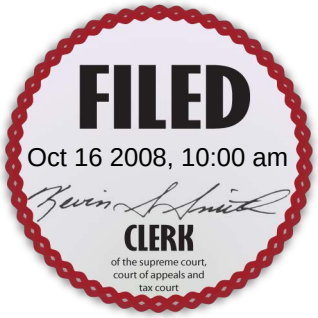

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IN THE COURT OF APPEALS OF INDIANA

PETER A. WILSON and NATALIE M. WILSON,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 64A03-0806-CV-293
	)	
PAUL and SARA DANGER,	)	
	)	
Appellees-Plaintiffs.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable David L. Chidester, Judge
Cause No. 64D04-0802-SC-731

October 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Peter and Natalie Wilson appeal the small claims court's judgment in favor of Paul and Sara Danger. The Wilsons raise one issue, which we revise and restate as whether the conclusion of the small claims court that the parties' Proration Agreement was unenforceable is clearly erroneous. We affirm.

The relevant facts follow. On September 26, 2006, the Wilsons and the Dangers entered into a purchase agreement under which the Dangers were to purchase a residence from the Wilsons. The purchase agreement provided for proration of real property taxes as follows:

> **L. TAXES, ASSESSMENTS, AND PRO-RATIONS:** Real property taxes (and personal property taxes if applicable) shall be pro-rated as of the date of closing unless otherwise herein provided. That is to say, Seller shall be charged with and pay taxes on the real estate and improvements (and personal property if applicable) covered by this Agreement that are payable in the current year and for that portion of taxes payable the following year calculated as of the date of closing, and Purchaser shall pay all taxes subsequent thereto. Pro-ration shall be made on the basis of the current tax rate and assessed valuation as of the date of closing and shall be done on a calendar year basis. Seller shall be responsible to pay the real property taxes (and personal property taxes if applicable) up to the date of closing.

Appellants' Appendix at 18.

At the closing on October 20, 2006, the parties signed a "Tax Proration Agreement," which provided that "all real estate taxes billed on or after this date are the sole responsibility of the **Purchaser.**" Id. at 31. The Proration Agreement also recited that "any prior agreement between parties shall be deemed as modified hereby." Id. In addition, the Wilsons were provided with a final statement regarding the purchase proceeds showing that they had been credited with $670.93 in county taxes.

After moving in, the Dangers eventually received a real property tax bill totaling $6,102.66 for the year 2006. Given that the Wilsons had lived in the residence from January 1, 2006 to October 20, 2006, the Dangers estimated that, at a rate of $16.72 a day ($6,102.66 / 365 days), the Wilsons owed $4,882.12 on the tax bill. Subtracting the $670.93 previously credited to them, they filed a small claims action against the Wilsons to recover the remaining $4,211.19. At trial, the Wilsons suggested that, pursuant to the Proration Agreement, the Dangers were solely responsible for payment of the remaining tax liability, as it was billed after the date of closing. Paul Danger, on the other hand, testified that the significance of the Proration Agreement was not explained to him at closing.[1] The small claims court found for the Dangers, holding that the Proration Agreement was not an enforceable contract because:

> The Purchase Agreement was an existing contract between the parties, which called for the division of real estate taxes on a pro-rata basis. The ProRation agreement, which modified the terms of the Purchase Agreement, is not a contract, but is merely a document signed by the parties, with the assistance of the closing agent, at closing. Even if a contract, a material term will always be missing, that is, the exact amount of the taxes for the current year. There can be no meeting of the minds without the existence of a material fact. There was no genuineness of assent among the parties as to the meaning of the closing statement. In contract interpretation, evidence as to trade usage, prior dealing, and course of performance may be admitted to clarify the meaning of an ambiguously worded contract. Here, the custom in Indiana is that real estate taxes were divided pro-rata. By the date of closing, the [Wilsons] knew and should have known that the assessed value would be much higher. [The Wilsons] knew that [the Dangers were] going to be assessed a much larger real estate tax. Finally, the Court believes that the ProRation Agreement must fail for lack of consideration. The Court can find

[1] Metropolitan Title Company was the title agent in the real estate closing and prepared the Proration Agreement contrary to the terms of the Purchase Agreement. Paul Danger testified that, after receiving notice that his escrow account was overdrawn, Metropolitan Title advised him, ". . . you need to contact the Wilson[]s to get that appropriate money back." Transcript at 9.

> no basis of consideration for the execution by [the Dangers] of the Agreement.

Appellants' Appendix at 9.

The issue is whether the conclusion of the small claims court that the parties' Proration Agreement was unenforceable is clearly erroneous. We note at the outset that the Dangers have failed to file a brief in this appeal. "When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error." Tucker v. Duke, 873 N.E.2d 664, 668 (Ind. Ct. App. 2007) (quoting Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006)), reh'g denied, trans. denied. "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" Id. "Where an appellant is unable to meet this burden, we will affirm." Id.

Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." Id. (quoting Ind. Small Claims Rule 11(A)). When reviewing claims tried by the bench without a jury, the reviewing court shall not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Id. (quoting Ind. Trial Rule 52(A)). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Id. A judgment in favor of a party having the burden of proof, i.e., the Dangers, will be affirmed if the evidence

was such that from it a reasonable trier of fact could conclude that the elements of the party's claim were established by a preponderance of the evidence. Id. This deferential standard of review is particularly important in small claims actions, where trials are informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law. Id.

The Wilsons argue that the small claims court's finding that there was inadequate consideration in support of the Proration Agreement is clearly erroneous. They cite Lechner v. Reutepohler, 545 N.E.2d 1144 (Ind. Ct. App. 1989), for the proposition that the exchange of promises to buy and sell a home is sufficient consideration for the terms of a purchase agreement. However, the Proration Agreement at issue here did not involve the terms of the original purchase agreement, but, rather, expressly modified that agreement. See Appellants' Appendix at 31 ("Any prior agreement between the parties shall be deemed as modified hereby."). Accordingly, we must determine whether there was sufficient consideration in support of the modification of the purchase agreement.

Under the common law of contracts, a written agreement may be modified by a subsequent written agreement so long as there exists consideration to support the modification. DiMizio v. Romo, 756 N.E.2d 1018, 1022 (Ind. Ct. App. 2001), trans. denied. The concept of consideration is oftentimes encapsulated by the phrase "bargained for exchange." Id. "To constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee." Id. at 1022-1023 (quoting Hamlin v. Steward, 622 N.E.2d 535, 539 (Ind. Ct. App. 1993)). A benefit is a legal right given to the promisor

to which the promisor would not otherwise be entitled. Id. at 1023. A detriment, on the other hand, is a legal right the promisee has forborne. Id.

In DiMizio, the DiMizios entered into a contract with Romo for the sale of a pizza restaurant for the sum of $150,000 at 7% per annum. Id. at 1020. The contract further provided that Romo would, "[u]pon complete payment of the $150,000 purchase price, . . . initiate payment to Sellers of a 6% fee on the gross receipts less sales tax for the remaining period of the lease and any extensions of the lease as hereinafter provided." Id. Subsequently, Romo requested that the percentage fee collected on the restaurant's gross receipts be reduced. The DiMizios agreed to reduce their commission and entered a written modification of their original contract which provided:

> *In consideration of the promise of the Sellers not to seek enforcement of the terms of the Original Contract regarding payment of a percentage of the gross receipts*, and for other valuable consideration as set forth in the Original Contract and this Addendum and Modification, the Buyer shall pay to Sellers Two percent (2%) of the gross receipts of the business, for a period of two (2) years[;] the percentage of gross receipts paid to Sellers shall be three percent (3%) for so long as the Buyer operates a pizza restaurant in the City of Anderson in the Mounds Mall.

Id. at 1021. Romo later discontinued payment of the commissions due to the DiMizios, who sued for breach of contract. Romo defended based in part on lack of consideration in support of the modified contract. The trial court found in favor of Romo.

On appeal, we reversed the trial court, holding that there was consideration in support of the modification. We reasoned that the written modification of the original contract:

> satisfies the consideration requirement as it sets forth a bargained-for-exchange. Under these facts, the DiMizios gave up their right to collect a six

> percent (6%) commission by substituting a lower percentage in an effort to help out Romo, who claimed to be struggling financially. However, the DiMizios also benefited by potentially extending the duration of time the commissions could be collected. Similarly, Romo experienced both a benefit and a detriment as a result of the Modification. While the Modification granted Romo some relief from the higher commission, at the same time, it had the consequence of extending the period of time in which the DiMizios would be entitled to collect a commission from Romo.

Id. at 1023.

Here, the parties agreed to a pro-rata division of the real property tax liability for 2006. At closing, the parties then signed a Proration Agreement, the significance of which was not explained to the Dangers, stating that the Dangers would be solely responsible for any real estate taxes billed after the date of the closing. The Wilsons argue that the consideration for this agreement "is the exchange of promises to allocate liability for taxes based on the date the taxes were billed." Appellants' Brief at 6. However, in contrast to DiMizio, under the modified agreement, the Wilsons would benefit by reducing their tax liability but would incur no detriment. The Dangers, on the other hand, while facing a greater tax liability, would receive no benefit. Accordingly, we conclude that there was no bargained-for-exchange in support of the modification,[2] and, thus, we cannot say that the small claims court's finding that the tax proration agreement was unenforceable for lack of

[2] The Wilsons cite Orem v. Ivy Tech State College, 711 N.E.2d 864 (Ind. Ct. App. 1999), for the proposition that Indiana courts "will not inquire into the *sufficiency* of the consideration." Appellant's Brief at 5 (emphasis added). Actually, Orem states that we do not inquire into the *adequacy* of consideration. 711 N.E.2d at 871. Indiana courts regularly inquire into the sufficiency of consideration, without which there can be no valid contract. See, e.g., Hamlin, 622 N.E.2d at 539 (holding that there was sufficient consideration for an oral modification of a contract but reciting that "[w]e do not inquire into the adequacy of consideration").

consideration was clearly erroneous.[3] See, e.g., Stelko Elec., Inc. v. Taylor Cmty. Schools Bldg. Corp., 826 N.E.2d 152, 159 (Ind. Ct. App. 2005) ("Here, there is no evidence of an offer by Taylor, an acceptance by Stelko, or consideration to cause a change in the completion date. In short, there is no evidence of a bargained for exchange that the Project be completed early. As such, Stelko's decision to comply with Taylor's request for early completion is not part of the contract."); Seastrom, Inc. v. Amick Const. Co., Inc., 161 Ind. App. 309, 312-313, 315 N.E.2d 431, 433 (1974) (holding that a lack of consideration would prevent the operation of an alleged agreement as a subsequent and valid modification of an earlier written lease agreement).

For the foregoing reasons, we affirm the small claims court's judgment in favor of the Dangers.

Affirmed.

MATHIAS, J. concurs

BAKER, C. J. concurs in result with separate opinion

[3] The Wilsons also allege error concerning the small claims court's findings that the Proration Agreement was unenforceable because: (1) a material term, namely the exact amount of the tax liability, was missing; (2) the agreement was ambiguous; and (3) there was no meeting of the minds. Because we hold that the modification was unenforceable for lack of consideration, we need not address the Wilsons' remaining allegations of error.

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	)	
PAUL and SARA DANGER,	)	
	)	
Appellees-Plaintiffs.	)	

BAKER, Chief Judge, concurring in result.

I concur in the result reached by the majority. Based strictly on these facts and the record on appeal, I agree that there was no consideration supporting the Proration because "the Wilsons would benefit by reducing their tax liability but would incur no detriment. The Dangers, on the other hand, while facing a greater tax liability, would receive no benefit." Slip op. p. 7.

I write separately, however, to voice my concern about a potential unintended consequence of this decision. Specifically, I am troubled that this result could place an undue burden on home buyers and sellers in the future. In Indiana, attorneys are not typically involved in residential real estate transactions; instead, the parties are assisted by their respective real estate agents. It is not uncommon that, in the interim between the execution of the purchase agreement and the closing, the parties may choose to modify the agreement.

For example, if the inspection of the home reveals a problem, the sellers may choose to credit the buyers with a certain amount to cover the cost of the repair. Such a transaction would modify the original purchase agreement. Implicit in this modification is adequate consideration; namely, the buyers agree to refrain from backing out of the deal because of the problem revealed by the inspection in exchange for the sellers' agreement to credit the buyers with funds to repair the defect. I believe that in a system such as ours where attorneys are not routinely involved, it is acceptable for the consideration supporting such a modification to remain implicit. Put another way, the parties need not explicitly recite the consideration supporting a modification of the purchase agreement for the modification to be enforceable – no "magic words" should be required.

Concluding that the consideration supporting the parties' modification of the purchase agreement may be implicit does not mean that consideration is unnecessary, however. Here, as noted above, there was simply no consideration whatsoever supporting the Proration Agreement. Consequently, I concur in the result reached by the majority.