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IN THE COURT OF APPEALS OF INDIANA

Hoosier Contractors, LLC,

Appellant-Plaintiff/ Cross-Appellee/Counterclaim Defendant,

v.

Sean Gardner,

Appellee-Defendant/ Cross-Appellant/Counterclaimant

June 8, 2022

Court of Appeals Case No. 21A-CT-1331

Interlocutory Appeal from the Hamilton Superior Court

The Honorable Jonathan M. Brown, Judge

Trial Court Cause No. 29D02-1602-CT-1262

Crone, Judge.

Case Summary

[1] Hoosier Contractors, LLC (Hoosier), filed a complaint against Sean Gardner alleging that he breached a contract (the Contract) that provided for Hoosier to make roof repairs on Gardner's home. Gardner filed a counterclaim, on behalf

of himself and a class of those similarly situated, alleging that Hoosier violated the Indiana Deceptive Consumer Sales Act (the DCSA). Following the trial court's certification of the class, the parties filed several motions that have given rise to this appeal. Hoosier filed a motion for partial summary judgment asserting that the class lacked standing under the DCSA because they had not suffered actual damages, which the trial court denied. Gardner filed a motion to approve class action notice. In response, the trial court issued an order addressing notice of class action, which required that the notice advise potential class members that they could be liable for Hoosier's attorney fees under the DCSA if Hoosier prevailed at trial. Gardner also filed a motion for partial summary judgment contending that the Contract was null and void and that its liquidated damages provision was unenforceable, which the trial court denied. Hoosier and Gardner appeal these rulings. Finding no error, we affirm.

Facts and Procedural History

[2] We present the facts most favorable to Hoosier as the nonmovant on the issues raised in Gardner's summary judgment motion.[1] In December 2015, Gardner contacted Hoosier to request a roof inspection and obtain an estimate for roof repairs on his Indianapolis home. On December 12, 2015, two Hoosier representatives visited Gardner's home. Prior to performing the inspection, Hoosier required Gardner to sign the Contract, a document entitled

[1] Hoosier's summary judgment motion raises only an issue of statutory interpretation, which is a question of law.

"Replacement Work Agreement." Appellant's App. Vol. 3 at 7. The Contract provided that if the owner's insurance company did not agree to pay for the proposed repairs, then the Contract "shall be null and void." *Id*. The Contract also contained a clause providing for liquidated damages in the event of breach of twenty percent of the total Contract price. *Id*. at 8. Gardner signed the Contract, and Hoosier inspected his roof. Gardner submitted a claim for roof repairs to his homeowner's insurance provider, Cincinnati Insurance (Cincinnati).

[3] On January 6, 2016, Cincinnati issued a "Scope of Work" document, which was provided to Hoosier and Gardner, containing an itemized list of the work Hoosier would perform on Gardner's home and the estimated cost for each item. *Id*. at 6, 18-24. The total estimated cost of the work was $50,619.46. *Id*. at 24. According to Joshua White, Hoosier's president, the Scope of Work indicated Cincinnati's approval of the repair work and the estimated cost. *Id*. at 11; Appellant's App. Vol. 4 at 150. Gardner's deductible for his homeowner's insurance policy was $5,000. Appellant's App. Vol. 3 at 11, 24.

[4] Gardner informed Hoosier that he believed that some of the items outlined in the Scope of Work were unnecessary, "asked for an adjustment of the insurance claim[,] and retained Spartan Claims, LLC [(Spartan)] to work with Cincinnati on the [a]djustment." *Id*. at 11-12. For approximately two weeks during January, Cincinnati exchanged emails with Spartan "regarding supplements and adjustments to the Scope of Work originally approved by Cincinnati." *Id*. at 12; Appellant's App. Vol. 4 at 144. On January 22, Cincinnati issued an

updated Scope of Work, which "was substantially the same as the original claim, except for pricing and costs assigned to certain line items associated with replacement of the roof." Appellant's App. Vol. 3 at 12, 25-32. The total estimated cost of the updated Scope of Work was $59,489.78. *Id*. at 12, 32. Hoosier paid Spartan's fee of $2,217.58. *Id*. at 12. According to White, "This is money Gardner did not pay but received the benefit of as the supplement was paid by Cincinnati." *Id*. at 12.

[5] At some point, Hoosier provided Gardner with a written notice of his right to cancel. This notice provided that if Gardner was notified by his insurance company that all or any part of the claim or the Contract was not a covered loss, he could "cancel the [C]ontract by mailing or delivering a signed and dated copy of this cancellation notice." *Id*. at 13, 34. Although Hoosier attempted to schedule repairs "approved by Cincinnati Insurance, Gardner refused to agree to a scheduled time for completion of the repairs." *Id*. at 13. "Hoosier never performed the agreed-upon repairs to Gardner's roof." *Id*. "Gardner did not indicate to Hoosier any desire or intent to cancel or repudiate the [C]ontract." *Id*. Cincinnati paid Gardner for the claim he filed. Hoosier alleges that Cincinnati paid Gardner "nearly $60,000" for roof repairs, but the portion of the record that it cites does not specify the amount Gardner received from Cincinnati. *See* Appellant's Br. at 10-11 (citing Appellant's App. Vol. 3 at 145). The record shows that Gardner received two or three checks from Cincinnati for roof repairs but does not indicate the amount of money he

actually received from Cincinnati. Appellant's App. Vol. 3 at 145. Gardner paid another company approximately $18,000 to repair his roof. *Id*. at 145.

[6] In February 2016, Hoosier filed a breach of contract claim against Gardner. Appellant's App. Vol. 2 at 28. Gardner filed a counterclaim with a putative class action, which he later amended. *Id*. at 48-55. In his amended counterclaim, Gardner alleged that the Contract violated numerous requirements under the Home Improvement Contractors Act (the HICA), Indiana Code Chapter 24-5-11. Further, Gardner alleged that the HICA violations were used by Hoosier as part of a "scheme, artifice, or device" intended to mislead Indiana residents into executing home improvement contracts, which constituted an "incurable deceptive act" actionable by a consumer under the DCSA, Indiana Code Chapter 24-5-0.5. *Id*. at 48, 53.

[7] In January 2017, Hoosier filed a motion for summary judgment, which the trial court denied. In so doing, the trial court found as follows:

> Hoosier's contract appears to contain at least two *prima facie* violations of HICA's requirements. First, the [C]ontract does not contain a price for the home improvement work to be performed as required by IC § 24-5-11-10(a)(8). Second, the [C]ontract does not include a description of the work to be performed as required by IC § 24-5-11-10(a)(4).

Appellee's App. Vol. 2 at 8.

[8] In July 2018, Gardner filed a motion to certify class action. In December 2018, the trial court granted the motion and certified the class as follows:

> All persons who entered into a Home Improvement Contract with Hoosier Contractors, LLC from February 12, 2014 until such time that Hoosier stopped utilizing said Contract(s) and began utilizing a Home Improvement Contract that was in compliance with the [HICA].

Appellant's App. Vol. 3 at 178.

[9] In February and March 2020, the parties filed the motions that led to this appeal. Hoosier filed a motion for partial summary judgment asserting that the class members lacked standing under the DCSA because they had not suffered actual damages. Gardner filed a motion to approve class action notice. He also filed a motion for partial summary judgment arguing that the Contract was null and void and that the liquidated damages clause was unenforceable. Following a hearing, in April 2021, the trial court issued separate orders denying each party's motion for partial summary judgment. The trial court also issued an order addressing notice of class action, in which the court ruled that the notice was required to advise potential class members that they could be liable for Hoosier's attorney fees if Hoosier prevails at trial. This appeal and cross-appeal ensued.

Discussion and Decision

[10] Hoosier appeals the trial court's denial of its motion for partial summary judgment, and Gardner cross-appeals the trial court's denial of his motion for partial summary judgment as well as the court's order addressing notice of class action. Our summary judgment standard of review is well established:

> We review a summary judgment ruling de novo, applying the same standard as the trial court. The moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. Our review is limited to those facts designated to the trial court.

Hopkins v. Indpls. Pub. Sch., 183 N.E.3d 308, 312 (Ind. Ct. App. 2022), *trans. denied*. When a challenge to summary judgment raises questions of law, this Court reviews them de novo. *Monroe Cnty. v. Boathouse Apts.*, 177 N.E.3d 1201, 1204 (Ind. Ct. App. 2021), *trans. denied* (2022). We owe no deference to a trial court's legal conclusions. *Id*. at 1205. Where, as here, the parties filed cross motions for summary judgment, our standard of review is not affected. *Id*. "We simply review each motion independently and construe the facts in favor of the nonmoving party in each instance." *Id*.

Section 1 – The class has standing to bring a claim for statutory damages under Indiana Code Section 24-5-0.5-4(a).

[11] We begin by addressing Hoosier's challenge to the trial court's denial of its motion for partial summary judgment. Hoosier argues that because the class has not suffered actual damages, the trial court erred in concluding that the class has standing under Indiana Code Section 24-5-0.5-4(a) of the DCSA. This argument raises a question of statutory interpretation. "Statutory interpretation

presents a pure question of law for which summary judgment is particularly appropriate." *City Sav. Bank v. Eby Constr., LLC*, 954 N.E.2d 459, 462 (Ind. Ct. App. 2011), *trans. denied* (2012).

[12] "When interpreting statutes, our primary purpose is to give effect to the intent of the legislature." *Montalvo v. State ex rel. Zoeller*, 27 N.E.3d 795, 799 (Ind. Ct. App. 2015), *trans. denied*.

> The first step in interpreting a statute is to determine whether the legislature has spoken clearly and unambiguously on the point in question. If the statute is clear and unambiguous, we need not apply any rules of statutory construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. If the legislature has not defined a word, we may properly consult English dictionaries to determine the plain and ordinary meaning of words. We review the statute as a whole and will presume that the legislature intended for the statutory language used to be applied in a logical and not an absurd manner. Clear and unambiguous statutes leave no room for judicial construction.

Id. (citations and quotation marks omitted).

[13] "The doctrine of standing focuses on whether the complaining party is the proper person to invoke the Court's power." *Bd. of Trs. of Purdue Univ. v. Eisenstein*, 87 N.E.3d 481, 503 (Ind. Ct. App. 2017) (quoting *Barnette v. U.S. Architects, LLP*, 15 N.E.3d 1, 11 (Ind. Ct. App. 2014)), *trans. denied* (2018). We have said that "to establish standing, a plaintiff must show that he or she has sustained, or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue." *Barnette*, 15 N.E.3d at 11-12 (quoting *Regan v.*

Uebelhor, 690 N.E.2d 1222, 1225-26 (Ind. Ct. App. 1998), *trans. denied*). In addition, under Indiana law, standing can be conferred by statute. *See Matter of E.H.*, 121 N.E.3d 594, 598 (Ind. Ct. App. 2019) (observing that the Grandparent Visitation Act conveys standing on grandparents to seek visitation rights upon satisfaction of certain prescribed criteria).

[14] Our General Assembly has proclaimed that the purposes of the DCSA are to "(1) simplify, clarify, and modernize the law governing deceptive and unconscionable sales practices; (2) protect consumers from suppliers who commit deceptive and unconscionable sale acts; and (3) encourage the development of fair consumer sales practices." Ind. Code § 24-5-0.5-1(b). The DCSA "shall be liberally construed and applied to promote its purposes and policies." Ind. Code § 24-5-0.5-1(a).

[15] Gardner and the class have alleged that Hoosier carried out a deceptive act by violating the HICA and, in so doing, committed an incurable deceptive act under the DCSA. The DCSA provides that violations of the HICA per se constitute deceptive acts. Ind. Code § 24-5-0.5-3(b)(24); *see also* Ind. Code § 24-5-11-14 ("A real property improvement supplier who violates this chapter commits a deceptive act that is actionable by the attorney general or by a consumer under IC 24-5-0.5-4 and is subject to the remedies and penalties under IC 24-5-0.5.").[2] An "[i]ncurable deceptive act" is "a deceptive act done

[2] 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.

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).

[16] The statutory provision at issue, Indiana Code Section 24-5-0.5-4(a), provides,

> 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).

(Emphasis added.)

[17] Hoosier asserts that a plain reading of the statute permits a consumer who relies on an uncured or incurable deceptive act *and* who suffers actual damages to bring an action for either an amount equal to the actual damages suffered or, if the actual damages suffered are less than $500, $500. In other words, according to Hoosier, the statute sets a minimum level of damages where some actual damages are suffered. Based upon this reading, Hoosier maintains that because the class members have suffered no actual injury, they do not have standing to maintain an action. Gardner contends that a plain reading of the statute conveys standing on a person who relies on an uncured or incurable deceptive act to bring an action against the supplier and provides one of two possible

remedies, either the actual damages suffered or a statutory damage remedy of $500, whichever is greater.

[18] We agree with Gardner's interpretation of Section 24-5-0.5-4(a). The legislature placed the word "or" between the phrases "the damages actually suffered as a consumer as a result of the deceptive act" and "five hundred dollars ($500)." According to the dictionary, the word "or" is "used as a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases." MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/or [https://perma.cc/KH8N-VQSU]. Thus, a plain reading of the statute conveys standing to a person who relies on an uncured or incurable deceptive act to bring an action for:

> the amount of the damages actually suffered as a result of the deceptive act
>
> or
>
> $500,

whichever is greater. This plain reading indicates that a violation of the DCSA supports an action for a statutory damage award of $500. Thus, if the class carries its burden to show that Hoosier committed incurable deceptive acts

upon which its members relied, its members are entitled to recover statutory damages of $500.[3]

[19] Hoosier's reliance on *Captain & Co. v. Stenberg*, 505 N.E.2d 88 (Ind. Ct. App. 1987), *trans. denied*, is unavailing. In discussing whether an award of damages was proper under claims for breach of contract, fraud, and the DCSA, the *Stenberg* court stated that under the DCSA, "the recovery must be limited to those damages which were the proximate result of the deceptive act." *Id*. at 98. However, at that time, Section 24-5-0.5-4(a) provided 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." This section was amended in 2005 to add "or five hundred ($500), whichever is greater[,]" as well as the language authorizing the trial court to increase the damages for a willful deceptive act. Ind. Pub. Law 165-2005 § 7 (eff. July 1, 2005). Thus, the provision at issue here was not in existence when *Stenberg* was written.[4]

[20] In addition, Hoosier's citation to *Travelers Indemnity Co. v. Cephalon, Inc.*, 32 F. Supp. 3d. 538 (E.D. Pa. 2014), does not support its interpretation of Section 24-

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[3] Recently, in *Willis v. Dilden Brothers., Inc.*, 184 N.E.3d 1167 (Ind. Ct. App. 2022), *trans. pending*, this Court considered an award of damages under the DCSA. Although the *Willis* court did not specifically address the issue raised here, we observe that both the majority and the dissent treated Section 24-5-0.5-4(a) as including a $500 statutory damages provision. *Id*. at 1183-84, 1188-92 (Bailey, J., dissenting in part).

[4] Hoosier also cites to *Horizon Bank v. Huizar*, 178 N.E.3d 326, 340-41 (Ind. Ct. App. 2021), for the proposition that the DCSA requires actual damages. However, that case is inapplicable because it was quoting *Stenberg*, and the quotation was presented within the context of determining whether DCSA allowed recovery for emotional distress damages. *Id*.

5-0.5-4(a). In *Travelers*, the plaintiffs alleged that the defendants violated the "unfair or deceptive acts or practices" of consumer protection laws of numerous states, including Indiana. *Id*. at 554. In considering whether the plaintiffs had standing in all the named states, the court began by noting that the plaintiffs failed to detail the elements of any state's consumer protection statute. *Id*. at 553. The court later observed that "state consumer protection statutes do require that a plaintiff have suffered an ascertainable loss or injury as a result of a defendant's alleged wrongdoing." *Id*. at 554. However, the only state that the court mentioned in support of that general observation was Pennsylvania, and that state's statute authorized an action for "[a]ny person who ... suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a[n] [unlawful] method, act or practice ...." *Id*. at n.23 (quoting *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 221 n.3 (3d Cir. 2008) (quoting 73 Pa. Stat. § 201-9.2)). Thus, Pennsylvania's statute is worded differently from Indiana's, and the *Travelers* court was not presented with, nor did it consider, Indiana's statute.

[21] Hoosier also compares Section 24-5-0.5-4(a) with federal laws to argue that the statute provides for a minimum level of damages rather than statutory damages. As an example of a minimum damages statute, Hoosier cites the Federal Privacy Act of 1974, which provides, "the United States shall be liable to the individual in an amount equal to the sum of … actual damages sustained by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recover* receive less than the sum of $1,000[.]" Appellant's Br. at 18 (quoting 5

U.S.C. § 552a(g)(4)(A)) (emphasis in Appellant's Br.). As an example of a statutory damages statute, Hoosier directs us to the Federal Wiretap Act, which states:

> In any other action under this section, the court may assess as damages whichever is greater of –
>
> > (A) the sum of actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
> >
> > (B) statutory damages of whatever is the greater of $100 a day for each day of violation or $10,000.

Id. at 19 (quoting 18 U.S.C. § 2520 (c)(2)). Hoosier emphasizes that the Wiretap Act uses the phrase "statutory damages" and Section 24-5-0.5-4(a) does not, and therefore Section 24-5-0.5-4(a) does not provide for statutory damages.

[22] We are unconvinced that this minor distinction leads to the inescapable conclusion that Section 24-5-0.5-4(a) provides for a minimum level of damages rather than statutory damages. Instead, we find that Section 24-5-0.5-4(a) is similar in structure to the Wiretap Act and uses "or" in the same way, which supports our reading of Section 24-5-0.5-4(a). We conclude that Section 24-5-0.5-4(a) provides for a statutory damages award of $500.[5] Accordingly, the trial

[5] While Hoosier has been accused of committing an incurable deceptive act, we note that Section 24-5-0.5-4(a) also applies to "uncured" deceptive acts. The DCSA distinguishes between curable and incurable deceptive acts, and there are additional provisions governing curable deceptive acts that bear on a person's

court did not err in finding that the class has standing and in denying Hoosier's motion for partial summary judgment.

Section 2 – Pursuant to Section 24-5-0.5-4(b), the trial court has discretion to award attorney fees to the prevailing party.

[23] We now turn to Gardner's cross-appeals, beginning with his appeal of the trial court's order addressing class action notice. He challenges the court's requirement that the notice advise potential class members that if the class is unsuccessful at trial, they could be liable for Hoosier's attorney fees if they are awarded by the court. Appellee's App. Vol. 2 at 11. He contends that the trial court erred in applying Section 24-5-0.5-4(b), which reads:

> Except as provided in subsection (j) [sic],[6] the court may award reasonable attorney fees to the party that prevails in an action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered.

[24] Gardner concedes that the statute says that a trial court "may award reasonable attorney fees" to the prevailing party but contends that "application of the DCSA's fee-shifting provision against a consumer or class of consumers runs in the face of the express purposes of HICA and the DCSA." Appellee's Br. at 20.

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right to recover, which do not apply to incurable deceptive acts. *See* Ind. Code § 24-5-0.5-2(a)(5) (defining cure); -(2)(a)(6) (defining offer to cure); -(2)(a)(7) (defining uncured deceptive act).

[6] We believe that "subsection (j)" is a scrivener's error and that subsection (k) is the intended reference for the current version of the statute, as subsection (k) specifies when a supplier may not be held liable for attorney's fees. Subsection (k) was subsection (j) prior to a 2006 amendment. Ind. Pub. Law 85-2006 § 4.

Gardner argues that to promote the purposes of these acts, we should expressly limit the trial court's discretion to award attorney fees to prevailing defendants to cases where the plaintiffs' claims are found to be frivolous, unreasonable, or groundless, and we should determine now, at this early stage, that this class action is none of those things.

[25] We observe that the parties do not direct us to, nor does our research reveal, any Indiana cases that have reviewed the grant or denial of an award of attorney fees to a prevailing defendant under the DCSA. The only case that has applied Section 24-5-0.5-4 to address an award of attorney fees is *Missi v. CCC Custom Kitchens, Inc.*, 731 N.E.2d 1037 (Ind. Ct. App. 2000). There, a jury awarded the plaintiffs a judgment of $2,500, but this was less than the $5,000 that the defendant had offered to settle prior to trial. The trial court denied the plaintiffs' request for attorney fees, and they appealed. The *Missi* court stated, "By the statute's plain language, the award or denial of attorney fees under Indiana Code Section 24-5-0.5-4 is discretionary." *Id*. at 1041. The *Missi* court concluded that the plaintiffs had failed to show that the denial of their request for attorney fees was an abuse of the trial court's discretion and affirmed the trial court's ruling. *Id*.

[26] We agree with the *Missi* court that the statute clearly and unambiguously places the decision whether to award attorney fees in the trial court's sound discretion. In addition, the statute clearly and unambiguously permits the trial court to award attorney fees to the prevailing party, whether it be the plaintiff or the defendant. "It is just as important to recognize what the statute does not say as

it is to recognize what it does say." *Kenwal Steel Corp. v. Seyring*, 903 N.E.2d 510, 514 (Ind. Ct. App. 2009). "A court may not read into a statute that which is not the expressed intent of the legislature." *City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813, 824 (Ind. Ct. App. 2019) (quoting *Rush v. Elkhart Cnty. Plan Comm'n*, 698 N.E.2d 1211, 1215 (Ind. Ct. App. 1998), *trans. denied*), *trans. denied*. Section 24-5-0.5-4 does not set different standards for an award of attorney fees depending on whether the prevailing party is a plaintiff or a defendant, and we will not read such a requirement into the statute.

[27] In support of his argument that an award of attorney fees to a prevailing defendant should be limited to cases where the plaintiffs' claims are found to be frivolous, unreasonable, or groundless, Gardner cites *Deadwyler v. Volkswagen of America, Inc.*, 748 F. Supp. 1146 (W.D.N.C. 1990), *aff'd Moore v. Volkswagen of America, Inc.*, 966 F.2d 1443 (4th Cir. 1992), *cert. denied*.[7] The *Deadwyler* court addressed whether the prevailing defendant was entitled to attorney fees under Indiana's DCSA and other similarly worded statutes. The defendant argued that these statutes authorized an award of attorney fees to a prevailing defendant. The plaintiffs asserted that the court should apply *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), wherein the Supreme Court held that under the Civil Rights Act of 1964, "if the defendant prevails he may not be awarded his attorney fees 'unless a court finds that [the plaintiff's] claim was

[7] "We note that while federal court decisions interpreting Indiana law are persuasive authority, we are not bound by their interpretations." *Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 812 n.1 (Ind. Ct. App. 2000).

frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" *Deadwyler*, 748 F. Supp. at 1155 (quoting *Christiansburg*, 434 U.S. at 422).

[28] The *Deadwyler* court explained that "[t]he *Christiansburg* case does not apply to or determine this state law question but it shows the trend of our jurisprudence on this legal issue and sheds some light on how trial judges should exercise their discretion." *Id*. Significantly, the *Deadwyler* court explicitly rejected the plaintiffs' contention that "the Court should follow *Christiansburg* and refuse to award fees except upon a finding that the claims were frivolous, unreasonable and without foundation" and found that contention to be "flawed." *Id*. at 1155. Rather, the *Deadwyler* court concluded that the "legislative bodies of the states involved meant exactly what the statutes say, that is, the Court may award a reasonable attorney fee to the prevailing party. *This is legislative authority to the judges to exercise discretion*." *Id*. (emphasis added).

[29] The *Deadwyler* court then exercised its discretion to determine whether the defendant should be awarded attorney fees. It noted that it could not find that the plaintiffs' action was "frivolous, unreasonable or without foundation." *Id*. at 1156. The *Deadwyler* court further considered whether there was any case law in the states construing the statutes, and it found none. The court then concluded,

> In the absence of any court decision or other substantial showing prevailing defendants are allowed attorney fees in similar cases the Court must exercise its discretion and deny the claims for attorney fees for legal services rendered in the States of Colorado, Illinois, Indiana, Kentucky and Missouri.

Id.

[30] Gardner seems to argue that the *Deadwyler* court adopted the requirement in *Christiansburg*, but it explicitly declined to do so. The *Deadwyler* court's reading of the statute is precisely the same as this Court's in *Missi*. Both courts take the statute at face value: the trial court *may* award a reasonable attorney fee to the prevailing party. We apply the unambiguous language of the statute and leave it to the trial court's discretion to determine whether the circumstances of the case warrant an award of attorney fees to the prevailing party. That said, it would certainly be within the trial court's discretion to consider whether the plaintiff's action is frivolous, unreasonable, or groundless, but other factors could be consequential depending on the case. And it is too soon at this early stage of the proceedings to conclude that Gardner and the class members cannot be held liable for Hoosier's attorney fees should Hoosier prevail. Accordingly, we conclude that the trial court did not err in requiring the notice of class action to advise potential class members that they may be liable for Hoosier's attorney fees.

Section 3 – Genuine issues of material fact exist as to whether the Contract is null and void.

[31] Gardner asserts that he is entitled to summary judgment on Hoosier's breach of contract claim because the Contract is null and void. The Contract contained the following provision:

> THE PARTIES AGREE THAT IF OWNER'S INSURANCE COMPANY DOES NOT AGREE TO PAY FOR THE

> PROPOSED REPAIR AND/OR REPLACEMENT WORK CONTEMPLATED BY THIS AGREEMENT, THEN THIS AGREEMENT SHALL BE NULL AND VOID.

Appellant's Vol. 3 at 7 (underlining omitted). The parties do not dispute that if Cincinnati did not agree to pay for the proposed repair, the Contract would be null and void. However, the parties dispute whether Cincinnati agreed to pay for Hoosier's repairs.

[32] Gardner contends that the designated evidence shows that there was never a final agreement between Hoosier and Cincinnati on the price Cincinnati would pay for the repairs. In support, he directs us to a January 22, 2016 email from Cincinnati to Spartan, in which Cincinnati stated that it was "not going to agree to your estimate of $65,831.30. I feel there are unreasonable charges in your estimate," and "be advised I am not going to authorize any repairs until I have an agreement in place." Appellee's App. Vol. 2 at 133. Gardner also points to White's deposition, during which White was shown the January 22, 2016 email and asked, "[W]ould you agree that at least *based on this email*, there's not an agreement as to price between Spartan … and Cincinnati." *Id.* at 87. White replied, "Yes, *per this email*, I don't think there's a final agreement[,]" and that, "*at this time*, if I look in the notes, they were closing it." *Id.* (emphases added). White was then asked, "And you would agree that Cincinnati didn't agree to what [Spartan] submitted to them?" *Id.* White responded, "I don't know if there was further communication after this exactly. That would be a question for them." *Id.* at 88.

[33] Gardner claims that this evidence shows that "White agreed that the email indicated that [Spartan and Cincinnati] never came to a final agreement on the price [Cincinnati] would agree to pay for Gardner's claim." Appellee's Br. at 24. We disagree with Gardner's characterization of the evidence. The evidence shows that *at the time of the email*, Cincinnati and Spartan were discussing the price of the repairs; it does not show that they *never* reached an agreement.

[34] Furthermore, on the same day as the January 22, 2016 email, Cincinnati issued the updated Scope of Work, which had a total estimated cost of $59,489.78. Appellant's App. Vol. 3 at 12, 32. The updated Scope of Work reflects a lower price than that mentioned in the email. In addition, the email was sent at 11:23 a.m., which allows for additional discussions to have occurred prior to the updated Scope of Work.[8] Significantly, it is undisputed that Gardner received two or three checks from Cincinnati for the claim. In addition, Hoosier's expert, Mark Ricketts, a multi-state licensed adjuster, testified that the initial and updated Scope of Work estimates and Cincinnati's payment ledger indicated that Gardner's claim was approved and paid by Cincinnati. Appellant's App. Vol. 4 at 166. We further note that White testified that the January 6 Scope of Work indicated an agreement to pay for the repairs contained therein. *Id*. at 150; Appellant's App. Vol. 3 at 11. Considering the evidence in support of Hoosier as the nonmovant and the reasonable inferences arising therefrom, we

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[8] Hoosier claims that the updated Scope of Work was issued at 11:49 a.m., but the page cited that provides that time does not clearly relate to the updated Scope of Work. *See* Appellant's App. Vol. 4 at 147 (deposition question to White: "so Jim Darling [Spartan employee] puts this note in at 11:49; is that correct?").

conclude that the possibility exists that after the email, Cincinnati and Spartan reached an agreement on the estimated cost reflected in the updated Scope of Work. Therefore, a genuine issue of material fact exists as to whether the Contract is null and void. Accordingly, we affirm the trial court's denial of Gardner's partial summary judgment motion on this issue.

Section 4 – A determination as to whether the liquidated damages clause is enforceable is premature.

[35] Last, Gardner contends that he is entitled to summary judgment on his claim that the Contract's liquidated damages clause is an unenforceable penalty. The Contract provided for liquidated damages of twenty percent of the total Contract price if the homeowner breached any obligation under the Contract. "While liquidated damages clauses are ordinarily enforceable, contractual provisions that constitute penalties are not." *Weinreb v. Fannie Mae*, 993 N.E.2d 223, 232-33 (Ind. Ct. App. 2013), *trans. denied*. Our supreme court has explained,

> When liquidated damages are grossly disproportionate to the loss that results from the breach or are unconscionably in excess of the loss sought to be asserted, appellate courts will treat the sum as an unenforceable penalty rather than as liquidated damages. …. *When determining whether a provision constitutes liquidated damages or an unenforceable penalty, appellate courts consider the facts, the intention of the parties and the reasonableness of the stipulation under the circumstances of the case*.

Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc., 136 N.E.3d 208, 211 (Ind. 2019) (citations and quotation marks omitted) (emphasis added).

[36] In this stage of the proceedings, there are numerous unresolved issues as to whether the Contract violates the HICA, whether such violations constitute an incurable deceptive act under the DCSA, whether the Contract is null and void because Cincinnati failed to agree to the requested repairs, and whether Gardner breached the Contract. These issues make a determination regarding the liquidation clause premature. Accordingly, we affirm the trial court's denial of summary judgment on this issue.

[37] Affirmed.

May, J., and Brown, J., concur.