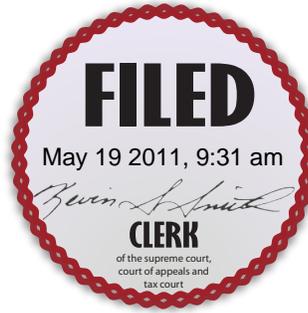


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MARK KRAMER and KERRI KRAMER,

Appellants,

vs.

KRAMER FURNITURE AND CABINET  
MAKERS, INC. and THOMAS KRAMER,

Appellees.

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No. 71A04-1008-PL-599

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Margot F. Reagan, Judge  
Cause No. 71D04-0510-PL-387

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**May 19, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Mark Kramer and Kerri Kramer (the “Kramers”) appeal from the trial court’s entry of judgment following a bench trial in favor of Kramer Furniture and Cabinet Makers, Inc. (“Kramer Furniture”) on Kramer Furniture’s complaint on account, for breach of contract and unjust enrichment, on the Kramers’ counterclaim, and on the Kramers’ third-party complaint against Thomas Kramer. The Kramers contend that the court misapplied a \$19,750 credit for antiques (the “antiques credit”) to the balance Tom Kramer owed on a promissory note to Mark Kramer as of September 1999 rather than to invoices the Kramers owed Kramer Furniture for labor and materials provided for construction of the Kramers’ new home through December 2010. Thus, the Kramers contend that the trial court erred when it entered a money judgment for Kramer Furniture rather than for the Kramers. The trial court made findings and conclusions under Trial Rule 52(A). We conclude that the evidence supports the findings and that the findings support the conclusions and judgment on this issue and, therefore, we affirm.

## **FACTS AND PROCEDURAL HISTORY**

Following a bench trial, and after considering the Kramers’ motion to correct error, the trial court entered amended findings of fact and conclusions as follows:

### Findings of Fact

#### A. Identification of Parties and Their Respective Claims and Defenses

1. Mark Kramer (“Mark”) and Kerri Kramer (“Kerri”) are married. These defendants together will be referred to as (“Kramers”).
2. Mark and Thomas Kramer (“Tom”) are brothers.

3. Mark owned a business known as Termiguard, Inc. (“Termiguard”) during relevant time periods.
4. Tom is the owner of Kramer Furniture & Cabinet Makers, Inc. (“Kramer Furniture”), successor to Warehouse Antiques, Inc. and Thomas H. Kramer, Inc.
5. Tom operates Kramer Furniture, which has been in the business of buying and selling antiques, and restoring and producing cabinets.
6. The current operation of Kramer Furniture primarily involves manufacturing cabinets and furniture.
7. On October 3, 2005, Kramer Furniture filed its Complaint (“Complaint”) against the Kramers requesting judgment in its favor for monies owed due (i) on account, (ii) from a breach of contract, or (iii) for unjust enrichment.
8. Kramer Furniture’s Complaint originally requested judgment in the amount of \$23,620.29 plus an additional prime plus one percent (1%) finance charge compounded daily until the date of judgment. Kramer Furniture has requested leave to revise its request for judgment to conform with the evidence produced at trial in an amount of \$40,866.06, plus statutory prejudgment interest through the date of judgment and that . . . motion has been granted.
9. On January 18, 2006, the Kramers filed their Answer to Kramer Furniture’s Complaint and raised three (3) affirmative defenses claiming that each barred Kramer Furniture’s Complaint: (i) unclean hands, (ii) accord and satisfaction, and (iii) right to an offset.
10. On January 18, 2006, the Kramers filed, along with their Answer, their Counterclaim against Kramer Furniture (“Counterclaim”) and a Third-Party Complaint against Tom (“Third-Party Complaint”).
11. With their Counterclaim, the Kramers alleged that Kramer Furniture “undertook” a debt Tom owed to Mark and they requested judgment in an “amount to be proven at trial”, which they appear to have claimed was in “excess of \$34,000.00”.
12. With their Third-Party Claim against Third-Party Defendant, Tom, the Kramers alleged that Kramer Furniture and Tom failed to accurately account for the goods and services Kramer Furniture provided to the

Kramers in their new home, and that Tom continued to owe a debt to the Kramers “in an amount to be proven at trial”.

13. As to both their Counterclaim and Third-Party Claim, the Kramers alleged that they incurred attorney’s fees in this matter exceeding \$13,000.00.

14. Kramer Furniture and Tom objected to the admission of the Kramers’ attorney’s fees because it was not within the issues set by the pleadings and as such would prejudice Kramer Furniture in its defenses on the merits. Their objections were overruled.

15. Kramer Furniture and Tom, respectively, answered the Counterclaim and the Third-Party Claim and raised four (4) affirmative defenses to each: (i) full accord and satisfaction, (ii) waiver and estoppel, (iii) full and complete payment, and (iv) laches.

B. Promissory Note

1. On October 3, 1987, Tom entered into a Note (“Promissory Note”) in favor of Termiguard wherein Termiguard loaned Tom the principal sum of \$50,000.00.

2. This Promissory Note was subsequently assigned to Mark.

3. Relevant provisions of the Promissory Note include:

a. Interest to be charged on the Promissory Note was eight and three-fourths percent (8 3/4%) annually;

b. The Promissory Note was to be paid off in full on January 3, 1988;

A provision of the Note provided:

c. “If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is delivered or mailed to me;”

Another provision of the Note provided:

d. "If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees;" and

e. "Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address."

4. Throughout the life of the Note, neither Mark nor Termiguard issued any written notice of default to Tom regarding payments due under the Promissory Note.

5. At trial, Tom presented evidence for payments totaling \$68,548.45 (principal plus interest) as of September 13, 1999. He also submitted two documents that purported to represent payments of \$7,000.00 and \$1,036.84 on the balance of the promissory notes.

6. He did not present cancelled checks or bank statements for those two payments. The documents appeared to have been reconstructed. The document showing a \$7,000.00 payment to Termiguard, Inc. did not contain a note like others which was: "Interest due on Note @ 8.75%." Instead, it said "Loan Principal Repayment." It was dated September 9, 1989, close to a \$12,000.00 loan Mark made to Tom (not the subject of this lawsuit). Mark testified that he didn't charge interest on the \$12,000.00 loan. Further, Mark did not recall receiving the two additional payments claimed by Tom. Mark acknowledged the remaining payments. Tom failed to prove that these amounts were paid by a preponderance of the evidence. Therefore he paid \$60,511.61 on the note as of September 13, 1999.

7. Towards repayment for the Note, Tom also transferred some antiques to Mark and Kerri, some of which were transferred back to him.

8. The parties agreed that the value of the antiques kept by the Kramers was to be deducted from the balance due under the promissory note.

9. The antiques that remained with Mark and Kerri had the following values:

Dresser	\$15,000.00
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Three Pitchers	\$ 750.00
Coffer	\$ 750.00
Sampler	\$ 2,500.00
Windsor Side Chair	<u>\$ 750.00</u>
TOTAL	\$19,750.00

10. The appropriate credit to Tom for the antiques is approximately \$19,750.00.

11. At all relevant times Tom was the owner, a director and an officer of Kramer's Furniture and had the authority to bind that company to its agreement with the Kramers.

12. As of September 13, 1999, Kramer Furniture owed Mark **\$19,411.83** on the Note. (**\$39,161.83 minus the antiques valued at \$19,750.00**). **The \$39,161.83 figure is from Kramer Furniture's calculations of payments and interest as of September 13, 1999 leaving this amount owed.**

C. Home Construction Work

1. On December 27, 1999, the Kramers contracted to build a new home at 13937 Hearthside Drive, Granger, Indiana ("New Home"), with Nugent Builders ("Nugent") and entered into a Sales and Specification Agreement ("Nugent Contract") with Nugent.

2. At the same time, the Kramers and Tom discussed whether Kramer Furniture would provide certain materials and labor for the Kramers' New Home (the "Agreement").

3. In return, Kramer Furniture would be compensated. The offer and acceptance of the terms of the agreement relating to the work and consideration were oral.

4. Nugent was to pay Kramer Furniture for materials and labor it supplied in accordance with the Nugent Contract ("Nugent Allowances").

5. The value of the materials and labor Kramer Furniture provided in excess of the Nugent Allowances would be credited for amounts Tom owed under the Promissory Note ("Setoff").

6. The materials and labor provided in excess of the Nugent Allowances and the Setoff were understood by Tom to be paid for by the Kramers to Kramer Furniture.

7. The Kramers agreed to accept Kramer Furniture's offer to provide materials and labor as the Kramers requested and the value of these materials and labor would be credited by the Nugent Allowances and the Setoff.

8. The relevant provisions of the Nugent Contract are:

a. Allowances. Dollar amounts designated as allowances on either the contract or proposals are estimates. After the work is performed, the actual cost exceeds the allowance the difference shall be charged to the Purchaser [the Kramers]. If the actual cost is less than the allowance, the Purchaser shall receive a refund at closing

b. Exterior Doors: Front door unit with Transom and round top (as per unit) with an allowance of \$1,620.00. Other exterior doors, to be insulated metal doors, no storm doors included.

c. Interior Trim: To be 3-1/4" casing on windows and doors, and 4-1/4" base, Coffered Ceiling in Great Room with Crown; Tray ceiling in Master Bedroom; 2-pieced Crown Molding in Dining Room, Living Room, Den and Sitting Room. Chair Rail in Dining Room Living Room, Den and Foyer.

d. Kitchen Allowance: An allowance of \$45,000.00 to include the following: Kitchen Cabinets and Counter Tops, Bathroom Vanities and Vanity Tops.

9. Kramer Furniture invoiced Nugent on three (3) separate occasions for the work it performed pursuant to the Nugent Contract, and Nugent paid all three (3) invoices in full for a total amount of \$60,594.05. The work Kramer Furniture performed was completed on or about December 10, 2000.

10. The Kramers worked with Kramer Furniture selecting and requesting the designs and materials they wanted installed in their New Home.

11. Kramer Furniture, at the Kramers' request, provided other materials and labor, including but not limited to, customized cabinetry, a wine rack, a custom-made Mahogany Front Door, lighting, and specialized designs.

12. Kramer Furniture also restored various furniture pieces for the Kramers and provided other miscellaneous items of furniture.

13. In total, the Kramers requested, and Kramer Furniture provided and installed, the following materials at the following costs:

House Cabinetry

Kitchen & Granite	\$40,783.00
Locker Area & Top	\$ 6,118.00
Laundry Area & Top	\$ 4,660.00
Master Bath & Tops	\$ 4,359.00
Bedroom Baths & Tops	<u>\$ 4,172.00</u>
	\$60,092.00

Study – stipulated charges over and above the allowance

Cabinetry	\$16,175.00
Wainscot Paneling	\$ 6,155.00

Miscellaneous

Wine Rack with Installation	\$ 445.00
Task Lighting for the Kitchen	\$ 408.00
Trim Package	\$13,668.00
Additional Trim	\$ 1,926.00
Upcharges	\$ 672.00
Chairs, Office Doors & Column	\$ 1,112.00
Mahogany Front Door	<u>\$ 3,700.00</u>
	\$21,931.00

Subtotal	\$104,353.00
Minus	<u>\$ 60,594.00</u> (allowances)
Subtotal	\$ 43,759.00
Minus	<u>\$ 19,411.83</u> (amount owed to Mark)
TOTAL	\$24,347.17 (amount Kramers owed to Kramer Furniture for additional work)

+ 8% simple annual prejudgment interest  
for eight years and four months.  
 \$36,360.18

[14.] The Court has adjusted Tom’s claims by removing the following costs:

- a. \$1,500.00 for the desk was paid in cash (Mark’s testimony page 189 of transcript).

- b. \$1,197.00 was included in the \$16,175.00 invoice (Ex 16)
  - c. \$1,359.00 Entertainment Center—page 194 of transcript—Mark bought from Tom.
  - d. \$550.00 Drawings (Mark’s testimony—a designer did it—page 190 of transcript).
15. Kramer Furniture provided all the materials and labor pursuant to the Kramers’ requests.
  16. Kramer Furniture made or purchased parts (wood plates, locking devices, knobs, etc.) for the Mahogany Study and then built the furniture and other items that were eventually installed in the study.
  17. Kramer Furniture painted a pair of French Doors to match the color of the Kramers’ study and paint supplied by Mark.
  18. Kramer Furniture provided materials at the Kramers’ request that were specially assembled, painted, etc. to meet the Kramers’ requests.
  19. Tom sent invoices to the Kramers. However, the dates of transmission of each invoice, are in dispute.
  20. There was no agreement as to interest on any amount owed by the Kramers for Tom’s services and materials.
  21. Invoices which were produced at trial did not contain all the services and products provided to the Kramers. Some invoices had no reference to interest and others had various interest rates.
  22. The invoices introduced as exhibits showed charges for:
 

a)	study & bar stools	\$16,175.00
b)	dog food container	\$ 200.00
c)	Ogee edge	\$270.00
d)	installation of casing	\$202.50
e)	column, chairs, French doors	<u>\$ 1,112.50</u>
		\$17,960.00

The amount claimed in Tom’s original complaint was \$23,620.29 which reflected the \$17,960.00 above plus the disputed interest.

At trial, Tom has claimed that he has provided more services and materials than those billed in the invoices produced. At trial, the Kramers agreed that many, but not all of the work and items were provided by Tom.

## Conclusions of Law

1. The Promissory Note was a binding contract. The contract was impliedly mutually modified by the parties' conduct. Indianapolis v. Twin Lakes Enterprises, Inc., 568 N.E.2d 1073, 1084 (Ind. App. Ct. 1991). The time to pay the interest and principal was extended over a period of almost fourteen years. As of September 13, 1999, Tom owed Mark **\$19,411.83 after applying the antiques credit to \$39,161.83**. This amount was fixed when Kramer Furniture orally agreed to provide services and materials to satisfy the remaining debt on the promissory note, thereby creating a new contract according to the modified terms. **(There is no evidence as to which day the parties agreed to the modified terms so the Court has used September 13, 1999, the date of the last payment on the promissory note).**

2. Kramer Furniture performed work on Kramers' new house which was covered, in part, by Nugent Builder's allowance of \$60,594.05. The parties stipulated that the amount of charges for the study was properly charged. The remaining charges are in dispute.

3. The parties never agreed on (or even discussed) additional costs or interest or late fees or fixed time to pay for the additional charges for work and materials. The delay in invoices, the absence of late fees, the various interest charges (or no such charge) indicate that there were no agreements. Although the parties orally agreed that Kramer Furniture should do work on the house, this court finds that it was not specifically limited. Any charges over the Nugent allowance and stipulated charges on the study were not part of the oral agreement. The doctrine of unjust enrichment now comes into effect. The Kramers were the beneficiaries of skilled workmanship. It is not credible that the Kramers didn't want the extra items. In fact, the evidence supports the fact that the Kramers specifically wanted the service and products. It is not credible that they didn't know what Tom was doing or the approximate cost of the work. It is not credible that they ignored his work and never questioned the work, the details and the cost. Unjust enrichment is a measurable benefit that has been conferred under such circumstances that the retention of the benefit without payment would be unjust and the claimant labored under an expectation of payment. See, e.g., Bright v. Kuehl, 650 N.E.2d 311, 316 (Ind. Ct. App. 1995). The Kramers should pay for the extra work and materials pursuant to this equitable doctrine.

4. The amount of \$17,960.00 (the unfounded amount of interest of [which] \$5,660.29 is not included) is the only amount that was backed up

by statements/invoices. The amount was not increased until the trial. The prejudgment interest statute would only cover that amount ascertainable from the date of the first invoice for \$17,960.00, which was transmitted on January 7, 2002 (the same amount demanded in the complaint filed October 3, 2005, less the alleged interest), until the date of judgment. An 8% annual simple rate of interest should be applied to \$17,960.00 when the accumulated billed amount became ascertainable, so from January 7, 2002 to May 14, 2010. IC 24-4.6-1-102; Thor Electric, Inc. v. Oberle & Assoc., 741 N.E.2d 373 (Ind. Ct. App. 2000); Indianapolis Machinery Co. v. Cohen, 378 N.E.2d 931 (Ind. Ct. App. 1978).

5. The prejudgment interest is calculated on the ascertainable amount of \$17,960.00 multiplied by 8% multiplied by number of years until judgment. The prejudgment amount to be added to \$24,347.12 is calculated as follows using January 7, 2002 until May 14, 2010 or **8 years and 129 days: Prejudgment interest would be \$12,013.06 (\$17,960.00 x .08/365 — 3.94 per diem x 3049 days).**

6. Attorney fees requested by the Kramers are not appropriate. In the contract (Promissory Note), attorney fees may be collected by Note Holder “if the Note Holder has required me to pay immediately in full as described above[.]” That was not the case here. The Note Holder never defaulted Tom nor called in the Note. There is no other legal basis for the mandatory award of attorney fees to the losing party. This court has no reason not to follow the “American Rule”. Each party pays their own attorney fees. Thor, [741 N.E.2d] at 382, 383.

7. Interest on the Promissory Note was paid up to September 13, 1999 which was the approximate date of the oral agreement whereby the cost of Tom’s work on Mark’s new house may “set off” any amounts remaining owed on the Promissory Note. At that point, the first agreement terminated by agreement and a new agreement was created. Therefore, interest ceased on the Promissory Note in September of 1999.

8. Plaintiff is awarded \$36,360.18 on Kramer Furniture & Cabinet Makers, Inc.’s complaint based upon counts of claimed money due on account, from a breach of contract and for unjust enrichment. Defendants failed to carry the burden of proof on affirmative defenses to those counts.

9. Third-party complaint filed by Mark and Kerri Kramer failed to show that any additional money was owed on a Promissory Note since September 13, 1999, when the contract was modified.

10. Kramer's failed to show any entitlement to attorney fees from the opposing party.

11. Although plaintiffs have had a less than optimal accounting and business operating systems, the defendants apparently aren't in a much better position. Their casual business dealings involving thousands of dollars have led to this very sad situation.

12. Judgment for the plaintiff is Ordered. The total judgment is \$24,347.17 plus prejudgment interest of \$12,013.01, the sum of which is \$36,360.18 due from defendants to plaintiff.

13. Judgment for the third-party defendant, Thomas Kramer.

14. Judgment for counterclaim defendant, Kramer Furniture.

SO ORDERED. Judgment entered.

Appellants' App. at 12-23 (emphases original). This appeal ensued.

### **DISCUSSION AND DECISION**

The trial court issued findings of fact and conclusions thereon pursuant to Indiana

Trial Rule 52. Our standard of review is well settled:

First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers must establish that the trial court's findings are clearly erroneous. Findings are clearly erroneous when a review of the record leaves us firmly convinced a mistake has been made. However, while we defer substantially to findings of fact, we do not do so to conclusions of law. Additionally, a judgment is clearly erroneous under Indiana Trial Rule 52 if it relies on an incorrect legal standard. We evaluate questions of law de novo and owe no deference to a trial court's determination of such questions.

McCauley v. Harris, 928 N.E.2d 309, 313 (Ind. Ct. App. 2010) (citation and quotation omitted), trans. denied. In other words, "[a] decision is clearly erroneous if it is clearly

against the logic and effect of the facts and circumstances that were before the trial court” or if the court misinterprets the law. Young v. Young, 891 N.E.2d 1045, 1047 (Ind. 2008).

The Kramers contend that the trial court erred when it entered judgment in favor of Kramer Furniture. In particular, the Kramers maintain that the trial court’s calculation of each party’s debts over the course of their business transactions was erroneous in that “the antique credit should not have been calculated and applied [to Tom’s debt to Mark] until after Tom’s provision of services [in the construction of the house], which was not completed until December 10, 2000[.]” Brief of Appellants at 9-10. The Kramers maintain that the credit was meant to go against what they owed Kramer Furniture for the work on their house. Without that credit, the Kramers argue that “the amount due to Mark as of December 10, 2000, was the balance [on the Note] of \$39,161.83 plus interest of \$4,271.59, less the ‘antiques credit’ of \$19,750.00, for a balance of \$23,683.42.” Id. at 10. Subtracting the amount of the invoices from Tom to Mark for the work on the house, \$17,960, leaves the net amount allegedly due from Mark to Tom as of January 7, 2002, as \$5,723.42. On appeal, the Kramers argue that judgment should be entered in their favor for that amount plus prejudgment interest at 8%.

But Kramer Furniture directs us to evidence that Tom gave the Kramers the antiques in 1998 or 1999, before any work was done on the Kramers’ house. Thus, Tom maintains that the trial court correctly applied the antiques credit for the balance due on the Note. Indeed, the Kramers do not direct us to any evidence in the record to support their assertion that the credit was due against the invoice for the work on the house.

Because the evidence supports the trial court's conclusion that the antiques credit was properly applied to the balance due on the Note, the Kramers cannot prevail on their claim that they are entitled to additional interest on the unpaid Note balance as of December 10, 2000.

The Kramers also allege that the trial court erred when it applied prejudgment interest to the additional \$17,960 the court found the Kramers owed Kramer Furniture as of January 7, 2002. The Kramers maintain that Kramer Furniture's debt to the Kramers at that time exceeded the \$17,960 invoice. But that contention rests on the Kramers' assertion that the antiques credit should not have been applied against Kramer Furniture's debt on the Note. Because we have concluded that the evidence supports application of the antiques credit against the Note, the Kramers cannot show that Kramer Furniture was indebted to them in an amount greater than their debt to Kramer Furniture as of January 7, 2002. The evidence supports the trial court's determination on this issue, and the Kramers have not shown reversible error. The trial court's judgment in favor of Kramer Furniture is affirmed.

Affirmed.

ROBB, C.J., and CRONE, J., concur.