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IN THE COURT OF APPEALS OF INDIANA

Robert D. Willis and Cindy L. Willis,
Appellants-Plaintiffs/Cross-Appellees,

v.

Dilden Brothers, Inc.,
Appellee-Defendant/Cross-Appellant

February 25, 2022

Court of Appeals Case No. 21A-CT-378

Appeal from the Tippecanoe Circuit Court

The Honorable Sean M. Persin, Judge

Trial Court Cause No. 79C01-1811-CT-173

Crone, Judge.

Case Summary

[1] Robert D. Willis and Cindy L. Willis filed a four-count complaint against well drilling company Dilden Brothers, Inc. (Dilden), alleging that Dilden's employees violated several consumer protection statutes by removing and replacing their well pump and other plumbing without their consent and without a written contract and by attempting to collect an invalid debt. Dilden filed a motion for partial summary judgment on Count 4, which the trial court granted. After a trial, the jury found in favor of the Willises and awarded them damages on all counts, including $115,000 on Count 4. Dilden filed a motion to correct error as to Counts 2 and 4, alleging that the damages were excessive. Based on its concern that the jury improperly included attorney's fees in its damages award on Count 4, the trial court vacated that award sua sponte and denied Dilden's motion to correct error. The Willises filed a motion for recusal, which the trial court also denied. After a bench trial on statutory damages and attorney's fees, the trial court awarded the Willises additional damages on Counts 1 and 3, $15,000 in damages on Count 4, and over $103,000 in attorney's fees.

[2] The Willises now appeal, arguing that the trial court erred in vacating the jury's damages award on Count 4, in granting partial summary judgment for Dilden on that count, in denying their motion for recusal, and in determining the amount of the attorney's fees award. Dilden cross-appeals, arguing that the trial court erred in denying its motion to correct error as to Count 2 and in awarding damages on Counts 3 and 4. We affirm in part and reverse in part.

Facts and Procedural History[1]

[3] In 1987, the Willises moved into their Lafayette home, which was served by a private well of unknown age. Robert determined that the well "had good water," with "no lime, sulfur, or iron that sort of thing." Tr. Vol. 2 at 202. In 2005, Robert, who ran the research machine shop for the mechanical engineering department at Purdue University, installed in his basement a "Sears best" deep well jet pump with a foot valve,[2] hydraulic arrestors, a pressure switch, and a forty-four-gallon holding tank with a pressurized bladder, all of which he purchased for approximately $1,100. *Id*. at 202-04. Robert, who was born in 1951, thought that the pump was "probably going to last [him] the rest of [his] life." *Id*. at 202. According to Robert, that water system "supplied all of the [household's] needs" without losing pressure. *Id*. at 205. The Willises "could run everything. Wash cars, take showers." *Id*.

[4] One night in early February 2018, Robert heard the "pump kick on[,]" which he thought was "just a little funny" because "nobody had been running any water[.]" *Id*. An hour later, he heard the noise again and checked the house for running water, but he found none. He went into the basement and inspected the holding tank. When the tank was full, he saw the "pressure gauge slowly

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[1] Dilden's statement of facts is not in accordance with the standard of review as required by Indiana Appellate Rule 46.

[2] When asked to explain to the jury "what a foot valve is[,]" Robert replied, "It's in the well the bottom of the well. Two lines that go down to it. One line pushes water down and there's kind of a venturi thing in this foot valve and it picks other water up from the well and it pushes it back up the other pipe and then feeds it to a tank." Tr. Vol. 3 at 32.

dropping," which caused the pump to "kick back on and fill that tank back up." *Id*. at 206. He suspected that either the foot valve or a check valve in the pump system was leaking water "back down the well." *Id*. He "really didn't think there was anything wrong with [the] pump" itself. *Id*. Robert "had a plan" to replace the foot valve himself if that turned out to be the source of the leak. *Id*. at 207.

[5] On February 5, Robert called Dilden and told the receptionist that he "wanted a second opinion so [he] could verify what [he] was thinking." *Id*. at 206. The receptionist told Robert that a service call would cost $150, which he agreed to so that he could either "confirm what [he] thought" or see if "it was something else[.]" *Id*. at 207. Later that day, three Dilden employees, one of whom was Norian Mundy, arrived at the Willises' home. Robert took them down to the basement, told them "about the pump kicking on periodically[,]" and stated that he "believed it was the foot valve[.]" *Id*. at 208, 209. Robert and Mundy "played around with" the water system, and Mundy "agreed with [Robert] it was the foot valve." *Id*. at 210. But Mundy told Robert that he did not want to repair the foot valve because the system was "ancient[,]" and he was "not even sure they make this stuff anymore[.]" *Id*. Robert was skeptical about this, and after listening to Mundy talk "for a while" about "submersible pumps[,]" he told Mundy that he would "sleep on it." *Id*. at 211. Mundy replied, "[W]e're a very busy company and […] we've got jobs all of the time, right now you're in the queue and if you wait any time at all you won't be in the queue and you'll be stuck out here without water." *Id*. Robert said, "[A]ll of the same, I am going

to think about this for a little while and sleep on this." *Id.* at 212. Mundy reiterated that Dilden was "a very busy company" and stated, "[T]omorrow after we get our jobs done maybe we can […] stop later in the day and see what you're thinking." *Id.* at 212.

[6] After Mundy and his coworkers left, Robert went to a home improvement store and confirmed that replacement parts for his water system, including foot valves, were still available. Early the next morning, as Cindy was getting ready to go to work, the now-retired Robert went to a fast-food restaurant to get breakfast, review some plumbing brochures he had gotten at the store, and "sit and think about this stuff and make a decision." *Id.* at 214. When Robert returned home, a truck was parked in his driveway, and Cindy told him that the "guys" who "were there yesterday" were "downstairs making a lot of noise." *Id.* at 215.[3] Robert was "surprised" at this news and went into the basement to find "plum[b]ing parts all over[,]" "holes drilled into [his] concrete block wall[,]" and a Dilden employee "going to mount [a] box in there on the wall." *Id.* at 216. Robert asked what was going on, and the man replied, "There's two guys outside you need to go and talk to them I can't tell you anything." *Id.*

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[3] According to Cindy, when the Dilden employees arrived that morning, she "opened the door to greet them[,]" and "[t]hey just came in and went right down the stairs." Tr. Vol. 3 at 101. She "assumed that they were coming to assess" the water system, but at some point she heard "noise[,]" peered into the basement, and saw that the water system components were "all in a big pile over on the side of the floor and there was all kinds of new stuff going on." *Id.* She did not give the Dilden employees permission to "go downstairs and work on the well[.]" *Id.*

[7] Robert went outside and saw two of the Dilden employees who had been there the day before. They had "dug a hole" at the Willises' well site and were "taking things apart and kind of [making] a mess[.]" *Id*. at 217. Robert told them to follow him into the basement and demanded to know what was going on. One of the men said that "they were not used to customers asking questions" and told Robert to "go somewhere and sit down." *Id*. Robert told the men to stop working, but they did not, so he called Dilden and told the receptionist that he wanted to talk to Mundy and that he wanted "everything stopped […] now." *Id*. at 219. Eventually, Mundy arrived at the Willises' home, conferred with his coworkers, and told Robert, "[W]e're going to try to get you some water." *Id*. at 221. Robert reminded Mundy that he "already had water" before the Dilden crew arrived, but at that point the original plumbing had been "torn apart and thrown aside." *Id*. at 226.

[8] The Dilden employees unsuccessfully attempted to install a four-inch-diameter pump in the well and ultimately installed a three-inch pump with restrictors that significantly reduced the flow of water. They also replaced the forty-four-gallon holding tank with a "dinky" seven-gallon tank. *Id*. at 230. Mundy told Robert that the pump would "get [him] enough water that [he] could get a drink" but that "if [he was] going to shower [he] might have enough to flip on [himself.]" *Id*. at 226. Mundy also stated, "I think you're going to need a new well." *Id*. Robert rejected Mundy's proposed sites for the well, which were either in an easement that the Willises did not own or in the drain field for the Willises' "kitchen sink" and "washer[.]" *Id*. at 227. Several days later, Dilden sent the

Willises an estimate of $7,000 for drilling a new well, relocating the recently installed components, and abandoning the existing well.

[9] At the end of February, Dilden sent the Willises an invoice for $3,254.74 for the parts installed and labor performed on February 6. The invoice states, "Service charges at the rate of 1.5% per month corresponding to an annual rate of 18%, along with costs, expenses and attorney fees will be charged on all unpaid balances after 30 days[.]" Ex. Vol. at 39. Robert called Dilden two or three times and asked to speak with the owner about the invoice, but he never got to talk to him.

[10] Around June 2018, Dilden sent the Willises an invoice summary showing three finance/late charges totaling $149.17 and an outstanding balance of $3,403.91, as well as a "Final Notice" that reads,

> To date we have received no correspondence to your $3403.91 debt to our company. This, following numerous attempts to collect, will be your final notification prior to our referring your debt to an outside collection firm.
>
> Your balance is 80 days past due. We intend to close this matter within no more than 10 business days of 06/18/18. Your full payment by that date will stop this process.
>
> If you fail to respond to this notice, you will be contacted by a collection firm and can no longer be assisted by our company in preventing this potential credit-affecting collection to take place.

Id. at 47.

[11] In August 2018, Dilden filed a complaint against the Willises in small claims court, seeking $3,254.74 plus $232.74 in interest and $600 in attorney's fees. The Willises retained counsel Duran Keller. On October 9, 2018, Keller sent Dilden a three-page demand letter that summarized the Willises' account of the foregoing events and further stated in pertinent part,

> The Willises have been living these past months with a sub-standard water system. Mr. Willis is a disabled senior citizen with multiple health issues and [medication]. This has been a very difficult ordeal for the Willis family. Neither Mr. Willis nor Mrs. Willis agreed to any of the work performed. They did not sign a contract for any work to be done. Dilden damaged the [Willises'] well and left them with a substandard system. Then, on August 27, 2018, Dilden sued Mr. and Mrs. Willis for amounts that they did not owe, including costs for the work that damaged the [Willises'] property and attorney's fees. Now Mr. and [Mrs.] Willis have endured attorney's fees in defending themselves, all of which should could [sic] have been avoided.
>
> All of the aforementioned conduct and/or omissions constitute deceptive acts for which Dilden is responsible. Heritage [presumably, Dilden's collection firm] and its agents' conduct gave Mr. and Mrs. Willis stress, anxiety, and headaches. In addition, Dilden's conduct brought about the need for […] Mr. and Mrs. Willis' legal representation and associated costs and expenses.
>
> This is your chance to cure without Court intervention and remedy Mr. and Mrs. Willis' loss. You may cure your deceptive acts by paying an amount that is reasonably calculated to remedy Mr. and Mrs. Willis' losses plus ten [percent] (10%) of such amount. If a qualified offer to cure is not received within thirty (30) days, we may treat the matters between the parties, including those discussed above, as uncured deceptive acts.

> If a resolution cannot be reached, Mr. & Mrs. Willis are prepared to litigate these matters against you including without limitation: Malicious Prosecution, Deceptive Sales, violation of Indiana's Home Improvement Contract Act, and Abuse of Process.

Id. at 7. Dilden obtained a dismissal with prejudice of its action against the Willises in January 2019, but no financial resolution was reached.

[12] In November 2018, the Willises filed a four-count complaint against Dilden, which was amended in March 2019. In Count 1, the Willises alleged that Dilden violated the Indiana Senior Consumer Protection Act (SCPA), Indiana Code Chapter 24-4.6-6, which allows a senior consumer[4] to bring an action against a person[5] who knowingly and by deception or intimidation obtains control over the property of the consumer. Ind. Code §§ 24-4.6-6-5(a), 24-4.6-6-4(a). The court may order the person to "reimburse the senior consumer for any damages incurred or for the value of the property or assets lost as a result of the violation or violations of this chapter." Ind. Code § 24-4.6-6-5(b)(2). For knowing violations of the SCPA committed by a person who is not in a position of trust and confidence with the senior consumer, the court may order "payment of two (2) times the amount of damages incurred of property or assets lost" and "payment of a civil penalty not exceeding five thousand dollars

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[4] A "senior consumer" is "an individual who is at least sixty (60) years of age." Ind. Code § 24-4-6.6-3(5). Only Robert was at least sixty years of age when the relevant events occurred.

[5] A "person" includes "an individual, a corporation, … or any other legal entity." Ind. Code § 24-4.6-6-3(3).

($5,000).” Ind. Code § 24-4.6-6-5(c)(1). The court may also “award reasonable attorney’s fees” to the senior consumer. Ind. Code § 24-4.6-6-5(d). The Willises alleged that Dilden violated the SCPA by misrepresenting that work needed to be done on their property and by performing services on their property without their permission.

[13] In Count 2, the Willises alleged that Dilden violated the Indiana Crime Victims’ Relief Act (CVRA), Indiana Code Section 34-24-3-1, by knowingly or intentionally exerting unauthorized control over their property, including the pump, tank, and “associated plumbing.” Appellants’ App. Vol. 2 at 64. This allegation tracks the elements of criminal conversion under Indiana Code Section 35-43-4-3. The CVRA provides that a person who “suffers a pecuniary loss” as a result of a violation of Indiana Code Article 35-43 “may bring a civil action against the person who caused the loss” for an amount not to exceed three times actual damages, “[t]he costs of the action[,]” “[a] reasonable attorney’s fee[,]” and other enumerated expenses. Ind. Code § 34-24-3-1.

[14] In Count 3, the Willises alleged that Dilden violated the Indiana Deceptive Consumer Sales Act (DCSA), Indiana Code Chapter 24-5-0.5, by committing various “deceptive acts.” Pursuant to our legislature’s directive, the DCSA “shall be liberally construed and applied to promote its purposes and policies[,]” which are to “(1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices; (2) protect consumers

from suppliers[6] who commit deceptive and unconscionable sales acts; and (3) encourage the development of fair consumer sales practices." Ind. Code § 24-5-0.5-1. Indiana Code Section 24-5-0.5-4(a) provides that "[a] person relying upon 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." "The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of: (1) three (3) times the actual damages of the consumer suffering the loss; or (2) one thousand dollars ($1,000)." *Id*. Subject to an exception not relevant here, "the court may award reasonable attorney fees to the party that prevails in an action under this subsection." *Id*.

[15] Indiana Code Section 24-5-0.5-3(a) provides that a "supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction[,]"[7] and that "[s]uch an act, omission, or practice by a supplier is a violation of this chapter whether it occurs before, during, or after the transaction. An act, omission, or practice prohibited by this section includes both implicit and explicit misrepresentations." Subsection (b) of the statute enumerates over three dozen deceptive acts, including "(14) Engaging in the

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[6] Indiana Code Section 24-5-0.5-2(a)(3) defines "supplier" in pertinent part as "[a] seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions …. The term includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer."

[7] Indiana Code Section 24-5-0.5-2(a)(1) defines "consumer transaction" in pertinent part as a sale or a service for primarily household purposes.

replacement or repair of the subject of a consumer transaction if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized." Ind. Code § 24-5-0.5-3(b).

[16] As indicated above, the DCSA distinguishes between curable and incurable deceptive acts. An "uncured deceptive act" is a deceptive act

> (A) with respect to which a consumer who has been damaged by such act has given notice to the supplier under section 5(a) of this chapter;[8] and
>
> (B) either:
>
>> (i) no offer to cure has been made to such consumer within thirty (30) days after such notice; or
>>
>> (ii) the act has not been cured as to such consumer within a reasonable time after the consumer's acceptance of the offer to cure.

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[8] Indiana Code Section 24-5-0.5-5(a) provides in pertinent part,

> 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 the sooner of (i) six (6) months after the initial discovery of the deceptive act, (ii) one (1) year following such consumer transaction, or (iii) any time limitation, not less than thirty (30) days, of any period of warranty applicable to the transaction, which notice shall state fully 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.

Ind. Code § 24-5-0.5-2(a)(7). A "cure" is either "to offer in writing to adjust or modify the consumer transaction to which the act relates to conform to the reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer" or "to offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer." Ind. Code § 24-5-0.5-2(a)(5). An "offer to cure" is a cure that

> (A) is reasonably calculated to remedy a loss claimed by the consumer; and (B) includes a minimum additional amount that is the greater of: (i) ten percent (10%) of the value of the remedy under clause (A), but not more than four thousand dollars ($4,000); or (ii) five hundred dollars ($500); as compensation for attorney's fees, expenses, and other costs that a consumer may incur in relation to the deceptive act.

Ind. Code § 24-5-0.5-2(a)(6). An "incurable deceptive act" is "a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead." Ind. Code § 24-5-0.5-2(a)(8).

[17] Specifically, the Willises alleged that Dilden committed deceptive acts in violation of the DCSA by showing up without an agreement and performing work on their property that was not requested; damaging their property, including their well; misrepresenting "the necessities of work that [they] needed done on their property"; attempting "to collect an amount that was not permitted by law or valid agreement"; claiming that the Willises owed money when they had no obligation to Dilden; suing the Willises and claiming that they owed attorney's fees; and continuing with the lawsuit after being informed

that it was frivolous. Appellants' App. Vol. 2 at 65. The Willises further alleged that Dilden never made a written offer in response to Keller's demand letter, that Dilden "committed deceptive acts before and after its transaction with the [Willises,]" and that "Dilden's deceptive acts were done as a part of a scheme, artifice, or device with intent to defraud or mislead." *Id*.

[18] Finally, in Count 4, the Willises alleged that Dilden violated the Indiana Home Improvement Contracts Act (HICA), Indiana Code Chapter 24-5-11,[9] by failing to provide them with a completed real property improvement contract[10] as required by Indiana Code Section 24-5-11-10. Indiana Code Section 24-5-11-14 provides that "[a] real property improvement supplier who violates this chapter 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."[11]

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[9] This chapter "applies only to residential real property located in Indiana, including all fixtures to, structures on, and improvements to the real property." Ind. Code § 24-5-11-1.

[10] A "real property improvement contract" is "an agreement, oral or written, between a real property improvement supplier and a consumer to make a real property improvement and for which the real property improvement contract price exceeds one hundred fifty dollars ($150)." Ind. Code § 24-5-11-4. In general, the written contract must, at a minimum, contain the following: (1) the name of the consumer and address of the subject property; (2) the name and address of the supplier, an email address, and a telephone number; (3) the date the real property improvement contract was submitted to the consumer and any time limitation on the consumer's acceptance; (4) a reasonably detailed description of the proposed real property improvements; (5) where applicable, a statement that specifications will be provided before work commences; (6) the approximate starting and completion dates of the real property improvements; (7) a statement of any contingencies that would materially change the approximate completion date; (8) the real property improvement contract price; (9) a statement as to third party suppliers; and (10) signature lines. Ind. Code § 24-5-11-10(a).

[11] A "real property improvement supplier" is "a person who engages in or solicits real property improvement contracts whether or not the person deals directly with the consumer." Ind. Code § 24-5-11-6.

[19] In December 2019, Dilden filed a motion for partial summary judgment, which neither party has included in its appendix on appeal. According to the trial court's March 2020 order on that motion, Dilden argued in pertinent part that "any claims of uncured acts from February 2018 set forth in Counts 3 and 4 are time barred because [the Willises] did not tender notice and an opportunity to cure until October 9, 2018." Summary Judgment Order at 4. The Willises did "not appear to dispute this as to Count 3" for purposes of the DCSA, but they did "not believe notice and opportunity to cure are prerequisites to prosecuting the allegations in Count 4 under [the HICA]." *Id*. The trial court noted that Dilden's position was supported by the majority's opinion in *Hayes v. Chapman*, 894 N.E.2d 1047 (Ind. Ct. App. 2008), *trans. denied* (2009), and that the Willises relied on the dissenting opinion. Because the Willises offered "no binding authority contrary to the majority opinion in *Hayes*[,]"the trial court granted Dilden's summary judgment motion "as to any uncured acts from February 2018 set forth in Counts 3 and 4." The court clarified that its ruling "shall not prevent [the Willises] from prosecuting claims of uncured acts from June or August 2018" or "claims of incurable acts alleged in Counts 1, 3 and 4." Summary Judgment Order at 5.

[20] In May 2020, Dilden filed a motion in limine, which neither party has included in its appendix, "seeking to exclude testimony, evidence and instructions regarding emotional distress damages" on the basis that the Willises did "not allege a cause of action that would allow for the recovery of emotional damages." Order on Motion in Limine at 2. In its September 2020 order

granting the motion, the trial court stated, "If carefully pled, [the Willises] may be able to seek emotional damages based on the alleged misconduct. However, as currently pled, the Court finds that [the Willises] may not seek emotional damages from the jury under the CVRA, SPCA, HICA or the DCSA." *Id*. at 5.

[21] The matter was set for jury trial. The parties agreed that the jury would decide liability and damages on all four counts, including additional damages, if any, under the CVRA, whether any violations under the SCPA were "knowing," and whether any violations under the DCSA were "willful"; the trial court would determine additional statutory damages for any knowing or willful violations, as well as attorney's fees, if applicable, at a subsequent bench trial. The day before trial, Robert Duff entered his appearance as additional counsel for the Willises.

[22] The trial commenced on September 22, 2020, and concluded the next day. The Willises testified to the relevant events as described above. When asked how much his pump and tank would have cost in 2018, Robert replied, "You would probably have I don't know maybe you probably have $1100 or $1200 in that pump and tank. To buy the arrestors and the pressure switch and some plumbing and stuff you could wrap up $1500 maybe all in total." Tr. Vol. 2 at 204. He later acknowledged that a "used pump would be worth less" than a new pump. Tr. Vol. 3 at 37. When asked how he had been "damaged from Dilden's actions in this case[,]" he replied,

> Well I have not very good water at my house. I turn my kitchen sink on it's a much reduced stream than I ever had before. If you

> flush a toilet or run other stuff or try to do other things it runs even less, I didn't have that before. My shower is not a very good shower anymore. It's very weak. Not the kind of thing that you can really get under and really bath[e] or anything it's a weak stream and you kind of have to just splash stuff on you and do the best you can a little bit here and there. My hose, my hose used to shoot very far, nice you can wash the car I don't have that. I've got a pretty weak hose, kind of wash the car it takes a while but not if somebody is going to go in and wash dishes when you're trying to do it.

Id. at 51-52.

[23] Cindy offered similar testimony. *See id*. at 103 ("Are we happy with the water? No. Do I get to take a good shower? No. Do I get to have family over? Very limited. It disrupted the things that we did many times a year with family and friends and holidays, Feast of the Hunters Moon we always put on a big party. We live like less than a block away."); *id*. at 109 ("Before I could do two or three loads of laundry in a given day and not think anything of it, take showers whatever. After Bob was really worried about the system also and I would do maybe a load of laundry every two or three days because of the showering and other things that we did."); *id*. at 110 (stating that she would do laundry at her "brother in law's house here in town and the laundry mat"). She further testified, "Because of [Dilden's] lawsuit we had to go out and hire an attorney and right now today we are like probably in debt well over $50,000.00 in legal fees.[…] We got small claims we probably were indebted to $2,000 to $2500." *Id*. at 103.

[24] The trial court's final instructions informed the jury that it could award damages, but said nothing about awarding attorney's fees. During deliberations, the jury sent a note to the court asking "how does the jury come to a decision on these open amounts" and "how do [we] know what plaintiffs' lawyers fees are if we feel like this needs to be included?" *Id.* at 229. The court informed counsel that "it was inclined to inform the jurors that they could not award attorney's fees[,]" and Dilden's counsel agreed with this approach. Order Correcting Error at 2. The Willises' counsel asked the court to simply instruct the jury to reread their instructions, which is ultimately what the court did, notwithstanding its concern "that could wind up with a verdict that's not supported by the evidence if we don't give them more guidance." Tr. Vol. 3 at 237. Thereafter, the jury found Dilden liable on all counts and awarded damages that will be detailed below. The trial court polled the jurors and released them, accepted the verdicts, and entered judgment.

[25] Afterward, the trial court met with the jurors to thank them for their service. The court overheard a juror's comment that led the court to believe that the jury included attorney's fees in its damages award of $115,000 on Count 4. The trial court informed the parties about the comment. The Willises filed a motion for recusal, and Dilden filed a motion to correct error as to Counts 2 and 4, arguing that the damages were excessive as a matter of law. The trial court held a status conference on October 2. On October 13, the trial court issued an order denying the parties' motions. The court found that prejudicial or harmful error had occurred as to Count 4 for purposes of Indiana Trial Rule 59(J), however, and

that it did not accept the jury's verdict as to damages on Count 4. The court set another conference for October 16 to discuss the options available under that rule. After that conference, the court set the abovementioned bench trial on damages and attorney's fees for November 10, and it was held as scheduled. Keller requested $89,521.30, consisting of 212.38 billable attorney hours at $400 per hour plus paralegal hours and expenses, and Duff requested $60,478.93, consisting of 135 billable attorney hours at $445 per hour plus costs.

[26] On February 16, 2021, the trial court issued a "Final Appealable Order on All Pending Matters" that reads in pertinent part as follows:

> The jury found in favor of Plaintiffs on all counts. Several additional issues were tried to the Court at a Bench Trial …. Post-trial submissions were filed. Having taken the remaining matters under advisement, the Court orders as follows:
>
> **Count 1: Senior Consumer Protection Act**
>
> Robert Willis argued that the removed parts had a value of at least $1,500.00. He asked the jury to award $1,500.00 on Count 1, and they did so. The jury found the SCPA violation to be "knowing." Pursuant to I.C. 24-4.6-6-5(c), the Court hereby awards additional damages of $3,000.00 and a civil penalty of $5,000.00, plus reasonable attorney's fees.
>
> **Count 2: Crime Victim's Relief Act**
>
> Plaintiffs argued that the cost to repair the current septic [sic] system will be no less than $7,000.00 and asked the jury to assess actual damages of $7,000.00. The jurors agreed and awarded actual damage[s] of $7,000.00 and treble damages of $21,000.00 (the maximum amount allowed on the verdict form).

The Court assesses criminality and reaffirms the verdict for $21,000.00 on Count 2, noting the jurors found that Dilden knowingly exerted unauthorized control over Plaintiffs' property and Plaintiffs suffered monetary loss as a result. [In a footnote, the trial court observed that the maximum recovery under the CVRA is three times actual damages, not four times actual damages.] Dilden contends Plaintiffs are limited to recovering the fair market value of the property removed from the home, but this would defeat the purpose of the CVRA. The old system cannot be fixed. The requirement of a new … system was a foreseeable consequence. Although Plaintiffs contend the cost for a new system will be no less than $7,000.00, they expect the actual cost to greatly exceed this amount.

Plaintiff[s] are entitled to reasonable attorney's fees under the CVRA.

Count 3: Deceptive Consumer Sales Act

The jurors found Dilden liable for an uncured act that was "willful" relating to Robert Willis, but awarded no damages.

The jurors found Dilden liable for an uncured act that was "willful" relating to Cynthia Willis, but awarded no damages. Cynthia Willis is entitled to statutory damages of $500.00. The Court does not increase this amount.

The jurors found Dilden liable for an incurable deceptive act that was "willful" relating to Bob Willis only, and awarded $2,500.00 (the amount charged by attorneys to defend the related small claims case).[12] Pursuant to I.C. 24-5-0.5-4(a), the Court awards

[12] In his closing argument, Keller stated with respect to Count 3, "[I]f you find [Dilden] liable then assess damages. And here the only evidence that we heard was $2500 for attorney fees for the small claims matter, for the small claims." Tr. Vol. 3 at 198.

additional damages of $5,000.00, for a total award of $7,500.00.

The jurors found Dilden liable for an incurable deceptive act that was "willful" relating to Cynthia Willis only, but awarded no damages.

Plaintiffs are entitled to reasonable attorney's fees under the DCSA.

Count 4: Home Improvement Contracts Act

The jurors found Dilden liable under the HICA as part of a scheme, artifice or device with the intent to defraud or mislead. Dilden made a clear decision to move forward without a written contract, which would have prevented this entire ordeal. Their actions were knowing and willful. The Court awards $5,000.00 on Count 4, which is increased by $10,000.00 pursuant to I.C. 24-5-0.5-4(a), for a total award of $15,000.00.

Plaintiffs are entitled to reasonable attorney's fees under the HICA.

The Court notes that Plaintiffs still maintain that the jury award of $115,000.00 on Count 4 should be accepted by the Court, *even though it included attorney's fees.* Surprisingly, Plaintiffs also ask the Court *to treble this amount.* In other words, not only are Plaintiffs asking the Court to award fees twice, they also ask the Court to triple this amount. Plaintiffs ultimately ask for total damages on all counts of $391,500.00. This excludes their request for emotional damages, which the Court summarily denied, and their request for attorney's fees. Such an award is not supported by the evidence and is not appropriate in this case. The goal of Indiana's consumer protection laws is to protect consumers, not to allow for windfalls.

Reasonable Attorney's Fees

Under Indiana Professional Conduct Rule 1.5, the factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

The size of an award on compensatory damages does not dictate the amount of reasonableness attorney's fees when a fee shifting statute is applied. *See R.L. Turner Corp. v. Wressell*, 44 N.E.3d 26 (Ind. Ct. App. 2015) (affirming attorney fee award of $99,870.00 to secure compensatory damages of $3,852.82 under the CCWA)[, *trans. denied*].

The Court has carefully considered all of the factors above and

places significant weight on the nature of this particular case. Except for the HICA claim, this case boiled down to a factual dispute as to whether the Plaintiffs authorized the work. It was not factually complex, did not require unusually extensive discovery, and was not expert driven.

Plaintiffs certainly benefitted from having lawyers with experience handling consumer law matters, and time spent working on this case prevented them from handling other work. The Court has no concern with the Plaintiffs retaining two attorneys for the jury trial. Defendants used several attorneys at various times on this case. A significant amount of time was spent on a focus group prior to trial, but the Court sees no reason why this case should be pursued less vigorously than a high dollar litigation case. Although the amount of the award in favor of Plaintiffs is a fraction of the attorney's fees incurred, the jurors also sent a clear message to Dilden, finding their actions to be completely unacceptable. Importantly, Dilden plans to break from their long-standing practice of handshake deals by requiring written contracts before commencing work.

The Court gives little weight to the 598-paged United States Consumer Law, Attorney Fee Survey Report, 2017-2018, filed with the Court. The Court understands that Mr. Keller may charge $400.00 per hour and Mr. Duff $445.00 per hour *for every consumer law case they handle*, regardless of the venue or complexities of the case. The Court also recognizes that both attorneys appear to be in high demand to assist with consumer law matters. However, the Court does not find their self-imposed rates to be dispositive on the issue of reasonable attorney's fees. A reasonable attorney fee rate in this case in Lafayette, Indiana is $300.00 per hour for Mr. Keller and Mr. Duff.

It would be inappropriate for a Court to refuse to award fees for time spent on all losing arguments. For example, the Court does not reduce the award of attorney's fees for time spent addressing Defendant's Motion to Dismiss or Plaintiffs' first motion to

> amend complaint. However, Plaintiffs did have a hand in unnecessarily driving up the expenses in this case for time spent: relying on the dissenting opinion in *Hayes v. Chapman*, drafting a motion for interlocutory appeal, pursuing emotional damages and contesting the motion in limine as to emotional damages, moving to amend their Complaint to include new claims of trespass at the eleventh hour, introducing evidence of attorney's fees at jury trial and then objecting to any instructions to the jurors on the issue of attorney's fees. The [Court] finds 8.46 hours of Mr. Keller's time and 10.0 hours of Mr. Duff's time to be unreasonable.
>
> The Court awards reasonable attorney's fees, including litigation expenses, to Mr. Keller in the amount of $65,680.20. The Court awards reasonable attorney's fees, including litigation expenses, to Mr. Duff in the amount of $37,903.93.

Final Appealable Order at 1-4 (underlining replaced with bolding).

[27] The Willises now appeal, and Dilden cross-appeals. Additional facts will be provided below.

Discussion and Decision

Section 1 – We summarily affirm the verdict and the final damages award on Count 1.

[28] Dilden does not challenge the verdict or the final damages award on the Willises' SCPA claim in Count 1,[13] so we summarily affirm them.

[13] Consequently, we find the dissent's unsolicited comments regarding this claim perplexing.

Section 2 - The trial court did not abuse its discretion in denying Dilden's motion to correct error as to Count 2.

[29] We now address Dilden's argument that the trial court erred in denying its motion to correct error as to the purportedly excessive damages for Count 2, which alleged a violation of the CVRA. Generally, we review a trial court's ruling on a motion to correct error for an abuse of discretion. *Poiry v. City of New Haven*, 113 N.E.3d 1236, 1239 (Ind. Ct. App. 2018). "An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." *Id*.

[30] Under the CVRA, a person who "suffers a pecuniary loss" as a result of a violation of the criminal conversion statute may recover an amount not to exceed three times actual damages, Ind. Code § 34-24-3-1, which the jury in this case found to be $7,000. "The measure of damages allowable in conversion is generally the fair market value of the converted property at the time of conversion." *Cannon v. Northside Transfer Co.*, 427 N.E.2d 712, 715 (Ind. Ct. App. 1981). But with respect to household goods, as the Willises point out, it is generally held that the amount of recovery "is not limited to the price which could be realized by a sale in the market, but that the owner may recover the value of the goods to him, based on his actual money loss resulting from his being deprived of the property, or the difference in actual value caused by the injury, excluding any fanciful or sentimental values which he might place upon them." *S. Indiana Gas & Elec. Co. v. Indiana Ins. Co.*, 178 Ind. App. 505, 518, 383

N.E.2d 387, 395-96 (1978) (quoting *Anchor Stove & Furniture Co. v. Blackwood*, 109 Ind. App. 357, 363, 35 N.E.2d 117, 119 (1941)).[14]

[31] "We afford a jury's damage award great deference on appeal." *Carney v. Patino*, 114 N.E.3d 20, 31 (Ind. Ct. App. 2018), *trans. denied* (2019).[15] "In considering whether a jury verdict is excessive, we do not reweigh the evidence and look only to the evidence and reasonable inferences that may be drawn therefrom that support the verdict." *Id*. "If there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed." *Id*. "To warrant reversal, the award must appear to be so outrageous as to impress the Court at first blush with its enormity." *Id*. (quoting *Sandberg Trucking, Inc. v. Johnson*, 76 N.E.3d 178, 189 (Ind. Ct. App. 2017)).

[32] The evidence supporting the verdict established that Dilden's employees knowingly exerted unauthorized control over the Willises' functioning well pump and holding tank,[16] replaced them with inferior plumbing that

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[14] We note that the jury was not specifically instructed as to the proper measure of damages for Count 2. *See* Appellants' Supp. App. Vol. 2 at 5 (final instruction 507B) ("If you find that Dilden Brothers violated the Crime Victims Relief Act, you may award damages."). The dissent observes that final instruction 510G defined "fair market value," but this phrase is not mentioned elsewhere in the instructions, and therefore it is not linked to the CVRA claim.

[15] The dissent places undue emphasis on the jury's "message signifying that it lacked a basis upon which to calculate damages." Slip op. at 45 (Bailey, J., dissenting). After the trial court instructed the jury to reread the instructions, the jury was able to calculate damages; except for the award on Count 4, those damages are supported by the evidence.

[16] Dilden asserts that the pump and the tank were broken and worthless, which is contrary to Robert's testimony that supports the verdict. Robert also testified that both he and Mundy believed that the pump's foot valve was causing water to leak from the tank, and that he had a plan to replace the valve himself. The dissent ignores all of this and improperly reweighs the evidence in Dilden's favor.

significantly reduced the household water flow, and told the Willises that they would need a new well. In sum, not only did Dilden's employees destroy the Willises' plumbing, but in doing so they also ruined a perfectly good well, which would cost $7,000 to replace based on Dilden's own estimate. Under these circumstances, we cannot conclude that the jury's award is outrageous, and therefore we cannot conclude that the trial court abused its discretion in denying Dilden's motion to correct error as to Count 2. Accordingly, we affirm the verdict and final damages award on that count.

Section 3 – The trial court did not abuse its discretion in awarding damages for an incurable deceptive act as to Robert on Count 3, but it did abuse its discretion in awarding damages for an uncured deceptive act as to Cindy.

[33] Next, we address Dilden's assertion that the trial court erred in awarding damages on Count 3, which alleged multiple violations of the DCSA.[17] "The trial court's award of damages is subject to review for an abuse of discretion." *CT102 LLC v. Auto. Fin. Corp.*, 175 N.E.3d 869, 872 (Ind. Ct. App. 2021). We "will not reverse a damage award upon appeal unless it is based on insufficient evidence or is contrary to law." *Id*.

[34] Dilden first argues that the trial court abused its discretion in awarding $7,500 in damages for an incurable deceptive act as to Robert, claiming that it amounts

[17] The dissent raises and responds to an argument that does not appear in Dilden's brief.

to an impermissible award of treble attorney's fees incurred in defending the small claims action. Dilden cites *Shepard v. Schurz Communications, Inc.*, for the proposition that "Indiana adheres to the 'American Rule' with respect to the payment of attorney fees and requires that parties pay their own attorney fees absent an agreement between the parties, statutory authority, or rule to the contrary." 847 N.E.2d 219, 226 (Ind. Ct. App. 2006). We conclude that Indiana Code Section 24-5-0.5-2(a)(6) authorizes an award of attorney's fees as damages for a deceptive act, because the legislature has specifically acknowledged that they are among the "costs" that "a consumer may incur in relation to the deceptive act." Accordingly, we find no abuse of discretion as to this award, and therefore we affirm it.

[35] Dilden also argues that the trial court abused its discretion in awarding $500 in damages for an uncured deceptive act as to Cindy. Dilden asserts,

> Given the factual timeline and the trial court's Order on Summary Judgment, a finding that Dilden is liable for an uncured deceptive act constitutes a finding that Dilden failed to cure an action related to its collection efforts in the Small Claims Case. In fact, Dilden did cure its alleged deceptive act of attempting to collect payment for the work performed by filing a motion to dismiss with prejudice in the Small Claims Case on December 13, 2018. The Small Claims Case was dismissed with prejudice on January 23, 2019.

Appellee's Br. at 13 (transcript citations omitted).

[36] The Willises do not respond to this argument in their reply brief, and therefore we may reverse if Dilden has established prima facie error, which in this

context means "at first sight, on first appearance, or on the face of it." *Atkins v. Crawford Cnty. Clerk's Off.*, 171 N.E.3d 131, 138 (Ind. Ct. App. 2021) (quoting *Salyer v. Washington Regul. Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020)). This less stringent standard of review relieves us of the burden of refuting arguments advanced in favor of reversal where that burden properly rests with the opposing party. *Id*. "We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required." *Id*.

[37] The Willises' closing argument at trial regarding the uncured deceptive act was light on specifics, to say the least, and their silence on appeal speaks volumes. We are aware of no law or facts that refute Dilden's argument. Consequently, we find that the trial court abused its discretion in awarding damages for an uncured deceptive act, and therefore we reverse that award.

Section 4 – The trial court abused its discretion in impeaching the jury's verdict on Count 4 based on the juror's comment about attorney's fees, but it did not abuse its discretion in reducing the award to $15,000.

[38] Both parties take issue with the trial court's rulings on Count 4, which alleged a violation of the HICA. The Willises argue that the trial court erred in impeaching the jury's verdict based on the juror's comment about attorney's fees. They also argue that the trial court erred in granting partial summary

judgment for Dilden on this count.[18] Dilden does not respond to these arguments, which triggers the application of the prima facie error rule. For its part, Dilden argues that the trial court's damages award is not supported by the evidence.

[39] We begin by looking at Trial Rule 59(J), which reads in pertinent part as follows:

> **(J) Relief Granted on Motion to Correct Error.** The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:
>
> (1) Grant a new trial;
>
> (2) Enter final judgment;
>
> (3) Alter, amend, modify or correct judgment;
>
> (4) Amend or correct the findings or judgment as provided in Rule 52(B);
>
> (5) In the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages, grant a new trial, or grant a new trial subject to additur or remittitur;

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[18] The Willises frame this argument as whether *Hayes v. Chapman* should be "overruled." Appellants' Br. at 19. We note that Indiana does not recognize horizontal stare decisis; "[t]hus, each panel of this Court has coequal authority on an issue and considers any previous decisions by other panels but is not *bound* by those decisions." *In re C.F.*, 911 N.E.2d 657, 658 (Ind. Ct. App. 2009). In other words, we may disagree with and decline to follow another panel's decision, but only our supreme court may "overrule" it.

> (6) Grant any other appropriate relief, or make relief subject to condition; or
>
> (7) In reviewing the evidence, the court shall grant a new trial if it determines that the verdict of a non-advisory jury is against the weight of the evidence; and shall enter judgment, subject to the provisions herein, if the court determines that the verdict of a non-advisory jury is clearly erroneous as contrary to or not supported by the evidence, or if the court determines that the findings and judgment upon issues tried without a jury or with an advisory jury are against the weight of the evidence.
>
> In its order correcting error the court shall direct final judgment to be entered or shall correct the error without a new trial unless such relief is shown to be impracticable or unfair to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. If corrective relief is granted, the court shall specify the general reasons therefor.

[40] "It has long been established in Indiana that a jury's verdict may not be impeached by the testimony of the jurors who returned it." *Ward v. St. Mary Med. Ctr. of Gary*, 658 N.E.2d 893, 894 (Ind. 1995). The policy reasons for this rule are that "(1) there would be no reasonable end to litigation, (2) jurors would be harassed by both sides of litigation, and (3) an unsettled state of affairs would result." *Id.* In a similar vein, we have held that it was legally impermissible, and thus an abuse of discretion, to rely upon notes sent by the jury during its deliberations to cast doubt upon the validity of its final verdict. *Cortner v. Louk*, 797 N.E.2d 326, 330 (Ind. Ct. App. 2003).

[41] Accordingly, the jury's verdict on Count 4 was not subject to impeachment based upon the juror's statement that led the trial court to believe that the jury had included attorney's fees in its damages award. That said, however, the trial court was convinced that the jury had included an improper element in its calculation of damages, and a trial court is not obliged to accept a verdict that is "clearly erroneous as contrary to or not supported by the evidence[.]" Ind. Trial Rule 59(J)(7). In their initial brief, the Willises offer nothing to support the proposition that the jury's $115,000 award is even remotely supported by the evidence.[19]

[42] Dilden argues that the trial court's $15,000 award is improper because the Willises "failed to introduce evidence they suffered any actual damages arising from Dilden's failure to provide a signed contract[.]" Appellee's Br. at 14. We disagree. The evidence supporting the verdict established that Dilden's employees showed up at the Willises' home unannounced and ripped out their functioning well pump and tank without their knowledge or consent and without a written contract for the work. The replacement pump and tank that Dilden's employees installed significantly reduced the household water flow and negatively affected the Willises' daily activities for over two and a half

[19] In their reply brief, the Willises argue that they are entitled to emotional distress damages on their HICA claim, which is contrary to the trial court's order in limine. "The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived." *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005); *see also* Ind. Appellate Rule 46(D)(5) ("No new issues shall be raised in a reply brief."). The Willises' argument for circumventing waiver is unpersuasive.

years, as described by the foregoing testimony.[20] We agree with the trial court's determination that Dilden's actions were knowing and willful, that providing the Willises with a written contract beforehand would have "prevented this entire ordeal[,]" and that the Willises actually suffered $5,000 in damages as a result of Dilden's failure to do so.[21]

[43] Finally, we note that the Willises do not suggest, let alone establish, that they would be entitled to additional damages if we were to agree with the dissenting opinion in *Hayes v. Chapman* and reverse the trial court's grant of partial summary judgment for Dilden on Count 4. Consequently, we decline to address that issue, and we affirm the trial court's damages award. *See* Ind. Appellate Rule 66(A) ("No error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.").

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[20] This testimony conclusively rebuts the dissent's assertion that "the factfinder simply had no basis upon which to evaluate the benefit or detriment of Dilden's work." Slip op. at 45 (Bailey, J., dissenting).

[21] The dissent proclaims that "multiple recoveries are not appropriate for one injury." Slip op. at 45 (Bailey, J., dissenting). Nowhere in its brief does Dilden raise a double-recovery argument.

Section 5 – The trial court did not abuse its discretion in denying the Willises' motion for recusal.

[44] We now address the Willises' contention that the trial court erred in denying their motion for recusal. The day after trial, the court held a hearing to inform the parties about the juror's comment regarding attorney's fees. Among other things, the trial court stated,

> I knew that I needed to disclose it but I guess where we go from there I have no problems recusing but I don't know what happens to the rest of the case. I don't know where you guys go from here. You know what I'm even ok with you guys thinking about it and—and briefing it or setting a hearing down the road as to what's going on. You guys—I mean I was not trying to mean saying hey I want a response [right] away. I want to get this off my chest, I want to be able to tell you guys that I heard something that I think is really going to impact this case and then do what you want, research it, think about it […].
>
> ….
>
> I'll tell you this I have had scenarios before where maybe some jurors afterwards have said this or that and were thinking this, that whatever but they weren't definitive. I got a statement that was definitive so this would impact the next hearing that you have.

Supp. Tr. Vol. 1 at 7, 8-9. The Willises filed a motion for recusal, which the court denied in its October 13 order, finding that recusal "would simply allow another judge to award attorney's fees that were already awarded by the jury and this would be unlawful and unfair" and that "[i]t would be inappropriate for a different judge to decide the issues of additional statutory damages and

attorney's fees unless that judge also observed the two-day jury trial." Order Correcting Error at 2.

[45] "A ruling upon a motion to recuse rests within the sound discretion of the trial judge and will be reversed only upon a showing of abuse of that discretion. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it." *Bloomington Magazine, Inc. v. Kiang*, 961 N.E.2d 61, 63-64 (Ind. Ct. App. 2012) (citation omitted). Dilden failed to respond to the Willises' argument on this issue, so the prima facie error rule applies.

[46] The Willises observe that Indiana Judicial Conduct Rule 2.11(A) provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including" when "[t]he judge has a personal basis or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." "When reviewing a trial judge's decision not to disqualify herself, we presume that the trial judge is unbiased." *Kiang*, 961 N.E.2d at 64. "In order to overcome that presumption, the appellant must demonstrate actual personal bias." *Id.* (quoting *In re Estate of Wheat*, 858 N.E.2d 175, 183 (Ind. Ct. App. 2006)).

> In addition, the mere appearance of bias and partiality may require recusal if an objective person, knowledgeable of all the circumstances, would have a rational basis for doubting the judge's impartiality. Upon review of a judge's failure to recuse, we will assume that a judge would have complied with the obligation to recuse had there been any reasonable question

> concerning impartiality, unless we discern circumstances which support a contrary conclusion.

Id. (citation omitted).

[47] The Willises have failed to demonstrate actual personal bias, and they merely suggest that the trial court must have been biased because it reduced their fee request "by essentially $50,000." Appellants' Br. at 15. We are not convinced. As best we can discern from the trial court's cryptic remarks, any "impact" that the juror's comment would have on this case would be on whether the damages award on Count 4 should be reduced due to the jury's improper inclusion of attorney's fees, not on the ultimate determination of the fee award. The mere fact that the award is not as large as the Willises' counsel requested is not conclusive evidence of personal bias. The Willises have failed to establish a prima facie abuse of discretion here.

Section 6 – The trial court did not abuse its discretion in determining the amount of the attorney's fees award.

[48] As for the fee award itself, we typically review the amount of an award for an abuse of discretion. *Purcell v. Old Nat'l Bank*, 972 N.E.2d 835, 843 (Ind. 2012). "A trial court abuses its discretion if its decision clearly contravenes the logic and effect of the facts and circumstances or if the trial court has misinterpreted the law." *Id*. In evaluating the reasonableness of a fee award, the starting point is the hours worked and the hourly rate charged. *Zartman v. Zartman*, 168 N.E.3d 770, 783 (Ind. Ct. App. 2021), *trans. denied*. The trial court may consider a number of other factors, including the parties' responsibility in incurring the

fees and the court's personal expertise and knowledge. *Id*. Also, a court may consider the factors listed in Indiana Professional Conduct Rule 1.5(a) governing the reasonableness of a fee for disciplinary purposes, as the trial court did here, but it is not required to expressly do so. *Id*. Once again, because Dilden failed to respond to the Willises' argument on this issue,[22] the prima facie error rule applies.

[49] The Willises observe that they presented "extensive" evidence regarding their attorneys' experience and hourly rates, including affidavits from several seasoned practitioners, and that the "only evidence submitted by Dilden was the five-paragraph affidavit of a local attorney … who does not practice consumer law." Appellants' Br. at 15, 16. Citing *Barker v. City of West Lafayette*, 894 N.E.2d 1004, 1011 (Ind. Ct. App. 2008), *trans. denied* (2009), the Willises assert that "[t]he burden of proving the market rate [of an attorney] is on the party seeking the fee award. However, once an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." Appellants' Br. at 15. But *Barker* involved a fee award under 42 U.S.C. § 1988, not under Indiana's consumer protection statutes, and the *Barker* court cited a federal appellate court

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[22] Nevertheless, the dissent improperly makes an argument on Dilden's behalf. *See State v. Peters*, 921 N.E.2d 861, 867 (Ind. Ct. App. 2010) ("This court is a neutral arbiter of disputes and not an advocate for either party."). If Dilden believed that the fee award was excessive, it could (and should) have made that argument in its brief. Dilden took a calculated gamble in not settling a relatively simple case that carried the risk of statutory damages and attorney's fees, and it lost that gamble. The trial court was in the best position to determine a reasonable fee award, and we should not second-guess that determination.

case for that proposition. Moreover, *Barker* does not stand for the proposition that a trial court is required to credit a party's evidence of an hourly rate as conclusively reasonable. The trial court in this case observed that local attorneys did not command $400 to $445 hourly, and the matter in controversy lacked such complexity as to bring it within the realm of a specialty practice of law. Such a determination is well within the trial court's discretion. We conclude that the Willises have failed to establish a prima facie abuse of that discretion in this case, and therefore we affirm the fee award.

[50] Affirmed in part and reversed in part.

Pyle, J., concurs.

Bailey, J., concurs in part and dissents in part with separate opinion.

Robert D. Willis and Cindy L. Willis,
Appellants-Defendants,

v.

Dilden Brothers, Inc.,
Appellee-Plaintiff.

Court of Appeals Case No. 21A-CT-378

Bailey, J., concurring in part and dissenting in part.

[51] I respectfully dissent with respect to the award under the Crime Victim's Relief Act. With respect to the Home Improvement Contracts Act ("the HICA") claim, I believe that an award of statutory damages for failure to produce a written contract is warranted, however, I believe that damages in excess of this amount are unsupported by the law and the evidence. As for damage awards under the Senior Consumer Protection Act ("the SCPA") and the Deceptive Consumer Sales Act ("the DCSA"), I concur in the result reached by the majority. I do so reluctantly, for the reasons expressed herein. And, in my view, the award of attorney's fees is excessive.

[52] This case began with a service call from the homeowners regarding their aging, under-performing well, and although a new replacement well would have cost $7,000.00 or less, a final judgment was entered for $157,084.13.[23]

[53] The homeowners filed a four-count claim under the SCPA, the Crime Victim's Relief Act,-the DCSA, and the HICA. Notwithstanding the modest amount involved, the failure of the homeowners to give notice to cure, and Dilden's voluntary dismissal of its small claims collection action, the Willises were awarded $53,500.00. And although the case was not complex, the two attorneys representing the Willises were collectively awarded $103,584.13.

[54] Now the parties cross-appeal, challenging aspects of a trial that was inordinately expanded despite the grant of partial summary judgment. Indeed, the grant of summary judgment has been largely ignored in the conduct of trial, instruction of the jury, awarding of damages, and affirmation of those damages. According to the summary judgment order, because the homeowners failed to give notice to cure, the uncured acts relating to alleged poor workmanship in February 2018 were not a basis for recovery under the DCSA and the HICA.

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[23] I freely acknowledge the duty to refrain from reweighing evidence. That said, one cannot reweigh equivocation. Robert Willis ("Robert") did not testify to having a perfectly functioning system. Rather, he explained that he was experiencing a water leak and wanted a second opinion about the source. According to Robert, one evening in February of 2018, he twice heard the water pump kick on without a faucet being turned on and he decided to investigate. Robert saw that the pressure gauge of the tank was "slowly dropping," but after "a certain amount of time," the pump would kick back on and the tank would fill back up. (Tr. Vol. II, pg. 206.) He observed that "water would leak out." (Tr. Vol. III, pgs. 33-34.) He suspected that there was a leaking check valve or a malfunctioning foot valve (more highly suspecting the latter). But Robert could not independently verify his suspicion, because the foot valve was located at the bottom of the well. This prompted his decision to get a second opinion about the cause of the water leak. At bottom, he testified to his conjecture.

What then remained of the Willises' voluminous but frequently non-specific allegations were assertions of: unfair debt collection practices; conversion of plumbing components; financial exploitation; and the incurable act of failure to produce a written statutorily compliant contract.

[55] DCSA. The allegation that Dilden engaged in unfair debt collection practices by attempting to collect a debt the Willises did not owe, however, does not constitute an uncured or incurable deceptive act under our state DCSA statutory scheme. Rather, the damages provision of Indiana Code Section 24-5-0.5-4(a) excludes application to "a deceptive act described in section 3(b)(20) of this chapter." In turn, Section 3(b)(20) references "[t]he violation by a supplier of the federal Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*), including any rules or regulations issued under the federal Fair Debt Collection Practices Act. Here, the alleged unfair debt collection practice is squarely proscribed by the federal Fair Debt Collection Practices Act, which prohibits the false representation of "the character, amount, or legal status of any debt[.]" 15 U.S.C. § 1692e(2)(A). Despite the alleged conduct falling under the federal act, the Willises sought damages under our DCSA for an allegedly "incurable" act of collection. This was not a proper basis for recovery under DCSA, which allows claims for uncured acts upon proper notice and non-excluded incurable acts.[24] I acknowledge that, although Dilden challenged the award of damages

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[24] Before the jury trial commenced, the trial court heard argument on Dilden's motion in limine seeking to exclude evidence of allegedly deceptive collections efforts. According to representations made by Dilden's

under the DCSA, Dilden did not develop a specific argument with respect to Indiana Code Section 24-5-0.5-4(a). Nonetheless, when recovery is predicated upon a particular statutory provision, I do not believe that we must in our review restrict our focus to read only certain statutory subsections and turn a blind eye to others.

[56] Crime Victim's Relief Act. The Willises alleged that Dilden committed criminal conversion by removing a pump and a water tank. They sought recovery pursuant to Indiana Code Section 34-24-3-1, which permits a victim of a specified crime, who has suffered a pecuniary loss, to bring a civil action for treble damages and attorney's fees. The jury was instructed that, if it found Dilden liable, it should award the fair market value of the plumbing parts removed.[25] Mundy testified that the Dilden crew did a "clean up," at which Robert was present. (Tr. Vol. III, pg. 81.) Mundy described the tank with a "burst bladder" as "not salvageable" and the pump as "old" and having "no value" such that it was thrown away. (*Id.* at 81-82.) Robert testified to his original cost in 2005 and projected a replacement cost, but he did not assign a

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counsel and the Willises' counsel, the Willises had brought suit in federal court under the federal Fair Debt Collection Practices Act, naming as defendants the law firm that had represented Dilden in the small claims collection case. Among the alleged wrongful acts were the issuance of the demand letter and the filing of the small claims lawsuit. Attorneys for both parties agreed – without submission of written documentation – that the federal lawsuit had been dismissed with prejudice after the law firm and the Willises reached a settlement.

[25] Final Instruction 510G defined "fair market value" as: "the price a willing seller will accept from a willing buyer when neither party is forced to do so." (Supp. App. Vol.II, pg. 11.) It is confounding that the majority seems to find this definition untethered to a particular count given that the Crime Victim's Relief Act is concerned with pecuniary loss and the attempts to elicit Robert's opinion of "fair market value" during his testimony was clearly directed toward assigning a value to his pump and water tank, the items allegedly "converted."

fair market value to allegedly converted property in its present state.[26] Nor did any other witness do so. As such, no probative evidence controverted Mundy's testimony that the discarded items were worthless. Ultimately, the Willises did not establish that they suffered a "pecuniary loss" such that they were eligible for the remedies of the Crime Victims Relief Act.

[57] SCPA. I acknowledge that Dilden did not on cross-appeal challenge the SCPA award and thus I concur in the affirmance of that award. However, I undertake to briefly explain my reluctance to do so. The SCPA is concerned with "financial exploitation" of a senior citizen committed when a person "knowingly and by deception or intimidation obtains control over the property of a senior consumer or illegally uses the [senior's] assets or resources." Ind. Code § 24-4.6-6-4. Under the SCPA, the Attorney General may seek injunctive relief and a senior consumer may directly seek actual damages from an individual for misappropriation of assets. I.C. § 24-4.6-6-5. Here, Count I alleged that Dilden had misrepresented facts related to property and necessity of work; wrongfully represented that it was owed attorney's fees; and "Dilden's conduct caused the Willis couple damages[.]" (App. Vol. II, pg. 63.) Even

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[26] Robert testified about the purchase price of his water tank, pump, and arrestors in 2005, in the approximate range of $1,200.00 to $1,500.00, and he estimated what replacement cost would be. The trial court advised the Willises' counsel that Robert appeared confused about the concept of fair market value and the trial court directed counsel to ask Robert separate questions about fair market value of the materials removed and their replacement costs. In response, counsel asked: "Hey Bob what do you believe the fair market value of the property that was taken from you was in February of 2018? Not how much you could go buy a new one for." (Tr. Vol. III, pg. 54.) Robert responded, apparently again alluding to the previously stated purchase price: "I don't know I think I could have had probably $1000, $1200." (*Id.*) Counsel did not follow up in this line of questioning.

assuming that the "conduct" alleged was the taking of "control" over plumbing components before Robert showed up, I do not believe this conduct falls within the purview of a statute directed toward financial exploitation. Indeed, the HICA is the specific statute controlling a transaction between a consumer and home improvement supplier. Moreover, the Willises showed no "actual damages," as required by the SCPA.

[58] HICA. The Willises alleged that Dilden violated the HICA by failing to provide a written contract and obtain a necessary permit. No evidence was adduced at trial as to the necessity of a permit for the particular work performed at the Willis residence. However, it is uncontested that Dilden provided no written contract to the Willises and, as a matter of course, did not produce written contracts for customers. The trial court's order stated that, for Dilden's incurable act of "moving forward without a contract, which would have prevented this whole ordeal," the Willises were entitled to "actual damages" of $15,000.00. Appealed Final Order at 2.

[59] I agree that, due to the omission of a written contract, the Willises are entitled to statutory damages of $500.00, which a trial court may increase for "a willful deceptive act" to $1,000.00. I.C. § 24-5-0.5-4(a). Yet, I find the trial court's willingness to award substantial damages on account of alleged poor workmanship to be inconsistent with the grant of partial summary judgment and also unsupported by the evidence. Succinctly, the evidence showed that the Willises had water until an interruption came, Robert became aware of a water supply problem, and he theorized that the appropriate repair was

installation of a foot valve (or, less probably, a leaking check valve). The homeowners contacted Dilden, who performed work that was not consistent with that theory.[27] But absent causation testimony from Robert or another person such as an expert or skilled witness, and absent any site inspection, the factfinder simply had no basis upon which to evaluate the benefit or detriment of Dilden's work.

[60] Thus, the issue of excessive damages presented by Dilden raises two elementary principles that I believe have been overlooked. First, "the plaintiff carries the burden of proof as to damages." *McLean v. Trisler*, 161 N.E.3d 1259, 1270 (Ind. Ct. App. 2020). Second, multiple recoveries are not appropriate for one injury. *See e.g.*, *Wysocki v. Johnson*, 18 N.E.3d 600, 604-05 (Ind. 2014) (recognizing that an "open ended complaint encompassing multiple theories of liability" presented the trial court with a choice between alternative statutory remedies). Here, Dilden alleged that the damages were excessive, which in this instance appears to have encompassed each of these concepts.

[61] At least twice, the trial court was squarely confronted with the absence of probative evidence to establish the elements of three of the Willises' four claims. First, the jury sent a message signifying that it lacked a basis upon which to calculate damages. Second, when the trial court considered its post-trial options at a hearing, the lack of evidentiary support for damages was again

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[27] Dilden recommended a submersible pump, which was also recommended in the estimate by family friend Ortman.

apparent. Dilden's attorney suggested that the trial court might "decide the proper amount of damages based on the evidence that's already been presented," whereupon the trial judge recognized that he was being asked to step "in the same boat" as the jury and then candidly entreated the attorneys, "How do we come up with damages?" (Tr. Vol. IV, pg. 14.) The proper action at that juncture would have been the entry of judgment upon the evidence pursuant to Indiana Trial Rule 50(A):

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

[62] I, like the jurors, ascertain from the testimony no basis for the calculation of damages, apart from statutory damages for the lack of a written contract. Dilden commenced work without authorization, ceased work, and commenced work again with Robert present. Although Robert hypothesized that nothing beyond replacement of a foot valve was warranted, he could not independently verify that hypothesis given the location of the valve, nor did he verify his alternate hypothesis that there was a leaking check valve. The factfinder had no basis upon which to conclude that any of the work performed was either unnecessary or substandard or that it had diminished the value of the water system as it existed when Robert initially called Dilden.

[63] Attorney's Fees. The trial court stated that it had "carefully considered" the factors of Indiana Professional Conduct Rule 1.5(a) and had placed "significant weight on the nature of [the] particular case." (Final Appealed Order at 3.) The court explained:

> Except for the HICA claim, this case boiled down to a factual dispute as to whether the Plaintiffs authorized the work. It was not factually complex, did not require unusually extensive discovery, and was not expert driven.

(*Id.*) I could not agree more with the trial court's assessment that this case lacked complexity. Moreover, I agree with the majority's characterization that this was a "relatively simple case." Yet, The Willises simply made almost no effort to show causation or damages and instead relied upon the emotional appeal of unrealized homeowner expectations and discontinued family celebrations. There was no evidence that a site inspection had been conducted. Rather, witnesses were invited to speculate on what the cause of the water supply problem might have been. As to whether the measures taken mitigated or exacerbated the problem, the factfinder was simply given no basis for reaching a conclusion. Indeed, when the trial court was asked to consider assuming the role of factfinder as to damages, the trial court candidly addressed the attorneys:

> To be fair, I would be in the same boat as the jurors who wrote back. How do we come up with damages?

(Tr. Vol. IV., pg. 14.)

[64] Moreover, the trial court observed that the Willises "ha[d] a hand in unnecessarily driving up the expenses in this case for time spent." Final Appealed Order at 4. Again, I agree with the trial court as far as this observation goes, but I am convinced that the majority of the fees were unnecessarily incurred. The instant litigation arose from a small claims case in which the Willises had been sued for non-payment for services and materials. When the Willises directed attention to the lack of a written contract, Dilden agreed to relieve the Willises of any obligation to pay upon the account stated. Treating a purported agreement as void and unenforceable is an appropriate deterrent action under the HICA.[28] While Dilden incurred, by voluntarily dismissing the small claims action, adverse financial consequence from its failure to present a conforming written contract, the Willises nevertheless stated a claim under the HICA for which they were entitled to statutory damages. Yet absent proof on the other claims, under these unique circumstances, I am persuaded that the majority of the billable hours were unnecessary and thus unreasonable.

[65] For the foregoing reasons, I dissent in part and concur in result in part.

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[28] I part ways with the majority's suggestion that Dilden was willing to gamble but unwilling to compromise. Rather, Dilden voluntarily dismissed its small claims action for an account stated for labor and materials provided in response to Robert's initial call for assistance.