in the amount of $34,398.50. Thereafter, the Newtons filed a motion to modify judgment (seeking an increase in attorney's fees), tax costs and assess judicial interest. On June 26, 2013, the trial court granted the motion and increased attorney's fees to $42,182.50, taxed costs in the amount of $4,099.44, and awarded judicial interest. The Dongieuxes appeal the

judgment finding them liable for redhibition and the amount awarded for attorney's fees.

ISSUES

The Dongieuxes raise three issues on appeal: (1) the trial court erred in finding the property contained a redhibitory defect; (2) the trial court erred in determining the Dongieuxes were manufacturers of the property so as to apply a presumption of knowledge of any defects for purposes of redhibition; and (3) the trial court erred in awarding attorney's fees because the Dongieuxes were not bad faith sellers, or alternatively the amount of attorney's fees awarded was excessive.

DISCUSSION

Redhibition

The Dongieuxes argue that the trial court erred in finding the property's propensity to flood was a hidden defect for purposes of redhibition because they disclosed the flooding problem to the Newtons prior to the sale of the home. As such, the Dongieuxes contend that the Newtons were on notice of the flooding issue and had an obligation to further investigate. Additionally, the Dongieuxes maintain the elevation of the backyard and pool was open and obvious, not hidden; thus, it could not be a redhibitory defect.

The Dongieuxes also argue that they were not manufacturers of their home and, thus, the presumption of knowledge under La. C.C. art. 2545 does not apply. They maintain they hired a contractor, a construction company, an architect and a pool company to design and construct the home and pool. The Dongieuxes further contend they do not have any specialized construction knowledge that would allow the presumption to apply. The Dongieuxes contend the trial court erred in relying on a pre-trial stipulation that they were general contractors when the trial evidence was clearly to the contrary. They further assert that neither party relied on the

stipulation and both parties, without objection, elicited testimony showing the Dongieuxes were not the general contractors of the home.

In its reasons for judgment, the trial court determined the Dongieuxes were manufacturers of the home based on the parties' pre-trial stipulation in their joint pre-trial order that the Dongieuxes served as the general contractors for the construction of the property. After making this determination, the trial court found the Dongieuxes were presumed to know of any defect in the property under La. C.C. art. 2545. The trial court then determined the Newtons' waiver of redhibition was void because a manufacturer who is presumed to know of the defects in the thing he sells can never be in good faith if a defect exists. Thereafter, the trial court found the flooding defect in the yard and carport existed at the time of the act of sale and, therefore, the Dongieuxes were liable in redhibition.

A trial court's factual findings will not be upset unless they are manifestly erroneous or clearly wrong. *Dumser v. Kardon*, 13-557 (La. App. 5 Cir. 12/12/13); 131 So.3d 277, 280. In order to reverse a factfinder's determinations, an appellate court must find a reasonable factual basis does not exist for the factual finding and that the record shows the factual finding is clearly wrong. *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La. 1993). The issue is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was reasonable in light of the record. *Id.* If an appellate court finds manifest error, it is required to determine the facts *de novo* from the entire record and render a judgment on the merits. *Rosell v. ESCO*, 549 So.2d 840, 844, n.2 (La. 1989).

We find the trial court was manifestly erroneous in finding the Dongieuxes were manufacturers of the home for purposes of La. C.C. art. 2545. Article 2545

provides that "[a] seller is deemed to know that the thing he sells has a redhibitory defect when he is a manufacturer of that thing."

In the parties' joint pre-trial order, under the heading "Pretrial Stipulations," the parties stated: "Defendants served as the general contractors for the construction of the Garden Road home, which was built in or around 2000." The trial court concluded that being a general contractor was equivalent to being a manufacturer of the home for purposes of Article 2545. The facts of this case do not reasonably support the trial court's conclusion.

In *Dumser v. Kardon*, *supra*, this Court found that the sellers were not manufacturers of the home for purposes of Article 2545 even though the seller admitted "building" the house. The record showed that the sellers hired a builder to build their home and that the builder hired subcontractors and oversaw the construction. Additionally, the plans and specifications were prepared by an architect. This Court concluded that although the seller testified he acted as his own general contractor, the facts were insufficient to show he was the manufacturer of the home.

Additionally, in *Lee v. Kendrick*, 532 So.2d 335 (La. App. 3rd Cir. 1988), the court determined that the seller did not manufacture the camp despite claims by the buyer that the seller acted as the general contractor for the construction of the camp. The court found no evidence that the seller had any knowledge of engineering or construction. Additionally, the seller found the plans for the camp in a magazine. Although the seller modified the plans, he submitted them to a professional for finalization. The seller hired workers to lay the foundation, build the frame and lay the bricks, but did not supervise the workers. The court ultimately concluded that the sellers did not effectively act as a general contractor and, thus, were not imputed with knowledge of any defects.

The mere label of "general contractor" is not equivalent to "manufacturer" under Article 2545. However, if a vendor-builder has any type of engineering or construction knowledge or is in the business of building or developing homes for sale, it is more likely that he will be considered a manufacturer. (*See Pickron v. Krebs*, 441 So.2d 272, 274 (La. App. 5th Cir. 1983), *writ denied*, 442 So.2d 481 (La. 1983), where this Court held that "a person with engineering and construction knowledge who plans, designs and personally supervises the building of an addition to a residence is presumed to be aware of any structural defect, and the lack of knowledge regarding any structural defect is imputed to him.")

In the instant case, there is nothing in the record to support a finding that the Dongieuxes were manufacturers of the house. Dr. Dongieux has been an orthodontist for 44 years and Ms. Dongieux owns a T-shirt company, with previous employment in sales and interior design. The Dongieuxes hired an architect and a construction company, C & G Construction, to build the home. The contractor and subcontractors were overseen by Dr. Dongieux's son, Glenn, who owns several construction companies. The record is completely devoid of any facts to show that the Dongieuxes possessed the requisite construction knowledge to effectively act as general contractors in the building of their home so as to be manufacturers of their home for purposes of Article 2545. Thus, we find the trial court was manifestly erroneous in finding the Dongieuxes to be manufacturers of the house.

We further find the trial court erred in finding that the backyard flooding was a redhibitory defect. While a property's susceptibility to flooding can be a redhibitory defect based on certain facts and circumstances,[3] the facts show it is not

[3] *See McCarthy v. E&L Development, Inc.*, 45,683 (La. App. 2 Cir. 11/10/10); 54 So.3d 1143, 1148.

redhibitory in this case because the defect was known to the Newtons at the time they purchased the property.

A seller warrants the buyer against redhibitory defects in the thing sold. La. C.C. art. 2520. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect, or else of such diminished usefulness and value that the buyer would only have purchased the thing for a lesser price. *Id.*

A seller owes no warranty for defects that were known to the buyer at the time of the sale or that should have been discovered by a reasonably prudent buyer. La. C.C. art. 2521. A buyer is under a duty to make an inspection that is reasonable in light of all the circumstances surrounding the sale. *Ollis v. Miller*, 39,087 (La. App. 2 Cir. 10/29/04); 886 So.2d 1199, 1203.

In *Nicholson v. Ellerbe*, 434 So.2d 1146, 1148 (La. App. 1st Cir. 1983), the court found that the property's susceptibility to flooding was not a redhibitory defect when the party negotiating the sale on behalf of the buyer had been informed by the seller that the property was prone to flooding. The court further concluded that the tendency of the property to flood was not only known to the buyer, but also was discoverable by simple inspection; thus, it was not a redhibitory defect under La. C.C. art. 2521.

In the present case, the record shows that the Dongieuxes disclosed the backyard flooding issue to the Newtons. Specifically, the property disclosure form asked, "Has any flooding, water intrusion, accumulation, or drainage problem been experienced with respect to the land?" and the Dongieuxes answered yes. In further explanation, the Dongieuxes noted on the form that "during a very hard rain, the backyard ponds water. Drains quickly." This disclosure, signed by all parties in February 2007, put the Newtons on notice of a problem. Despite

knowing of the problem, the Newtons purchased the property and waived redhibition.

The Newtons claim the Dongieuxes misrepresented the extent of the flooding issue and, thus, they never had full knowledge of the problem. The Newtons assert Ms. Dongieux's comment about being able to soak up the water with a beach towel misled them into thinking there was no real flooding issue.

We find that once the Dongieuxes disclosed the fact that the property had experienced flooding/water intrusion/accumulation/drainage problems, it was incumbent upon the Newtons, as purchasers, to act as reasonably prudent buyers and to further investigate the flooding issue. At the time the Newtons signed the property disclosure form, they were aware of a potential flooding defect and had not sought further explanation from the Dongieuxes. While the Newtons subsequently sought explanation from the Dongieuxes, it is unclear whether this was done before or after the Newtons had the property inspected. Nonetheless, the Newtons testified that they did not seek a specific inspection regarding the flooding issue or elevation of the property despite knowing of a potential flooding defect.

We find the Newtons could not have reasonably relied on Ms. Dongieux's statement as a reason not to further investigate. When taken in context, Ms. Dongieux's statement that she could soak up the puddle with a beach towel was an example of what remained after the water drained after a heavy rain. She made no statement about the amount of water that ponded during the heavy rain. Further, the waiver of redhibition signed by the Newtons at the time they executed the agreement to purchase, specifically stated:

> Purchaser acknowledges and declares that neither the Seller nor any party, whomsoever, acting or purporting to act in any capacity whatsoever on behalf of the Seller has made any direct, indirect,

> explicit, or implicit statement, representation or declaration, whether by written or oral statement or otherwise, and upon which the Purchaser has relied, concerning the existence or non-existence of any quality, characteristic or condition of the property herein conveyed. Purchaser has had full, complete and unlimited access to the property herein conveyed for all tests and inspections which Purchaser, in Purchaser's sole discretion, deems sufficiently diligent for the protection of Purchaser's interests.

The waiver stated that it would be made a part of and would not become effective until the act of sale. Thus, at the time of the act of sale, the Newtons expressly stated that they had not relied on any written or oral statements made by the Dongieuxes regarding any quality, characteristic or condition of the property.

Based on these circumstances, we do not find the Newtons acted as reasonably prudent buyers in failing to further investigate a potential flooding defect in the backyard when the sellers disclosed in the property disclosure form that water ponds in the backyard during a heavy rain.

As for the flooding of the carport, the record shows that it was a redhibitory defect that was not disclosed by the Dongieuxes. In particular, question 12 of "Section 3: Structure" of the property disclosure form asked, "Has any structure on the property ever taken water by flooding (rising water or otherwise)?" to which the Dongieuxes answered no. To the contrary, the evidence presented at trial clearly showed flooding of the carport behind the cabana, located at the rear of the property, with several inches of water on top of the slab and against the foundation and two sets of stairs leading to the cabana and to the apartment above the cabana.

A purchaser is entitled to the warranty against redhibitory defects, unless expressly waived. To be effective, a waiver of warranty against redhibitory defects must meet three requirements: (1) be written in clear and unambiguous terms; (2) be contained in the contract; and (3) either brought to the attention of the buyer or explained to him. *Jeffers v. Thorpe*, 95-1731 (La. App. 4 Cir. 1/19/96); 673 So.2d

202, 205, *writ denied*, 96-1721 (La. 10/4/96); 679 So.2d 1390. The Newtons never challenged the existence of a valid redhibition waiver, but rather maintained the waiver was void because the Dongieuxes failed to disclose the defect.

The Newtons can only obtain relief from the redhibition waiver if they can show fraud in the inducement of the contract. *See Shelton v. Standard/700 Associates*, 01-587 (La. 10/16/01); 798 So.2d 60, 64. A warranty against redhibitory defects is not effective if the seller commits fraud, as defined in the civil code, upon the buyer. *Id.*

A contract is formed by the consent of the parties. La. C.C. art. 1927. However, consent may be vitiated by fraud. La. C.C. art. 1948. "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." La. C.C. art. 1953. "Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill." La. C.C. art. 1954.

There are three elements for fraud against a party to a contract: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by the fraudulent act must relate to a circumstance substantially influencing the victim's consent to the contract. *Shelton*, *supra.*

In this case, we cannot say the Dongieuxes committed fraud when they failed to disclose the flooding of the carport. Specifically, the record does not support a finding that the Dongieuxes intended to obtain an unjust advantage over the Newtons or to cause damage or inconvenience to the Newtons. First, the Dongieuxes were not trying to sell their house when they were approached by the Newtons, who expressed an interest in buying the house. Ms. Dongieux testified

that when Mrs. Newton approached her about buying the house, she did not want to sell. Dr. Dongieux also testified that Ms. Dongieux did not want to sell the house. Second, there were no negotiations regarding the purchase price. Dr. Dongieux stated that his wife asked him to give the Newtons a "ridiculous price just to get [Mrs. Newton] off my back." He told the Newtons he would sell the house for $1.4 million and they accepted without any negotiation. Mr. Newton testified that when Dr. Dongieux called and said he wanted $1.4 million, they said okay. Third, the Dongieuxes did disclose flooding issues in the backyard, where the carport was located. We do not find these facts sufficiently demonstrate that the Dongieuxes intended to defraud the Newtons.

Based on the total circumstances surrounding the purchase of this property, we cannot say the Dongieuxes committed fraud by failing to disclose the carport flooding. Although the flooding of the carport was a redhibitory defect, the Newtons executed a valid waiver of the warranty of redhibition. Thus, they are not entitled to damages for any redhibitory defect.

DECREE

Based on the foregoing, we reverse the trial court's judgment in favor of Plaintiffs, William and Elaine Newton, against Defendants, Gene Dongieux, Sr. and Rhonda Dongieux, relating to Plaintiffs' redhibition claims and award of attorney's fees. The Plaintiffs are to bear the costs of this appeal.

REVERSED

WILLIAM J. NEWTON AND ELAINE NEWTON	NO. 13-CA-776
VERSUS	FIFTH CIRCUIT
DR. GENE LEWIS DONGIEUX, SR. AND RHONDA BARRAS DONGIEUX	COURT OF APPEAL STATE OF LOUISIANA

FAW

WICKER, J., DISSENTS WITH REASONS

Because I would affirm the judgment of the trial court, I respectfully dissent.

I agree with the majority that the trial court erred when it found that the Dongieuxs were the manufacturers of the home for purposes of La. C.C. art. 2545, and that the Dongieuxs were, therefore, deemed to know that the house they sold had a redhibitory defect. Being the general contractor in the construction of the home is not necessarily equivalent to being the manufacturer for purposes of La. C.C. art. 2545. *Dumser v. Kardon*, 13-557 (La. 5 Cir. 12/12/13). Under the facts of this case, where the Dongieuxs hired a contractor, a construction company, an architect, and a pool company to design and construct the home and the pool, and where the Dongieuxs had no specialized construction knowledge, they were not the manufacturers, although they were the general contractor. Therefore, the Dongieuxs are not deemed to know that the home contained two redhibitory defects – the backyard flooding in the pool area and the carport flooding.

I, however, disagree with the majority's finding that the property did not suffer from a redhibitory defect because the Newtons knew of the defect when they purchased the property. After a *de novo* review of the trial record, I am of the opinion that the property suffered from two redhibitory defects which were not open and obvious and that the Newtons did not fail to make a reasonable inspection of the property. Further, while the parties to this sale executed waivers of redhibitory rights and the sale was "as is", it is my opinion that the waivers were

invalidated because the Dongieuxs concealed the fact that the property flooded (rather than the "ponding with quick drainage" as described by the Dongieuxs), and that during such floods, dirt washed from the lawn onto the pool's deck and into the pool. I am also of the opinion that the Dongieuxs failed to disclose the fact that the carport flooded and that, therefore, the stairs to the second floor apartment were rotted. "... A buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have. ..." La. C.C. art. 2548.

In the February 5, 2007 property disclosure form, the Dongieuxs responded "Yes" to question number four under "Section 1: Land," which asked, "Has any flooding, water intrusion, accumulation, or drainage problem been experienced with respect to the Land?" The Dongieuxs stated on the form, "during a very hard rain, the backyard ponds water. Drains quickly." The Dongieuxs responded "no" to "Section 3: Structure" question 3, which asked, "Has any structure on the property ever taken water by flooding (rising water or otherwise)?" After the property disclosure form was executed and before the act of sale was consummated, Mrs. Newton asked Ms. Dongieux about the "ponding" problem. In response, Mrs. Dongieux told Mrs. Newton and their real estate agent, Bonnie Schultz, that after a hard rain a "little puddle forms where the sidewalks meet". Mrs. Dongieux elaborated that, "Well, once I was having a party, and it rained, and I got that little puddle/pond, and I took a beach towel and wiped up." Neither Dr. nor Mrs. Dongieux ever mentioned the pool's deck or the carport as a place where flooding occurred. Furthermore, the Dongieuxs never mentioned that a sump pump was installed behind bushes to assist with the flooding and drainage issue.

Mr. Newton testified that, based upon Mrs. Dongieux's explanation of the only disclosed defect, he did not make any further investigation into that disclosure. He did, however, have the home and pool inspected. Neither the pool

inspection report nor the home inspection report indicated that the inspectors observed the flooding later revealed on both the video and photos taken by the Newtons. Based upon the evidence, it is my opinion that the Newtons discharged their duty to inspect when they queried Mrs. Dongieux about the yard flooding and she dissembled as noted above, after which they retained inspectors with instructions consistent with the information Mrs. Dongieux had provided to them. While the majority deems the Newtons to have known of the defects, causing them not to be redhibitory, I respectfully disagree.

In his Reasons for Judgment, the trial court found in part:

> ... On February 5, 2007, the Dongieuxs signed a property disclosure revealing that "[d]uring a very hard rain, the backyard ponds water. Drains quickly". Ms. Newton testified that she asked Ms. Dongieux to further explain what they meant by this disclosure and Ms. Dongieux told her that on one occasion they had a heavy rain prior to a party that caused some flooding in the backyard. Ms. Dongieux explained that she was able to mop up the excess water with a beach towel rather than waiting for it to drain. The parties then entered into an Agreement to Purchase on February 15 [sic] 2007, and the Newtons completed inspections of the Property and pool on February 21, 2007. ...
>
> With respect to the redhibition claims, the Newtons allege that the Property was defective at the time of purchase because the swimming pool was lower than the surrounding yard and landscaping. The Newtons also allege that the Dongieuxs did not have adequate drainage for the Property and also failed to disclose that the carport flooded due to an unlevel slab. Video evidence introduced by the Newtons demonstrated an excessive amount of water flooding the pool and entire surrounding area following a hard rain. Though the Dongieuxs denied ever experiencing this type of flooding during the time they owned the Property, the Newtons contend that this occurred on several occasions after they purchased the Property and caused dirt and debris to flow into the pool each time. The Newtons also introduced photos showing the water that became trapped in the rear carport area due to the unlevel slab.
>
> ... With respect to the flooding in the rear carport area, the Newtons introduced photographs of the flooding. They also presented pictures of the bottom of the stairs that had started to rot due to the water that became trapped in the rear carport area. Finally, the Newtons testified that after they had concrete added to level the carport slab, the flooding stopped. Based on the foregoing, the Court finds that this defect existed in the carport area prior to the sale of the Property.

> With respect to the flooding in the pool area, William O'Berry, Jr. of Southern Style Swimming Pool Services testified that the pool flooded because the pool is lower than the yard and landscaping. Isaias Toscano, the contractor who elevated the pool, also testified that the pool flooded because it was 9" lower than the yard. Both of these witnesses testified that they saw no evidence of sinking or shifting, and therefore the elevation problem had to date back to the time of the original construction of the pool area. Furthermore, the real estate agent, Bonnie Schulz, testified that she witnessed the flooding in the pool area the day that she delivered the keys to the Newtons. In addition, following the act of sale, the Newtons found a sump pump behind shrubs that could be used to remove water from the backyard area. Therefore, the Court finds that the preponderance of the evidence demonstrates that the flooding of the yard into the pool area existed prior to the act of sale.

Upon *de novo* review, I am of the opinion that the district court, though in error on the issue of the Dongieuxs' manufacturer status, had sufficient evidence to reasonably conclude that the Dongieuxs had actual knowledge of the two flooding defects when they sold the property to the Newtons. Evidence established that the Dongieuxs had installed additional drainage in their "backyard" to relieve flooding after the initial phase of construction of the property. Furthermore, the trial court may have reasonably inferred from the defendants' installation of a sump pump by the carport that the defendants knew that the property had a problem with flooding that exceeded the "ponding" as described by Mrs. Dongieux.

Therefore, it is my opinion that the Dongieuxs' failure to disclose the flooding of the property's pool's deck and carport, and Mrs. Dongieux's explanation minimizing the extent of the disclosed backyard flooding, voided the waivers of redhibitory rights executed by the Newtons.

For the foregoing reasons, I strongly feel that the Newtons are clearly entitled to the relief granted by the trial court. Accordingly, I would affirm the judgment of the trial court in favor of the Newtons and against the Dongieuxs.

WILLIAM J. NEWTON AND ELAINE NEWTON	NO. 13-CA-776
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GRAVOIS, J., DISSENTS FOR THE REASONS ASSIGNED BY WICKER, J.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **JUNE 24, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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13-CA-776

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