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2013 IL App (1st) 113798-U

Third Division
June 28, 2013

No. 1-11-3798

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GEORGE ZARINS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	08 L 7407
	)	
BOB ROHRMAN AUTO GROUP d/b/a	)	
SCHAUMBURG HONDA AUTOMOBILES,	)	Honorable
	)	Sanjay T. Tailor,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Sterba concurred in the judgment.
Justice Pierce concurred in the judgment only.

ORDER

¶ 1 *Held*: (1) A party forfeits review of the trial court's exclusion of evidence if an offer of proof is not made; (2) the evidence was sufficient to establish that a defendant breached its written warranty where plaintiff's expert provided unrebutted testimony that the car's failure was due to a defect in the manufacture of the car and that the car's driver could not have caused or contributed to the car's failure, but the evidence was insufficient to support the judgments for common law fraud and consumer fraud where plaintiff's expert testified that the car had a latent defect and plaintiff failed to provide any evidence that defendant knew

of the defect or that it could have discovered the defect through a normal inspection; (3) the evidence was sufficient to support the damages awarded for defendant's breach of its written warranty; and (4) the trial court did not err when it awarded plaintiff attorney fees because plaintiff's claims for relief involve a common core of operative facts.

¶ 2 Plaintiff, George Zarins, filed a four count complaint against the defendant, The Bob Rohrman Auto Group d/b/a Schaumburg Honda Automobiles (Schaumburg Honda), and complained about defendant's failure to repair the used car he purchased from the defendant. Schaumburg Honda filed an answer and affirmative defenses and alleged that the damage to plaintiff's car was due to driver abuse. At the end of the trial, the jury returned verdicts for plaintiff on the breach of warranty and common law fraud counts, the trial court found for the plaintiff on the consumer fraud count and entered a judgment on the verdicts and awarded attorney fees and costs.

¶ 3 Schaumburg Honda appeals and presents four issues for our review: (1) whether the trial court erred when it excluded the opinion testimony of Schaumburg Honda's employees; (2) whether the evidence was sufficient to support a finding for plaintiff on the common law fraud, consumer fraud and breach of warranty counts; (3) whether the damages awarded were excessive; and (4) whether the award of attorney fees was excessive.

¶ 4 We find that Schaumburg Honda did not make an offer of proof in the trial court and, thus, forfeited review of the trial court's exclusion of the opinion testimony of its employees; that the evidence was sufficient to support a judgment for breach of warranty, but the evidence was insufficient to support the judgments for common law fraud and consumer fraud; that the evidence was sufficient to support the damages awarded for breach of warranty; and the

trial court did not err when it awarded plaintiff attorney fees because plaintiff's claims for relief involve a common core of operative facts. Therefore, we affirm in part and reverse in part.

¶ 5 Background

¶ 6 On August 28, 2004, George Zarins purchased a 2001 Honda S2000, with a six-speed manual transmission, for $22, 995.16 from Schaumburg Honda for his son, Kevin Zarins. At the time of purchase, the car's odometer had a reading of 22,539 miles. Schaumburg Honda provided plaintiff with an express limited written warranty which covered the engine, transmission and drive axle for three months or 3,000 miles, whichever occurred first. The warranty also stated that the dealer would pay 100% of the labor costs and 100% of the costs for any parts that are covered by the warranty and which fail during the warranty period. The warranty also indicated the following systems were covered:

> "ENGINE: All internally lubricated parts, water pump, fuel pump, manifolds, engine block, cylinder head and rotary engine housing. (Coverage limited to the above listed parts.)"

¶ 7 On September 8, 2004, while Kevin was driving home from work, the car experienced engine problems. The next morning, Kevin and his father attempted to start the car, but it would not start. When the car failed to start, Kevin called Schaumburg Honda and Schaumburg Honda had the car towed to the dealership. Later that day, Kevin gave Schaumburg Honda permission to break down the head of the engine in order to diagnose the problem. After Schaumburg Honda broke down the engine, the dealership reported to

Kevin that a mechanic found bent valves and that the repairs would not be covered under the warranty because the damage resulted from driver abuse of the vehicle.

¶ 8 When Schaumburg Honda refused to cover the repairs under the warranty, Kevin decided to have the car repaired at Sound Performance. Sound Performance and Opel Engineering repaired the vehicle for $3,961.95. Schaumburg Honda also billed Kevin $888.38 for the breakdown and diagnosis of the engine problem and for towing the vehicle.

¶ 9 On May 5, 2005, plaintiff's attorney wrote a letter to Schaumburg Honda revoking plaintiff's acceptance of the vehicle and demanding that Schaumburg Honda cancel the contract and return all funds paid, plus compensation for all of plaintiff's damages.

¶ 10 In 2005, plaintiff filed a complaint and alleged that Schaumburg Honda failed to repair the car it sold with a warranty. When a crucial witness for the plaintiff was outside of the jurisdiction and unable to appear for the trial, the 2005 case was dismissed for want of prosecution.

¶ 11 On July 9, 2008, George Zarins refiled his complaint against Schaumburg Honda and alleged a breach of the written warranty under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Magnuson-Moss Act) (15 U.S.C. § 2301 *et seq.* (2006)) (count I); a breach of the implied warranty of merchantability under the Magnuson-Moss Act (15 U.S.C. § 2308) (2006) and the Illinois Uniform Commercial Code (UCC) (810 ILCS 5/2-314 (2008)) (count II); a violation of Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (2008)) (count III); and common law fraud (count IV).

¶ 12 When the jury trial began on January 31, 2011, plaintiff's counsel read Kevin Zarins' evidence deposition to the jury. Kevin testified that he visited Schaumburg Honda about a week prior to purchasing the car. Kevin spoke with Tom Klimczak, a salesman for Schaumburg Honda, and went on a test drive with him. Kevin testified that he was impressed with the car, that the engine sounded like it was in perfect working order, and that the vehicle seemed to be in great condition. Klimczak confirmed that the vehicle had been inspected and that it was in good working order. Kevin testified that having a reliable vehicle was important to him and he communicated this information to Klimczak.

¶ 13 On August 28, 2004, George and Kevin went to Schaumburg Honda and George purchased the car for $22,995.16 and received a written warranty. Kevin testified that they would not have bought the car without a warranty.

¶ 14 Kevin testified that on September 8, 2004, while driving home from work with the car in third gear and traveling at a speed of approximately 15 miles per hour, he made a left turn from Army Trail Road onto Bloomingdale Road. As Kevin entered the turn, he downshifted to second gear. After he completed the turn, he tried to accelerate, but he noticed that the engine was running rough. He could feel a vibration and the car seemed to lose power. Kevin drove the car for approximately one mile to his father's house, but he did not over rev the car. Kevin testified that there were 23,010 miles on the vehicle when it was brought in to Schaumburg Honda for repairs.

¶ 15 On cross-examination, Kevin testified that no lights were illuminated on the dashboard during the incident on September 8, 2004. The next morning when Kevin and his father tried

to start the car, several lights were illuminated on the dashboard. After the vehicle was repaired following the September 8, 2004, incident, no other major repairs were made to the car. Kevin sold the car in 2007 for approximately $12,000.

¶ 16 Next, plaintiff called Phillip Grismer as his Supreme Court Rule 213 expert witness. Grismer testified that he is an ASE master automotive technician, that he is certified in all areas of automotive repair, and that he is a certified automotive appraiser. Grismer inspects vehicles on behalf of warranty and service contract companies and insurance companies and has testified as an expert witness in numerous cases. Grismer testified that he inspected plaintiff's Honda on September 16, 2004, and he found the parts which had been removed by Schaumburg Honda in boxes inside the vehicle. Grismer testified that the timing components were exposed, that he observed piston impact marks at the top of all the pistons, that all the exhaust valves were bent, and that two of the intake valves were bent.

¶ 17 Grismer opined that the valves were bent when the engine stopped running and resulted from one of two potential causes. One possible cause for the engine's damage was water ingress into a combustion chamber prior to the plaintiff's purchase of the car. However, according to Grismer, the most likely cause for the engine's damage was that the variable valve timing, controlled through a solenoid valve timing and actuator, may have failed causing a timing defect incident. He opined that the vehicle had a timing defect in the engine that was latent since its manufacture, and it had not manifested itself prior to the date that Kevin experienced the engine's failure. He testified that he did not believe that there was anything the vehicle's driver could have done that would have caused or contributed to the damage.

Grismer explained that the vehicle was equipped with rev limiters which prohibit the engine from over revving and that Kevin could not have caused the bent valves by over revving the engine. Grismer also testified that subsequent to his examination of the car, he tried to replicate an over revving condition in two other vehicles which were equipped with manual transmissions and rev limiters, and in each instance, the rev limiters prevented any over revving of the engines and prevented any damage.

¶ 18 Grismer opined that Schaumburg Honda had acted improperly and breached its warranty when it charged Zarins for the examination of the vehicle and when it refused to repair the vehicle under the warranty. Grismer stated that it was his opinion that the vehicle was defective and unmerchantable at the time of sale to plaintiff and that the value of the vehicle at the time of sale was $11,497.38 and not the $22,995.16 that the plaintiff paid for the car.

¶ 19 Grismer's inspection report was admitted into evidence as plaintiff's exhibit 15 and it revealed that (A) the average value of the vehicle in the "good valuation category," according to the Kelly Blue book and the National Automobile Dealer Association (NADA) guides, was $19,750 and $23,900, respectively; (B) the value of the vehicle with the defect at the time of sale was $11,497.58; and (C) the diminished value of the vehicle was $10,912.50.

¶ 20 On cross-examination, Grismer testified that although he had not worked in an automotive repair facility in the past 16 years, the lapse of time did not make his opinions any less reliable because he had remained current on the advancement of automotive technology. Grismer testified that the primary purpose of rev limiters is to prohibit a driver from over revving during acceleration, but they are also operative during deceleration. Grismer also

testified that the vehicles that he used to recreate the scenario had five speed transmissions, not a six speed transmission like the plaintiff's car, and that they were a different make and model from the plaintiff's vehicle. Grismer testified that the timing chain was removed when he examined the engine so he could not tell if the timing chain was damaged or had slipped. According to Grismer, if either the timing chain or the timing tensioner were not operating properly, it would cause the valves to bend.

¶ 21 Schaumburg Honda's counsel showed Grismer the repair bills from both Opel Engineering and Sound Performance. Grismer testified that neither facility's documentation indicated that either the timing chain or timing tensioner were replaced. Grismer indicated that there was one part listed on the repair bill that he could not identify from the code that was used and it was possible that this was either a timing chain or timing tensioner but there was no other indication from the repair bills that any part of the timing system had been damaged or was replaced.

¶ 22 According to Grismer, once all the cylinders were bent the vehicle would have stopped running and there would have been warning lights illuminated on the dashboard. Grismer could not explain how Kevin could have driven the car for another mile or why no lights were illuminated on the dashboard during the incident. He testified that a warranty would not cover damage to a vehicle caused by the owner's improper operation of the vehicle. But he stated that in this case, the driver did not do anything wrong and he was sure that the damage could not have occurred as the dealership claimed.

¶ 23 George Zarins was the next witness. George's testimony was consistent with Kevin's

deposition testimony regarding the occurrence on September 8, 2004, and Schaumburg Honda's response to the problem.

¶ 24 At the close of plaintiff's case, Schaumburg Honda moved for a directed verdict on all counts arguing that plaintiff had failed to present evidence to establish the elements necessary to carry his burden on each of the counts. In response, the trial court stated that the plaintiff had offered sufficient evidence on each issue and denied Schaumburg Honda's motion for a directed verdict.

¶ 25 After the court denied Schaumburg Honda's motion for a directed verdict, the dealership called Jeff Doran, a mechanic from its service department, to testify about his observations of the vehicle's engine when it was towed to the service department and to render his opinion about the cause of the engine's failure. Plaintiff's counsel objected to Doran's testimony and argued, pursuant to Supreme Court Rule 213, that Schaumburg Honda was attempting to elicit expert testimony from a witness who had never been disclosed as an expert witness. Plaintiff's counsel presented the court with an order entered by the previous judge prohibiting Schaumburg Honda from calling any expert witnesses, and argued that Schaumburg Honda should be barred from eliciting any opinion testimony as to the purported cause of the engine's failure.

¶ 26 Schaumburg Honda's counsel responded by arguing that the previous judge's order only prohibited the dealership from calling independent expert witnesses, not its service personnel. Schaumburg Honda's counsel explained that its previous counsel retained an expert witness, but the expert witness refused to testify once Schaumburg Honda's former

counsel withdrew from the case. Therefore, Schaumburg Honda's counsel informed the court that the independent expert would not be appearing, and that Schaumburg Honda would rely on the testimony of its previously listed witnesses, the service personnel. Schaumburg Honda's counsel maintained that the previous judge did not decide whether the dealership's service personnel could testify as expert witnesses and the court did not bar their testimony. Schaumburg Honda's counsel further argued that they were only seeking to elicit the observations of Schaumburg Honda's service employees, and that these observations included the cause for the engine's failure.

¶ 27 Judge Tailor ruled that Schaumburg Honda’s employees' opinions regarding the engine's failure were barred by Supreme Court Rule 213. Therefore, Schaumburg Honda’s employees could not offer any opinions to explain the cause for the engine's failure.

¶ 28 After the judge's ruling, Doran testified that on September 10, 2004, he was asked to look at plaintiff's vehicle. Doran testified that he determined that the head of the engine needed to be removed, that he advised the service directors of his observations, and that he was later advised that plaintiff had approved the work. He examined the engine's components and observed that the valves appeared to be bent and that the vehicle would not start or run.

¶ 29 Doran's notes were admitted into evidence. Doran wrote in his notes that his inspection of the car revealed that the compression in cylinder number one was low and was possibly caused by bent valves due to over revving. He recommended further diagnostic tests by removing the cylinder head. After the diagnostic tests were performed, Doran wrote that all exhaust valves had made contact with pistons, that the number four intake valve was also hit,

and that all exhaust valves were bent. He recommended (1) sending the head out for further diagnostics, and (2) removal of pistons to inspect ring lands and bearings. He noted that the customer declined to have further work performed.

¶ 30 Schaumburg Honda then called Ken Wahl, its service manager. Wahl testified that he was aware that the vehicle had bent valves because he observed them. He informed plaintiff's son that the damage was not covered under the warranty.

¶ 31 At the conclusion of Wahl's testimony, Schaumburg Honda rested. Schaumburg Honda renewed its motion for a directed verdict and raised the same arguments as before, but the court denied the motion. Finally, the parties presented their closing arguments and the case was submitted to the jury.

¶ 32 On February 7, 2011, the jury returned a verdict for the plaintiff on the breach of warranty counts (count I or II)[1] and awarded damages in the amount of $11,480. The jury also returned a verdict for the plaintiff on the common law fraud count and assessed no compensatory damages, but awarded plaintiff $25,000 in punitive damages. The court entered judgment on the verdicts for $36,480, plus costs.

¶ 33 On March 11, 2011, the court held a hearing on plaintiff's consumer fraud claim. The trial judge made the following findings regarding plaintiff's consumer fraud claim: (A) that the mechanic at Schaumburg Honda who inspected the car noted that further investigation was

[1] The jury did not specify whether its breach of warranty verdict was based on the express or implied warranty.

needed to determine the cause of the problem; (B) that Schaumburg Honda told the plaintiff that the breakdown of the engine was due to over revving; (C) that Schaumburg Honda's refusal to repair plaintiff's car before it had determined the cause of the engine's failure was a deceptive practice; (D) that Schaumburg Honda intended that the plaintiff rely on the concealment; (E) and that the concealment occurred in the course of conduct involving trade or commerce. The court awarded the plaintiff $4,000 in compensatory damages but denied plaintiff's request for punitive damages.

¶ 34 On July 29, 2011, the court held a hearing on plaintiff's petition for attorney fees and costs. At the hearing, Schaumburg Honda's counsel argued that plaintiff was not entitled to attorney fees for work that was done on the 2005 case. The court found that all of plaintiff's claims arose out of the same operative facts, and it would be difficult to differentiate the work that was done on the statutory claims (consumer fraud and breach of warranty) from work that was done on the other claims. The court concluded that plaintiff was entitled to attorney fees, including fees for work that was done on the 2005 case because the work that was done on the 2005 case was carried over to the 2008 case and there was no evidence of any duplicative work. The judge awarded plaintiff $72,113.75 for attorney fees and $2,763.91 for costs.

¶ 35 On August 25, 2011, Schaumburg Honda filed an amended post-trial motion requesting a new trial or a judgment notwithstanding the verdict (judgment *n.o.v.*). The court denied Schaumburg Honda's motion and granted plaintiff's request for additional attorney fees in the amount of $6,175. Schaumburg Honda timely appealed pursuant to Supreme Court Rule

303. Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 36 Analysis

¶ 37 I. Record on Appeal

¶ 38 Plaintiff contends that Schaumburg Honda failed to provide this court with a complete record to consider the merits of this appeal. Case law makes it clear that an appellant has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Supreme Court Rule 323(c) authorizes the use of a bystanders' report in lieu of reports of proceedings when the latter are unavailable. Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). Here, the record on appeal consists of: (1) three volumes of common law record; (2) reports of proceedings for the consumer fraud count hearing and plaintiff's fee petition hearing; and (3) the transcript containing Kevin Zarins' evidence deposition, a bystanders' report which includes the testimony of the other witnesses and the trial exhibits. Therefore, we find that Schaumburg Honda has provided this court with a sufficient record for this court to decide this appeal.

¶ 39 II. Trial Court's Exclusion of Defendant's Witnesses' Opinion Testimony

¶ 40 Schaumburg Honda argues that the trial court erred when it barred its service personnel from offering their opinions as to what caused the damage to the engine and why the repairs were not covered under the warranty. Schaumburg Honda also argues that the trial court's decision to limit the testimony of its witnesses resulted in prejudice and deprived Schaumburg Honda of a fair trial. The decision to allow or exclude evidence is within the sound discretion of the

trial court and the court's decision will not be disturbed absent an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92 (1995).

¶ 41 However, we will not reverse a judgment of the trial court based on its failure to admit evidence without an indication of the substance of the excluded evidence. *A. W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 117-18 (1993). To preserve an error when evidence is excluded, the proponent of the evidence must make an adequate offer of proof in the trial court. *Northern Trust Co. v. Burandt and Armbrust, LLP*, 403 Ill. App. 3d 260, 280 (2010). The purpose of an offer of proof is to disclose the nature of the proffered evidence for the information of the trial judge and opposing counsel, and to allow the reviewing court to determine whether exclusion of the evidence was erroneous and harmful. *Wright v. Stokes*, 167 Ill. App. 3d 887, 891 (1988). "To be adequate, an offer of proof must apprise the trial court of what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose." *Chicago Park District v. Richardson*, 220 Ill. App. 3d 696, 701 (1991). In the absence of an offer of proof, the issue of whether evidence was improperly excluded will be deemed forfeited. *Northern Trust Co.*, 403 Ill. App. 3d at 280.

¶ 42 Schaumburg Honda did not make an offer of proof during the trial. Therefore, by failing to disclose the substance of the excluded witnesses' testimony, we find that Schaumburg Honda has forfeited our review of the trial court's exclusion of its employees' opinion testimony.

¶ 43 Forfeiture aside, the testimony of Schaumburg Honda's employees was properly excluded because Schaumburg Honda was attempting to elicit opinions from its employees who had not been previously disclosed as expert witnesses in a written interrogatory. See Ill. S. Ct.

R. 213(f) (eff. Jan. 1, 2007). Supreme Court Rule 213(f) required Schaumburg Honda to provide the following information about its employees in order for the employees to testify as controlled expert witnesses: (i) the subject matter on which the witnesses will testify; (ii) the conclusions and opinions of the witnesses and the bases therefor; (iii) the qualifications of the witnesses; and (iv) any reports prepared by the witnesses about the case. Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). Schaumburg Honda did not provide answers to the Rule 213(f) interrogatories with the information required by Rule 213(f) for its controlled expert witnesses. Therefore, we find that the trial court properly excluded the opinions that Schaumburg Honda wanted to elicit from its employees.

¶ 44 III. Standards of Review

¶ 45 In this case, the jury returned verdicts in favor of plaintiff for breach of warranty and common law fraud and the judge entered judgment on the verdicts. The trial judge decided the consumer fraud count and found in favor of plaintiff. Schaumburg Honda filed the following motions which were denied by the trial court: (1) a motion for a directed verdict on the breach of warranty and common law fraud counts; (2) a motion for judgment *n.o.v.* but the motion only referred to the common law fraud count; and (3) a motion for a new trial on the breach of warranty, common law fraud and consumer fraud counts. Schaumburg Honda contends on appeal that plaintiff failed to present sufficient evidence to prove the elements required to establish common law fraud, breach of warranty and consumer fraud. Accordingly, Schaumburg Honda contends that the trial court was required to enter a directed verdict or a judgment *n.o.v.* in its favor or, in the alternative, grant Schaumburg Honda a new

trial.

¶ 46 We begin our review of Schaumburg Honda's claims by setting forth the standards of review. A motion for a directed verdict or a judgment *n.o.v.* should be granted only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 100 (2010). A judgment *n.o.v.* "is inappropriate if reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *Lazenby*, 236 Ill. 2d at 100. We review *de novo* the trial court's decision denying Schaumburg Honda's motion for a directed verdict and its motion for judgment *n.o.v.* *Lazenby*, 236 Ill. 2d at 100.

¶ 47 A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006). A verdict is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence. *York*, 222 Ill. 2d at 179. A reviewing court will not reverse the circuit court's decision with respect to a motion for a new trial unless it finds that the circuit court abused it discretion. *York*, 222 Ill. 2d at 179.

¶ 48 IV. Sufficiency of the Evidence

¶ 49 A. Breach of Warranty

¶ 50 Here, Schaumburg Honda argues that plaintiff failed to provide sufficient evidence to prove that it breached its warranty, and that the trial court erred when it denied its motion for a

directed verdict and its motion for a new trial. Specifically, Schaumburg Honda argues that plaintiff failed to prove that it breached its written warranty because the testimony of plaintiff's expert lacked credibility and there was a legitimate dispute as to whether the damage to the car was covered by the limited written warranty.

¶ 51 Plaintiff alleged that Schaumburg Honda breached the express warranty and the implied warranty of merchantability, and that there was sufficient evidence in the record to support the verdicts in favor of plaintiff. Because there was a written warranty in this case, our resolution of the breach of warranty claim will focus on whether plaintiff provided sufficient evidence to establish a breach of the written warranty.

¶ 52 The Magnuson-Moss Act provides a consumer with a private cause of action against a manufacturer or retailer that fails to comply with the Act or the terms of a written warranty or any implied warranty arising therefrom. *Oggi Trattoria & Caffe, Ltd. v. Isuzu Motors America, Inc.*, 372 Ill. App. 3d 354, 360 (2007); 15 U.S.C. § 2310(d)(1). The Magnuson-Moss Act defines a written warranty, in pertinent part, as follows:

> "(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> Which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." 15 U.S.C. § 2301(6).

¶ 53 State law applies when the Magnuson-Moss Act does not conflict with a state's law governing the sale of consumer products. *Oggi Trattoria & Caffe, Ltd.*, 372 Ill. App. 3d at 360 (citing *Bartow v. Ford Motor Co.*, 342 Ill. App. 3d 480, 484 (2003)). In Illinois, Article 2 of the UCC (810 ILCS 5/1-101 *et seq.*) (West 2008)) governs the sale of goods. *Razor v Hyundai Motor America*, 222 Ill. 2d 75, 86 (2006). This court has held that the elements a party must prove to establish a cause of action under the UCC are the same under the Magnuson-Moss Act. *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 794 (2001); see also *Oggi Trattoria & Caffe, Ltd.*, 372 Ill. App. 3d at 360. Therefore, we will analyze this case under the UCC.

¶ 54 In a breach of express warranty action under the UCC, the plaintiff must show a breach of an affirmation of fact or promise that was made part of the bargain. *Oggi Trattoria & Caffe,* 372 Ill. App. 3d at 360. Since express warranties are contractual in nature, the language of the warranty controls and dictates the obligations and rights of the various parties. *Hasek*, 319 Ill. App. 3d at 788. The burden is on the plaintiff to show "by a preponderance of the evidence the terms of the warranty, the failure of some warranted part, a demand upon the defendant to perform under the terms of the warranty, a failure of the defendant to do so, a compliance with the terms of the warranty by the plaintiff, and damages measured by the terms of the warranty." *Hasek*, 319 Ill. App. 3d at 793.

¶ 55 Here, it is undisputed that Schaumburg Honda provided the plaintiff with a written warranty that covered the engine, transmission and drive axle for three months or 3,000 miles, whichever occurred first. Plaintiff's evidence established that within the warranty period, 12

days after plaintiff took possession of the car, and after driving the car for only 471 miles, the car ceased running as a result of problems with the engine, a part covered by the warranty. Plaintiff's expert testified that the car's problems were caused by a latent defect in the engine. Plaintiff's expert also testified that he was certain that the damage to the engine could not have resulted from over revving because plaintiff's car was equipped with rev limiters which prevent damage to the engine from over revving. Plaintiff tendered the car for repairs but Schaumburg Honda refused to make the repairs under the warranty before it determined the cause of the car's engine problems: a Schaumburg Honda mechanic's report recommended further diagnostic testing to determine the cause of the engine's failure. Plaintiff suffered damages in the amount of $4,850.33 (engine repairs-$3,961.95; towing, breakdown and diagnostics-$888.38), as a result of the dealership's refusal to repair the car's engine under the warranty.

¶ 56 Schaumburg Honda's employee witnesses testified about what they observed when they inspected the car, and one witness's report recommended that the engine be sent out for further diagnostic testing. Therefore, Schaumburg Honda did not present any evidence which rebutted the testimony of plaintiff's expert or established that plaintiff's engine problems were not covered under the warranty.

¶ 57 Reviewing the evidence in the light most favorable to plaintiff, we cannot say that all the evidence so overwhelmingly favored Schaumburg Honda that no contrary verdict on the evidence could ever stand. Therefore, we find that the trial court did not err when it denied Schaumburg Honda's motion for a directed verdict. In addition, because plaintiff's expert's

testimony was not rebutted or contradicted by Schaumburg Honda's witnesses, we find that the jury's verdict was not against the manifest weight of the evidence, and we hold that the trial court did not abuse its discretion when it denied Schaumburg Honda's motion for a new trial.

¶ 58 B. Common Law Fraud

¶ 59 Next, we must decide whether plaintiff presented evidence to prove all of the elements necessary for establishing common law fraud, and whether the trial court erred when it denied Schaumburg Honda's motions for a directed verdict, judgment *n.o.v.* and a new trial. The presumption in the law is that all transactions are fair and honest, and fraud is not presumed. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005). Therefore, plaintiff must prove fraud by clear and convincing evidence. *Avery*, 216 Ill. 2d at 191.

¶ 60 In order to prove common law fraud, plaintiff had to establish: (A) that defendant made a false statement of material fact; (B) that defendant had knowledge that the statement was false; (C) that defendant intended that the statement induce the plaintiff to act; (D) that plaintiff relied upon the truth of the statement; and (E) that plaintiff suffered damages resulting from reliance on the statement. *Connick v. Suzuki Motor Co. Ltd.*, 174 Ill. 2d 482, 496 (1996).

¶ 61 Plaintiff alleged in his common law fraud count that Schaumburg Honda knowingly misrepresented to plaintiff that the car was in good working order. We must determine whether there is evidence which establishes that Schaumburg Honda knew that the car was

not in good working condition at the time the statement was made. Plaintiff's expert testified that the car had a latent defect at the time the car was manufactured, and that the defect did not present itself until the incident occurred on September 8, 2004. A latent defect is defined as one that is hidden or concealed; one not readily discoverable through reasonable and diligent inspection; one that could not have been discovered by the exercise of ordinary and reasonable care. *Board of Education of Maine Township High School District 207 v. International Insurance Co.*, 292 Ill. App. 3d 14, 19-20 (1997) (and cases cited therein). Based upon the plaintiff's expert's testimony that the defect was latent, Schaumburg Honda could not have known of the existence of the latent defect in the car, even with the exercise of reasonable care. Therefore, since the car's defect was latent, there is no evidence in the record that Schaumburg Honda had knowledge at the time the statement was made that the car had a latent defect, so Schaumburg Honda's statement that the car was in good working order could not have been knowingly false when made.

¶ 62 Plaintiff's second argument in support of his common law fraud claim is that Schaumburg Honda sold plaintiff the car with a warranty, but refused to repair the vehicle within the first three months or 3,000 miles as represented in the warranty. Plaintiff maintains that Schaumburg Honda's failure to repair the vehicle under the warranty was part of a scheme to defraud because Schaumburg Honda never intended to honor the warranty when it was issued.

¶ 63 Schaumburg Honda promised in its written warranty to pay for labor costs and parts if plaintiff's car experienced engine problems during the first three months or 3,000 miles. In

Illinois, the promissory fraud doctrine prevents a plaintiff from maintaining an action for fraud based on a fraudulent promise to perform a future act. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 309 (2002); *Goldberg v. Goldberg*, 103 Ill. App. 3d 584, 588 (1981). In *Miller v. Sutliff*, 241 Ill. 521 (1909), our supreme court explained the promissory fraud doctrine as follows:

> "If a promise is made to do something in the future and at the time it is not intended to perform the promise, that fact does not constitute a fraud in the law. If an intention not to perform constituted fraud, every transaction might be avoided where the facts justified an inference that a party did not intend to pay the consideration or keep his agreement. A mere breach of a contract does not amount to a fraud, and neither a knowledge of inability to perform, nor an intention not to do so, would make the transaction fraudulent." *Miller*, 241 Ill. at 526-27.

¶ 64 Here, Schaumburg Honda sold plaintiff a car with a warranty but refused to repair the car before it determined the cause of the car's engine problems and whether the car's engine problems were covered by the warranty. Schaumburg Honda's warranty was clearly a contract to perform future services for plaintiff's car, but Schaumburg Honda's breach of the promises in the warranty, whether because of an inability to perform or an intention not to perform, does not constitute fraud. *Miller*, 241 Ill. at 526-27.

¶ 65 However, an exception to the general rule exists where the plaintiff also proves that the act was part of a scheme or artifice to defraud. *Prime Leasing*, 332 Ill. App. 3d at 309;

Goldberg, 103 Ill. App. 3d at 588. Plaintiff's only evidence that Schaumburg Honda engaged in a scheme to defraud is that Schaumburg Honda did not fulfill its promise to repair the car. Illinois law does not allow a fraud claim when the evidence of intent to defraud consists of nothing more than unfulfilled or broken promises. See *Adult v. C.C. Services, Inc.*, 232 Ill. App. 3d 269, 271 (1992). Thus, standing alone, evidence that Schaumburg Honda failed to fulfill its promise to repair plaintiff's car is insufficient to make out a claim for promissory fraud. See *Adult*, 232 Ill. App. 3d at 271; *Association Benefit Services, Inc. v. Caremark RX, Inc.*, 493 F. 3d 841, 853 (2007).

¶ 66 Therefore, we find that plaintiff failed to present clear and convincing evidence (A) that Schaumburg Honda had knowledge, an essential element of a claim for common law fraud, that the car's engine had a latent defect at the time it sold the car, and (B) that Schaumburg Honda engaged in a scheme to defraud. Reviewing the jury's verdict in the light most favorable to plaintiff, we find that the plaintiff failed to present evidence that Schaumburg Honda had knowledge of the latent defect or engaged in a scheme to defraud, so the trial court erred when it denied Schaumburg Honda's motion for a directed verdict or judgment *n.o.v.* Finally, because we found that the trial court erred when it denied the motion for judgment *n.o.v.*, we need not address whether the trial court erred when it denied plaintiff's motion for a new trial and we reverse the verdict on the common law fraud count without a remand. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37 ("[w]hen the trial court has erroneously denied a motion for judgment *n.o.v.*, we will reverse the verdict without a remand").

¶ 67 C. Illinois Consumer Fraud Act

¶ 68 Next, Schaumburg Honda argues that plaintiff failed to present any evidence to prove that it violated the Illinois Consumer Fraud Act, and argues that the court's judgment was against the manifest weight of the evidence so it was entitled to a new trial.

¶ 69 "The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002).

¶ 70 Section 2 of the Act provides in pertinent part:

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact *** in the conduct of any trade or commerce are hereby declared unlawful." 815 ILCS 505/2 (West 2008).

¶ 71 The Consumer Fraud Act creates a cause of action different from the traditional common law tort of fraud and affords consumers greater protection than a common law action since the Act also prohibits any deception or a false promise. *Buechin v. Ogden Chrysler-Plymouth, Inc.,* 159 Ill. App. 3d 237, 249-50 (1987). In order to establish a violation of the Consumer Fraud Act, the plaintiff must prove: (1) a deceptive or unfair practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception, (3) the deception occurred in the course of conduct involving trade and commerce, (4) actual damages suffered by the

plaintiff that is a result of the deception. *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550 (2009); *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 283 (2006).

¶ 72 Here, the trial court found (A) that Schaumburg Honda's statement to the plaintiff that the car's engine problems were caused by over revving was a deceptive practice because the statement was made before Schaumburg Honda determined the cause of the car's engine problem; (B) that Schaumburg Honda intended that the plaintiff rely on the concealment; and (C) that the concealment occurred in the course of conduct involving trade or commerce.

¶ 73 Illinois case law holds that a claim of statutory consumer fraud can only be premised upon acts or statements made prior to the date of purchase, because plaintiff can recover damages under the statute only for injuries that were proximately caused by the consumer fraud. *Connick*, 174 Ill. 2d at 502; *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 509-10 (2005); *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 165 (2003); *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 656 (2001).

¶ 74 We find that Schaumburg Honda's statement that plaintiff's car repairs would not be covered under the warranty cannot be grounds for a consumer fraud claim because this statement was not made prior to the date of purchase or at the time of purchase, but when plaintiff experienced engine problems after the purchase date. Accordingly, plaintiff cannot prove that his injuries were proximately caused by a statement the defendant made prior to the date of purchase.

¶ 75 Plaintiff also alleged that Schaumburg Honda violated the Consumer Fraud Act when it failed to repair the car under the warranty. However, what plaintiff calls consumer fraud or

deception is simply Schaumburg Honda's failure to fulfill its contractual obligations. *Avery*, 216 Ill. 2d at 169. Therefore, plaintiff's claim that Schaumburg Honda breached its contractual promise to repair the car, without more, is not actionable under the Consumer Fraud Act. *Avery*, 216 Ill. 2d at 169.

¶ 76 Finally, plaintiff alleged in his complaint that defendant misrepresented the fact that the car was in good working order in order to induce plaintiff to purchase the car. A plaintiff suing under the Consumer Fraud Act may recover for intentional, negligent or even innocently made misrepresentations or omissions. *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.*, 197 Ill. App. 3d 948, 953 (1990); see also *Cripe v. Leiter*, 184 Ill. 2d 185, 191 (1998). However, the Consumer Fraud Act is not intended to be used as a vehicle for transforming nondeceptive and nonfraudulent statements into actionable ones. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 122 (2006); *Kellerman v. Mar-Rue Realty & Builders*, *Inc.*, 132 Ill. App. 3d 300, 306 (1985). Plaintiff must present evidence establishing a deceptive act or an unfair practice in order for a defendant to be held liable for violating the Act. *Stern v. Norwest Mortgage*, Inc., 284 Ill. App. 3d 506, 513 (1996). See *Hoke v. Beck*, 224 Ill. App. 3d 674, 679 (1992) (a representation known to be false or made in culpable ignorance of its truth or falsity is fraudulent); *Gordon v. Dolin*, 105 Ill. App. 3d 319, 329 (1982).

¶ 77 In this case, the plaintiff argued that defendant's representation that the car was in good working order was a misrepresentation in violation of the Consumer Fraud Act. Plaintiff's expert testified that the car had a latent defect since its manufacture which did not present

itself until the incident occurred on September 8, 2004. Defendant could not have discovered the latent defect through a normal inspection and plaintiff presented no evidence that defendant had a duty to undertake a complicated, lengthy and costly investigation for hidden or latent defects prior to selling the car. See *Harkala v. Wildwood Realty, Inc.*, 200 Ill. App. 3d 447, 454 (1990).

¶ 78 Therefore, we find that because Schaumburg Honda could not have discovered the car's latent defect through normal inspection, its representation that the car was in good working order was not knowingly false when made nor was it made with culpable ignorance of its truth or falsity. Accordingly, the trial court's judgment for plaintiff was against the manifest weight of the evidence and the court erred when it denied Schaumburg Honda's motion for a new trial.

¶ 79

V. Damages

¶ 80 On the issue of damages, Schaumburg Honda contends that plaintiff cannot prove that he suffered any damages because Kevin was the true owner of the car and, therefore, plaintiff cannot claim any damages which Kevin might have sustained. Plaintiff responds that Schaumburg Honda forfeited this issue because it did not raise this argument in the trial court and is raising it here for the first time on appeal. It is well settled that an argument not raised in the trial court may not be raised for the first time on appeal. *Greenwich Insurance Co. v. RPS Products, Inc.*, 379 Ill. App. 3d 78, 85 (2008). Schaumburg Honda failed to raise the issue in the trial court regarding whether plaintiff or Kevin was the true owner of the car.

Therefore, this argument has been forfeited and will not be considered in this appeal.

¶ 81 Schaumburg Honda next argues that the jury's verdict and the trial court's judgment entered thereon were based on an incorrect measure of damages and should be vacated for a new trial or a remittitur. Schaumburg Honda contends that an accurate measure of damages for breach of warranty is the reasonable expense of the necessary repairs, which was $4,850.33.[2]

¶ 82 Plaintiff responds that the diminished value of the property is a proper measure of damages for breach of warranty, that plaintiff's expert testified that the car's value at the time of sale was $11,497.38, and that the jury's award of $11,480 was consistent with the expert's assessment of the car's value.

¶ 83 The assessment of damages is a question of fact for the jury. *F.L. Walz, Inc. v. Hobart Corp.*, 224 Ill. App. 3d 727, 733 (1992). A reviewing court will set aside a jury verdict only if it is against the manifest weight of the evidence, that is, only if the jury's findings are unreasonable, arbitrary and not based on the evidence. *Redmond v. Socha,* 216 Ill. 2d 622, 651 (2005). Further, the practice of ordering a remittitur of excessive damages should only be employed when a jury's award falls outside the range of fair and reasonable compensation, appears to be the result of passion or prejudice, or is so large that it shocks the judicial conscience; it should not be ordered if the award falls within the flexible range of

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[2]Schaumburg Honda stated that plaintiff's actual damages were $4,845.32. We find that the three invoices in the record from Sound Performance, Opel Engineering and Schaumburg Honda establish that plaintiff's total expenses were $4,850.33.

conclusions which can reasonably be supported by the facts. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 412 (1997). Therefore, we will not reverse the damages awarded unless they were not based on the evidence.

¶ 84 While it is not necessary that damages for breach of warranty be calculated with mathematical precision, basic contract principles require that damages be proved with reasonable certainty. *Razor*, 222 Ill. 2d at 106-07. The diminished value of a product due to defects associated with the product is a compensable injury in consumer fraud and breach of warranty causes of action. *Dewan v. Ford Motor Co.*, 363 Ill. App. 3d 365, 369 (2005).

¶ 85 In this case, plaintiff's expert stated in his inspection report that the value of plaintiff's vehicle with the defect at the time of sale was $11,497.58 and that the diminished value of the vehicle was $10,912.50. The monetary value of the jury's award for the breach of warranty count was $11,480, which was within the range of valuation presented by plaintiff's expert for the value of the vehicle at the time of sale and the diminished value of the vehicle due to the defect.

¶ 86 Therefore, we find that there was sufficient evidence in the record to support the jury's verdict of $11,480 for breach of warranty. Furthermore, we cannot say that the award was outside the limits of fair and reasonable compensation, resulted from passion or prejudice, or was so large as to shock the judicial conscience and, therefore, we will not overturn the jury's damage award.

¶ 87 Schaumburg Honda further argues that the jury awarded no actual damages for common law fraud, and punitive damages were, therefore, improper. We note that Illinois has a long line

of cases which hold that an award of punitive damages in the absence of actual or compensatory damages is improper. *Mitchell v. Elrod*, 275 Ill. App. 3d 357, 362 (1995) (and cases cited therein). However, Schaumburg Honda's punitive damages issue has become moot because we have reversed the judgment on the common law fraud count. Accordingly, we vacate the trial court's award of punitive damages.

¶ 88 In addition, because we are reversing the judgment on the consumer fraud count, the award of damages for the consumer fraud count is also vacated.

¶ 89 VI. Attorney Fees

¶ 90 Schaumburg Honda argues (A) that the attorney fees were improper because the trial court awarded plaintiff attorney fees for work that was done on the 2005 case, and (B) that the award of attorney fees and costs for $81,052.66 was excessive because it was not commensurate with plaintiff's actual damages of $4,850.33. The trial court's decision to award attorney fees are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Bussey*, 108 Ill. 2d 286, 299 (1985).

¶ 91 First, Schaumburg Honda contends that the trial court erred when it awarded plaintiff attorney fees for work that was done on the 2005 case. The trial court found that the instant lawsuit did not start in 2008, but picked up where the 2005 case left off. The court made note of the fact that all discovery that was performed in the 2005 case was used in the 2008 case and that there was no evidence of any duplicative work. The trial court concluded that the work that was performed in the 2005 case contributed to the plaintiff's success in this, the

2008 case.

¶ 92 Schaumburg Honda has not cited any cases which bar a trial court from awarding attorney fees for work performed by attorneys in a prior action where the work that was done in the prior case was used in the refiled case. Therefore, we find that the trial court did not abuse its discretion when it awarded plaintiff attorney fees for discovery that was performed in the 2005 case but used in the refiled 2008 case.

¶ 93 Schaumburg Honda next argues that the award of attorney fees and costs was excessive because it was not commensurate with plaintiff's actual damages. The Magnuson-Moss Warranty Act permits the trial court to award attorney fees and costs to the prevailing party. 15 U.S.C. § 2310(d)(2). Under the Magnuson-Moss Act, the purpose of awarding attorney fees is to provide consumers with access to legal assistance so that they might pursue a remedy for their injuries involving inexpensive consumer products. *Cannon v. William Chevrolet/GEO, Inc.*, 341 Ill. App. 3d 674, 686 (2003). The award of attorney fees does not need to be proportionate to any award of money damages. *Cannon*, 341 Ill. App. 3d at 686. It is for the trial court to determine a reasonable fee, if any, in light of all the particular facts and circumstances of each case. *Cannon*, 341 Ill. App. 3d at 686.

¶ 94 However, a plaintiff is generally entitled to only those fees incurred on his or her prevailing claims that allow for attorney fees. *Cannon*, 341 Ill. App. 3d at 687. When a plaintiff fails to prevail on claims that are distinct in all respects from the prevailing claims, the hours spent on unsuccessful claims may be excluded in considering the amount of reasonable attorney fees. *Cannon*, 341 Ill. App. 3d at 687 (citing *Hensley v. Eckerhart*, 461 U.S. 424,

435 (1983). We note that both the Magnuson-Moss Act and the Consumer Fraud Act allow a successful plaintiff to recover attorney fees (15 U.S.C. § 2310(d)(2); 815 ILCS 505/10a(c)), but there is generally no recovery of attorney fees for common law fraud. See *Grate v. Grzetich*, 373 Ill. App. 3d 228, 231 (2007). In the trial court, the plaintiff succeeded on all three counts, but the trial court did not distinguish the fees for each count. Here, in light of our decision to reverse the judgments on the consumer fraud and the common law fraud actions, the only remaining successful claim that allows for attorney fees is the breach of warranty count.

¶ 95 However, as the *Cannon* court further explained:

> "In [some] cases the plaintiff's claims for relief involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead, [the court] should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Cannon*, 341 Ill. App. 3d at 687 (quoting *Hensley*, 461 U.S. at 435).

¶ 96 During the hearing on plaintiff's fee petition, the trial court noted that all of plaintiff's claims arose out of the same set of operative facts, and it would be difficult to differentiate between the work done on the statutory claims and the work done on the non-statutory claim. Therefore, because the record shows that the trial court followed the test as outlined in

Cannon in determining the appropriate attorney fees, we find that the trial court did not abuse its discretion when it awarded attorney fees to plaintiff.

¶ 97 Conclusion

¶ 98 We hold that (1) Schaumburg Honda did not make an offer of proof in the trial court, and, therefore, forfeited review of the trial court's exclusion of the opinion testimony of its employees; (2) the evidence was sufficient to establish that Schaumburg Honda breached its written warranty where plaintiff's expert provided unrebutted testimony that the car's failure was due to a defect in the car and that the car's driver could not have caused or contributed to the car's failure, but the evidence was insufficient to support the judgments for common law fraud and consumer fraud because plaintiff's expert testified that the car had a latent defect and plaintiff failed to provide any evidence to establish that Schaumburg Honda knew of the defect or that it could have discovered the defect through a normal inspection; (3) the evidence was sufficient to support the damages awarded for Schaumburg Honda's breach of its written warranty; and (4) the trial court did not err when it awarded plaintiff attorney fees because plaintiff's claims for relief involve a common core of operative facts. Therefore, we affirm the trial court's judgment on the breach of warranty count and the award of attorney fees, but we reverse the judgments on the common law fraud and the consumer fraud counts.

¶ 99 Affirmed in part and reversed in part.