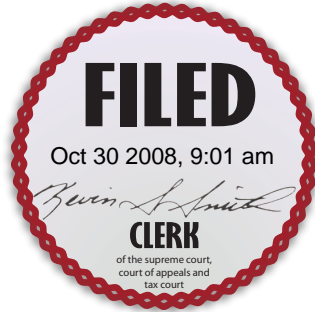


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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VIRGIL L. PRIDE,

Appellant-Defendant,

vs.

KELVIN CHRISTIAN,  
VALERIE CHRISTIAN,

Appellees-Plaintiffs.

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No. 64A05-0802-CV-59

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APPEAL FROM THE PORTER SUPERIOR COURT  
The Honorable Mary R. Harper, Judge  
Cause No. 64D05-0412-PL-11069

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**OCTOBER 30, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

STATEMENT OF THE CASE

Defendant/Appellant Virgil Pride (“Pride”) appeals the trial court’s judgment in favor of Plaintiffs/Appellees Kelvin and Valerie Christian (the “Christians”) and Cross-Claimants/Appellees LaVonne Hoskins and Anew Mortgage (collectively, “Hoskins”). We affirm.

### ISSUES

Pride raises two issues for our review, which we restate as:

- I. Whether the parties presented sufficient evidence to support the trial court’s finding that Pride breached the purchase agreement for the sale of the Christians’ house.
- II. Whether the trial court’s conclusion that Pride was responsible for broker and attorney fees was contrary to law.

### FACTS AND PROCEDURAL HISTORY

After a bench trial, the trial court made findings of fact and conclusions of law in support of its judgment. The court’s findings are included in pertinent part in the recitation of the facts.

Pride visited the Christians’ house, which was being sold by the owners, on or about October 3, 2004. Trial Court’s Order and Judgment at 2. Pride stated his interest in buying the house to the Christians, but he requested that they allow him to hire a realtor. *Id.* Pride contacted Hoskins regarding the sale of the house, and the Christians, Pride, and Hoskins entered into a one-day listing contract for the sale of the house. *Id.* The listing contract provided for a professional realtor service fee of \$2,500.00 to be paid to Hoskins. *Id.* at 3. The Christians, Pride, and Hoskins also entered into a “Limited Agency Agreement,” whereby the Christians and Pride agreed Hoskins would represent

both parties during the sale of the Christians' house. Finally, the Christians and Pride entered into a purchase agreement for the sale of the Christians' house. *Id.*

The purchase agreement set the purchase price for the Christians' house at \$214,900.00. *Id.* The agreement required Pride to obtain an insured conventional mortgage loan in the amount of the purchase price. Furthermore, the agreement required the parties to close the transaction on or before November 20, 2004 ("closing date"). *Id.* The agreement also provided for payment of liquidated damages, attorney fees, the broker's fee, and costs in the event of either party's breach. *Id.*

Pride provided all relevant materials to Hoskins to obtain mortgage financing through Anew, and prior to the signing of the purchase agreement, Anew approved Pride for a conventional mortgage in the amount of \$215,000.00 at 95 percent loan-to-value. *Id.* at 4. After signing the purchase agreement and "Limited Agency Agreement," Pride alleged that he became uncomfortable with Hoskins' dual representation, and he contacted Hoskins to obtain a mutual release form. Prior to providing the mutual release form to the Christians, Pride contacted them and expressed his interest in proceeding with the purchase of the house without Hoskins' assistance. *Id.* The Christians directed Pride to contact their attorney. *Id.* From that point forward, Pride took no further action to finalize mortgage financing for the purchase of the Christians' house or to close on the house on or before the agreed closing date. *Id.*

On December 10, 2004, the Christians filed a "Complaint for Liquidated Damages and Attorney Fees," naming Pride as the defendant. *Id.* at 1. The complaint sought damages and fees arising from the breach of the purchase agreement *Id.* Pride

filed an affirmative defense alleging he did not close on the transaction due to legal cause and that he was entitled to attorney fees. *Id.* at 2. Hoskins filed a third party counter-claim, interpleading Pride's \$1,000.00 earnest deposit and naming the Christians as defendants. *Id.*

The trial court held a bench trial and entered its findings of fact and conclusions of law in support of its judgment. The court concluded that Pride had obtained the requisite financing for the purchase of the Christians' house and that he owed damages to the Christians and to Hoskins for breaching the purchase agreement. The court further concluded that the liquidated damages provision of the purchase agreement was a penalty and that damages were easily ascertainable. *Id.* at 10-12. Accordingly, the court ordered Pride to pay the Christians \$14,200.00, together with reasonable attorney fees and costs in the amount of \$10,916.54 for the breach.<sup>1</sup> *Id.* at 12. Furthermore, the court ordered Pride to pay Hoskins the \$2,500.00 broker fee plus interest, together with reasonable attorney fees and costs of \$4000.00. Pride now appeals.

## DISCUSSION AND DECISION

### I. PROPRIETY OF THE TRIAL COURT'S CONCLUSION OF BREACH

Pride first contends that the evidence is insufficient to support the trial court's conclusion that he breached the purchase agreement. Specifically, he contends that the Christians refused to deal with him when they told him to contact their attorney and that

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<sup>1</sup> The damages represent (1) the difference between the agreed upon purchase price for the sale of the house to Pride and the later sale of the house (\$9,900.00); (2) the cost of the home inspection (\$300.00); (3) the cost of refinancing costs incurred by the Christians (\$3,000.00); and the cost of additional mortgage payments on the house Pride was to purchase (\$1,000.00). Trial Court's Order and Judgment at 8-9.

they “cannot refuse to deal with Pride prior to the closing date and then claim that it was Pride who breached the agreement.” Appellant’s Brief at 4.

In the alternative, Pride contends that his acquisition of an insured conventional mortgage was a condition precedent to the agreement between Pride and the Christians. He claims that he never obtained an insured conventional mortgage and that he was therefore not required to perform under the agreement.

Where, as here, a trial court has entered specific findings of fact and conclusions of law, we will affirm the judgment on any legal theory supported by the findings. *Capenhart v. Capenhart*, 705 N.E.2d 533, 536 (Ind. Ct. App. 1999), *trans. denied*. In reviewing the judgment, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. *Id.* The judgment will be reversed only when clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks any reasonable inferences from the evidence to support them. *Id.* In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will not reweigh the evidence or assess witness credibility. *Id.*

With regard to Pride’s initial contention, we note that the Christians did not refuse to deal with Pride after he developed reservations about Hoskins’ dual representation. The Christians merely informed Pride to work with their attorney. Indeed, their attorney sent a letter on October 18, 2004, over a month before closing, which indicated the Christians’ desire to abide by the terms of the purchase agreement. Furthermore, the letter requested that Pride or his attorney contact the Christians’ attorney to resolve any

dispute between the parties. Pride ignored the letter and failed to honor the terms of the agreement by the time stipulated therein. The trial court did not err in concluding that Pride breached the purchase agreement.

With regard to Pride's alternative argument, we note that under the purchase agreement Pride was required to make a good faith effort to procure financing that conformed to the condition precedent. *See Beck v. Mason*, 580 N.E.2d 290, 292 (Ind. Ct. App. 1991) (holding that "Such an interpretation not only comports with the reasonable expectations of the parties, but is a logical extension of the sound rule of contract law that a promisor cannot rely upon the existence of a condition precedent to excuse his performance where the promisor, himself, prevents performance of the condition"). After receiving his approval letter from Anew, Pride did not finalize the loan or respond to the mortgage broker's inquiries. Pride's lack of good faith and reasonable effort precludes him from arguing that the failure of the condition precedent barred his performance under the purchase agreement.

Alternatively, the financing contingency was satisfied when Pride was approved for a conventional mortgage loan in the amount of \$215,000.00 with a 5 percent down payment. According to the uncontested testimony of two loan officers, the approved loan was an insured conventional loan as required by the agreement because an uninsured conventional loan would have required a 20 percent down payment.

Either way, it was Pride that breached the terms of the purchase agreement. Accordingly, the trial court did not err in ruling in favor of the Christians.

## II. PROPRIETY OF AWARD OF REALTOR'S FEES AND COSTS

Pride contends that the trial court erred in awarding broker and attorney fees to Hoskins. He argues that although the purchase agreement between him and the Christians puts the obligation upon the one who breached the contract, the listing agreement, signed by all of the parties, puts the obligation upon the Christians to pay Hoskins' fees out of any damages they might receive from Pride's breach. He also argues that the award was improper because Hoskins never requested that Pride pay her; instead, she filed her cross-claim against the Christians. Finally, Pride argues that Hoskins represented herself at trial and that she failed to establish the existence of any attorney fees.

While it is true that Hoskins did not file her claim against Pride, it is also true that if the professional fees should be paid by the Christians under the listing agreement, then their damages are increased. Thus, the trial court's damage award should increase to cover those damages, and the trial court's award directly to Hoskins instead of the Christians is not a substantial error.

Hoskins did represent herself at trial; however, she testified that she was representing herself because she already owed \$4,000.00 in attorney fees. The trial court addressed this issue in its "Order and Judgment," and concluded from its review of the case file that \$4,000.00 "for attorney fees and costs would be consistent with [Hoskins'] testimony." *Id.* at 10. We cannot say that the trial court committed reversible error in concluding that Hoskins owed \$4,000.00 in attorney fees.<sup>2</sup> *See Reed Sign Service, Inc. v. Reid*, 755 N.E.2d 690, 699 (Ind. Ct. App. 2001), *trans. denied* (holding that a trial court

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<sup>2</sup> We note that the payment of attorney fees is contractual in this case.

may determine the amount of attorney fees, even where evidence is lacking, when the award is small and is not unreasonable on its face).

### CONCLUSION

The trial court did not err in ordering Pride to pay damages to the Christians, including fees and costs. Furthermore, the trial court did not err in ordering Pride to pay broker and attorney fees directly to Hoskins.

Affirmed.

RILEY, J., and ROBB, J., concur.