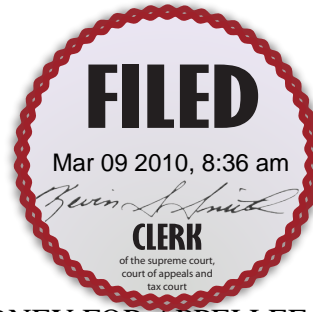


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

AMJAD M. AL-JUNDUB,)
)
Appellant-Defendant,)
)
vs.) No. 32A01-0910-CV-477
)
ARDIZZONE ENTERPRISES, INC.,)
)
Appellee-Plaintiff.)

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Stephenie LeMay-Luken, Judge
Cause No. 32D05-0812-CC-357

March 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Amjad Al-Jundub appeals the trial court's judgment, following a bench trial, in favor of Ardizzone Enterprises, Inc. ("Ardizzone"). Al-Jundub raises three issues for our review, which we consolidate and restate as (1) whether the trial court abused its discretion in excluding evidence offered by Al-Jundub, and (2) whether the trial court erred in entering judgment in favor of Ardizzone for \$10,761.80. Concluding the trial court did not abuse its discretion in excluding evidence, and the evidence favorable to the judgment establishes Ardizzone is entitled to recover in quantum meruit and supports the trial court's award of damages, we affirm.

Facts and Procedural History

Al-Jundub owns a personal residence in Plainfield, Indiana, which sustained storm damage in April 2006. Ardizzone is a construction company that, as a favor to Al-Jundub's brother, one of its major clients, undertook to repair Al-Jundub's residence on an at-cost basis. Before or during the first week of March 2007, Ardizzone's project manager, John Rumpel, sent Al-Jundub a typewritten and signed work proposal for the following:

- Remove existing aluminum siding, shutters and guttering
- Inspect for rotten or damaged wood framing and gutterboard . . .
- Install house wrap and tape to exterior of home.
- Install color plus-Hardie Board brand siding -(choice of colors)
- Install composite wood corners (choice of colors)
- Install vinyl hidden vent soffit and metal fascia wrap. (choice of colors)
- Install new shutters front of house.
- Flesh Balooney and front ledger board. . . .
- Install new gutters and downspouts
- Remove all debris from work site daily

Plaintiff's Exh. 1. The proposal listed the price of the work as \$11,761.80 but did not list a start or completion date or the date Ardizzone submitted it to Al-Jundub. Along with the proposal, Rumpel "dropped off siding color samples" for Al-Jundub to review. Transcript at 10. The available siding colors included "Khaki Brown JH20-30" and "Cobble Stone JH40-10." Defendant's Exh. A. Thereafter, Al-Jundub made hand-written notations on the proposal requesting installation of new shutters on the back as well as the front of the house; requesting "Khaki Brown (JH 20-30)" as the siding color; and requesting "Cobble Stone (JH 40-10)" as the color of the house wrap and exterior tape, composite wood corners, vinyl vent soffit and metal fascia wrap, and gutters and downspouts. Exh. 1. Al-Jundub signed the proposal on March 7, 2007, and faxed it back to Ardizzone.

Soon after receiving the faxed-back copy, Ardizzone began work on Al-Jundub's residence. Ardizzone or its subcontractor eventually performed all of the work described in Ardizzone's typewritten proposal but did not install shutters on the back of the house. The siding was installed in khaki brown, but the house wrap and exterior tape, wood corners, vinyl vent soffit and metal fascia wrap, and gutters and downspouts were installed in an almond color rather than the cobblestone color Al-Jundub requested on the proposal form. Rumpel and Ardizzone's owner, Anthony Ardizzone, testified the cobblestone was a siding color only and did not have an exact match in the colors available for the other components, which were made by different manufacturers. As a result, according to Rumpel, he met with Al-Jundub to explain the situation, and Al-Jundub verbally agreed to accept almond as the color for the other components.

Rumpel testified the work was “90% completed” by April 10, 2007, the date Ardizzone sent Al-Jundub an invoice for \$11,761.80. Tr. at 14. Al-Jundub had requested an invoice at that time in order to meet his deadline for filing an insurance claim by the anniversary of the storm damage. The remainder of the work was performed by Ardizzone or its subcontractor during the succeeding months, with the last work date being August 15, 2007. On September 13, 2007, Rumpel sent Al-Jundub a letter demanding payment of the invoice and stating: “Also on the proposal is where you wrote in install shutters on the back of the house, I will be more than happy to order and install these shutters however if I do that I will have to invoice you for all additional work. The total of this invoice will be \$2,010.00.” Exh. 4 (emphasis in original). Al-Jundub replied, in a letter to Ardizzone’s attorney dated November 11, 2007, that he had not paid Ardizzone any money because the work was “not yet complete” due to, among other deficiencies, no shutters being installed on the back of the house and the components besides siding not being installed in the cobblestone color Al-Junjub requested on the proposal form. Exh. B.

On December 11, 2008, Ardizzone filed its complaint for payment. The trial court held a bench trial on August 24, 2009. On August 26, 2009, the trial court entered judgment in favor of Ardizzone accompanied by sua sponte findings:

1. The Court finds that the parties entered into and [sic] agreement for [Ardizzone] to re-side [Al-Jundub]’s home. This re-siding included the type-written items listed on Plaintiff’s Exhibit 1.

* * *

3. [Ardizzone] entered into the agreement with [Al-Jundub] as a favor to [Al-Jundub]’s brother who is a client of [Ardizzone]’s.

4. [Ardizzone] agreed to provide the work at cost, with no profit.

* * *

6. [Al-Jundub] was given Defendant's Exhibit A in order to pick the siding color. Despite his claims to being well-versed in the construction trade, [Al-Jundub] also picked colors for the composite wood, house wrap, soffit and fascia wrap, gutters and downspouts from Exhibit A. Exhibit A is clearly marked as siding samples. Exhibit A does not display gutter samples or any other sample other than [sic] siding.

7. The Court finds the parties, by agreement, made alternate selections to match the siding due to [Al-Jundub]'s error.

8. [Ardizzone]'s work in some areas was poor, made evident by Defendant's Exhibit C.

9. Overall [Ardizzone] provided the service and products that were requested and ordered and agreed upon.

* * *

11. The Court enters judgment in favor of [Ardizzone] against [Al-Jundub] in the amount of \$10,761.80. The Court denies [Ardizzone]'s request for pre-judgment interest, attorneys fees and costs due to the only written document with [Ardizzone]'s and [Al-Jundub]'s signatures is Exhibit 1 and it does not allow for the collection of these three items.

Appellant's Appendix at 4-5. Al-Jundub now appeals.

Discussion and Decision

I. Exclusion of Evidence

Al-Jundub argues the trial court erred in excluding his opinion testimony "about the estimated costs to correct Ardizzone's deficient performance." Appellant's Brief at 11. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. Sullivan Builders & Design, Inc., v. Home Lumber of New Haven, Inc., 834 N.E.2d 129, 133 (Ind. Ct. App. 2005), trans. denied. An abuse of discretion occurs when the trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. Id.

Indiana Rule of Evidence 701 states:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

understanding of the witness's testimony or the determination of a fact in issue.

Thus, “[o]pinion testimony by a lay witness is limited to those opinions rationally based on some combination of the witness’s own personal observation, knowledge and past experience.” Ackles v. Hartford Underwriters Ins. Corp., 699 N.E.2d 740, 743 (Ind. Ct. App. 1998), trans. denied. During Al-Jundub’s testimony, the trial court sustained a hearsay objection to Defendant’s Exhibit F, an estimate from a third-party construction company, offered to show the amount of money required to repair alleged defects in Ardizzone’s work. Thereafter, the trial court sustained hearsay objections to Al-Jundub’s testimony regarding what he thought the cost of further repairs would be, initially because there had “not been a foundation yet” to show Al-Jundub’s opinion was based upon anything besides the excluded estimate, tr. at 83, and then because the trial court ruled Al-Jundub’s expertise as a highway engineer and architect, and experience in construction of “buildings like homes,” was not equivalent to expertise or experience in “home real estate,” id. at 84-85. Thus, even though the objection to Al-Jundub’s testimony was a hearsay objection, the trial court effectively ruled his testimony was inadmissible because he was unqualified to render an opinion regarding the cost of future repairs. Al-Jundub did not testify to having any expertise or experience specific to the home improvement trade or any knowledge or observations upon which his opinion regarding the cost of future repairs was based. Under these circumstances, the trial court did not abuse its discretion in excluding Al-Jundub’s opinion testimony.

II. Judgment

A. Standard of Review

The trial court accompanied its judgment with findings of fact entered sua sponte. Review of sua sponte findings and conclusions “is based upon the same standard as a review of findings and conclusions issued upon a party’s written request.” Mullis v. Brennan, 716 N.E.2d 58, 62 (Ind. Ct. App. 1999). Thus, we “may affirm the judgment on any legal theory supported by the findings.” Id. (citing Mitchell v. Mitchell, 695 N.E.2d 920, 923 (Ind. 1998)). In reviewing the judgment, first we determine whether the evidence supports the findings, and second we determine whether the findings support the judgment. Money Store Inv. Corp. v. Summers, 909 N.E.2d 450, 458 (Ind. Ct. App. 2009). As to issues upon which there are no findings, a general judgment standard controls, and the judgment will be affirmed if it can be sustained on any legal theory supported by the evidence. Id. We will not set aside the findings or judgment unless they are clearly erroneous. Ind. Trial Rule 52(A). In conducting our review, we consider only the evidence and reasonable inferences favorable to the judgment, and we neither reweigh the evidence nor judge the credibility of witnesses. Mullis, 716 N.E.2d at 62. However, we review questions of law de novo. Hayes v. Chapman, 894 N.E.2d 1047, 1052 (Ind. Ct. App. 2009), trans. denied.

B. Home Improvement Contracts Act

Al-Jundub argues the trial court’s judgment is clearly erroneous because it failed to consider Indiana law governing home improvement contracts. Indiana’s Home Improvement Contracts Act (“HICA”), Indiana Code sections 24-5-11-1 to -14, has the purpose of

protect[ing] consumers by placing specific minimum requirements on the contents of home improvement contracts. As we [have] observed . . . , 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) (citations omitted).

HICA requires home improvement suppliers performing any alteration, repair, or modification to a residential property for an amount greater than \$150 to provide the consumer with a written home improvement contract. See Ind. Code §§ 24-5-11-1, -3, -4, -10(a); Homer v. Burman, 743 N.E.2d 1144, 1148 (Ind. Ct. App. 2001). A home improvement contract must be “completed . . . before it is signed by the consumer” and must contain, at a minimum: (1) the name and address of the consumer and the residential property; (2) the name and address of the home improvement supplier and names and telephone numbers “of any agent to whom consumer problems and inquiries can be directed”; (3) the date the contract was submitted to the consumer and any time limitation on the consumer's acceptance; (4) a “reasonably detailed” description of the work to be done; (5) approximate starting and completion dates; (6) a statement of contingencies that would materially change the approximate completion date; (7) the contract price; and (8) signature lines for the consumer and the supplier or supplier's agent, including a legible printed or typed version of the person's name. Ind. Code § 24-5-11-10(a). Further, before the consumer signs the home improvement contract and before the consumer can be required to make any down payment, the home improvement supplier “must have agreed unequivocally

by written signature to all of the terms of the home improvement contract.” Ind. Code § 24-5-11-11. Finally, a modification to a home improvement contract is not enforceable against a consumer unless it is stated in a writing signed by the consumer. Ind. Code § 24-5-11-10(d).

The evidence presented at trial establishes Ardizzone failed to comply with applicable provisions of HICA. The only document with both parties’ signatures, Ardizzone’s work proposal as modified by Al-Jundub’s handwritten notations, does not contain the date it was submitted to Al-Jundub, approximate starting and completion dates for the work, or a statement of contingencies. Further, the document fails to reflect agreement between the parties regarding two material terms of the home improvements: (1) whether shutters would be installed on the back as well as the front of the house, and (2) which colors would be used for the siding, house wrap and exterior tape, wood corners, vinyl vent soffit and metal fascia wrap, and gutters and downspouts. Both of these terms were subsequently disputed, and the parties never executed a written and signed modification regarding them as required for a modification to be enforceable under Indiana Code section 24-5-11-10(d).

Ardizzone argues violation of HICA is not a defense to a home improvement consumer’s liability for contract damages and HICA only operates when the consumer files a counterclaim. We disagree. Although Ardizzone correctly cites Indiana Code section 24-5-11-14, which provides violation of HICA is a “deceptive act” actionable by a consumer, this section does not state that a claim or counterclaim is the only remedy for a HICA violation. To the contrary, HICA specifically provides that a modification to a home improvement contract not contained in a writing signed by the consumer is not enforceable against the

consumer. Ind. Code § 24-5-11-10(d). Further, in Cyr v. J. Yoder, Inc., 762 N.E.2d 148 (Ind. Ct. App. 2002), this court applied the principle that violation of HICA can operate as a defense to a contractor’s suit for damages. In Cyr, two contractors sued a homeowner for nonpayment of accounts after performing home repairs covered by the homeowner’s insurance. The trial court entered judgment in favor of the contractors, rejecting the homeowner’s defense that both contractors violated HICA. See id. at 149. This court reversed in relevant part, concluding that because HICA was applicable and the evidence showed the contractors violated its provisions, “the damage award entered for [the contractors] must be set aside.” Id. at 152; cf. Woodward v. Heritage Constr. Co., Inc., 887 N.E.2d 994, 999 (Ind. Ct. App. 2008) (concluding homeowner “was not entitled to conform his pleadings at the end of the trial to add an unlitigated defense under HICA” because the applicability of HICA “was not litigated by the parties either expressly or impliedly”) (emphasis added).

Here, as in Cyr, the evidence establishes Ardizzone violated HICA by failing to give Al-Jundub a home improvement contract containing the provisions required by Indiana Code section 24-5-11-10(a) and all terms of the parties’ agreement as required by Indiana Code section 24-5-11-11. Therefore, judgment in favor of Ardizzone cannot be sustained on a breach of contract theory. Accordingly, we must consider whether the judgment can be affirmed on any other legal theory supported by the trial court’s factual findings.

C. Quantum Meruit

Ardizzone argues, and we agree, its violations of HICA do not preclude it from recovering in quantum meruit based upon the value of the work it performed and Al-Jundub accepted. In the absence of an express contract, “a party may recover under the theory of unjust enrichment, or quantum meruit.” Troutwine Estates Dev. Co., LLC v. Comsub Design & Eng’g, Inc., 854 N.E.2d 890, 897 (Ind. Ct. App. 2006), trans. denied. To recover in quantum meruit, “the party must establish that a benefit was rendered to the other party at the express or implied request of that party, that allowing the other party to retain the benefit without paying for it would be unjust, and that the party seeking recovery expected payment for his services.” Mueller v. Karns, 873 N.E.2d 652, 659 (Ind. Ct. App. 2007). Here, there was no express contract governing the parties’ dealings, both because the parties never executed a document satisfying the requirements for a home improvement contract under HICA, and they failed to achieve mutual assent regarding all material terms of the home improvements. However, the evidence favorable to the judgment establishes, and the trial court found, that Ardizzone provided new siding, gutters, and other home improvements to Al-Jundub at his request, and Ardizzone expected payment for these items. Thus, Ardizzone is entitled to recover in quantum meruit if the home improvement work it performed is a valuable benefit Al-Jundub would retain unjustly in the absence of making payment.

The trial court’s findings, although not addressing the issue of quantum meruit, support an affirmative answer to this question. The trial court found Ardizzone “[o]verall . . . provided the service and products that were requested . . . and agreed upon.” Appellant’s

App. at 5. Despite disputing the quality of Ardizzone's workmanship in some areas and whether it met specifications in other areas, Al-Jundub "testified consistently that the siding was installed according to specification." Appellant's Br. at 13 (emphasis added). Thus, Ardizzone's work was a valuable benefit to Al-Jundub. It is undisputed that Al-Jundub never paid Ardizzone for the work. Yet Al-Jundub admitted receiving insurance proceeds for the damage to his house. In these circumstances, it would be unjust for Al-Jundub to retain the benefit of Ardizzone's home improvements without rendering any payment. Therefore, Ardizzone is entitled to recover in quantum meruit, and the trial court did not err in entering judgment in Ardizzone's favor.

Finally, we must determine whether the trial court's award of \$10,761.80 to Ardizzone is proper as a measure of quantum meruit recovery. In general, the measure of quantum meruit recovery is the "fair market value of services rendered," In re Estate of Carroll, 436 N.E.2d 864, 866 (Ind. Ct. App. 1982), or the "reasonable value" thereof, Mueller, 873 N.E.2d at 659. The trial court's award of \$10,761.80 is one thousand dollars less than the \$11,761.80 quoted in Ardizzone's proposal and requested by Ardizzone in its complaint. The trial court found Ardizzone's "work in some areas was poor." Appellant's App. at 5. Thus, the trial court did not intend to award Ardizzone the full benefit of its bargain with Al-Jundub, but rather an amount reflecting the value of its actual performance. In addition, the trial court found Ardizzone undertook to provide the work described in its proposal "at cost, with no profit." Id. at 4. Thus, the price quoted in the proposal, reduced by one thousand dollars due to some deficiencies in the work, reflects the reasonable value of the work

actually performed, rather than a markup. As a result, the trial court's award, although consistent with a breach of contract theory, is equally consistent with the application of quantum meruit principles. Therefore, there is no need to remand for a new hearing on the measure of Ardizzone's quantum meruit recovery, as there would be if the trial court's award was based on a contract price rather than, as here, an assessment of the reasonable value of Ardizzone's work.

Conclusion

The trial court did not abuse its discretion in excluding evidence offered by Al-Jundub. The evidence favorable to the judgment and the trial court's findings establish Ardizzone is entitled to recover in quantum meruit for the work it performed and Al-Jundub accepted, and the trial court's award is a proper measure of Ardizzone's damages. Therefore, we affirm the judgment of the trial court.

Affirmed.

BAKER, C.J., and BAILEY, J., concur.