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ATTORNEY FOR APPELLANTS:

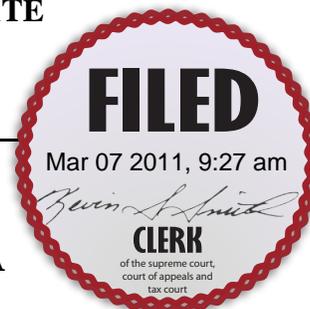
**PHILIP D. SEVER**

Sever Storey, LLP  
Carmel, Indiana

ATTORNEYS FOR APPELLEES  
CROWN MARK MORTGAGE, INC.  
AND DAVID DEWAELSCHE:

**MICHAEL J. LEWINSKI**  
**CHRISTINA L. FUGATE**

Ice Miller LLP  
Indianapolis, Indiana



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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CARL AND JANE SONNENBERG, )

Appellants-Petitioners, )

vs. )

No. 29A04-1005-PL-381

A.N. REAL ESTATE SERVICES, INC., )

CROWN MARK MORTGAGE, INC., )

DAVID DEWAELSCHE, AND )

NATALIE HIGGENS, )

Appellees-Respondents. )

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APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Daniel J. Pfleging, Judge  
Cause No. 29D02-0710-PL-1154

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**March 7, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Carl and Jane Sonnenberg appeal the trial court's determination that they are entitled to only \$650.00 in damages in a lawsuit against A.N. Real Estate Services, Inc. ("ANRES"), and ANRES employee Natalie Higgins pursuant to the Home Loan Practices Act, Indiana Code article 24-9, for an erroneous appraisal of their Carmel, Indiana, home. Because the trial court entered default judgment against ANRES and Higgins, the facts as alleged in the complaint are deemed admitted. Nevertheless, the court must still determine whether, as a matter of law, the facts as alleged in the complaint entitle the Sonnenbergs to relief. Here, the trial court held a hearing pursuant to Indiana Trial Rule 55(B) and properly determined that the Sonnenbergs were entitled to only \$650.00 in damages because the facts as alleged in the complaint were insufficient to establish a deceptive act in connection with a home loan. We therefore affirm the trial court.

## **Facts and Procedural History**

In 2005, the Sonnenbergs paid ANRES \$500.00 to appraise their Carmel, Indiana, home. Higgins appraised the home as having a livable area of 5927 square feet and a fair market value of \$975,000.00. The Sonnenbergs used this appraisal to obtain two loans with the assistance of mortgage loan broker Crown Mark Mortgage, Inc.—a ten-year \$780,000.00 interest-only adjustable rate mortgage and a \$146,250.00 home equity line of credit.

In 2007, the Sonnenbergs hired Robert Goar to conduct a second appraisal of their home. Goar appraised the home as having a livable area of 4254 square feet and a fair market value of \$695,000.00.

Shortly after the 2007 appraisal, the Sonnenbergs filed a complaint against Higgins, ANRES, Crown Mark Mortgage, Inc., and mortgage broker David Dewaelsche (an employee of Crown Mark Mortgage, Inc.) alleging six counts including intentional misrepresentation and deceptive acts in connection with a home loan in violation of the Home Loan Practices Act, Indiana Code article 24-9. Specifically, the Sonnenbergs alleged that the square footage and appraised value in Higgins' appraisal was "false," that Higgins "knew or was recklessly ignorant" of the falsity, that Higgins knew and intended for the Sonnenbergs to rely on the falsity, and that it was "an attempt to defraud [the Sonnenbergs] into obtaining higher loan amounts than they actually would have obtained if they had known the true square footage and value of their property." Appellants' App. p. 35-36, paras. 40-42, 45, 47.

In September and December of 2008, the trial court granted default judgments against Higgins and ANRES. *Id.* at 2-3 (paras. 1 and 2 of the trial court's damages order referencing its prior default judgments).<sup>1</sup> The damages hearing occurred in February 2010, well over a year after the default judgments were entered. Counsel for the Sonnenbergs, Crown Mark Mortgage, and Dewaelsche attended the hearing. Higgins and ANRES were neither represented by counsel nor present at the hearing. The

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<sup>1</sup> We note that the Sonnenbergs have not provided us with a copy of these default judgments. They have also failed to include a copy of the trial court's chronological case summary. *See* Ind. Appellate Rule 50(A)(2)(a), (f) (Appellant's Appendix shall contain the CCS and necessary documents from the Clerk's Record). Accordingly, we are left with a significant gap in the record in this case.

Sonnenbergs requested a total of \$480,650.00 in damages: \$280,000.00 for the difference between the two appraisals, \$190,000.00 in interest paid on the two loans, \$10,000.00 in attorney's fees, \$150.00 for costs of filing suit, and \$500.00 for refund of the appraisal. Mr. Sonnenberg testified as to how each of these figures was calculated.

In April 2010, the trial court issued its final judgment against Higgs and ANRES. The judgment contains the following findings of fact:

9. The Sonnenbergs have taken income tax deductions for the interest they paid with regard to the First Mortgage Loan and the Line of Credit.

10. There is nothing in the record to indicate that ANRES or Higgs were directly or indirectly involved in the negotiations of the aforementioned loans, nor did ANRES or Higgs directly profit from the aforementioned loans.

11. There is nothing in the record to indicate that Sonnenbergs did not negotiate the First Mortgage Loan and the Line of Credit as an "arms length transaction" with the finance company.

\* \* \* \* \*

13. The Sonnenbergs have received \$926,250.00 in funding for the First Mortgage Loan and the Line of Credit. They have had the benefit of those funds. They have received the interest deduction for income tax purposes.

14. The Sonnenbergs admit that their credit is excellent and that this matter has not had a detrimental effect on their credit.

15. While the Sonnenbergs have raised a claim under Ind. Code § 24-9-2-8, the Court finds they have failed to prove by a preponderance of the evidence that the Home Loan Practices Act applies to either ANRES or Higgs as appraisers.

*Id.* at 3-4. Although the Sonnenbergs requested \$480,650.00 in damages, the trial court awarded the Sonnenbergs only \$650.00 in damages (\$500.00 refund of the appraisal fee

and \$150.00 for costs to bring suit), plus post-judgment interest. The Sonnenbergs now appeal.

### **Discussion and Decision**

The Sonnenbergs appeal the trial court's award of damages. As an initial matter, we note that although Crown Mark Mortgage and Dewaelsche have submitted an Appellee's brief because they are parties of record in the trial court below, *see* Ind. Appellate Rule 17(A), Higgens and ANRES, against whom the judgments were actually entered, have not submitted an Appellee's brief.

When an appellee fails to submit a brief, we will not undertake the burden of developing arguments for the appellee. *Ramsey v. Ramsey*, 863 N.E.2d 1232, 1237 (Ind. Ct. App. 2007). In these situations, we apply a less stringent standard of review with respect to showings of reversible error, and we may reverse the trial court's decision if the appellant can establish prima facie error. *Id.* In this context, prima facie error is defined as "at first sight," "on first appearance," or "on the face of it." *Id.*

The Sonnenbergs argue that the trial court erred in failing to award damages pursuant to the Home Loan Practices Act. According to the Sonnenbergs, their complaint alleged the necessary facts to establish a violation of the Home Loan Practices Act. So when the trial court entered default judgments against Higgens and ANRES, the facts as alleged in their complaint were deemed admitted. Thus, because a violation of the Home Loan Practices Act was established by their facts, the Act "mandates" the payment of damages as outlined in the statute. Appellants' Br. p. 5. Therefore, the Sonnenbergs'

argument continues, the trial court erred in awarding only \$650.00 in damages when the Act allows for much more.

The Home Loan Practices Act (“the Act”) was first enacted in 2004. *See* P.L. 73-2004, Sec. 33 (effective Jan. 1, 2005). It prohibits certain lending practices and places additional restrictions on “high cost home loans.” Ind. Code chs. 24-9-3 & -4. In this case, the Sonnenbergs focus on a portion of the Act prohibiting deceptive acts in connection with a home loan. Ind. Code § 24-9-3-7. This portion of the Act was revised substantially in 2009 and 2010 to expand the scope of prohibited acts. *See* P.L. 52-2009, Sec. 7 (effective July 1, 2009); P.L. 105-2009, Sec. 8 (effective July 1, 2009); P.L. 114-2010, Sec. 18 (effective July 1, 2010). At the time of the alleged violation in this case, however, this section provided:

A person may not:

- (1) divide a loan transaction into separate parts with the intent of evading a provision of this article;
- (2) structure a home loan transaction as an open-end loan with the intent of evading the provisions of this article if the loan would be a high cost home loan if the home loan had been structured as a closed-end loan; or
- (3) *engage in a deceptive act in connection with a:*
  - (A) *home loan*; or
  - (B) loan described in IC 24-9-1-1.

I.C. § 24-9-3-7 (2005) (emphasis added); *see also* P.L. 141-2005, Sec. 5. The Act defines

“deceptive act” as:

- (a) [A]n act or a practice as part of a consumer credit mortgage transaction involving real property located in Indiana in which a person at the time of the transaction knowingly or intentionally:
  - (1) makes a material misrepresentation; or
  - (2) conceals material information regarding the terms or conditions of the transaction.

(b) For the purposes of this section, “knowingly” means having actual knowledge at the time of the transaction.

Ind. Code § 24-9-2-7.

If there is a violation of the Act, damages including consequential damages, statutory damages equal to two times the finance charges agreed to in the home loan, costs, and reasonable attorney’s fees are recoverable:

(a) A person who violates this article is liable to a person who is party to the home loan transaction that gave rise to the violation for the following:

- (1) Actual damages, including consequential damages. A person is not required to demonstrate reliance in order to receive actual damages.
- (2) Statutory damages equal to two (2) times the finance charges agreed to in the home loan agreement.
- (3) Costs and reasonable attorney’s fees.

Ind. Code § 24-9-5-4 (2005) (this section was amended in 2009 and again in 2010, effective July 1, 2010, which was after the trial court’s April 2010 order in this case).<sup>2</sup>

Here, the Sonnenbergs alleged in their complaint that Higgens’ appraisal of the value and square footage of their home was false, that Higgens knew or was recklessly ignorant of the falsity, that Higgens knew they would rely on the false appraisal and intended they do so, and that they would not have obtained the loan and line of credit if they had known the true value and square footage of their home. It is true that, as the Sonnenbergs argue, the effect of a default judgment is that the facts as alleged in the

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<sup>2</sup> Crown Mark Mortgage and Dewaelsche argue on appeal that according to the 2010 amendment to Indiana Code section 24-9-5-4, *see* P.L. 105-2009, Sec. 10 (effective July 1, 2010), which inserted “as appropriate” in the introductory language, damages are now discretionary. Appellees’ Br. p. 7-8. We first note that the 2010 amendment went into effect on July 1, 2010, after the trial court’s order in this case. Moreover, we make no comment as to whether the addition of the phrase “as appropriate” gives the court discretion in awarding the damages listed in the statute.

complaint are deemed admitted. *See Shoulders v. State*, 462 N.E.2d 1034, 1035 (Ind. 1984). Therefore, we must assume that the allegations in the Sonnenbergs' complaint are true. However, this does not mean that the Sonnenbergs are entitled to relief under the Act.

This is because a trial court must still determine whether, as a matter of law, the facts as alleged in a complaint entitle the plaintiffs to relief. *Id.* To that end, Indiana Trial Rule 55(B) provides that even though a default has been granted, a trial court may conduct a hearing to enable it to enter a judgment:

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required.

Ind. Trial Rule 55(B); *see also Shoulders*, 462 N.E.2d at 1035. This is precisely what the trial court did here. The court heard additional evidence in February 2010 and entered an order in April 2010 which essentially concluded that the allegations in the complaint were insufficient to establish a deceptive act in connection with a home loan. That is, although the appraisal may have been used by the Sonnenbergs in procuring their loan, there are no facts that ANRES or Higgens were directly involved in the home loan transaction or that they falsified the appraisal with the purpose of deceiving the Sonnenbergs into procuring the loan.

Nevertheless, the dissent points out that the Sonnenbergs' complaint alleges counts other than a violation of the Home Loan Practices Act, that is, negligence on the part of the appraiser and mortgage broker, intentional misrepresentation by the appraiser,

and breach of fiduciary duty by the mortgage broker. Although our reading of the Sonnenbergs' appellate brief reflects that they are arguing only that the trial court erred in determining that the Home Loan Practices Act does not apply and in failing to award damages pursuant to that Act, to the extent that the Sonnenbergs are also arguing that they are entitled to damages based on these other counts, we make the following observations. First, the Sonnenbergs claim that they are entitled to \$10,000.00 in attorney's fees. However, they would only be entitled to attorney's fees under the Home Loan Practices Act or some other statute which they do not cite on appeal. *See Kintzele v. Przybylinski*, 670 N.E.2d 101, 102 (Ind. Ct. App. 1996) ("Generally, litigants must pay their own attorney's fees. Thus, attorney fees are not allowable in the absence of a statute or some other agreement or stipulation authorizing such an award." (citation omitted)). Second, the Sonnenbergs claim that they are entitled to \$280,000.00 for the difference between the two appraisals and \$190,000.00 in interest paid on the two loans. However, as the trial court found, the Sonnenbergs have received the benefit of the funds they received and tax deductions for the interest they paid. Therefore, they are not entitled to these damages. And because they do not ask for any other damages, there is nothing to remand for.

Affirmed.

ROBB, C.J., concurs.

MAY, J., dissents with separate opinion.

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CARL and JANE SONNENBERG,	)	
	)	
Appellants-Petitioners,	)	
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vs.	)	No. 29A04-1005-PL-381
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A.N. REAL ESTATE SERVICES, INC.,	)	
CROWN MARK MORTGAGE, INC.,	)	
DAVID DEWAELSCHÉ, and	)	
NATALIE HIGGENS,	)	
	)	
Appellees-Respondents.	)	
	)	

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**MAY, Judge, dissenting**

The Sonnenbergs’ complaint alleges, in addition to violation of the Home Loan Practices Act, negligence on the part of the appraiser (Count I); negligence on the part of the mortgage broker (Count II); intentional misrepresentation by the appraiser (Count III); and breach of fiduciary duty by the mortgage broker (Count VI). The majority opinion appears to address only the decision not to award damages under the Act, presumably on the ground the Act did not apply, but the trial court’s judgment was not explicitly so limited.<sup>3</sup> Because I believe the trial court erred to the extent it determined

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<sup>3</sup> Nor was the Sonnenbergs’ argument on appeal so limited, though the majority addresses only their argument “that the trial court erred in failing to award damages *pursuant to the Home Loan Practices Act.*” (Slip op. at 5) (emphasis added).

the Sonnenbergs were not damaged by the mortgage loan they obtained based on the erroneous and inflated appraisal, I must respectfully dissent.

I do not suggest the Sonnenbergs are necessarily entitled to the “interest free loan,” (Appellees’ Br. at 5), ANRES asserts they are seeking in the form of interest on the full amount they borrowed. But neither can I agree with the trial court that the Sonnenbergs did not incur *any* damages based on the difference between the 2005 and 2007 appraisals.

The trial court found ANRES and Higgins appraised the Sonnenbergs’ home at a fair market value of \$975,000, and that the Sonnenbergs then obtained a mortgage loan of \$780,000 and a line of credit in the amount of \$146,250.00 secured by a second mortgage. It found they “received all funds from the [loans] and utilized those funds for their benefit.” (App. at 3.)

I do not accept the trial court’s apparent premise that debt -- in the form of a mortgage that a borrower could not have obtained absent an inflated appraisal -- is necessarily a “benefit” that cannot amount to “damage.” I believe the Sonnenbergs’ debt in the form of a mortgage loan and home equity line of credit totaling \$926,250.00 is more accurately characterized as a “burden” to the Sonnenbergs than a “benefit,” as with the new appraisal they are now “underwater.”<sup>4</sup> *See, e.g., In re Abbott*, 408 B.R. 903, 912 n.6 (Bankr. S.D. Fla. 2009) (when the value of real estate used to secure a mortgage loan is less than the outstanding balance on the loan, the borrower with such negative equity is referred to as being “underwater.”). As a result of the erroneous appraisal, they are

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<sup>4</sup> Carl Sonnenberg testified the house was “currently up for sale for \$675,000” while the amount owned on the loan was \$926,250. (App. at 20.)

saddled with debt that far exceeds the value of the real estate that secures it. I would not hold the Sonnenbergs “utilized those funds for their benefit” (App. at 3), when they remain legally obligated to pay all of it back, with interest, and might well be unable to do so because their real estate is worth far less than the amount they were lent.

I have found no decisions specifically addressing whether, in this context, debt that could not have been incurred but for an inflated appraisal amounts to “damage.”<sup>5</sup> But in some situations, debt that should never have been incurred is considered “damage” and not a “benefit.” For example, our Indiana Supreme Court stated in *Pflanz v. Foster*, 888 N.E.2d 756, 759 (Ind. 2008), that in contribution or indemnification cases, “the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party.”

The Sonnenbergs incurred “a monetary obligation that is attributable to the actions of another party,” *id.*, when they obtained a mortgage debt amounting to almost a million dollars based on the inaccurate appraisal. Thus, I believe damage occurred. *See id.* I would reverse and remand for the trial court to determine the amount of that damage. I must therefore respectfully dissent.

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<sup>5</sup> In *Costa v. Neimon*, 366 N.W.2d 896 (Wis. Ct. App. 1985), Neimon appraised property as having a fair market value of \$21,500. A loan to Costa was approved, and the sale closed. The Costas considered relocating and hired an independent appraiser who determined that the value of the property was \$13,000. The Costas lost the property in a mortgage foreclosure in 1979 for failure to make the monthly payments. The court determined the evidence did not support the jury’s damage award, but noted “the Costas’ loss of their home due to their inability to make the monthly payments may be a consequential damage resulting from the misrepresentation.” *Id.* at 901.