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.

ATTORNEY FOR APPELLANTS:

CHARLES E. DAVIS
Davis Law, LLC
Fort Wayne, Indiana

ATTORNEY FOR APPELLEES:

JOHN JOHNSTON
Johnston & Johnston
Wabash, Indiana

FILED
May 29 2009, 8:38 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

JON HUFF and MARY HUFF,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 35A05-0808-CV-455
	)	
MIKE STOFFEL and ROSE STOFFEL,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey R. Heffelfinger, Judge
Cause No. 35C01-0601-PL-11

May 29, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants-Defendants Jon Huff and Mary Huff appeal following the trial court's award of $11,525 in damages, $14,036.10 in attorney's fees, and costs, in favor of Appellees-Plaintiffs Mike Stoffel and Rose Stoffel in their breach-of-contract action against the Huffs arising out of the parties' real estate purchase agreement. Upon appeal the Huffs challenge the judgment on several grounds, including two grounds which we find dispositive: whether the trial court committed clear error in (1) finding constructive fraud, and (2) enforcing the parties' purchase agreement despite a lack of evidence demonstrating compliance with Indiana Code section 32-21-5-10(c) (2005). Concluding that the trial court committed clear error on both grounds, we reverse and remand for vacation of the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

Prior to the initiation of this action and ensuing appeal, the Stoffels lived at and owned the real estate located at 1631 Cherry Street in Huntington. Prior to October of 2005, the Stoffels had listed this property for sale with Coldwell Banker realtor Cole Christman. On October 29, 2005, the Huffs, represented by Coldwell Banker realtor Boots Beam, submitted an offer to purchase the Stoffels' property and certain furnishings for $225,000. The Huffs' offer provided that the Huffs had twenty days to obtain a commitment for a mortgage loan for eighty percent of the purchase price. Next to this mortgage-loan provision, the Huffs indicated as follows: "(Preapproved at Priority Mtg.)." App. p. 240.

The Stoffels and Christman believed this "preapproved" provision demonstrated that the Huffs' offer to purchase their property for $225,000 had already been approved by a

mortgage lender, specifically Priority Mortgage. In fact, Priority Mortgage was merely a mortgage broker whose purpose it was to seek to obtain a mortgage loan for the Huffs.

According to the Huffs and Beam, the "preapproved" provision meant only that the Huffs were preapproved, as a general matter unconnected to the property at issue, for a mortgage loan in an amount equal to or lesser than $300,000. As an additional term of the purchase agreement, the Huffs specified as an "Other Provision" in Section 12.01, that "House must appraise for sale price or greater." App. p. 242.

The Stoffels did not accept the Huffs' offer but made a counteroffer. The counteroffer similarly listed the sale price of $225,000 but indicated that certain items of furniture were not included. Apart from these specified terms, the counteroffer incorporated all other terms and conditions of the purchase agreement contained in the Huffs' offer. The Huffs accepted the Stoffels' counteroffer on October 30, 2005.

On November 1, 2005, Sue Dame of Priority Mortgage asked Freck Appraisal to perform an appraisal of the property. Dame's appraisal application estimated the value of the property at $200,000. In a November 5, 2005 appraisal, Freck appraised the property at the selling price of $225,000.

Upon determining that the property had appraised for $225,000, the Stoffels' agent Christman advised them to proceed as planned for the scheduled November 22, 2005 closing. In preparation, the Stoffels ordered a survey and title insurance, and fixed a defect in the fireplace detected during the inspection. The Stoffels also made immediate arrangements to vacate the property pursuant to the term in the sale agreement requiring them to deliver

possession on the date of closing. These arrangements included entering into a rental lease agreement and paying a security deposit; cleaning the rental property and activating its utilities; packing their possessions and renting two storage facilities to store them; and purchasing a washer and dryer, bedroom furniture, and blinds, among other items.[1]

Priority Mortgage subsequently sent a copy of the $225,000 appraisal to an underwriter. The underwriter, however, refused to extend a loan based upon the $225,000 appraisal, stating as its reason, "Collateral is not supported by comps." Defendant's Exh. E. On November 15, 2005, Priority Mortgage notified the Huffs' realtor Beam that it could not support the valuation of the property at $225,000 "[d]ue to the lack of comparables of similar age and location" and suggested an alternative valuation, which it could support, of $210,000. Defendant's Exh. D. Christman submitted additional "comparables," to support the $225,000 value, none of which Dame found acceptable. Neither the Huffs nor their realtor Beam attempted to obtain "comparables" in an effort to support the $225,000 valuation. Dame recommended submitting the loan application to another lender, but Mary instructed Dame not to.

On November 15, 2005, Beam sent to the Stoffels' agent Christman an e-mail message she had received from the Huffs reiterating the purchase agreement provision requiring the property to appraise for the sale price and further stating, "Therefore, we are offering $210,000 as per appraisal and all other terms to remain the same." Plaintiff's Exh. 3. The email message indicated that "time [was] of the essence" and requested a written

[1] The Stoffels were subsequently able to return or cancel their order on certain items including the bedroom furniture and the washer and dryer.

response within approximately four hours. Plaintiff's Exh. 3. On November 16, 2005, the Stoffels responded that they were not willing to negotiate the price and indicated their preparedness to close the deal as scheduled on November 22, 2005. After it became apparent that the Huffs would not attend the closing, Christman cancelled the November 22 closing.

On January 4, 2006, the Stoffels filed a complaint in Huntington Circuit Court against the Huffs alleging both breach of contract (Count I) and fraud and misrepresentation (Count II), and seeking damages, attorney's fees, and costs. On May 1, 2006, the Stoffels amended their complaint to expand upon the allegations in Count II. On November 13, 2006, due to a conflict, the action was transferred to Huntington Superior Court.

The Stoffels filed a motion for summary judgment, and a hearing was held on February 5, 2007. On March 1, 2007, the trial court granted partial summary judgment in favor of the Stoffels. In granting partial summary judgment, the trial court found that the contractual provision requiring that the property appraise at or above the $225,000 sale price had been met. The trial court denied summary judgment on all other issues.

The trial court held a bench trial on April 4, 2008. At the close of the Stoffels' case, the Huffs moved to dismiss pursuant to Indiana Trial Rule 41(B) on the grounds that the Stoffels had failed to establish that the purchase agreement was an enforceable contract under Indiana Code section 32-21-5-10(c), which requires a signed disclosure statement. The trial court denied the motion. At the close of trial, the Huffs renewed their motion, which the trial court again denied.

Following trial, the parties submitted proposed findings and conclusions. The proposed findings and conclusions filed by the Huffs included the finding that the Stoffels had failed to demonstrate that the purchase agreement was enforceable pursuant to section 32-21-5-10. The Stoffels subsequently filed a memorandum, with an alleged disclosure statement attached as an evidentiary exhibit, in response to the Huffs' proposed findings.[2] The Huffs filed a motion to strike, and the Stoffels filed a response to the Huffs' motion to strike, after which the Huffs filed a reply to the memorandum. On May 16, 2008, following a hearing, the trial court struck the alleged disclosure statement from the record.

On June 17, 2008, the trial court, upon issuing findings and conclusions, entered judgment in favor of the Stoffels for $11,525 in damages, $14,036.10 in attorney's fees, and the costs of the action. These findings did not address the section 32-21-5-10 issue raised by the Huffs. This appeal follows.

DISCUSSION AND DECISION

I. Standard of Review

The Huffs challenge the trial court's findings and conclusions and its judgment in favor of the Stoffels by claiming, *inter alia*, that there was inadequate evidence of fraud and that the Stoffels failed to prove compliance with Indiana Code section 32-21-5-10(c). Pursuant to Trial Rule 52, the trial court entered findings of fact and conclusions thereon in

[2] This memorandum and its attachment are not in the record. The CCS indicates that the memorandum was in response to the Huffs' proposed finding with respect to compliance with "I.C. 32-21-8-10." App. p. 5. Indiana Code section 32-21-8-10 does not exist. Given the Huffs' subsequent response memorandum arguing the merits of section 32-21-5-10, it would appear from the record that the Stoffels' memorandum related to the merits of section 32-21-5-10.

support of its judgment. Our standard of review with respect to these findings and conclusions 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.

Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001) (citations omitted).

To the extent that the Huffs' claims involve contract interpretation, our review is *de novo*. *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1142 (Ind. Ct. App. 2003). Unless the terms of the contract are ambiguous, they will be given their plain and ordinary meaning. *Shorter v. Shorter*, 851 N.E.2d 378, 383 (Ind. Ct. App. 2006). Clear and unambiguous terms in the contract are deemed conclusive, and when they are present we will not construe the contract or look to extrinsic evidence but will merely apply the contractual provisions. *Id*. A document is not ambiguous merely because the parties disagree about a term's meaning. *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 532 (Ind. 2006). Rather, language is ambiguous if reasonable people could come to different conclusions as to its meaning. *Id*. The determination of whether a contract is ambiguous is a question of law. *Bernstein v. Glavin*, 725 N.E.2d 455, 459 (Ind. Ct. App. 2000), *trans. denied*.

II. Constructive Fraud

The Huffs challenge the trial court's finding that they committed constructive fraud. The trial court issued the following findings and conclusions with respect to the Stoffels' allegations of fraud:

> 29. The Huffs offered testimony that the term "preapproved" as used in the Huffs' offer meant they had been approved for a loan amount based on their incomes and credit scores, and did not mean they had been preapproved for a mortgage loan on any specific property. That evidence was refuted by the testimony of the Stoffels' agent, Cole Christman, who is a licensed Indiana real estate sales person. Christman testified that, in his opinion, "preapproved" meant the Huffs had been approved for a mortgage loan sufficient to purchase the Stoffel home. If, as the evidence shows in this case, the term "preapproved" used in a real estate offer can be interpreted in more than one way by persons who are trained, licensed, and deal in real estate and real estate mortgages, it is logical to conclude that the term "preapproved" used by the Huffs in their offer is ambiguous and should be construed against them. The Court finds, therefore, that the term "preapproved at Priority Mortgage" as used in the Huffs' offer meant Priority Mortgage had approved them for a mortgage loan on the Stoffel home at the time the offer was made, and it was reasonable for the Stoffels to interpret it in that manner.
>
> 30. Fraud may be either actual or constructive. Actual fraud involves an intentional or reckless deception. Constructive fraud does not involve a conscious intent to deceive. Constructive fraud consists of a material representation of fact, which representations are false and cause a reliance upon such representation to the detriment of the one so relying. *Ebby v. York-Division, Borg-Warner* (1983, Ind.App.) 455 N.E.2d 623@ 628.
>
> 31. The statement in the Huffs' offer that they had been preapproved at Priority Mortgage resulted in a constructive fraud. Although the Court does not believe the Huffs intended to deceive the Stoffels, the statement in the Huffs' offer that they had been preapproved was false. They had not been approved for a mortgage. They had not even been approved for a loan. The misrepresentation was relied upon by the Stoffels to their detriment. The Huffs benefited from the Stoffels' reliance because the Stoffels packed their belongings and moved from their home on Cherry Street so it would be vacant and the Huffs could move in immediately following the closing. It was the Huffs who insisted the closing take place on or before November 22, 2005, or

> just over 3 weeks after the contract was signed. The Stoffels did not have the luxury, like most sellers, of delivering possession 30 days after closing. If the Stoffels had not incurred the expenses, they would have been unable to deliver possession of the home to the Huffs at the time of closing.

App. pp. 12-13.

The trial court's finding of constructive fraud was premised upon its conclusion that the "Preapproved at Priority Mtg." language was ambiguous and subject to differing interpretations. In reaching this conclusion, the trial court credited Christman's trial testimony claiming that the "preapproved" language, in his view, meant that the Huffs had been approved for a mortgage loan for the Cherry Street property at the $225,000 purchase price. The court therefore construed the "preapproved" language against the Huffs as drafters and concluded that it constituted a misrepresentation which the Stoffels had relied upon to their detriment, resulting in constructive fraud.

We disagree that, under the terms of the instant contract, Christman's interpretation of the "preapproved" language was reasonable or capable of creating a contractual ambiguity. A contract is ambiguous only if a reasonable person would find it subject to more than one interpretation. *See Univ. of S. Ind. Found.*, 843 N.E.2d at 532. The "preapproved" language at issue here was not reasonably susceptible to Christman's claimed interpretation.

Significantly, the very word "*pre*approved" demonstrates that the approval at issue was in a preliminary, not final, stage. Further, the plain language of the payment section in which the "preapproved" language appeared indicated that the Huffs' financing to purchase the property remained entirely unresolved, with the purchaser required to perform certain steps following the effective date of the agreement in an effort to secure financing. These

steps included, within five[3] days of the agreement, (1) applying for a loan; (2) ordering and paying for an appraisal of the property; (3) ordering and paying for a credit report; and (4) "*then* proceed[ing] promptly and in good faith to meet the lender's requirements for a commitment or other indication that the lender w[ould] make the Loan to Buyer." App. p. 240 (emphasis supplied). The plain language of these future payment terms, part of which the Huffs supplied at presumably the same time that they noted their "preapproved" status, demonstrates that financing for the property was a subsequent step rather than a settled term. Christman's suggestion to the contrary, that financing had in fact been settled as of the date of the agreement, is simply irreconcilable with the terms of the agreement. In our *de novo* review of contract interpretation, we must accept an interpretation of a contract that harmonizes its provisions rather than one that places its provisions in conflict. *Whitaker v. Brunner*, 814 N.E.2d 288, 294 (Ind. Ct. App. 2004), *trans. denied*. We therefore conclude that Christman's interpretation of the contract is unreasonable, and that the trial court erred in finding an ambiguity in the contract, construing it against the Huffs, and awarding judgment to the Stoffels based upon constructive fraud.

III. Breach of Contract

In addition to their claim of fraud, the Stoffels also sought relief against the Huffs under a breach of contract claim. Following the Stoffels' presentation of evidence, the Huffs timely moved to dismiss on the grounds that the Stoffels had failed to prove compliance under section 32-21-5-10(c), which the trial court denied. The Huffs renewed their objection

[3] The Huffs supplied the five-day term.

on this ground following the close of evidence. The trial court's findings and conclusions awarding judgment in favor of the Stoffels determined that the only condition precedent at issue was the condition that they obtain financing. The trial court did not address the question of the Stoffels' alleged noncompliance with section 32-21-5-10(c). In challenging the trial court's judgment, the Huffs claim that the purchase agreement was unenforceable pursuant to 32-21-5-10(c), precluding the trial court's determination that they were in breach.

In seeking to enforce the purchase agreement, the burden of proof was on the Stoffels to demonstrate that the agreement was, in fact, enforceable. "It is axiomatic that a party seeking to enforce a contract must establish that all conditions precedent have been fulfilled, and that the burden of proof is on this party." *First Nat'l Bank of Logansport v. Logan Mfg. Co.*, 577 N.E.2d 949, 953 (Ind. 1991). The Stoffels do not dispute that compliance with section 32-21-5-10(c) was a condition precedent to the purchase agreement.

Indiana Code section 32-21-5-10(c) provides, in pertinent part, as follows with respect to residential real estate sales: "Before closing, an accepted offer is not enforceable against the buyer until the owner and the prospective buyer have signed the disclosure form. After closing, the failure of the owner to deliver a disclosure statement form to the buyer does not by itself invalidate a real estate transaction." The parties do not dispute that a closing did not occur in the instant case, making the enforceability of the accepted offer subject to the required disclosure form.

Not only did the Stoffels fail to introduce evidence showing compliance with section 32-21-5-10(c), the undisputed evidence in the record demonstrates that the purchase

agreement was *not* in compliance with section 32-21-5-10(c).[4] A simple review of section 13.02 of the agreement, which governs the disclosure form at issue in Indiana Code chapter 32-21-5,[5] indicates that the Huffs had not received the disclosure form required under current chapter 32-21-5. Under the plain language of section 32-21-5-10(c), the agreement is therefore unenforceable.

The Stoffels seek to avoid the applicability of section 32-21-5-10(c) by suggesting that the Huffs waived the issue by failing to raise it as an affirmative defense. In making this argument the Stoffels rely upon *Thompson v. City of Aurora*, 263 Ind. 187, 190, 325 N.E.2d 839, 841 (1975), wherein the Indiana Supreme Court held that a statutory notice requirement applicable to the plaintiff's cause of action was merely a "procedural precedent," that it need not have been included in the plaintiff's pleadings, and that the defendant must have raised the issue as an affirmative defense for the plaintiff's failure to prove notice to be fatal to its case. The Stoffels argue based upon *Thompson* that section 32-21-5-10(c) is a similar kind of condition precedent which the Huffs must have raised as an affirmative defense for it to prove fatal to their case.

Unlike in *Thompson*, section 32-21-5-10(c) is not merely a procedural condition precedent. Indeed, it implicates the heart of the purchase agreement by requiring a mutual

---

[4] The Stoffels point to Christman's testimony, in which he responded, "No," when asked whether any other conditions under the contract had to be met following the appraisal, as substantive evidence of compliance with section 32-21-5-10(c). App. p. 70. Christman's testimony is silent on the question of compliance with section 32-21-5-10(c), and section 13.02 of the purchase agreement, which directly addresses the issue, demonstrates noncompliance with section 32-21-5-10(c).

[5] The purchase agreement references Indiana Code chapter 24-4.6-2, as amended, which has has been recodified as Indiana Code chapter 32-21-5. Former section 24-4.6-2-10 is current section 32-21-5-10.

understanding between the contracting parties regarding such fundamental components of a residential property as its structural integrity and the condition of its mechanical, water and sewer systems. *See* Ind. Code § 32-21-5-7 (2005). Significantly, the purpose of section 32-21-5-10(c) is to render unenforceable, prior to closing, any agreement which does not involve the exchange of such information. As a substantive element of the contract enforcement action at issue, the disclosure requirement in section 32-21-5-10(c) is fully distinguishable from the merely procedural notice requirements addressed in *Thompson*. Accordingly, as the party seeking to enforce the agreement, the Stoffels had the burden to establish the disclosure's existence in compliance with section 32-21-5-10(c). *See First Nat'l Bank of Logansport*, 577 N.E.2d at 953. Because the Stoffels failed to demonstrate such compliance, especially in light of the undisputed provision in section 13.02 of the agreement demonstrating that the required disclosure had not been provided, the agreement is unenforceable as a matter of law under section 32-21-5-10(c). The trial court's failure to so find constituted clear error.

Having determined that the trial court's award of damages, attorney's fees, and costs was clearly erroneous on both the fraud and breach-of-contract grounds alleged by the Stoffels, we reverse the trial court's award and remand with instructions to vacate its judgment and enter judgment in favor of the Huffs.[6] In light of this conclusion, we find it unnecessary to address the Huffs' remaining allegations of error.

[6] Without discussion or authority, the Huffs request attorney's fees "for having to defend." Appellant's Br. p. 31. We decline that request. *See* Ind. Appellate R. 46(A)(8)(a) (providing that argument must be supported by cogent reasoning and citation to authority).

The judgment of the trial court is reversed, and the cause is remanded with instructions.

MAY, J., concurs.

FRIEDLANDER, J., concurring in result.

IN THE
COURT OF APPEALS OF INDIANA

JON and MARY HUFF	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	**No. 35A05-0808-CV-455**
	)	
MIKE and ROSE STOFFFEL	)	
	)	
Appellees-Defendants.	)	
	)	

FRIEDLANDER, Judge, concurring in result.

I concur in the ultimate resolution of this case, i.e., that the award of damages, attorney fees, and costs must be reversed. I write separately, however, to explain why I cannot agree with the Majority's conclusion that the term "preapproved" in this context "was not reasonably susceptible" to Christman's interpretation that the Huffs' offer of $225,000 had already been approved by a mortgage lender. *Slip op*. at 9.

It is not clear to me how, as the Majority explains it, "the very word '*pre*approved' demonstrates that the approval at issue was in a preliminary, not final, stage." *Id.* (emphasis in original). Although I understand that the Majority also makes reference to what it describes as the "entirely unresolved", *id*., state of the Huffs' financing at the relevant stage

of the negotiations, it seems to me that much of the Majority's analysis on this issue hinges upon the meaning of the term "preapproved" as used in the Huffs' written offer.

The prefix "pre" has three related, primary meanings, which are (1) earlier than, prior to, or before, (2) preparatory or prerequisite to, in advance or beforehand, and (3) in front of. Merriam Webster's Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/pre (last visited on May 8, 2009). Although I suppose one could make the argument that "preapproved" (not "preapprov*al* provision", which is the shorthand reference to this critical term that is primarily used in the Majority opinion; the distinction between the two is not inconsequential here) means something akin to "before it was approved", that is not the only reasonable meaning. Indeed, I would submit that it is not even the *most* reasonable interpretation. To cite just a few examples of the contemporary common usage and understanding of the prefix "pre", I note that a phone card with prepaid minutes refers to a phone card on which the charges for a designated number of minutes have already been paid. Utilizing a somewhat more somber example, I note that a prearranged funeral refers to a situation in which a person's funerary plans have been completed before death. Indeed, such involves *preplanning* and *prepaying* the applicable costs and fees. This is universally understood to mean that all choices relative to the arrangements have been completed, and payment has been made. *See* Indiana Funeral Director's Association, "Masterchoice Funeral Trust, Why Prearrange?", *available at* http://www.indiana-fda.org/_mgxroot/page_10786.php (last visited on March 9, 2009). I could go on, but hopefully I have sufficiently made the point that the prefix "pre" in front of a verb (e.g.,

preplan, prepay, prearrange) can, and I submit generally does, denote that the action conveyed by that verb has already been accomplished.

Applying these principles to the offer language in question, I believe Christman's interpretation of "preapproved" to mean that the Huffs had already been approved not only was plainly not "unreasonable", it was in fact the *most* reasonable interpretation of the meaning of that notation on the written offer sheet.

Having said all this, I nonetheless concur in the result reached by the Majority because, as ably explained in Part III of the Majority opinion, a discussion with which I am in full agreement, the contract containing the "preapproved" language was not enforceable.