MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Jared Sullivan,

Appellant-Defendant / Counter Plaintiff

v.

Chris Pruitt,

Appellee-Plaintiff / Counter Defendant

March 21, 2024

Court of Appeals Case No.
23A-SC-1944

Appeal from the Washington Circuit Court

The Honorable Larry R. Blanton, Special Judge

Trial Court Cause No.
88C01-2203-SC-32

Memorandum Decision by Judge Mathias

Judge Weissmann concurs.
Judge Tavitas concurs in part and dissents in part, with separate opinion.

Mathias, Judge.

[1] Jared Sullivan appeals the Washington Circuit Court's judgment for Chris Pruitt on Pruitt's complaint alleging nonpayment for a concrete-pouring project at Sullivan's home. Sullivan presents three issues for our review:

> 1. Whether the trial court erred when it found that the Home Improvement Contracts Act ("HICA") does not apply to the oral contract between Sullivan and Pruitt.
>
> 2. Whether the trial court erred when it found that Sullivan was unjustly enriched.
>
> 3. Whether the trial court erred when it found that a nonparty was responsible for Sullivan's alleged damages.

[2] We affirm.

Facts and Procedural History

[3] In early 2020, Sullivan wanted to replace a large wooden deck abutting his house with a poured concrete deck. Sullivan contacted Pruitt, who has been pouring concrete professionally since 1982. Sullivan and Pruitt verbally agreed to the price and scope of the work, which included the deck, adjoining stairs, and a separate area around a fire pit.

[4] On May 4, Pruitt and his employee Chris Gettelfinger began the project by demolishing the old wooden deck and pouring the footers for the new concrete deck. Shortly after the work started, Sullivan asked Pruitt about adding a colorant to the concrete. Pruitt told Sullivan to contact IMI Irving Materials ("IMI") directly to choose the color and to place the order, which he did. There was a slight delay to get the colored concrete, so Pruitt and Gettelfinger had some "time off." Tr. p. 13. In the interim, Sullivan paid Pruitt $6,000 towards the contract price.

[5] IMI called Pruitt when the colored concrete was available, and, on May 14, Pruitt and Gettelfinger resumed work on the project. An unexpected rainstorm came in, and Pruitt and Gettelfinger quickly covered the exposed section of the fresh concrete pour with plastic. Less than thirty minutes later, when the rain had stopped, they removed the plastic and resumed work on the concrete deck.

[6] Later on May 14, Sullivan took photographs of the new concrete deck and sent a text message to Pruitt to say that he was "not happy with it." *Id.* at 57. Pruitt agreed, for no additional cost, to "pour a skim coat" over the slab in an attempt to improve the color and uniformity of the deck. Appellant's App. Vol. 2, p. 9. But the result of that skim coat was not satisfactory to Sullivan. Sullivan refused to pay the balance owing to Pruitt.

[7] On March 28, 2022, Pruitt filed a claim seeking $8,154[1] for unpaid "labor and materials" from Sullivan. *Id.* at 37. On April 22, Sullivan filed a counterclaim against Pruitt seeking $10,000[2] "to repair improperly installed concrete[.]" *Id.* at 39. And, on June 2, Sullivan filed an amended counterclaim seeking $10,000 and alleging that Pruitt's actions "constitute a deceptive act under Ind. Code 24-5-0.5" and seeking attorney's fees. *Id.* at 45.

[8] Following a trial on April 4, 2023, the small claims court entered judgment for Pruitt on his claim against Sullivan. In support, the trial court made findings and conclusions, including the following:

> There were no schematic plans or drawings. There were no specification[s] to be added to particular specifications and no contractual documents of any kind prepared nor signed. Not surprisingly, home improvement contracts must be in writing although the Home Improvement Contracts statute does not include [an] EXPRESS requirement for a written contract, and although the definition of "home improvement contract" includes oral agreements, as a practical matter it is impossible for an oral contract to comply with the statute.
>
> After discussing Sullivan's project, Pruitt gave an estimated price of approximately $14,000.00. Sullivan agreed to said estimate.
>
> There was a "verbal agreement" as to the scope of the project and the customary parameters for the work which Sullivan requested. There has been no allegation of misrepresentation, Sullivan asked

[1] At some point, Pruitt gave Sullivan an invoice showing the total contract price of $14,154 and the balance due as $8,154. Sullivan does not dispute that that was the contract price.

[2] Sullivan got an estimate from another company to repair the appearance of the concrete deck.

Pruitt to perform the concrete work. He described what he wanted. Sullivan could have asked for a written contract, but he did not.

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Sullivan has never been satisfied with the color of the concrete[;] the additive did not work as he envisioned.

After Sullivan complained, Pruitt agreed to make an attempt to make the concrete color mor[e] in conformity with Sullivan's selected color. Pruitt agree[d] to pour a skim coat over the sla[b]. Pruitt performed this work.

Pruitt satisfies the requirements of the statute by his performance at the request of Sullivan.

There [are] no written contract requirements within the statute as Sullivan does not specify any on the part of "deceptive acts" of Pruitt. Pruitt tried to cure any defects and Pruitt attempted to complete the project as agreed.

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CONCLUSION:

The Court finds that there was no fraud or material [mis]representation of the services to be provided by Pruitt to Sullivan. The Court reminds the Parties that a contract is formed where there is a meeting of the minds as to the subject matter being considered. Contracts may be reduced to writing or they may be concluded orally. Once formed any changes must be considered and agreed to by the parties.

Sullivan failed to bring himself within the provisions of Ind. Code 24-5-11-1, et seq.

> Sullivan is not entitled to any relief, either by way of damages or attorney fees under the Act.
>
> Pruitt performed all the work necessary to complete the work. Pruitt provided the labor and conducted the project as agreed. The parties are obligated to perform under their contractual agreement, based on the "HANDSHAKE" contract. Either party could have created a written contract, but neither chose to do so. The Court declines to create a contract after the fact. The contractual agreement for material, workmanship and construction has been fulfilled, and under applicable principles of equity and common law, Pruitt is entitled to be paid.
>
> There are flaws and deviations in the colored concrete and after considering the testimony presented to the Court it is determined that the imperfection in the coloration of the concrete is attributed to the provider of the concrete. The end result of the coloration is not Pruitt's fault. The modification of the contract was at the direction of Sullivan, the responsibility for the color additive was also his choice. Sullivan chose the color to be used, he chose the company to mix the additive with the concrete, and he chose to have it delivered to Pruitt for his use.
>
> JUDGMENT is in favor of PRUITT, in the amount of $8,154.00, together with court costs and interest at the statutory rate.

Id. at 7-11. Sullivan filed a motion to correct error, which the trial court denied.

This appeal ensued.

Discussion and Decision

Standard of Review

[9] Sullivan appeals the trial court's findings and conclusions following a bench trial in small claims court. Our standard of review is well settled. Small claims actions involve informal trials with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law. *Harvey v. Keyed in Prop. Mgmt., LLC*, 165 N.E.3d 584, 587 (Ind. Ct. App. 2021), *trans. denied*. Accordingly, judgments from small claims actions are provided a deferential standard of review. *Id.* We will neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable to the judgment. *Pfledderer v. Pratt*, 142 N.E.3d 492, 494 (Ind. Ct. App. 2020). However, this deferential standard relates only to procedural and evidentiary issues; it does not apply to substantive rules of law, which we review de novo. *Id.*

Issue One: HICA

[10] Sullivan first contends that the trial court erred when it found that HICA did not apply to his contract with Pruitt. As this Court has explained,

> The purpose of HICA
>
> > is to protect consumers by placing specific minimum requirements on the contents of home improvement contracts . . . [because] few consumers are knowledgeable about the home improvement industry or of the techniques that must be employed to produce a sound structure. The consumer's

> reliance on the contractor coupled with the well-known abuses found in the home improvement industry, served as an impetus for the passage of [HICA], and contractors are therefore held to a strict standard.

Benge v. Miller, 855 N.E.2d 716, 720 (Ind. Ct. App. 2006) (internal citation omitted). To that end, HICA requires home improvement suppliers[] performing any alteration, repair, or modification to a residential home property in an amount greater than $150 to provide the customer with a written home improvement contract. I.C. § 24-5-11-1 et seq. A home improvement supplier who violates HICA—by, among other things, failing to provide a written contract—commits "a deceptive act that is actionable . . . by a consumer under IC 24-5-0.5-4 and is subject to the remedies and penalties under IC 24-5-0.5." I.C. § 24-5-11-14.

Indiana Code section 24-5-0.5-4 provides that "[a] person relying on an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars ($500), whichever is greater." An "uncured deceptive act" means a deceptive act of which the consumer gave proper notice to the supplier and either the supplier made no offer to cure within thirty days of the notice or the act was not cured within a reasonable time. I.C. § 24-5-0.5-2(a)(7). An "incurable deceptive act" means "a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead." I.C. § 24-5-0.5-2(a)(8). The section related to limitation of actions explicitly states that

> (a) No action may be brought under this chapter . . . unless (1) the deceptive act is incurable or (2) the consumer bringing the action shall have given notice in writing to the supplier [within a certain time frame], which notice shall fully state the nature of the alleged deceptive act and the actual damage suffered

> therefrom, and unless such deceptive act shall have become an uncured deceptive act.
>
> (b) No action may be brought under this chapter except as expressly authorized in section 4(a), 4(b),[] or 4(c)[] of this chapter. Any action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act.

I.C. § 24-5-0.5-5.

Hayes v. Chapman, 894 N.E.2d 1047, 1052-53 (Ind. Ct. App. 2008), *trans. denied*.

[11] Sullivan's contention that the trial court erred when it found that HICA does not apply here fails for two reasons. First, Sullivan's argument to the trial court on this issue was vague, and we conclude that he did not preserve the issue for our review.

> As a general rule, a party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court. *Pitman v. Pitman*, 717 N.E.2d 627, 633 (Ind. Ct. App. 1999). This rule exists because trial courts have the authority to hear and weigh the evidence, to judge the credibility of witnesses, to apply the law to the facts found, and to decide questions raised by the parties. *See Whiteco Indus., Inc. v. Nickolick*, 549 N.E.2d 396, 398 (Ind. Ct. App. 1990). Appellate courts, on the other hand, have the authority to review questions of law and to judge the sufficiency of the evidence supporting a decision. *Id. The rule of waiver in part protects the integrity of the trial court; it cannot be found to have erred as to an issue or argument that it never had an opportunity to consider.*

GKC Indiana Theatres, Inc. v. Elk Retail Invs., LLC., 764 N.E.2d 647, 651 (Ind. Ct. App. 2002) (emphasis added).

[12] Here, Sullivan argued to the trial court only that Indiana Chapter 24-5-0.5 applied here without any reference to a specific *section* within that Chapter. Indeed, Sullivan made no argument to the trial court that Pruitt committed any specific deceptive act under HICA or that he relied on any specific deceptive act when he incurred damages.[3] The trial court did not have an opportunity to consider the argument Sullivan makes for the first time on appeal.[4] *See id.* Accordingly, the issue is waived.

[13] Waiver notwithstanding, Sullivan's HICA claim is time-barred. Sullivan and Pruitt reached their verbal agreement in early 2020, and Sullivan did not allege a HICA violation until June 2022, more than two years later. *See Hayes*, 894 N.E.2d at 1054 (holding HICA claim time-barred where first raised three years after parties "reached their verbal agreement"; citing I.C. § 24-5-0.5-5(b)).[5]

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[3] For the first time in his motion to correct error, Sullivan argued that Pruitt was not entitled to damages "as a matter of law because the contract was not in writing." Appellant's App. Vol. 2, p. 14. And Sullivan argued that he provided "notice of the defect" sufficient to satisfy HICA requirements. *Id.* But it is well settled that an argument is waived where it is presented for the first time in a motion to correct error and had been available during the original proceedings. *O'Bryant v. Adams*, 123 N.E.3d 689, 694 (Ind. 2019).

[4] The trial court invited post-trial briefing on the issue, but if the parties submitted anything, they have not included that briefing in their appendices on appeal. And the parties do not mention any such briefing in their appellate briefs.

[5] Further, we note that the only allegedly deceptive act Sullivan raises on appeal is Pruitt's failure to provide a written contract. But Sullivan confuses the provisions of HICA and argues that Pruitt's attempt to cure the deceptive act, namely, the skim coat he applied after the original slab was poured, was insufficient. But only the provision of a written contract could have cured the lack of a written contract. In any event, "[a]

Issue Two: Unjust Enrichment

[14] Sullivan next contends that the trial court erred when it found that he was unjustly enriched. But the trial court made no such finding.[6] Indeed, as this Court has explained,

> *if there is no express contract*, a plaintiff may sometimes recover under the theory of unjust enrichment,[] which is also called quantum meruit, contract implied-in-law, constructive contract, or quasi-contract. *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991), *reh'g denied*, *cert. denied* 502 U.S. 1094, 112 S. Ct. 1170, 117 L.Ed.2d 415 (1992). These theories are "legal fictions invented by the common law courts in order to permit recovery where in fact there is no true contract, but where, to avoid unjust enrichment, the courts permit recovery of the value of the services rendered just as if there had been a true contract." *Wallem*[*v. CLS Industries, Inc.*], 725 N.E.2d[880,] 890[(Ind. Ct. App. 2000)].

Kelly v. Levandoski, 825 N.E.2d 850, 860 (Ind. Ct. App. 2005) (emphasis added).

[15] Here, because the trial court found that the parties had an oral contract, and because the court made no finding that Sullivan was unjustly enriched, Sullivan's argument on this issue is misplaced. To the extent Sullivan argues

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deceptive act that deceives no one injures no one." *Hoosier Contractors, LLC v. Gardner*, 212 N.E.3d 1234, 1242 (Ind. 2023). Sullivan has not shown that he was injured by a deceptive act.

[6] While the trial court concluded that Pruitt was entitled to be paid "under applicable principles of equity and common law," the court made no reference to "unjust enrichment." Appellant's App. Vol. 2, p. 10. In any event, the court explicitly concluded that Pruitt "fulfilled" the parties' "contractual agreement for material, workmanship and construction," and referred to their "'HANDSHAKE' contract." *Id.* And in his brief on appeal, Sullivan refers to the parties' agreement as an "oral contract." Appellant's Br. at 17.

that Pruitt did not prove his damages, Sullivan asks us to reweigh the evidence, which we will not do on appeal.

Issue Three: Allegedly Erroneous Finding

[16] Finally, Sullivan contends that the trial court erred when it found that "the imperfection in the coloration of the concrete is attributed to the provider of the concrete," IMI. Appellant's App. Vol. 2, p. 10. Sullivan maintains that there is no evidence to support that finding and that it is clearly erroneous.

[17] Sullivan does not support this argument with cogent reasoning or citation to legal authority, and the issue is waived. Waiver notwithstanding, Sullivan's argument is merely another request that we reweigh the evidence. Pruitt testified that "color[ed] concrete tends to have . . . a marbling look." Tr. p. 18. Pruitt also testified that "color[ed] concrete has different variations in it" and that "[d]ifferent stone in the gravel will accept stain different[ly]." *Id.* at 27. IMI mixed the colored concrete at Sullivan's direction. Pruitt merely poured the concrete and finished the surfaces. Pruitt testified that nothing he did caused the problems with the coloring. Sullivan has not shown that the trial court's finding on this issue is clearly erroneous.[7]

[18] For all these reasons, we affirm the trial court's judgment for Pruitt.

[19] Affirmed.

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[7] We note that Sullivan did not allege that IMI was a necessary party to this litigation.

Weissmann, J., concurs.
Tavitas, J., concurs in part and dissents in part, with separate opinion.

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Tavitas, Judge, concurring in part and dissenting in part.

[20] I concur as to Issue Three because Sullivan's argument is little more than a request that we reweigh the evidence.[8] I conclude, however, that Pruitt's failure to provide Sullivan with a written contract is, as a matter of law, a deceptive act under the Home Improvement Contract Act ("HICA"), which bars Pruitt from recovering any contractual damages.[9] Accordingly, I respectfully dissent from the majority's holding to the contrary in Issues One and Two.

A. The Home Improvement Contract Act

[21] Over forty years ago, our Supreme Court recognized that a building contractor occupies a position of trust with those who enter into a home improvement contract with the contractor. *F.D. Borkholder Co. v. Sandock*, 274 Ind. 612, 618, 413 N.E.2d 567, 571 (1980); *accord Mullis v. Brennan*, 716 N.E.2d 58, 65 (Ind. Ct. App. 1999). Our Supreme Court in *F.D. Borkholder* "emphasized that few consumers are knowledgeable about this industry or of the techniques that must be employed to produce a sound structure; therefore, consumers are forced to

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[8] I cannot ignore, however, that the photographs admitted at trial show that the concrete work done by Pruitt indisputably shows the streaks and other faults alleged by Sullivan. The trial court credited Pruitt's testimony that neither the rain nor covering the concrete caused the issues with the concrete. On appeal, we are not at liberty to second-guess the trial court's credibility determination.

[9] The majority claims that Sullivan argued for the first time in his motion to correct error that Pruitt was not entitled to damages as a matter of law because the contract was not in writing. *Supra*, note 3. I disagree. At the conclusion of Pruitt's case-in-chief, Sullivan moved to dismiss Pruitt's complaint due to Pruitt's violation of HICA. Tr. Vol. I. p. 44. Sullivan's failure to provide Pruitt with a written contract was, as a matter of law, one such violation of HICA. Accordingly, Sullivan did not waive his argument that Pruitt cannot recover on a breach-of-contract claim.

rely on the expertise of the contractor." *Mullis*, 716 N.E.2d at 58 (citing *F.D. Borkholder*, 274 Ind. at 618, 413 N.E.2d at 571).

[22] Accordingly, the purpose of HICA is:

> to protect consumers by placing specific minimum requirements on the contents of home improvement contracts . . . [because] few consumers are knowledgeable about the home improvement industry or of the techniques that must be employed to produce a sound structure. The consumer's reliance on the contractor coupled with well-known abuses found in the home improvement industry, served as an impetus for the passage of [HICA], and contractors are therefore held to a strict standard.

Kluger v. J.J.P. Enterprises, Inc., 159 N.E.3d 82, 87-88 (Ind. Ct. App. 2020) (quoting *Imperial Ins. Restoration v. Costello*, 965 N.E.2d 723, 727 (Ind. Ct. App. 2012)).[10] The trial court here failed to hold Pruitt to this higher standard.

B. HICA Precludes Recovery by Pruitt

[23] It is undisputed that the parties did not enter into a written contract. The trial court placed the blame for this failure on both parties. But HICA places this burden on the contractor, not the customer. Specifically, under HICA:

> a "home improvement contract" is defined as "an agreement, oral or written, between a home improvement supplier and a consumer to make a home improvement and for which the contract price exceeds . . . $150." I.C. § 24-5-11-4. The "home

[10] The court in *Imperial Restoration* was in turn quoting *Hayes v. Chapman*, 894 N.E.2d 1047, 1052 (Ind. Ct. App. 2008), *trans. denied*.

> improvement contract price" is "the amount actually charged for the services, materials, and work to be performed under the . . . contract. . . ." I.C. § 24-5-11-5. HICA "**requires home improvement suppliers** performing any alteration, repair, or modification to the residential property of a consumer for an amount greater than $150 **to provide the consumer with a written home improvement contract**."

Kluger, 159 N.E.3d at 88 (citing *Imperial*, 965 N.E.2d at 727-28) (footnote omitted) (emphases added). *See also* Ind. Code § 24-5-11-10(a) ("A real property improvement supplier shall provide a completed real property improvement contract to the consumer before it is signed by the consumer").

[24] Any violation of HICA by a property improvement supplier, including the failure to provide the consumer with a written contract is itself, by operation of statute, a "deceptive act that is actionable . . . by a consumer under IC 24-5-0.5-4 and is subject to the remedies and penalties under IC 24-5-0.5." Ind. Code § 24-5-11-14; *accord Hayes v. Chapman*, 894 N.E.2d 1047, 1053 (Ind. Ct. App. 2008), *trans. denied*. Thus, by failing to provide Sullivan with a written contract, Pruitt committed a "deceptive act" under HICA. *See DeWeese v. Pribyla*, 114 N.E.3d 501, 506 (Ind. Ct. App. 2018) (contractor's failure to provide consumer with written contract in conformity with HICA was, as a matter of law, a deceptive act subject to the remedies and penalties of the Deceptive Consumer Sales Act).

[25] A contractor who fails to provide a consumer with a written contract, as required by HICA, cannot enforce a non-HICA compliant oral contract against

the consumer. *See Ambrose v. Dalton Const., Inc.,* 51 N.E.3d 320, 322 (Ind. Ct. App. 2016) (holding that violation of HICA made unwritten home improvement contract unenforceable against the consumer) (opinion on rehearing); *Cyr v. J. Yoder, Inc.*, 762 N.E.2d 148, 152 (Ind. Ct. App. 2002) (holding that contractors could not bring an action against homeowner due to the contractors' failure to comply with the HICA, including the provision requiring that home improvement contracts be in writing). I recognize that in *Imperial*, 965 N.E.2d at 729, a panel of this Court held that "the General Assembly did not intend that every contract made in violation of HICA to automatically be void." Where, however, the contract to be enforced is entirely unwritten—as opposed to containing some provisions that violate HICA—the contract is simply unenforceable against the consumer. *See Ambrose*, 51 N.E.3d at 322; *Cyr*, 762 N.E.2d at 152; *see also* Ind. Code § 24-5-11-10(d) ("A modification to a real property improvement contract is not enforceable against a consumer unless the modification is stated in a writing that is signed by the consumer").[11]

[26] Here, Pruitt admittedly failed to provide Sullivan with a written contract, as Pruitt was required to do under HICA. Indeed, Pruitt readily admitted that he "never" enters into written contracts with his customers. Tr. Vol. I p. 24. Although it may be admirable that Pruitt "trust[s] a man at his word," his

[11] If a modification to a contract under HICA is unenforceable against a consumer, then logic dictates that contract that is entirely unwritten is also unenforceable against a consumer, as we held in *Ambrose* and *Cyr*.

failure to provide a consumer customer such as Sullivan with a written contract is contrary to HICA.

[27] The majority also concludes that any HICA claim asserted by Sullivan is time barred because Sullivan did not allege any HICA violation until he filed his counterclaim in June 2022, which is more than two years after the verbal agreement between Pruitt and Sullivan in early 2020. Under the majority's approach, Pruitt, who violated HICA by failing to provide Sullivan with a written contract, is able to recover under the oral agreement, which has a six-year statute of limitations. *See* Ind. Code § 34-11-2-7(a). Yet Pruitt would be barred from asserting any claim under HICA. *See* Ind. Code § 24-5-0.5-5(b) (imposing two-year statute of limitations on claims for HICA violations brought under the Deceptive Consumer Sales Act); *Hayes v. Chapman*, 894 N.E.2d 1047, 1054 (Ind. Ct. App. 2008) (holding that HICA claims were barred by two-year statute of limitations). This effectively rewards contractors for failing to comply with HICA.

[28] In short, Pruitt cannot recover any damages due to his failure to provide Sullivan with a written contract, which is a deceptive act under HICA. I dissent from the majority's holding to the contrary.

C. Pruitt Cannot Recover on a Theory of Unjust Enrichment

[29] On Issue Two, the majority concludes that the trial court did not need to rely on unjust enrichment because of the contractual damages. Pruitt cannot, under HICA, recover damages on an unwritten contract, and he did not bring a claim

for unjust enrichment. Accordingly, I agree with Sullivan that the trial court erred to the extent that it relied on a theory of unjust enrichment in awarding Pruitt damages.