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IN THE
COURT OF APPEALS OF INDIANA

Butler Motors, Inc., et al.,
Appellants-Defendants,

v.

Michael Benosky, et al.,
Appellee-Plaintiffs.

November 24, 2021

Court of Appeals Case No. 20A-PL-1871

Appeal from the Marion Superior Court

The Honorable Heather A. Welch, Judge

Trial Court Cause Nos.
49D01-1904-PL-13575
49D01-1904-PL-15204
49D01-1904-PL-15255
49D01-1904-PL-15917
49D01-1904-PL-16711
49D01-1904-PL-16916
49D01-1905-PL-20767
49D01-1905-PL-20774
49D01-1905-PL-21116
49D01-1908-PL-32098
49D01-1909-PL-37963
49D01-1909-PL-40171
49D01-2003-PL-9617
49D01-2008-PL-26373

Pyle, Judge.

Statement of the Case

[1] This interlocutory appeal involves fourteen separate class action causes that were consolidated for pre-trial purposes into one cause in the Indiana Commercial Court in Marion County ("the trial court"). A group of consumers, who had purchased automobiles from various automobile dealers, filed class action complaints against the automobile dealers, who then filed Indiana Trial Rule 12(B)(6) motions to dismiss. The trial court denied the

motions and certified its orders for interlocutory appeal. Concluding that the trial court did not err by denying the motions to dismiss, we affirm the trial court's interlocutory orders.

[2] We affirm.

Issue

Whether the trial court erred by denying the Indiana Trial Rule 12(B)(6) motions to dismiss.

Facts[1]

[3] This appeal arrives in this Court from two interlocutory orders ruling on two consolidated motions to dismiss. Specifically, the trial court denied a Rule 12(B)(6) motion to dismiss filed by a group of automobile dealer defendants ("Dealers") and a separate Rule 12(B)(6) motion to dismiss filed by a group of automobile dealers who were named as defendants under the alter ego doctrine ("Alter Ego Dealers").[2] The plaintiffs in the underlying fourteen consolidated class action causes ("Consumers") are customers who purchased or leased an automobile for personal use from Dealers. As part of the various transactions,

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[1] Because this is an appeal from the automobile dealers' motions to dismiss, we take the undisputed facts from the underlying complaints.

[2] Consumers filed their complaints against all entities within a particular Dealer group. Consumers alleged that Alter Ego Dealers were alter egos of their respective Dealers and that they were, in relation to their dealer group, a single business enterprise.

which occurred between 2013 and 2020, Dealers charged Consumers a document preparation fee ("Doc Fee") of less than $200.00.[3] Dealers listed the Doc Fee as an itemized expense in the sales contracts but neither included the Doc Fee in the advertised price of the vehicle nor negotiated the Doc Fee with Consumers.

[4] This appeal ultimately stems from the charging of those Doc Fees, and it involves the Deceptive Consumer Sales Act ("DCSA") under INDIANA CODE § 24-5-0.5-3 ("Deceptive Acts Statute") and the Motor Vehicle Dealer Services Act ("MVDSA") under INDIANA CODE § 9-32-13-7 ("MVDSA Doc Fee Statue"). Because the content and history of these statutes are relevant to the facts and procedure of the multiple class action causes on appeal, we will generally review them here.

[5] The Deceptive Acts Statute of the DCSA provides, in relevant part, that "[a] supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction" and that such conduct is "a violation of [the DCSA] whether it occurs before, during, or after the transaction."[4] I.C. § 24-5-0.5-3(a). The prohibited conduct under the DCSA "includes both implicit and explicit misrepresentations." *Id.* The Deceptive

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[3] The Doc Fee charged varied among Dealers.

[4] A "supplier" is a "seller, lessor, . . . or other person who regularly engages in or solicits consumer transactions," and it "includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer." *See* I.C. § 24-5-0.5-2(a)(3). A "consumer transaction" includes a sale, lease, . . . or other disposition of an item of personal property . . . to a person for purposes that are primarily personal[.]" *See* I.C. § 24-5-0.5-2(a)(1).

Acts Statute contains an enumerated list or categories of conduct that constitute deceptive acts. *See* I.C. § 24-5-0.5-3(b). Additionally, section 10 of the DCSA sets forth conduct that constitutes a deceptive act or may be treated as a deceptive act under the DCSA. *See* I.C. § 24-5-0.5-10. The DCSA confers a private right of action in which a consumer "relying upon an uncured or incurable deceptive act" may bring an action for damages and a class action.[5] *See* I.C. § 24-5-0.5-4(a),(b). Additionally, under the DCSA, the Indiana "[A]ttorney [G]eneral may bring an action to enjoin a deceptive act[.]" I.C. § 24-5-0.5-4(c).

[6] On the other hand, the MVDSA is enforced by the Indiana Secretary of State. *See* I.C. § 9-32-3-2. From July 2013 to May 2019, the MVDSA Doc Fee Statute, INDIANA CODE § 9-32-13-7, provided as follows:

> It is an unfair practice for a dealer to require a purchaser of a motor vehicle as a condition of the sale and delivery of the motor vehicle to pay a document preparation fee, unless the fee:
>
> (1) reflects expenses actually incurred for the preparation of documents;
>
> (2) was affirmatively disclosed by the dealer;
>
> (3) was negotiated by the dealer and the purchaser;

---

[5] An "uncured deceptive act" is a deceptive act "with respect to which a consumer who has been damaged by such act has given notice to the supplier" and either "no offer to cure has been made to such consumer within thirty (30) days after such notice" or "the act has not been cured as to such consumer within a reasonable time after the consumer's acceptance of the offer to cure. *See* I.C. § 24-5-0.5-2(a)(7). 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." *See* I.C. § 24-5-0.5-2(a)(8).

> (4) is not for the preparation, handling, or service of documents that are incidental to the extension of credit; and
>
> (5) is set forth on a buyer's order or similar agreement by means other than preprinting.

I.C. § 9-32-13-7 (later amended in 2019).

[7] The filings of the class action complaints in this appeal were preceded and seemingly precipitated by an opinion handed down by this Court. On March 6, 2019, this Court handed down *Gasbi LLC v. Sanders*, 120 N.E.3d 614 (Ind. Ct. App. 2019), *trans. denied*, which addressed a motion to dismiss a consumers' class action complaint that raised a claim under the DCSA. Specifically, the consumers' claim was brought under INDIANA CODE § 24-5-0.5-3, the Deceptive Acts Statute of the DCSA. In *Gasbi*, the consumers alleged that the automobile dealer had charged a Doc Fee that, contrary to INDIANA CODE § 9-32-13-7 of the MVDSA, had not been affirmatively disclosed, had not been negotiated by the dealer, and had exceeded the actual expenses incurred for the preparation of the documents. The consumers alleged that the charging of the Doc Fee was a violation of the Deceptive Acts Statute of the DCSA because it was an "'unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction.'" *Gasbi*, 120 N.E.3d at 616-17 (quoting I.C. § 24-5-0.5-3(a)). The consumers also alleged that the dealer had engaged in both uncured and incurable deceptive acts.

[8] The dealer in *Gasbi* argued that the consumers' complaint should be dismissed pursuant to Indiana Trial Rule 12(B)(6) because the consumers did not have a

private right of action under INDIANA CODE § 9-32-13-7 of the MVDSA and because the consumers had failed to state a claim for relief under one of the specifically enumerated categories of deceptive acts contained in INDIANA CODE § 24-5-0.5-3(b) of the DCSA. The consumers acknowledged that they had no private right of action under INDIANA CODE § 9-32-13-7 of the MVDSA but argued that the action described under that statute was merely descriptive of an unfair consumer practice prohibited by the DCSA. The trial court denied the dealer's motion to dismiss, concluding that "a 'catch-all' provision embodied in Indiana Code [§] 24-5-0.5-3(a) [of the DCSA] permitted the claim of non-disclosure[.]" *Gasbi*, 120 N.E.3d at 617.

[9] On appeal, this Court held that the dealer was not entitled to dismissal based on its argument that the consumers had failed to state a claim for relief under one of the specifically enumerated categories of deceptive acts contained in INDIANA CODE § 24-5-0.5-3(b) of the DCSA. *Id.* at 620. We discussed the statutory changes to INDIANA CODE § 24-5-0.5-3 following and "perhaps in response to" this Court's decision in *Lawson v. Hale*, 902 N.E.2d 267 (Ind. Ct. App. 2009). *Id.* at 619. Specifically, in 2014, the legislature amended the DCSA to "add a 'catch-all' provision . . . now found in subsection (a) of [INDIANA CODE §] 24-5-0.5-3" in which "deceptive acts [we]re now broadly defined to include non-disclosures or omissions." *Id.* We held that "[u]nder the plain language of the amended statute, [the dealer] could not obtain dismissal of the [consumers'] Complaint on grounds that its allegations did not pertain to

[the specifically enumerated] categories of deceptive acts" in INDIANA CODE § 24-5-0.5-3(b) of the DCSA. *Id.* at 619-20.

[10] Additionally, this Court held that dismissal of the consumers' complaint was not justified based on the dealer's argument that consumers did not have a private right of action under the MVDSA Doc Fee statute, INDIANA CODE § 9-32-13-7. *Id.* at 620. We explained that "[g]iven the breadth of the language in subsection (a) of Indiana Code § 24-5-0.5-3 [of the DCSA] – that is, a prohibited act by a supplier includes 'an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction' – conduct prohibited elsewhere in the Indiana Code could also be a deceptive act under the [DCSA]." *Id.* We, however, explained that a violation of the MVDSA did not equate to a per se violation of the DCSA. *Id.* We held that the consumers' "general allegations of uncured and incurable acts" under the DCSA were "adequate to withstand dismissal." *Id.* at 621. Ultimately, this Court affirmed the trial court's denial of the dealer's Trial Rule 12(B)(6) motion to dismiss. *Id.*

[11] The following month, in April 2019, some of the Consumers[6] in this case filed their initial class action complaints, alleging violations of the DCSA based on the charging of Doc Fees. The next month, in May 2019, the legislature amended INDIANA CODE § 9-32-13-7, the MVDSA Doc Fee statute. According

[6] While some of the Consumers filed their initial class action complaints in April 2019, the remaining Consumers filed their complaints in May 2019, August 2019, September 2019, March 2020, and August 2020.

to Consumers' complaints, one of the legislators indicated, during that legislative process, that there had been "a prior 'gentlemen's agreement' between the auto dealers [association] and the Indiana Attorney General that the Attorney General would not prosecute dealers who charged less than $200, regardless of the law restricting [Doc Fee] charges to the actual expenses incurred." (App. Vol. 3 at 100, 125; Appellees' App. Vol. 2 at 8, 31, 54, 72, 92, 112, 135, 154, 178, 197; Appellees' App. Vol. 3 at 13).[7] "[T]he auto dealers association communicated this 'gentlem[e]n's agreement' to its members, essentially encouraging them that dealers would not be prosecuted by the Attorney General if they charged a Doc Fee of less than $200[.]" (App. Vol. 3 at 100, 125; Appellees' App. Vol. 2 at 8, 31, 55, 72-73, 92-93, 112, 135, 154-55, 178, 198; Appellees' App. Vol. 3 at 13).

[12] The amendment to MVDSA Doc Fee Statute provided as follows:

> (a) Except as provided in subsection (b), it is an unfair practice for a dealer to charge a document preparation fee in excess of two hundred dollars ($200). A document preparation fee under this section must be:
>
> (1) included in the advertised sale price of a vehicle; and

[7] We remind the parties that, while the existence of any sort of gentlemen's agreement may be factually interesting, it is irrelevant and does not alter our statutory interpretation. *City of Huntingburg v. Phoenix Natural Resources, Inc.*, 625 N.E.2d 472, 475 (Ind. Ct. App. 1993) ("The motive of an individual legislator, whether a sponsor of the legislation or not, cannot be imputed to the entire legislature absent statutory expression."). As Indiana has no legislative history concerning this statute, we determine the intent of a statute from its plain, ordinary meaning. *See Jackson v. State*, 50 N.E.3d 767, 777 (Ind. 2016) (holding that where a statute is unambiguous, we will not delve into legislative history).

(2) affirmatively disclosed:

(A) in writing by the dealer during negotiations for the sale of a vehicle to a potential purchaser that states the dollar amount of the document preparation fee to be charged; and

(B) as a separate line item on the purchaser's bill of sale or other purchase contract.

(b) A document preparation fee under this section may be adjusted annually by a percentage equal to the annual percentage change in the Consumer Price Index, as published by the United States Bureau of Labor Statistics.

I.C. § 9-32-13-7. The legislature amended the statute on May 5, 2019, declared an emergency for the amendment ("2019 Doc Fee Amendment"), and made the effective date of the amended statute retroactive to July 1, 2013. *See* 2019 Ind. Leg. Servs. P.L. 245-2019, Section 4 (H.E.A. 1237).[8]

[13] Following the enactment of the 2019 Doc Fee Amendment, those Consumers who had previously filed their complaints then filed amended class action complaints, and the remaining Consumers filed their class action complaints. It

[8] Within the same May 2019 public law that amended the MVDSA Doc Fee statute, the legislature added two new sections, both regarding the definition of a Doc Fee and both retroactive to July 1, 2013. *See* 2019 Ind. Leg. Servs. P.L. 245-2019, Sections 1 and 2 (H.E.A. 1237). The first new section, INDIANA CODE § 9-13-2-45.8, provided and still provides that a "'[d]ocument preparation fee" has the meaning set forth in IC [§] 9-32-2-11.2." The second new section, INDIANA CODE § 9-32-2-11.2, provided that a "'[d]ocument preparation fee" means any fee charged by a dealership concerning the sale of a motor vehicle, regardless of designation, and that includes costs incurred by the dealership for the preparation of documents concerning the sale of [a] motor vehicle" and that "[t]he term does not include a fee imposed by a financial institution for the purpose of extending credit for the purchase of a vehicle." I.C. § 9-32-2-11.2 (2019). We further note that, in 2020, the legislature amended INDIANA CODE § 9-32-2-11.2, changing the two references of "dealership" to "dealer" and adding the article "a" that was missing before "motor vehicle[.]"

is these complaints that are now the subject of Dealers' and Alter Ego Dealers' Trial Rule 12(B)(6) motions to dismiss being appealed.

[14] In their class action complaints, Consumers raised three claims: (1) a violation of the DCSA; (2) constructive fraud; and (3) unjust enrichment. All these claims were based on the Consumers' allegation that, between 2013 and 2020, Dealers had charged a Doc Fee that was contrary to the MVDSA Doc Fee Statute, INDIANA CODE § 9-32-13-7. More specifically, Consumers' complaints alleged, in part, that Dealers had affirmatively misrepresented the Doc Fee as a fee incurred by the Dealers for preparation of documents and that Dealers had charged Consumers a Doc Fee that did not reflect expenses actually incurred for the preparation of documents, had not been negotiated, and had not been included in the advertised price, all in violation of the DCSA under INDIANA CODE § 24-5-0.5-3(a). Additionally, Consumers alleged that Dealers' charging of an unduly excessive Doc Fee was in violation of the DCSA under INDIANA CODE § 24-5-0.5-10(b)(3). Consumers alleged that Dealers' conduct "constituted an incurable deceptive act because it was done as part of a scheme, artifice, or device, with the intent to defraud or mislead" in violation of the DCSA. (App. Vol. 3 at 106, 130; Appellees' App. Vol. 2 at 14, 37, 61, 79, 99, 119, 142, 161, 183, 204; Appellees' App. Vol. 3 at 19, 53). In regard to the constructive fraud claim, Consumers alleged, in part, that Dealers had a duty of good faith and fair dealing to Consumers and that Dealers, who had superior knowledge, had violated that duty by making various representations and omissions. Consumers further alleged that they had relied upon Dealers'

representations and omissions and that they had been injured. Finally, as for the unjust enrichment claim, Consumers alleged, in part, that Dealers had improperly requested, received, and retained funds from Consumers.

[15] The Consumers' complaints that included Alter Ego Dealers as defendants also alleged that these Alter Ego Dealers "operated as alter egos and as a single business enterprise with respect to the charging of unlawful [Doc Fees]." (App. Vol. 3 at 120; Appellees' App. Vol. 2 at 24; Appellees' App. Vol. 2 at 49; Appellees' App. Vol. 2 at 87; Appellees' App. Vol. 2 at 107; Appellees' App. Vol. 2 at 129; Appellees' App. Vol. 2 at 172; Appellees' App. Vol. 3 at 7; Appellees' App. Vol. 3 at 46). Additionally, Consumers alleged that the Alter Ego Dealers "share[d] similar corporate names; share[d] overlapping officers, directors, and employees; ha[d] similar business purposes; share[d] certain offices; advertise[d] together as a single unit on their website . . . ; and . . . generally operated in an interconnected and controlled way, such that [they] c[ould] be considered a single unit for liability purposes." (App. Vol. 3 at 120; Appellees' App. Vol. 2 at 24-25; Appellees' App. Vol. 2 at 49-50; Appellees' App. Vol. 2 at 87; Appellees' App. Vol. 2 at 107; Appellees' App. Vol. 2 at 129; Appellees' App. Vol. 2 at 172-73; Appellees' App. Vol. 3 at 7-8; Appellees' App. Vol. 3 at 46-47). Alternatively, these Consumers alleged that the Alter Ego Dealers had "conspired and colluded to do the acts alleged in th[e] complaint and, as a result, each [wa]s jointly and severally liable for the damages resulting for that civil conspiracy." (App. Vol. 3 at 120; Appellees' App. Vol. 2 at 25; Appellees' App. Vol. 2 at 50; Appellees' App. Vol. 2 at 87;

Appellees' App. Vol. 2 at 107; Appellees' App. Vol. 2 at 129; Appellees' App. Vol. 2 at 173; Appellees' App. Vol. 3 at 8; Appellees' App. Vol. 3 at 47).

[16] On March 2, 2020, Consumers filed, pursuant to Indiana Trial Rule 42(A), a motion to consolidate their pending Commercial Court cases for pre-trial purposes, and the trial court granted that motion. Additionally, following a request by Consumers and pursuant to INDIANA CODE § 34-33.1-1-1, the trial court issued an order notifying the Indiana Attorney General that the consolidated cases may call into question the constitutionality of the Doc Fee Statute, INDIANA CODE § 9-32-13-7, to the extent that Consumers may potentially argue that retroactive application of the statute was unconstitutional.

[17] On March 30, 2020, Dealers filed a consolidated motion to dismiss ("Consolidated MTD") and Alter Ego Dealers filed a combined motion to dismiss ("Alter Ego MTD"). They filed their motions under Indiana Trial Rule 12(B)(6), seeking to dismiss the complaints of all Consumers.

[18] Alter Ego Dealers argued that Consumers' claims against them should be dismissed because they had not charged a Doc Fee to any of the Consumers since their names were not on the sales contracts. Alter Ego Dealers asserted that Consumers "lack[ed] standing to pursue claims against the Alter Ego D[ealers] who [ha]d not charge[d] or collect[ed] a Doc Fee to or from the [Consumers]" and that Consumers' complaints "were not sufficient to establish alter ego liability." (App. Vol. 3 at 172, 178).

[19] In response to the Alter Ego MTD, Consumers argued, in part, that the trial court should deny the motion because the question of whether the Alter Ego Dealers were alter egos of Dealers was a fact-sensitive inquiry and not appropriate to decide at the motion to dismiss stage, where all the allegations in Consumers' complaints were to be taken as true. Consumers also argued that they had standing because their complaints had alleged that all defendant groups were single entities that had charged unlawful Doc Fees and had caused damages. Consumers alternatively argued that their claims against the Alter Ego Dealers should not be dismissed for lack of standing because of the juridical link doctrine.

[20] In Dealers' Consolidated MTD, they made multiple arguments regarding why they believed that Consumers' three claims should be dismissed. The majority of their arguments focused on Consumers' DCSA claim. For example, Dealers argued that the trial court should dismiss Consumers' DCSA claims because Consumers did not have a private right of action under the MVDSA. Dealers acknowledged that the *Gasbi* decision provided that a consumer could raise a claim under the DCSA by alleging that a dealer had violated the MVDSA Doc Fee statute. Dealers, however, argued that *Gasbi* predated the 2019 Doc Fee Amendment and applied only to the pre-amendment version of the Doc Fee Statute.

[21] In response to this argument, Consumers acknowledged that there was not a private right of action under the MVDSA, but they asserted that they were not bringing a claim under the MVDSA. Instead, Consumers were alleging

violations of the DCSA and common law. Consumers maintained that the ruling under *Gasbi*, that a consumer could state a claim for relief under the DCSA by alleging a violation of the MVDSA, was applicable to the case and should be followed by the trial court. Consumers also argued that their complaints had sufficiently alleged that Dealers had the requisite intent to charge a Doc Fee that was unfair and deceptive, which the *Gasbi* Court had held to be sufficient to survive a motion to dismiss.

[22] Dealers' primary argument in their Consolidated MTD was that Consumers' DCSA claims, which were based on a violation of the MVDSA Doc Fee statute, should be dismissed because the 2019 Doc Fee Amendment should be applied retroactively. Dealers asserted that the 2019 Doc Fee Amendment expressly permitted a Doc Fee under $200, which they asserted made the Doc Fees that the Dealers had charged "per se" lawful. (App. Vol. 3 at 142). Dealers reasoned that there was no violation of the DCSA because INDIANA CODE § 24-5-0.5-6 provides that the DCSA "does not apply to an act or practice that is . . . expressly permitted by state law[.]" I.C. § 24-5-0.5-6(2).

[23] Despite arguing that the 2019 Doc Fee Amendment applied retroactively, Dealers argued that Consumers could not use that retroactive amendment to prove their DCSA claim that Dealers had failed to include the Doc Fee in the advertised sale price. Specifically, Dealers argued that "[Consumers'] allegations regarding advertised prices [would] fail because [Dealers] c[ould] not have intentionally misrepresented a requirement they did not know existed[.]" (App. Vol. 3 at 142). In other words, Dealers argued that the 2019

Doc Fee Amendment could not be used to retroactively impose a requirement on them that did not exist in the pre-amendment version of the Doc Fee Statute.

[24] In response to Dealers' retroactivity argument, Consumers argued that their DCSA claims were not precluded by the 2019 Doc Fee Amendment. They asserted that the amendment could "not be applied retroactively to bar the [Consumers'] vested rights to their causes of action that [had] accrued before May 5, 2019." (App. Vol. 3 at 198). Alternatively, Consumers asserted that even if the 2019 Doc Fee Amendment applied retroactively, it neither expressly permitted the Doc Fees charged nor provided that charging a Doc Fee of less than $200 was a lawful practice. Consumers pointed out that "[a] rule forbidding fees in excess of $200 [wa]s not express permission to charge lower fees in deceptive and misleading ways." (App. Vol. 3 at 202). Consumers argued that the allegations in their complaints stated a violation of the DCSA and that the trial court should deny Dealers' motion to dismiss Consumers' DCSA claims.

[25] In their Consolidated MTD, Dealers also argued in the alternative to retroactivity of the statute. Specifically, Dealers argued that Consumers' DCSA claims were barred even if the statute did not apply retroactively. Dealers asserted that even if they had violated the pre-amendment version of the MVDSA Doc Fee statute, the *Gasbi* Court had explained that such a violation of the MVDSA was not a per se violation of the DCSA. Dealers argued that the trial court should dismiss Consumers' DCSA claims because Consumers

could not establish a per se violation of the DCSA or show that Dealers had intentionally misrepresented the fees.

[26] In response, Consumers asserted that Dealers' argument that dismissal was required under the pre-amendment statute was "directly contrary" to the *Gasbi* case that had "sparked these cases." (App. Vol. 3 at 206). Consumers pointed out that *Gasbi* had held that the consumers' complaint had stated claims under the DCSA where they had alleged that the Doc Fees were part of an unfair practice under the pre-amendment statute and generally constituted deceptive acts under the DCSA. Consumers asserted that, like the consumers in *Gasbi*, their complaints had contained the same assertions and should not be dismissed.

[27] Additionally, Dealers argued that the two-year statute of limitations applicable to DCSA claims barred three of the individual consumer plaintiffs' DCSA claims. Specifically, Dealers contended that the alleged transactions of those plaintiffs had occurred more than two years before the applicable complaints had been filed.[9]

[9] Specifically, Dealers argued that the DCSA claims in the three following causes were time-barred: (1) Berger v. Bill Estes Chevrolet, et al., 49D01-1905-PL-020774; (2) Woods v. Hubler Nissan, Inc., et al., 49D01-1905-PL-021116; and (3) Morse v. Rohr Indy Motors, Inc., et al., 49D01-1909-PL-037963. In its motion to dismiss, Dealers argued that these three causes and Red v. Ray Skillman, et al., 49D01-1904-PL-015254 were time barred by the statute of limitations. However, the trial court later dismissed Red v. Ray Skillman, et al., 49D01-1904-PL-015254, when it granted the defendants' motion to compel arbitration that was based on an arbitration agreement clause contained in the disputed contracts from that cause. Thus, that cause is not before this Court on appeal.

[28] Consumers argued that the trial court should deny Dealers' request to dismiss the disputed causes based on the statute of limitations. Consumers asserted that their complaints had alleged that Dealers knew the Doc Fees were deceptive and had concealed them and that, at this stage of the proceedings, the trial court could not determine whether the limitations period may have been tolled.

[29] Finally, in regard to Consumers' constructive fraud and unjust enrichment claims, Dealers argued those claims should be dismissed because they were based on violations of the MVDSA, which they asserted had abrogated any common law claim. Dealers also argued that Consumers' constructive fraud and unjust enrichment claims were duplicative of their DCSA claim and that the dismissal of the DCSA claim should also lead to a dismissal of the constructive fraud and unjust enrichment claims.

[30] In response to this argument, Consumers argued that the MVDSA had not abrogated their common law claims. Additionally, Consumers argued that their complaints had sufficiently stated claims for constructive fraud and unjust enrichment.

[31] On June 16, 2020, the trial court held a hearing on the two pending motions. Thereafter, on July 31, 2020, the trial court issued the two interlocutory orders at issue in this appeal. The trial court's comprehensive orders addressed in detail the arguments raised by Dealers and Alter Ego Dealers and contained the trial court's reasoning for denying their motions to dismiss. In relevant part, the trial court, for purposes of Dealers' Consolidated MTD, treated the 2019 Doc

Fee Amendment as applying retroactively and found that it did not expressly authorize Dealers to charge Doc Fees under $200. Thus, the trial court determined that Consumers' DCSA claims were not subject to dismissal. The trial court also determined that the MVDSA did not abrogate Consumers' common law claims of constructive fraud and unjust enrichment and that Consumers' complaints had adequately alleged those claims to survive a Rule 12(B)(6) motion to dismiss. Additionally, the trial court determined that Consumers' complaints had adequately alleged fraudulent concealment to survive Dealers' statute of limitations argument at the motion to dismiss stage. Finally, the trial court determined, in relevant part, that Consumers' complaints would survive Alter Ego Dealers' MTD because Consumers had sufficiently demonstrated a claim under the alter ego doctrine and had standing.[10]

[32] Thereafter, Dealers and Alter Ego Dealers filed motions requesting the trial court to certify its two orders and to stay the proceedings. The trial court granted both requests. Dealers and Alter Ego Dealers then sought permission to file this interlocutory appeal, and this Court granted their request.

[10] The trial court, however, granted the motion to dismiss based on the alter ego doctrine and standing to all Ray Skillman Alter Ego Defendants because the two causes in which these defendants were named, Red v. Ray Skillman, et al., 49D01-1904-PL-015254, and Glaser v. Ray Skillman Avon Imports, Inc. et al., 49A01-1904-PL-016186 had already been dismissed when the trial court granted the motions to compel arbitration in those two causes. These causes are not part of this appeal.

Decision

[33] In this appeal, Dealers challenge the trial court's interlocutory order denying their Consolidated MTD, and Alter Ego Dealers challenge the trial court's interlocutory order denying their Alter Ego MTD. We will review each order in turn.

[34] We view motions to dismiss under Trial Rule 12(B)(6) "with disfavor because such motions undermine the policy of deciding causes of action on their merits." *McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied.* In *Gasbi*, we explained our standard of review for a motion to dismiss as follows:

> A Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim, not the supporting facts. Accordingly, we view the complaint in the light most favorable to the non-moving party and draw every reasonable inference in favor of that party. We stand in the shoes of the trial court and must determine if the trial court erred in its application of the law. A motion to dismiss is proper if it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances. In making this determination, we look only to the complaint and may not resort to any other evidence in the record.

Gasbi, 120 N.E.3d at 617 (cleaned up). "A complaint is sufficient and should not be dismissed so long as it states any set of allegations, no matter how unartfully pleaded, upon which the plaintiff could be granted relief." *Id.* at 621 (cleaned up).

[35] "A 'plaintiff need not set out in precise detail the facts upon which the claim is based" but "must still plead the operative facts necessary to set forth an actionable claim.'" *Anonymous Physician 1 v. White*, 153 N.E.3d 272, 277 (Ind. Ct. App. 2020) (quoting *Trail v. Boys and Girls Clubs of Northwest Ind.*, 845 N.E.2d 130, 135 (Ind. 2006)). Under Indiana's notice pleading requirements, a plaintiff's complaint needs only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Trail*, 845 N.E.2d at 135 (quoting Indiana Trial Rule 8(A)). "A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues[,]" and Defendants thereafter may flesh out the evidentiary facts through discovery[.]" *Anonymous Physician 1*, 153 N.E.3d at 277 (cleaned up).

[36] We first turn to Dealers' challenge to the trial court's interlocutory order denying their Consolidated MTD. Some of Dealers' arguments for their motion to dismiss are grounded in statutory interpretation. "If the language of a statute is clear and unambiguous, we need not apply rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meaning." *Gasbi*, 120 N.E.3d at 617. On the other hand, "if a statute is open to more than one interpretation, it is deemed ambiguous and subject to judicial construction." *Id.*

[37] Here, Consumers' complaints alleged, in part, that the Doc Fees charged by Dealers were contrary to the MVDSA Doc Fee Statute and constituted a deceptive act under the DCSA.

[38] The DCSA is a "remedial statute" and "shall be liberally construed and applied to promote its purposes and policies." *Id.* at 618 (cleaned up). The "purposes and policies" of the DCSA are to:

> (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
>
> (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts; and
>
> (3) encourage the development of fair consumer sales practices.

I.C. § 24-5-0.5-1(b).

[39] The Deceptive Acts Statute of the DCSA provides that "[a] supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction." I.C. § 24-5-0.5-3(a). The Deceptive Acts Statute contains an enumerated list or categories of conduct that constitute deceptive acts. *See* I.C. § 24-5-0.5-3(b). Additionally, section 10 of the DCSA sets forth conduct that constitutes a deceptive act or may be treated as a deceptive act under the DCSA. *See* I.C. § 24-5-0.5-10.[11]

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[11] INDIANA CODE § 24-5-0.5-10 provides, in relevant part, that:

> (b) A supplier commits an unconscionable act that shall be treated the same as a deceptive act under this chapter if the supplier solicits a person to enter into a contract or agreement:
>
> * * * * *
>
> (3) in which the price is unduly excessive;
>
> and there was unequal bargaining power that led the person to enter into the contract or agreement unwillingly or without knowledge of the terms of the contract or agreement.

[40] The DCSA provides a private right of action for a person against a supplier. *See* I.C. § 24-5-0.5-4(a). "A deceptive act is actionable only if it is 'incurable' or 'uncured.'" *Gasbi*, 120 N.E.3d at 618 (quoting I.C. § 24-5-0.5-4(a)). This appeal involves an allegation that there was an "incurable" deceptive act, which is defined as "a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead." I.C. § 24-5-0.5-2(a)(8). Pursuant to INDIANA CODE § 24-5-0.5-4, "[a] person relying upon an . . . incurable deceptive act may bring an action [against a supplier] for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars ($500), whichever is greater." I.C. § 24-5-0.5-4(a). Moreover, a trial 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)." I.C. § 24-5-0.5-4(a) (format altered). The DCSA, however, "does not apply to an act or practice that is . . . expressly permitted by state law[.]" I.C. § 24-5-0.5-6(2).

[41] The other statute at issue in this appeal is the MVDSA Doc Fee Statute. A Doc Fee is defined as "any fee charged by a dealership concerning the sale of a motor vehicle, regardless of designation, and that includes costs incurred by the dealership for the preparation of documents concerning the sale of a motor vehicle[,]" and it does "not include a fee imposed by a financial institution for

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> There is a rebuttable presumption that a person has knowledge of the terms of a contract or agreement if the person signs a written contract.

the purpose of extending credit for the purchase of a vehicle." I.C. § 9-32-2-11.2.

[42] The version of the MVDSA Doc Fee Statute that was in effect when some of the Consumers had filed their initial complaints provided that:

> It is an unfair practice for a dealer to require a purchaser of a motor vehicle as a condition of the sale and delivery of the motor vehicle to pay a document preparation fee, unless the fee:
>
> (1) reflects expenses actually incurred for the preparation of documents;
>
> (2) was affirmatively disclosed by the dealer;
>
> (3) was negotiated by the dealer and the purchaser;
>
> (4) is not for the preparation, handling, or service of documents that are incidental to the extension of credit; and
>
> (5) is set forth on a buyer's order or similar agreement by means other than preprinting.

I.C. § 9-32-13-7 (later amended in 2019).

[43] The legislature amended the MVDSA Doc Fee Statute on May 5, 2019, declared an emergency for the amendment, and made the effective date of the amended statute retroactive to July 1, 2013. That 2019 Doc Fee Amendment currently provides, in part, as follows:

> (a) Except as provided in subsection (b), it is an unfair practice for a dealer to charge a document preparation fee in excess of two hundred dollars ($200). A document preparation fee under this section must be:

(1) included in the advertised sale price of a vehicle; and

(2) affirmatively disclosed:

(A) in writing by the dealer during negotiations for the sale of a vehicle to a potential purchaser that states the dollar amount of the document preparation fee to be charged; and

(B) as a separate line item on the purchaser's bill of sale or other purchase contract.

I.C. § 9-32-13-7.

[44] On appeal, Dealers raise three main arguments to challenge the trial court's denial of their Consolidated MTD. Specifically, Dealers contend that the trial court erred by determining that: (1) Consumers' DCSA claims were not subject to dismissal based on Dealers' argument that the 2019 Doc Fee Amendment provided Dealers with express authority to charge Doc Fee under $200; (2) Consumers' complaints for three individual plaintiffs contained adequate allegations to survive Dealers' statute of limitations argument at this motion to dismiss stage; and (3) the MVDSA did not abrogate Consumers' common law claims of constructive fraud and unjust enrichment and that the Consumers' complaints had adequately alleged those claims to survive a Rule 12(B)(6) motion to dismiss.

[45] First, as to Consumers' DCSA claims, Dealers argue that the trial court should have dismissed those claims because the DCSA does not apply to an act that is expressly permitted by state law. Specifically, Dealers contend that 2019 Doc Fee Amendment of the MVDSA expressly permits Dealers to charge a Doc Fee

of less than $200, thereby making the DCSA inapplicable and prohibiting Consumers from raising DCSA claims that involved Doc Fees under $200. In other words, Dealers contend that the 2019 Doc Fee Amendment bars Consumers' DCSA claims.

[46] INDIANA CODE § 24-5-0.5-6 provides that the DCSA "does not apply to an act or practice that is . . . expressly permitted by state law[.]" I.C. § 24-5-0.5-6(2). As set forth above, the 2019 Doc Fee Amendment provides that "it is an unfair practice for a dealer to charge a document preparation fee in excess of two hundred dollars ($200)." I.C. § 9-32-13-7(a). The statute further provides that "[a] document preparation fee under this section must be . . . included in the advertised sale price of a vehicle; and . . . affirmatively disclosed . . . in writing by the dealer during negotiations for the sale of a vehicle to a potential purchaser . . . and . . . as a separate line item on the purchaser's bill of sale or other purchase contract." *Id.* (format altered).

[47] The trial court disagreed with Dealers' argument that the 2019 Doc Fee Amendment expressly permitted Dealers to charge Doc Fees of $200 or less without restriction. The trial court concluded that "[t]he only explicit designation [in the amended statute] is that Doc Fees over $200 are necessarily unfair" and that "[t]here is no parallel language expressly designating Doc Fees of $200 or less as necessarily fair." (App. Vol. 3 at 61). The trial court pointed out that the 2019 Doc Fee Amendment also required a dealer to comply with advertising and disclosure requirements when charging a Doc Fee. The trial court also concluded that "[t]here is no language [in the 2019 Doc Fee

Amendment] where Doc Fees of $200 or less will be presumed to be fair or otherwise expressly permitted under state law as to prevent [Consumers] from proceeding with their DCSA claims regarding these Doc Fees." (App. Vol. 3 at 62-63).

[48] We agree that the 2019 Doc Fee Amendment does not expressly permit Dealers to charge Doc Fees of $200 or less.[12] While the plain language of the 2019 Doc Fee Amendment provides that the charging of Doc Fee "in excess" of $200 is "an unfair practice" by a dealer, the amended statute contains no language expressly permitting Dealers to charge Doc Fees of $200 or less. *See* I.C. § 9-32-13-7. "[I]t is just as important to recognize what the statute does not say as it is to recognize what it does say." *Goodrich Quality Theaters, Inc. v. Fostcorp Heating & Cooling, Inc.*, 39 N.E.3d 660, 665 (Ind. 2015) (cleaned up). Indeed, the plain language of subsections (a)(1) and (a)(2) of the 2019 Doc Fee Amendment sets forth limitations that generally apply to the charging of Doc Fees by any dealer. *See* I.C. § 9-32-13-7. Specifically, the amended statute requires that a dealer's Doc Fee must be included in the advertised sale price of a vehicle and be affirmatively disclosed in writing by the dealer during negotiations and as a separate line item on the purchase contract. Because the 2019 Doc Fee

[12] The trial court found that the 2019 Doc Fee Amendment was ambiguous before it concluded that the amended statute does not expressly authorize Dealers to charge Doc Fees of $200 or less. We, however, conclude that the 2019 Doc Fee Amendment is unambiguous and give the words and phrases of the amended statute their plain and ordinary meaning. *See Gasbi*, 120 N.E.3d at 617 (explaining that when the language of a statute is clear and unambiguous, we need not apply rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meaning).

Amendment did not expressly authorize the charging of the Doc Fees of $200 or less, there is no preclusive effect under INDIANA CODE § 24-5-0.5-6(2), and the DCSA was applicable to the claims relating to Doc Fees raised by Consumers.

[49] Given our procedural posture of reviewing the denial of a Trial Rule 12(B)(6) motion to dismiss, we look at the allegations of the DCSA claims in Consumers' complaints, accepting them as true, to determine whether they establish any set of circumstances under which Consumers would be entitled to relief. *See Anonymous Physician 1*, 153 N.E.3d at 278. Consumers' complaints alleged that Dealers' charges of the Doc Fees at issue were in violation of the DCSA under INDIANA CODE § 24-5-0.5-3(a) and INDIANA CODE § 24-5-0.5-10(b)(3). Consumers alleged that Dealers' conduct "constituted an incurable deceptive act because it was done as part of a scheme, artifice, or device, with the intent to defraud or mislead" in violation of the DCSA. (App. Vol. 3 at 106, 130; Appellees' App. Vol. 2 at 14, 37, 61, 79, 99, 119, 142, 161, 183, 204; Appellees' App. Vol. 3 at 19, 53). Because Consumers' complaints, in relation to their DCSA claims, set forth allegations upon which relief could be granted, the trial court did not err by denying Dealers' Consolidated MTD in regard to Consumers' DCSA claims. *See Gasbi*, 120 N.E.3d at 620 (explaining that while a violation of the MVDSA did not equate to a per se violation of the DCSA, it was sufficient to withstand a dealer's Trial Rule 12(B)(6) motion to dismiss). *See also Anonymous Physician 1*, 153 N.E.3d at 277 ("Dismissals are improper under 12(B)(6) unless it appears to a *certainty* on the face of the complaint that

the complaining party is not entitled to any relief.") (cleaned up) (emphasis added).[13]

[50] Next, we turn to Dealers' argument that the trial court erred by concluding that Consumers' complaints contained adequate allegations to survive Dealers' statute of limitations argument. Dealers had argued that the two-year statute of limitations applicable to DCSA claims barred three of the individual consumer plaintiffs' DCSA claims. The trial court rejected Dealers' argument, concluding that, for purposes of the motion to dismiss, the three Consumers' complaints had adequately alleged fraudulent concealment that could potentially toll the statute of limitations. Specifically, the trial court concluded that "[a]t this stage, [Consumers] need only make allegations supporting a claim for relief" and that "[Consumers] ha[d] alleged that [Dealers] concealed the true purpose of the Doc Fees to [Consumers] through their representations to [Consumers] regarding the purpose of the Doc Fee[,]" which was "sufficient to create an

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[13] We note that Dealers also make other arguments about Consumers' DCSA claims. For example, Dealers argue that the 2019 Doc Fee Amendment was retroactive and constitutional. Here, however, the trial court treated the amendment as retroactive when addressing whether it expressly permitted the disputed Doc Fees, and Consumers did not argue that the amendment was unconstitutional. Accordingly, we need not address these arguments.

We do, however, note that various dealers and consumers in other Doc Fee cases currently existing in other Indiana trial courts may differ on the issue of constitutionality. For example, in a recent memorandum decision, *Mike Raisor Auto Grp., Inc. v. Schroeder*, 2021 WL 2407869 *1 n.4 (Ind. Ct. App. June 14, 2021), we noted that the automobile dealer had argued that applying the 2019 Doc Fee Amendment would be unconstitutional, and the parties proceeded by applying the Doc Fee Statute in effect at the time of the vehicle transaction.

inference of fraudulent concealment at the motion to dismiss stage." (App. Vol. 3 at 69-70).

[51] INDIANA CODE § 24-5-0.5-5(b) provides that "[a]ny action brought under this chapter may not be brought more than two (2) years after the occurrence of the deceptive act." However, this statute of limitations may be tolled by fraudulent concealment. *See* I.C. § 34-11-5-1 ("If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action."). "Usually, to invoke the protection provided by this statute, the wrongdoer must have actively concealed the cause of action and the plaintiff is charged with the responsibility of exercising due diligence to discover the claims." *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1262 (Ind. 2014) (cleaned up). "The affirmative acts of concealment must be calculated to mislead and hinder a plaintiff from obtaining information by the use of ordinary diligence, or to prevent inquiry or elude investigation." *Id.* (cleaned up). However, "if the parties are in a fiduciary [or confidential] relationship such that the defendant had a duty to disclose the existence of the claim to the plaintiff, the concealment need not be active; the defendant's failure to fulfil that duty may be sufficient to invoke the protection of the statute." *Id. See also Forth v. Forth*, 409 N.E.2d 641, 645 (Ind. Ct. App. 1980) (explaining that, in regard to fraudulent concealment, "the concealment need not be done through affirmative acts where there is a fiduciary or confidential relationship giving rise to a duty to disclose material information between the parties"); *Malachowski v.*

Bank One, Indianapolis, 590 N.E.2d 559, 563 (Ind. 1992) ("A mere failure to disclose, when there is a duty to disclose, may be sufficient to toll the statute [of limitations].")

[52] Here, Consumers' complaints alleged that there was a buyer-seller relationship between Consumers and Dealers, and they further alleged that Dealers had violated the DCSA in various ways, including by affirmatively misrepresenting the Doc Fee as a fee incurred by the Dealers for preparation of documents, failing to negotiate the fees, and failing to include fees in the advertised price. Consumers also alleged that Dealers had concealed the nature of the Doc Fee charged and that Dealers' conduct "constituted an incurable deceptive act because it was done as part of a scheme, artifice, or device, with the intent to defraud or mislead." (App. Vol. 3 at 106, 130; Appellees' App. Vol. 2 at 14, 37, 61, 79, 99, 119, 142, 161, 183, 204; Appellees' App. Vol. 3 at 19, 53).

[53] Again, we recall that this case is before us on a Trial Rule 12(B)(6) motion to dismiss. "A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues[,]" and Defendants thereafter may flesh out the evidentiary facts through discovery[.]" *Anonymous Physician 1*, 153 N.E.3d at 277 (cleaned up). Given the procedural posture of these cases on appeal, we conclude that the complaint sufficiently raises fraudulent concealment that may toll the statute of limitations to survive this motion to dismiss stage. Accordingly, the trial court did not err by denying Dealers' motion to dismiss on this basis.

[54] The last issue from Dealers' challenge to the denial of their Consolidated MTD is their contention that the trial court erred when it declined to dismiss Consumers' common law claims of constructive fraud and unjust enrichment. Dealers contend that the 2019 Doc Fee Amendment did not create a private cause of action and that any common law claims relating to the charging of a Doc Fee should therefore be dismissed. Dealers argue that the enactment of the 2019 Doc Fee Amendment and the legislature's "ratif[ication] of the $200 or less threshold in the Doc Fee staute" abrogated or "closed the door" to Consumers' common law claims. (Dealers' Br. 28). Otherwise, Dealers argue that Consumers' complaints insufficiently stated claims for relief for constructive fraud and unjust enrichment.

[55] Consumers argue that the 2019 Doc Fee Amendment of the MVDSA did not abrogate Consumers' claims under common law. Specifically, Consumers argue that the amended statute of the "MVDSA d[id] not undertake to cover the entire field related to Doc Fees; [instead,] it merely set[] some parameters under which the Doc Fees will be considered an 'unfair practice' under the MVDSA." (Consumers' Br. 32-33). Consumers contend that the MVDSA 2019 Doc Fee Amendment "does not authorize charging excessive or *fraudulent* Doc Fees in any amount" nor is it incompatible with common law claims to recover Doc Fees that were deceptively charged. (Consumers' Br. 33) (emphasis in original).

[56] "[T]here is a presumption that when the legislature enacts a statute, it is aware of the common law and does not intend to make a change unless it expressly or

unmistakably implies that the common law no longer controls. *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390, 394-95 (Ind. 2018). "Indiana courts may imply an abrogation of the common law only if[:]" (1) "a statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law" or (2) "the two laws are so repugnant that both in reason may not stand." *Gunderson v. State*, 90 N.E.3d 1171, 1182 (Ind. 2018) (cleaned up), *cert. denied*.

[57] When rejecting Dealers' abrogation argument, the trial court pointed out that the MVDSA had no provision explicitly abrogating all other claims related to Doc Fees, and it concluded that "[t]here is no case law supporting [Dealers'] assertion that the MVDSA subverts all other claims related to vehicle purchasing at the motion to dismiss stage." (App. Vol. 3 at 71). The trial court concluded, based on this Court's *Gasbi* opinion, that "actions that may implicate the MVDSA can also be brought under other statutes or at common law." (App. Vol. 3 at 71).

[58] We agree with Consumers and the trial court. Dealers' abrogation argument seems to rely on the incorrect premise that Consumers' complaint alleges a claim specifically for a violation of the MVDSA, which has no private right of action. Here, however, Consumers are not alleging a claim that Dealers' conduct was in direct violation of the MVDSA. Instead, Consumers' claims allege that Dealers' conduct was in violation of the DCSA and constituted constructive fraud and unjust enrichment. It is presumed that when the legislature amended the 2019 Doc Fee Amendment, "it [wa]s aware of the

common law and d[id] not intend to make a change unless it expressly or unmistakably implie[d] that the common law no longer control[ed]." *See Daniels*, 109 N.E.3d at 394-95. Here, the legislature made no such express implication. Nor did it indicate that the amended statute was "clearly designed as a substitute for the common law." *See Gunderson*, 90 N.E.3d at 1182. Therefore, we conclude that the trial court did not err by concluding that the common law claims were not precluded by the 2019 Doc Fee Amendment.

[59] Next, we address Dealers' argument that Consumers' complaints insufficiently stated claims for relief for constructive fraud and unjust enrichment. Specifically, Dealers recognize that Consumers alleged that there was a buyer-seller relationship but contend that Consumers have not sufficiently alleged any express or affirmative statement made to Consumers that would support their claim. Dealers argue that Consumers' unjust enrichment argument should have been dismissed because the parties had a contract.

[60] We pause to recall that this case is before us on a Trial Rule 12(B)(6) motion to dismiss, which requires us to look at the allegations of the constructive fraud and unjust enrichment claims in Consumers' complaints, accepting them as true, to determine whether they establish any set of circumstances under which Consumers would be entitled to relief. *See Anonymous Physician 1*, 153 N.E.3d at 278.

[61] "For purposes of constructive fraud, the existence of a duty may arise in . . . the case of a buyer and seller." *BloomBank v. United Fid. Bank F.S.B.*, 113 N.E.3d

708, 722 (Ind. Ct. App. 2018), *trans. denied*. "A constructive fraud may arise in a buyer/seller relationship when: (1) a seller makes unqualified statements to induce another to make a purchase; (2) the buyer relies upon the statements; and (3) the seller has professed to the buyer that he has knowledge of the truth of those statements." *Am. Heritage Banco, Inc. v. Cranston*, 928 N.E.2d 239, 247 (Ind. Ct. App. 2010), *reh'g denied*. The statement made by the seller may include "an omission to induce another to sell." *BloomBank*, 113 N.E.3d at 722 n.7. *See also Boots v. D. Young Chevrolet, LLC*, 93 N.E.3d 793, 799 (Ind. Ct. App. 2018) ("Fraud is not limited only to affirmative representations; the failure to disclose all material facts can also constitute actionable fraud."), *trans. denied*.

[62] In regard to the constructive fraud claim, Consumers alleged, in part, that Dealers had a duty of good faith and fair dealing to Consumers and that Dealers, who had superior knowledge, had violated that duty by making various representations and omissions. Consumers further alleged that they had relied upon Dealers' representations and omissions and that they had been injured.

[63] Taking these facts as true and viewing the pleadings with every reasonable inference in Consumers' favor, we conclude that Consumers have pleaded the operative facts necessary to establish a claim of constructive fraud. *See Anonymous Physician 1*, 153 N.E.3d at 278. In other words, because it does not appear to a certainty on the face of the complaints that Consumers are not entitled to relief, a dismissal of Consumers' complaints would have been improper.

[64] The trial court also did not err by denying Dealers' motion to dismiss Consumers' unjust enrichment claim. "To prevail on a claim of unjust enrichment, a plaintiff must establish that it conferred a measurable benefit on the defendant under circumstances in which the defendant's retention of the benefit without payment would be unjust." *Garage Doors of Indianapolis, Inc. v. Morton*, 682 N.E.2d 1296, 1303 (Ind. Ct. App. 1997), *trans. denied*. Generally, "[t]he existence of an express contract precludes a claim for unjust enrichment[;]" however, "there are exceptions to this rule." *Kohl's Indiana, L.P. v. Owens*, 979 N.E.2d 159, 168 (Ind. Ct. App. 2012). For example, "when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice." *Id.*

[65] In *Lawson v. First Union Mortgage Co.*, this Court reversed the grant of a Trial Rule 12(B)(6) motion to dismiss on the plaintiff's claim of money had and received or unjust enrichment, which was the plaintiff's alternative equitable theory of relief to her DCSA claim, despite the existence of an express contract. 786 N.E.2d 279, 284-85 (Ind. Ct. App. 2003). The plaintiff had alleged that the charging of a documentation fee by the defendant bank was deceptive under the DCSA and was prohibited by Indiana law. We explained that the rule that recovery cannot be based upon a theory implied in law when the parties are controlled by a contract applies only when the contract is valid. *Id.* at 284. Because "[t]he contract at issue contain[ed] a provision—namely, the documentation fee provision—which [wa]s prohibited by Indiana law[,]" the defendant bank "c[ould] [] not use a prohibited provision to preclude recovery

under an equitable claim." *Id.* Thus, this Court held that, at the motion to dismiss stage, the trial court's dismissal of the plaintiff's claim was erroneous. *Id.* at 285.

[66] Here, Consumers' complaints alleged that Dealers had improperly requested, received, and retained funds or unlawful Doc Fees from Consumers. Taking the allegations in Consumers' complaints as true, as we must do when conducting a Trial Rule 12(B)(6) review, we conclude that Consumers have established a set of circumstances under which they could be entitled to relief. *See id.* Accordingly, the trial court did not err in denying Dealers' motion to dismiss Consumers' unjust enrichment claim.[14]

[67] The final issue we address in this appeal is the Alter Ego Dealers' challenge to the trial court's interlocutory order denying their Alter Ego MTD. In its order, the trial court determined, in relevant part, that Consumers' complaints survived Alter Ego Dealers' motion to dismiss because Consumers had sufficiently demonstrated a claim under the alter ego doctrine and therefore standing. Specifically, the trial court reviewed the factors for determining whether to apply the alter ego doctrine and found that Consumers' complaints had alleged multiple factors of how Alter Ego Dealers and Dealers operated as

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[14] In Dealers' Reply Brief, they raise an argument in regard to Consumers' common law claims that they did not raise in their Appellants' Brief. Specifically, they assert that Consumers' constructive fraud and unjust enrichment claims should have been dismissed because they had not alleged damages. "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).

a single entity, operated in an interconnected manner, and had shared officers and advertising, such that dismissal under Trial Rule 12(B)(6) was improper. The trial court, noting that the decision to pierce the corporate veil was a fact-sensitive inquiry, reminded the parties that the ultimate decision about whether the alter ego doctrine would be applicable to the various cases would be determined after the consideration of evidence submitted on the issue. Upon determining that Consumers had, for purposes of Trial Rule 12(B)(6), sufficiently demonstrated a claim under the alter ego doctrine, the trial court also determined that Consumers had standing because they had "ha[d] demonstrated a personal stake in the outcome of the lawsuit and that they ha[d] alleged they ha[d] sustained some direct injury as a result of the conduct at issue." (App. Vol. 3 at 91).[15]

[68] "Standing requires that a party have a personal stake in the outcome of the lawsuit and 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." *Foundations of E. Chicago, Inc. v. City of E. Chicago*, 927 N.E.2d 900, 903 (Ind. 2010), *decision clarified on reh'g*, 933 N.E.2d 874 (Ind. 2010) (cleaned up). A motion to dismiss for lack of standing may be brought pursuant to Indiana Trial Rule 12(B)(6) for failure to state a claim upon which relief can be granted. *Thomas v. Blackford Cty. Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 990 (Ind. 2009). When a Rule

[15] The trial court also addressed Consumers' alternative standing argument about the juridical link doctrine and concluded that it applied as an alternative reason for standing. Because we affirm the trial court's initial conclusion that Consumers had standing, we need not address the trial court's alternative reason.

12(B)(6) motion challenging standing is raised, "the allegations of the complaint are required to be taken as true." *Id.* "A successful 12(B)(6) motion alleging lack of standing requires that the lack of standing be apparent on the face of the complaint." *Id.*

[69] "The corporate alter ego doctrine is a device by which a plaintiff tries to show that two corporations are so closely connected that the plaintiff should be able to sue one for the actions of the other." *Ziese & Sons Excavating, Inc. v. Boyer Const. Corp.*, 965 N.E.2d 713, 720 (Ind. Ct. App. 2012) (cleaned up). The corporate alter ego doctrine is a subset of piercing the corporate veil.[16] *Id.* "Corporate identity may be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation." *Konrad Motor & Welder Serv., Inc. v. Magnetech Indus. Servs., Inc.*, 973 N.E.2d 1158, 1165 (Ind. Ct. App. 2012) (cleaned up). "Indiana courts will not recognize corporations as separate entities where evidence shows that several corporations are acting as one." *Id.*

[70] When a plaintiff seeks to pierce the corporate veil under the theory of the alter ego doctrine, courts will "consider additional factors, including whether: (1) similar corporate names were used; (2) the corporations shared common

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[16] Factors considered when determining whether to pierce the corporate veil include: (1) undercapitalization; (2) absence of corporate records; (3) fraudulent representation by corporation shareholders or directors; (4) use of the corporation to promote fraud, injustice, or illegal activities; (5) payment by the corporation of individual obligations; (6) commingling of assets and affairs; (7) failure to observe required corporate formalities; and (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form. *Ziese*, 965 N.E.2d at 720.

principal corporate officers, directors, and employees; (3) the business purposes of the corporations were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards." *Ziese*, 965 N.E.2d at 720. "Factors indicating that a corporation is the alter ego of another may include the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public." *Id.* "The decision to pierce the corporate veil is ultimately a fact-sensitive inquiry to be determined after consideration of all evidence submitted[.]" *Id.* at 721.

[71] Here, Consumers' complaints that included Alter Ego Dealers as defendants alleged that these Alter Ego Dealers "operated as alter egos [of Dealers] and as a single business enterprise with respect to the charging of unlawful [Doc Fees]." (App. Vol. 3 at 120; Appellees' App. Vol. 2 at 24; Appellees' App. Vol. 2 at 49; Appellees' App. Vol. 2 at 87; Appellees' App. Vol. 2 at 107; Appellees' App. Vol. 2 at 129; Appellees' App. Vol. 2 at 172; Appellees' App. Vol. 3 at 7; Appellees' App. Vol. 3 at 46). Consumers also alleged that the Alter Ego Dealers "share[d] similar corporate names; share[d] overlapping officers, directors, and employees; ha[d] similar business purposes; share[d] certain offices; advertise[d] together as a single unit on their website . . . ; and . . . generally operated in an interconnected and controlled way, such that [they] c[ould] be considered a single unit for liability purposes." (App. Vol. 3 at 120; Appellees' App. Vol. 2 at 24-25; Appellees' App. Vol. 2 at 49-50; Appellees' App. Vol. 2 at 87; Appellees' App. Vol. 2 at 107; Appellees' App. Vol. 2 at 129;

Appellees' App. Vol. 2 at 172-73; Appellees' App. Vol. 3 at 7-8; Appellees' App. Vol. 3 at 46-47). These complaints also alleged that the combined Dealers/Alter Ego Dealers entity had engaged in a practice of treating the Doc Fee as a non-negotiable item and charging a Doc Fee that was more than the amount for the actual price to prepare the documents. Consumers' complaints indicate that, when they had purchased a vehicle from these auto dealers, they had been charged a Doc Fee that was in excess of the actual cost for document preparation. Additionally, the complaints alleged that "[t]he true purpose of the Doc Fee is not to cover the expenses actually incurred for the preparation of documents, but to unfairly and deceptively generate additional profit to Dealership on top of the agreed-upon purchase price for the vehicle." (App. Vol. 3 at 121; Appellees' App. Vol. 2 at 26; Appellees' App. Vol. 2 at 51; Appellees' App. Vol. 2 at 88-89; Appellees' App. Vol. 2 at 108; Appellees' App. Vol. 2 at 130-31; Appellees' App. Vol. 2 at 174; Appellees' App. Vol. 3 at 9; Appellees' App. Vol. 3 at 48).

[72] Again, "[a] motion to dismiss under [Indiana Trial] Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish *any* set of circumstances under which a plaintiff would be entitled to relief." *Trail*, 845 N.E.2d at 134 (emphasis added). Because Consumers' allegations are sufficient to establish circumstances under which they could be entitled to relief if they are able to prove their claim, we conclude the trial court did not err by denying Alter Ego Dealers' motion to dismiss for lack of standing under the alter ego doctrine. *See id.* (explaining that "we do not test the

sufficiency of the facts alleged with regards to their adequacy to provide recovery[;]" instead, we "test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred").

[73] Affirmed.

Najam, J., and Tavitas, J., concur.