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.

FILED
Aug 12 2010, 9:08 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANTS:

JAY T. SEEGER
Seeger & Forbes
Lafayette, Indiana

ATTORNEY FOR APPELLEES:

THOMAS M. BEEMAN
Anderson, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EUGENE HURT and L. ANITA HURT,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. 48A02-0912-CV-1248
	)	
EULALIA A. MAY, by KALEAIA F. PASCHAL, Guardian of the Person, and ESTATE OF EULALIA A. MAY,	)	
	)	
Appellees.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-0606-MF-731

August 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Eugene Hurt and L. Anita Hurt appeal a judgment in favor of the Estate of Eulalia A. May (the Estate) in the Estate's action to foreclose against the Hurts on a real estate contract. The Hurts present the following restated issues for review:

1. Did the trial court err in concluding there was no breach of warranty?

2. Was the amount of damages awarded by the trial court excessive?

We affirm.

The facts favorable to the judgment are that Eulalia May and her husband, Travis,[1] owned the Willow Mobile Home Park (Willow) in Anderson, Indiana and in 1992, entered into negotiations with the Hurts, who were interested in purchasing the mobile home park. Eugene Hurt expressed concern to Charles Coffman, whose real estate company listed the property on behalf of the Mays, that the State of Indiana would increase requirements concerning the electrical service at the mobile home park. Travis May assured Coffman there would be no need to increase the electrical service at Willow. At the conclusion of negotiations, Coffman's attorney prepared a Contract for the Conditional Sale of Real Estate that included the following warranty with respect to electrical service: "Seller warrants that the electrical service for the mobile home tenants is satisfactory for mobile home purposes." *Appellants' Appendix* at 97. The contract was executed on June 1, 1992.

In 1993, the Indiana State Department of Health (the ISDH) began deliberating

[1] Travis died on July 11, 2003 and Eulalia died on March 3, 2007. After their deaths, ownership of the contract interest implicated in this appeal passed to the Eulalia A. May Revocable Trust.

changes that would require upgrades in electrical service to mobile home parks in Indiana. Those changes eventually were enacted[2] and the ISDH established a 2000 deadline for completing the upgrade. The Hurts ultimately upgraded the electrical service at Willow in 2000 at a cost of $35,684.57.

In 2005, Eugene Hurt indicated to Eulalia that according to his calculations, the balance of the loan was approximately $6600. Until that point in time, the Hurts had made timely payments on the real estate contract. The Mays responded that the balance was $25,354.55.[3] At that point, the Hurts stopped making payments and asserted the claim that the Mays had breached the foregoing electrical service warranty.

On June 13, 2006, Eulalia filed a Complaint To Foreclose On Real Estate Contract. The Hurts filed an answer in denial and added a counter-claim seeking reimbursement for the costs incurred in upgrading the electrical service to Willow. The matter proceeded to trial, after which the trial court entered findings of fact and conclusions of law in support of its judgment for the Estate and against the Hurts. Those findings and conclusions state, in relevant part, as follows:

---

[2] The changes required Willow to increase from 60- to 100-amp service.

[3] Actually, in response to Eugene Hurt's communiqué indicating that the balance was approximately $6600, Eulalia countered that the balance was $21,726.94. It was later determined that the Mays had utilized incorrect interest figures in reaching their figure. After those mistakes were corrected, the amended amount was determined to be $25,354.55. Ultimately, at trial and before Eulalia's calculation error was discovered, the parties stipulated that the balance as of June 1, 2005 was $21,726.94.

FINDINGS OF FACT

* * * * *

4. After the execution of the contract, the Defendants operated the mobile home park for several years and made the payments in a timely fashion up until July of 2005 when the Defendants missed their payment. The Defendants have made no further payments since their last payment of June 1, 2005, at which time the balance of their contract was $25,354.55. The Defendants claimed in June of 2005 that the payoff on the contract was only $6,604.00. The Defendants were claiming credits for the cost of upgrading the electric service for the park. The Plaintiff demanded full payment under the contract and denied that any credit was due for any electrical repairs made to the real estate.

5. An affidavit was attached to the contract whereas the Plaintiff warranted that the electric company was not enforcing or requesting any change to the electrical service to the homes located on the real estate. There was absolutely no evidence presented by Defendants that the electrical company ever requested any changes in the electrical service. The Defendants did not present any evidence from any licensed electrician or professional expert regarding the electrical repairs that the Defendants performed on the real estate. The Defendants presented no evidence as to the need for said repairs.

6. The only other warranty in the contract was the statement in Item I, Section 3 of the contract which stated that *"Seller warrants that the electrical service for the mobile home tenants is satisfactory for mobile home purposes."* Based on the lack of any evidence that there was any specific problem with the electrical service at the date of sale, there is simply not sufficient evidence to find any breach of warranty of this provision by the seller. The fact that the state may have required upgrades of electrical service seven (7) to eight (8) years after the contract was signed was not something that could have been foreseen or expected by the sellers. In addition, the warranty in the contract is a warranty of the current condition of the real estate, not one that is unlimited.

7. Evidence was submitted by both parties by [sic] the Indiana Department of Health regarding a program whereby the Indiana Department of Health was requiring upgrades of electrical service to mobile home parks. However, the information submitted from the Indiana Department of Health showed that this program did not start until after the contract in this case was

signed. In fact, the documents indicate there were no required upgrades until 1999. In addition, the Defendants' evidence was that they did not do any upgrades until the year 2000. It would appear, based on this evidence, that the warranties made in the contract with the plaintiff were not breached in any fashion.

8. The balance of the contract including principal, interest, and late fees is $43,863.25 and the Plaintiff has submitted evidence of attorney fees incurred in the amount of $4,265.34.

CONCLUSIONS OF LAW

1. A valid contract for sale of real estate exists between the parties.

2. The Defendants have breached the contract by failing to make payments beginning July 1, 2005.

3. The Defendants claimed that they only owed $6,604.11 and wanted to pay that amount to satisfy the contract in June of 2005. Plaintiff demanded the balance of the contract which, at the time, was $25,354.55.

4. The only stated defenses of the Defendants were that warranties were breached regarding electrical service on the mobile home park. The Court finds that there was not sufficient evidence to prove any breach of warranty to TRAVIS O. MAY or EULALIA A. MAY. There has been no expert testimony presented regarding any electrical service upgrades and no evidence that TRAVIS O. MAY or EULALIA A. MAY knew of any required upgrades or of any insufficiencies in the system. There is no breach of warranty regarding electrical service.

5. The Court will enter judgment for Plaintiff in the amount of $43,863.25 consisting of principal, interest, and late fees, plus attorney fees of $4,265.34, for a total judgment in the amount of $48,128.59, plus costs of this action.

6. The Defendants may payoff [sic] said judgment within thirty (30) days of the date of this Order and the Plaintiff, upon receipt of said payment, shall tender a deed to the Defendants pursuant to the contract for sale of real estate.

7. If Defendants elect not to pay off said judgment within thirty (30) days of the date of this Order, then the Court will enter an order to

foreclose the parties' interest in the real estate contract.

Appellants' Appendix at 6-8 (emphasis in original). The Hurts contend the trial court erred in entering judgment in favor of the Estate.

1.

The Hurts contend the trial court erred in concluding there was no breach of warranty.

The Hurts appeal from a judgment accompanied by findings of fact and conclusions of law. Pursuant to Indiana Trial Rule 52(A), "[o]n appeal of claims tried by the court without a jury ... the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." When a trial court's judgment is accompanied by specific findings and conclusions, we apply a two-tiered standard of review. *Anthony v. Indiana Farmers Mut. Ins. Group*, 846 N.E.2d 248 (Ind. Ct. App. 2006). We construe the findings liberally in support of the judgment and first consider whether the evidence supports those findings. *Id*. Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. *Id*. Next, we must determine whether the findings support the judgment. *Id*. A judgment is clearly erroneous when the findings of fact and conclusions thereon do not support it. *Id*. We will disturb the judgment only when there is no evidence supporting the findings or the findings fail to support the judgment. *Id*. In performing this review, we do not reweigh the evidence and consider only the evidence favorable to the trial court's judgment. *Id*.

The particular clearly erroneous standard to be used depends upon whether the party is

appealing a negative or an adverse judgment. *Id*. In the instant case, the Hurts appeal from an adverse judgment because they were defending against the Estate's lawsuit and thus did not bear the burden of proof. The Estate, which bore the burden of proof, prevailed.

> When the trial court enters findings in favor of the party bearing the burden of proof, the findings are clearly erroneous if they are not supported by substantial evidence of probative value. Moreover, we will reverse such a judgment even where we find substantial supporting evidence, if we are left with a definite and firm conviction a mistake has been made.

Id. at 252 (quoting *Romine v. Gagle*, 782 N.E.2d 369, 376 (Ind. Ct. App. 2003), *trans. denied*).

The judgment in favor of the Estate hinged upon the trial court's resolution of the Hurts' claim in defending against the Estate's foreclosure action that the Mays breached the real estate contract's warranty concerning the electrical service at the mobile home park. The trial court concluded that the Hurts did not present sufficient evidence of a breach. In order to prevail on their claim, the Hurts would have been required to show that the electrical service in place at the time of the sale was in some way inadequate. The undisputed evidence showed that at the time the parties signed the contract, Willow had primarily 60-amp electrical service and that such was in compliance with the applicable rules and regulations then in force. The Estate introduced uncontroverted evidence showing that the ISDH did not begin until 1993 deliberating changes in the applicable governing regulations that would require upgrading the service from 60 to 100 amps. This was months after the real estate contract was signed. On the other hand, the Hurts presented no evidence tending to show that the State was in the process of contemplating regulatory modifications that would

necessitate upgrading electrical service to mobile home parks such as Willow, much less that the Mays knew about such deliberations at the time the contract was negotiated and executed. Yet, the Hurts contend that the necessity for an upgrade *was* foreseen at the time of the contract was signed. According to the Hurts, the evidence supporting this argument consists of the following:

> In his affidavit Charles S. Coffman, who was May's real estate agent in connection with the sale of the mobile home park, affirmed that prior to the purchase Hurt was concerned about the need to upgrade the electrical service for the mobile home park. He also stated that May told him to tell Hurt that May would guarantee the electrical service for the mobile home park.
>
> Clearly it was foreseen at the time that the contract was entered into that the electrical service for the mobile home park could be required to be upgraded. The plaintiff presented no evidence to dispute this.

Appellant's Brief at 7 (internal citation to authority omitted). The foregoing represents the sum total of the Hurts' identification of, and argument relative to, the evidence that an upgrade was foreseeable.

We conclude that Eugene Hurt's unsubstantiated expression of concern about the adequacy of Willow's electrical service represented no evidence at all vis-à-vis the actual adequacy of the mobile home park's then-existing electrical service. Nor did it constitute evidence with respect to a foreseeable *necessity* that the electrical service would need to be upgraded. Clearly, warranty language that "the electrical service for the mobile home tenants is satisfactory for mobile home purposes" could only have one of two meanings. *Appellants' Appendix* at 97. First, it could have meant that, from a practical viewpoint, the electrical service did not meet the needs of Willow's residents. Even assuming it was construed to mean this, there was no evidence that the electrical service was deficient in this manner.

Second, it could be construed to mean that Willow's then-existing electrical service was not or foreseeably would not be in compliance with applicable state or local ordinances or codes. It appears that this is, in fact, the meaning that the parties intended at the time and argue now on appeal. Assuming this *was* the meaning of the warranty language, the Hurts presented no evidence that the Mays breached the warranty. Eugene's expression of concern was not based upon knowledge of present, impending, or suspected regulatory changes – or at least there is no evidence of such. In fact, there is no indication in the record as to the basis, if any, of Eugene's pre-purchase expression of concern about Willow's electrical service. Whatever the basis, Eugene's private concern or misgivings cannot serve as the basis for concluding that the Mays breached the warranty with respect to whether Willow's electrical service complied with applicable regulations at the time the contract was executed. As indicated above, that hinged upon proof that the service was substandard at the time of the sale or that the Mays knew or should have known that the service did not or soon would not comply with applicable state and local regulations. The Hurts failed to present evidence of either.

The evidence supports the trial court's finding that there was no specific problem with the electrical service at Willow at the time of the sale, as well as the finding that the electrical service complied with all applicable regulations then in force and that the process of changing those regulations had not yet begun. These findings in turn support the conclusion that the Mays did not breach the warranty with respect to the electrical service at Willow. Having failed to demonstrate error, much less clear error, the Hurts' claim in this regard must

fail.

2.

The Hurts contend the amount of damages awarded by the trial court was excessive.

> Our scope of review when considering a damage award in a breach of contract case is limited. We do not reweigh evidence or judge witness credibility, and will consider only the evidence favorable to the award. The damage award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence. When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred. Accordingly, a damage award must reference some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances. We will reverse the trial court's award only when it is not within the scope of the evidence of record.

Coffman v. Olson & Co., P.C., 906 N.E.2d 201, 210-11 (Ind. Ct. App. 2009) (internal citations omitted), *trans. denied*.

The Hurts contend the trial court's calculation of the damages award was incorrect. The contract provided as follows with respect to this calculation:

> (c) The unpaid balance of the purchase price shall bear interest as follows:
>
> (i) During the first five years of this contract, interest shall be at the rate of eight percent (8%) per annum, such interest to be computed monthly, on the first day of each month, upon the principal sum unpaid at the beginning of such period. The amount of interest so found due shall be deducted from the amount of aggregate payments made during the succeeding period, and the balance of the aggregate of such payments shall be credited against the principal.
>
> (ii) Thereafter, at one (1) year intervals, the interest rate shall be adjusted to an amount equal to one percentage point over the national prime rate (e.g. prime rate is 8.25%; interest rate is 9.25%); the adjustment shall not exceed 9.5% per annum during the term of this contract. Additionally, in no event

> shall the interest rate under this contract fall below 8% per annum, regardless of the national prime rate. At the time of each change in the interest rate, the amount of interest so found due shall be deducted from the amount of aggregate payments made during the succeeding period, and the balance of the aggregate of such payments shall be credited against the principal.
>
> * * * * *
>
> [e] (i) Notwithstanding any other provision of this Contract to the contrary, *Buyer* shall pay the entire unpaid balance, including principal and interest, on or before ten (10) years from the date of execution of this contract….
>
> (ii) At the end of ten (10) years, the *Buyer* will apply for a mortgage to pay off the contract if the *Buyer* can secure a loan for no more than 11%. Otherwise, the contract will be extended for five (5) years and during that time the *Buyer* will apply for a mortgage every two (2) years until such mortgage can be secured under the conditions set out above.
>
> Any other interest rate notwithstanding, during this five (5) year extension period, interest to be computed monthly, on the first day of each month, upon the principal sum unpaid at the beginning of such period. The amount of interest so found due shall be deducted from the amount of aggregate payments made during the succeeding period, and the balance of the aggregate of such payments shall be credited against the principal.

Appellants' Appendix at 96-97.

This contract remained in force until January 23, 2002, when the parties executed an agreement entitled "Extension of Contract For Conditional Sale Of Real Estate". *Id*. at 97. According to the terms of the extension agreement, paragraph (e)(i) modified the Hurts' obligation to "pay the entire unpaid balance, including principal and interest, on or before ten (10) years from the date of execution of this contract". *Id*. Under the extension agreement,

this was modified to provide that the Hurts would "pay the entire unpaid balance, including principal and interest, on or before *fifteen (15)* years from the date of execution of this contract." *Id*. at 17 (emphasis supplied). Paragraph (e)(ii) was modified to provide, "during the period beginning June 1, 2002, and thereafter, interest shall be at the rate of eight percent (8%) per annum, such interest to be computed monthly, on the first day of each month, upon the principal sum unpaid at the beginning of such period." *Id*.

Based upon the foregoing provisions, it appears that the interest rate to be applied to the balance was as follows: From June 1, 1992 through June 1, 1997 – 8 percent (per paragraph (c)(i) of the original sales contract); from June 2, 1997 through June 1, 2002 - 1 percentage point over the national prime rate, but in any event not less than 8 percent and not more than 9.5 percent (per paragraph (c)(ii) of the original sales contract); and from June 2, 2002 through June 1, 2007 – 8 percent (per paragraph (e)(ii) of the extension agreement). Finally, Article IX of the original sales contract, which was not modified in this respect by the extension agreement, provided that in the event of default, "*Seller* ... shall recover interest on the unpaid balance at the time of default at the rate of fifteen percent (15%) per annum", plus attorney fees. *Id*. at 56-57.

There is evidence of record to support the trial court's conclusion that the balance after the Hurts made their last payment, i.e., June 1, 2005, was $25,354.55. Thus, because the Hurts made no other payments, that was still the balance as of July 1, 2006. The Estate contends that the trial court correctly determined that the penalty for default at that point in time was calculated by multiplying that amount by fifteen percent, yielding a product of

$3803.18. The Estate contends the trial court correctly added that amount, i.e. $3803.18, to the debt calculation as of July 1, 2007, yielding a total debt at that time of $29,157.73. The trial court multiplied this amount by fifteen percent interest, which yielded a product of $4373.66, representing the increase in the balance owed by the Hurts as of that date. Repeating this formula for the dates July 1, 2008 (the next per-annum accounting date) and June 1, 2009 (the date of the final order in this case), the court arrived at a final figure of $43,863.25.

The Hurts contend that the trial court's math is incorrect and that it should have utilized a different formula to calculate the Estate's damages. According to the Hurts, the amount should be "no more than $40,281.09", which is 15 percent times $25,354.55 times the number of years the balance went unpaid (1400 divided by 365). The difference between the two figures lies in the calculation of interest. Basically, the Estate urges that the use of compound interest was appropriate. The formula proffered by the Hurts uses simple interest, not compound interest. The Hurts do not argue this issue on those terms, citing only what they deem to be the appropriate methodology for calculating interest and stating "the trial court offers no explanation as to [the] discrepancy" between the result of their calculation and the result of the trial court's calculation. *Appellant's Brief* at 12. In point of fact, the use of compound interest versus simple interest accounts for the difference between the amounts advanced by the two parties in this appeal.

The difference between simple and compound interest is that the former does not periodically merge interest with the principal, thereby increasing the principal base upon

which future interest is calculated. With compound interest, on the other hand, accrued interest is added periodically to the principal, and interest is computed upon the new principal thus formed. We note that neither side offers legal argument in favor of Article IX in the contract being construed in such a way as to prescribe one versus the other. The Estate merely mentions the subject in passing. *See Appellee's Brief* at 11 (e.g., "[i]f Hurt failed to pay any of the monthly installments, May "*shall recover interest on the* <u>*unpaid balance*</u> *at the time of default at a rate of 15% per annum*'…. Thus, the interest calculations at the time of default are of a compound nature"). (Emphasis in original.) The Hurts do not squarely mention the issue at all.

An examination of the relevant contractual language reveals that the provision in question is susceptible to either interpretation. Article IX specifies only that the Mays "shall recover interest on the unpaid balance at the time of default at the rate of fifteen percent (15%) per annum[.]" *Appellants' Appendix* at 56-57. We can find no case or statute establishing a presumption in Indiana that contractual language calling for interest "per annum" means either simple or compound interest. *But cf. Indiana Tel. Co. v. Indiana Bell Tel. Co., Inc.*, 171 Ind. App. 616, 360 N.E.2d 610 (1977) (*upon reh'g)*.[4] It appears that the

[4] In this case, the court initially affirmed an award of damages plus interest. *See Indiana Tel. Co. v. Indiana Bell Tel. Co., Inc.*, 171 Ind. App. 616, 358 N.E.2d 218 (1976). Upon rehearing, the court clarified that the interest in question was simple interest, not compound interest. The court discussed at length whether compound interest was appropriate. There is language in the opinion that, on the face of it, arguably appears to support the proposition that, as a general matter, simple interest is favored, e.g.,:

> "The general rule is that compound interest is not allowed as damages. Logically, it would seem that if a note or other pecuniary obligation is payable with interest annually or at other stated periods, and there is default extending over several interest periods, the promisee should recover interest not only on the principal sum but on the various broken obligations to pay interest. Such, however, is not the general rule of law."

trial court determined that the phrase meant compound interest. Although the Hurts contend that the trial court erred in calculating damages, they do not acknowledge that the difference between the trial court's calculation and the one they urge on appeal is attributable to the use of compound interest. More importantly, they do not explain why the trial court's use of compound interest, versus simple interest, constituted an erroneous interpretation of an ambiguous contractual provision. "A party waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority." *Zoller v. Zoller*, 858 N.E.2d 124, 127 (Ind. Ct. App. 2006) (quoting *Steiner v. Bank One Ind., N.A.*, 805 N.E.2d 421, 429 n.6 (Ind. Ct. App. 2004)). Because the contract provision in question is susceptible to construction that would permit compound interest, and because the Hurts have not offered cogent legal argument in favor of the proposition that it should be construed otherwise, the argument is waived.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.

Indiana Tel. Co. v. Indiana Bell Tel. Co., Inc., 171 Ind. App. 616, 360 N.E.2d 610 at 612 (quoting Willston, Contracts, § 1417 (3d ed. 1968)). We note, however, that *Indiana Telephone* was decided in a case that did not include a contract provision providing for compensation in the event of breach. In other words, that case dealt with the preferability of simple interest where the parties had not addressed the subject in the relevant contract. In the instant case, on the other hand, the trial court was called upon to construe the meaning of the parties' agreement that in the event of breach, the Hurts would pay fifteen percent "per annum" in interest. Thus, *Indiana Telephone* and its progeny are not applicable here.