COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP962 **Cir. Ct. No. 2009CV2430**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RANDAL M. SCHWEIGER,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

KIA MOTORS AMERICA, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. This case arises from two Wisconsin Lemon Law claims and a federal Magnuson-Moss Warranty Act claim that Randal Schweiger brought against Kia Motors America, Inc. A jury found in favor of Schweiger on one of the Lemon Law claims and on the Warranty Act claim. The

circuit court dismissed the remaining claim. Kia appeals the resulting judgment, and Schweiger cross-appeals.

¶2 Kia's appeal raises five issues:

(1) whether Kia's offer of a refund barred Schweiger's claims;

(2) whether Kia was entitled to judgment notwithstanding the verdict because Schweiger failed to provide evidence of a "nonconformity" in the vehicle that remained unrepaired during the first year after delivery;

(3) whether the jury's damages finding in the special verdict rendered the entire verdict invalid;

(4) whether Kia was entitled to a new trial because the special verdict form was improper; and

(5) whether the circuit court erred in awarding Schweiger his full attorney's fees and costs.

We resolve all five of these issues against Kia. Schweiger raises two issues in his cross-appeal:

(1) whether the circuit court erred in dismissing the remaining Lemon Law claim; and

(2) whether the circuit court erred in reducing the amount of the jury's damages finding.

We resolve both issues against Schweiger. Accordingly, we affirm the circuit court's judgment.

BACKGROUND

¶3 We provide limited facts for purposes of background but reference additional facts as needed in our Discussion section below. The background facts are undisputed unless otherwise indicated.

¶4 Schweiger purchased a 2008 Kia Spectra EX on behalf of his step-daughter, April Kirichkow, who was unable to make the purchase. He financed the entire cost of the vehicle, including the purchase price, taxes, fees, and a service contract at an interest rate of zero percent.

¶5 Kirichkow experienced a problem starting the vehicle on a number of occasions, first in October 2008, and several more times during the summer of 2009. The Kia dealership was unable to remedy the starting problem after replacing various components and eventually told Kirichkow in September 2009 that she should not have a starting problem if she maintained at least one-quarter tank of gasoline in the vehicle.

¶6 Schweiger sent a Wisconsin Lemon Law claim notice to Kia, demanding a refund calculated in accordance with the Lemon Law. Kia responded in writing, agreeing to provide a refund. However, the parties disputed the proper calculation of the amount of the refund.

¶7 Schweiger filed his two Wisconsin Lemon Law claims and his Magnuson-Moss Warranty Act claim against Kia. Kia's answer to the claims included as an affirmative defense that Kia offered a refund complying with the Lemon Law and the Magnuson-Moss Warranty Act, thus barring Schweiger's claims.

¶8 For convenience, we refer to Schweiger's two Wisconsin Lemon Law-based claims as his "failure-to-refund" claim and his "failure-to-repair" claim. We recognize that the parties dispute the nature of what we call the "failure-to-refund" claim and that Schweiger maintains that the allegations in this claim stated a breach of contract claim. Our shorthand terms are not intended to carry any legal significance.

¶9 The circuit court concluded that Schweiger's failure-to-refund claim should be tried separately from his other two claims in order to avoid jury confusion. The court thus held a jury trial on Schweiger's failure-to-repair claim and the Magnuson-Moss Warranty Act claim. In a special verdict, the jury found in favor of Schweiger on Kia's liability for both claims, and further found that the value of the vehicle was diminished by $7,000 because of a defect.

¶10 In ruling on post-verdict motions, the circuit court denied Kia's motions for judgment notwithstanding the verdict and for a new trial. The court entered a partial judgment on the jury verdict. As part of that judgment, the court awarded Schweiger his attorney's fees and costs and reduced the jury's damages award from $7,000 to $4,307.

¶11 Schweiger moved for summary judgment on his remaining claim, the failure-to-refund claim.[1] Kia opposed the motion and moved for summary judgment in its favor. As part of its motion, Kia argued that it was entitled to judgment on *all* of Schweiger's claims, based on its affirmative defense that Schweiger's claims were barred by Kia's refund offer.[2]

[1] Schweiger titled his motion a "motion for judgment," but we treat the motion as one for summary judgment because it is plain from Schweiger's brief in support of that motion that he relied on evidentiary materials in the record. The circuit court and Kia similarly treated the motion as one for summary judgment.

[2] Kia informs us that it did not submit evidence of its affirmative defense to the jury because that would have required the jury to hear prejudicial evidence of a pre-suit settlement offer. Kia explains that, before trial, it moved to have its affirmative defense tried separately, but the court declined to grant the motion. As far as we can discern, Kia is not challenging the court's decision on this motion. Therefore, it might be said that Kia has forfeited its affirmative defense, except as to the claim that was not tried. Even if we assume without deciding that Kia preserved its defense as to all three of Schweiger's claims, the defense fails for the reasons explained starting at ¶14 in the text.

¶12 The circuit court granted summary judgment to Kia on Schweiger's failure-to-refund claim, dismissing that claim based on the doctrines of election of remedies and unjust enrichment. The court denied Kia's motion on the two remaining claims that were tried. The court entered judgment accordingly.[3]

DISCUSSION

Kia's Appeal

¶13 As indicated above, Kia's appeal presents five issues:

(1) whether Kia's refund offer barred Schweiger's claims;

(2) whether Kia was entitled to judgment notwithstanding the verdict because Schweiger failed to provide evidence of a "nonconformity" in the vehicle that remained unrepaired during the first year after delivery;

(3) whether the jury's damages finding in the special verdict rendered the entire verdict invalid;

(4) whether Kia was entitled to a new trial because the special verdict form was improper; and

(5) whether the circuit court erred in awarding Schweiger his full attorney's fees and costs.

For the reasons explained below, we resolve each issue against Kia.

[3] We find no express statement by the circuit court in the record that it denied Kia's motion for judgment in Kia's favor on the two claims that were tried. We conclude, however, that the only reasonable interpretation of the record is that the court denied that motion because there is no indication that the court vacated its earlier partial judgment entered on the jury verdict on those two claims. To the contrary, a hearing transcript shows that, immediately after the court granted summary judgment to Kia on Schweiger's failure-to-refund claim, the court acknowledged the earlier partial judgment on the jury verdict and asked Kia to draft a judgment to "supplement that judgment," meaning the partial judgment. Kia agreed to this procedure.

1. Kia's Refund Offer

¶14 Kia argues that its refund offer bars all of Schweiger's claims. Schweiger disagrees. The crux of the parties' dispute is whether Kia's offer complied with the statutory standard for calculating a refund under the Wisconsin Lemon Law, WIS. STAT. § 218.0171 (2011-12).[4]

¶15 Kia asserts, and we agree, that the parties' dispute can be resolved as a matter of summary judgment that we may decide de novo because it involves only undisputed facts and may be determined as a matter of law. We need not repeat all of summary judgment methodology here. It is enough to state that summary judgment is appropriate when there is no genuine dispute of material fact and a party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) and (6).

¶16 While we agree with Kia on the standard of review, we disagree that Kia has shown that its refund complied with the statutory standard in the Wisconsin Lemon Law. Stated another way, in terms of summary judgment methodology, we conclude that there is no genuine dispute of material fact preventing summary judgment in Schweiger's favor on this issue.

¶17 The record shows that Kia offered Schweiger a refund of $3,306.24. In response, Schweiger wrote Kia explaining that Kia's refund calculation failed to

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. Wisconsin's Lemon Law statute has not changed in any pertinent respect since the time that Schweiger purchased the vehicle. In Kia's briefing, however, Kia sometimes appears to refer to an outdated version of the statute with different numbering. *See* WIS. STAT. § 218.015(2) (1997-98). As far as we can tell, Kia's references to the outdated statute are unintentional and inconsequential.

include the $1,301 cost of the service contract that Schweiger purchased and financed. Kia declined to increase the offered refund.

¶18 The pertinent statutory provision states that the refund is calculated as follows: The vehicle manufacturer must

> refund to the consumer and to any holder of a perfected security interest in the consumer's motor vehicle, as their interest may appear, the full purchase price plus any sales tax, finance charge, amount paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use.

WIS. STAT. § 218.0171(2)(b)2.b.

¶19 Kia does not dispute that the cost of a service contract is an item to be included in the refund calculation under the statute. Kia argues, however, that its calculation of the refund included the service contract Schweiger purchased. We disagree.

¶20 Kia offers the following calculation in its briefing to justify the $3,306.24 refund it offered:

Vehicle purchase price:	$17,231.00
Sales tax:	557.26
Title/registration fees:	168.00
Manufacturer rebate:	- 500.00
Allowance for mileage used:	- 1,089.86
Amount owed to lender:	- 13,060.16
Net refund due to Schweiger:	$ 3,306.24

Schweiger, in contrast, offers this calculation:

Vehicle purchase price:	$17,231.00
Sales tax:	557.26
Title/registration fees:	168.00

Service contract:	1,301.00
Manufacturer rebate:	- 500.00
Allowance for mileage used:	- 1,089.86
Amount owed to lender:	- 13,060.16
Refund due Schweiger:	$ 4,607.24

¶21 Thus, the parties' refund calculations differ by exactly $1,301, the price Schweiger paid for the service contract. The reason for this discrepancy, as far as we can discern from the parties' briefing and the record, is simply that Kia omitted, and continues to omit, the cost of the service contract from its calculation.

¶22 Kia argues that its "proposed payoff to the lender [$13,060.16] would by definition refund the cost of the service contract." Similarly, Kia argues that, "[b]y including the payoff to the [lender] in Kia's [refund] calculation, the cost of the service contract was compensated." We see no logical basis for these arguments. Schweiger does not dispute the amount owed to the lender or, for that matter, any of the other underlying amounts. The only apparent reason for the discrepancy between the parties' calculations is that Kia's calculation simply omits the service contract.

¶23 We find the following summary of Kia's argument in its reply brief to be particularly puzzling:

> While it is true the amount paid for the service contract would have to have been directly reimbursed to Mr. Schweiger had he paid for the vehicle in cash (as there would be no payment to the lienholder), Mr. Schweiger did not pay cash for the vehicle and did not pay cash for the service contract.
>
> In juxtaposition to the scenario painted by Schweiger, Schweiger rolled the amount of the service contract into the amount financed and financed it at 0%, thereby paying no finance charges on the service contract. By including the payoff to the lienholder in Kia's

> repurchase calculation, the cost of the service contract was compensated.

We find this argument illogical because, contrary to what Kia seems to assume, the cost of the service contract was not the only cost "rolled … into the amount financed … at 0%." Rather, it is undisputed that *all* of the costs associated with the vehicle's purchase—including the purchase price of the vehicle, taxes, fees, and the service contract—were rolled into the amount financed at a zero percent interest rate. Thus, we see no justification for Kia to single out the service contract for separate treatment in this argument. If there could be some logical justification, then the fault lies with Kia for failing to identify it with a coherent argument supported by relevant record citations.

¶24 Accordingly, we conclude that Kia's refund offer did not comply with the statutory standard in the Wisconsin Lemon Law, WIS. STAT. § 218.0171(2)(b)2.b. Therefore, Kia's offer does not bar Schweiger's claims.

2. Kia's Motion for Judgment Notwithstanding the Verdict—Evidence of "Nonconformity" that Remained Unrepaired During the First Year After Delivery

¶25 Kia argues that the circuit court erred in denying its motion for judgment notwithstanding the verdict. More specifically, Kia argues that the court should have granted its motion because there was (1) no evidence of a "nonconformity" and (2) no evidence that the alleged nonconformity remained unrepaired during the first year after delivery of the vehicle.

¶26 Kia relies on case law stating that "[a] motion for JNOV [judgment notwithstanding the verdict] does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are sufficient to permit recovery as a matter of law." *See* ***Logterman v. Dawson***, 190 Wis. 2d 90, 101,

526 N.W.2d 768 (Ct. App. 1994) (citation omitted). We agree with Schweiger, however, that Kia's particular arguments go to the sufficiency of the evidence. We thus limit our discussion in the remainder of this section to sufficiency of the evidence.

¶27 Our review of a jury's verdict for sufficiency of the evidence is highly deferential:

> Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding.
>
> In applying this narrow standard of review, th[e] court considers the evidence in a light most favorable to the jury's determination. We do so because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. To that end, appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. If we find that there is "any credible evidence in the record on which the jury could have based its decision," we will affirm that verdict. Similarly, if the evidence gives rise to more than one reasonable inference, we accept the particular inference reached by the jury. Th[e] court will uphold the jury verdict "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing."

Morden v. Continental AG, 2000 WI 51, ¶¶38-39, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted); *see also* WIS. STAT. § 805.14(1).

¶28 The parties agree that the elements that Schweiger needed to prove are set forth in the Wisconsin Civil Jury Instructions. Those elements are the following:

> [1] [that] the vehicle did not conform to an applicable express warranty, and

> [2] that the nonconformity was reported to the manufacturer or its authorized dealer before (date), and
>
> [3] that the vehicle was made available for repair of the nonconformity on or before (date), and
>
> [4] that the nonconformity was not repaired by the manufacturer or its authorized dealer, and
>
> [5] that the nonconformity continues after expiration of … (one year).

WIS JI—CIVIL 3304 (footnote omitted); *see also* WIS. STAT. § 218.0171(2). Kia's arguments relate to the first, fourth, and fifth elements.

¶29 We first address Kia's argument that there was no evidence of a "nonconformity" (the first element). We then turn to Kia's argument that there was no evidence that a nonconformity remained unrepaired during the first year after delivery of the vehicle (the fourth and fifth elements).[5]

[5] Kia's arguments make clear that Kia concedes that, if the evidence was sufficient to support the jury's verdict on Schweiger's Lemon Law claim, it was also sufficient to support the jury's verdict on Schweiger's Magnuson-Moss Warranty Act claim. Therefore, we conduct no separate analysis under the Warranty Act. The Wisconsin Civil Jury Instructions state the elements of a Warranty Act claim as follows:

> 1. that (defendant) supplied (plaintiff) with a (name of consumer product) that was defective or that malfunctioned;
>
> 2. that the defect or malfunction was covered by warranty;
>
> 3. that (plaintiff) afforded (defendant) … a reasonable opportunity to repair the defect or malfunction;
>
> 4. that (defendant) failed to repair the (name of consumer product) at no charge to (plaintiff) within a reasonable time.

WIS JI—CIVIL 3310; *see also* 15 U.S.C. §§ 2301 et seq.

a. "Nonconformity"

¶30 Kia argues that Schweiger failed to present evidence of a "nonconformity." "Nonconformity" means, as applicable here, "a condition or defect which substantially impairs the use, value or safety of a motor vehicle, and is covered by an express warranty applicable to the motor vehicle or to a component of the motor vehicle." WIS. STAT. § 218.0171(1)(f); *see also* WIS JI—CIVIL 3301.

¶31 According to Kia, Schweiger failed to present evidence of a nonconformity because: Schweiger failed to introduce evidence of the type of defect covered by Kia's warranty, namely a defect in "material or workmanship"; Schweiger failed to introduce a copy of Kia's warranty into evidence or otherwise present the terms of the warranty to the jury; and Schweiger failed to present evidence that the alleged starting problem impaired the vehicle's use, value, or safety. For the reasons that follow, we are not persuaded by any of these arguments.

i. Evidence of Defect in Material or Workmanship

¶32 We begin with Kia's argument that Schweiger failed to introduce evidence of the type of defect covered by Kia's warranty, namely a defect in "material or workmanship." The evidence before the jury included the following.

¶33 Service records for Schweiger's vehicle showed that Kirichkow reported a starting problem to the dealership in October 2008, and six additional times during the summer of 2009. In some of those instances, the dealership documented that one or more components were faulty, malfunctioning, or had failed. The dealership repeatedly attempted to fix the starting problem, including

by replacing the fuel pump, the fuel pump relay, the fuel tank, the charcoal canister, and the "PCM."[6] The dealership considered replacement of these components to be covered by Kia's warranty. In September 2009, the dealership advised Kirichkow that it had fixed everything it could and that Kirichkow should not have any problems if she kept her fuel tank at least one-quarter filled.

¶34 Kirichkow confirmed in her testimony that she first experienced a starting problem in October 2008. Over the winter of 2008-09, she had a practice of keeping the fuel tank near or above the half-a-tank level to try to avoid "frozen fuel lines." She did not have any starting problems during that period.

¶35 Kirichkow further testified, consistent with the service records, that there were multiple instances in which the vehicle would not start in the summer of 2009. As to some of the instances, Kirichkow specifically recalled that the fuel tank was about one-eighth full.

¶36 After September 2009, Kirichkow generally tried to maintain at least one-quarter of a tank of gas, as the dealership advised. However, she continued to have problems starting the vehicle at times when the tank was only about one-eighth full.

¶37 Kia's dealership's service manager testified that needing to keep one-quarter of a tank of fuel in a 2008 Kia Spectra was not a "normal condition." He further testified that he knew of nothing in the vehicle owner's manual that indicated a need to keep the fuel level above a certain point to avoid starting

[6] Kia's dealership's service manager testified that "PCM" refers to the "power control module," which is "basically a computer on the car that activates fuel and ignition to the vehicle."

problems. To his knowledge, Kia never advised owners of such a need. He conceded that there was no indication that the fuel light was on during any of the times that the vehicle was brought in for service. He also conceded that it is reasonable for a customer to expect that a vehicle will start without a problem if the low fuel light is not on.

¶38 Schweiger's automotive expert testified that he tested the vehicle and confirmed at least one "no-start" episode with the fuel level between one-eighth and one-quarter of a tank. During the test, the fuel light was not on. The automotive expert further testified that it would be reasonable to assume that the vehicle should run when the fuel light is not on, and that the starting problem was a "defective condition" for a 2008 Kia Spectra under warranty.

¶39 Schweiger's valuation expert testified that he had difficulty starting the vehicle when the fuel level was at about one-eighth of a tank and the low fuel light was not on. The valuation expert further testified that an ordinary consumer would expect a vehicle to start under such conditions; that it is not reasonable to expect an ordinary consumer to keep the fuel tank at least one-quarter full to avoid starting problems; and that he was unaware of any automobile manufacturer that advises consumers to keep the fuel tank at least one-quarter full to avoid starting problems.

¶40 The vehicle's manual states that there are approximately 2.25 gallons of fuel left in the tank when the fuel light comes on. Nothing in the manual indicates that the vehicle may be difficult to start if the fuel level is low.

¶41 Based on this evidence, we conclude that a jury could reasonably infer that the vehicle would not reliably start when the fuel tank was less than one-

quarter full and that this problem with the vehicle was due to an underlying defect in material or workmanship.

¶42 The details of Kia's argument to the contrary are somewhat difficult to understand. If Kia is arguing that Schweiger had to show which particular component or components of the vehicle were defective in order to show a defect in material or workmanship, that argument lacks merit under ***Dobbratz Trucking & Excavating, Inc. v. PACCAR, Inc.***, 2002 WI App 138, 256 Wis. 2d 205, 647 N.W.2d 315. Indeed, although the parties do not cite ***Dobbratz***, the case is instructive and supports a conclusion that there was more than sufficient evidence of a defect in material or workmanship in Schweiger's case.

¶43 ***Dobbratz*** involved a dump truck with a "stationary steering" problem that the dealership was repeatedly unable to remedy and asserted was "normal." ***Id.***, ¶¶3-7. An expert testified that he had "'never seen another dump truck not be able to steer when stationary on concrete' and that the truck's steering problems were 'consistent with a malfunction.'" ***Id.***, ¶12. Additionally, there was testimony that a dump truck like the one at issue "should be able to stationary steer and that a failure to do so indicates that the truck 'doesn't conform to the specification.'" ***Id.***

¶44 We concluded in ***Dobbratz*** that this testimony provided sufficient evidence for the jury to conclude that the truck's inability to stationary steer was "caused by a defect in materials or workmanship." ***Id.*** We explained that, "[a]lthough it is true that neither the dealership mechanics nor [the plaintiff's] expert were able to pinpoint a specific component that was defective, this was not required." ***Id.*** A Lemon Law plaintiff is not required to "identify the exact cause of the vehicle's malfunction before a jury may infer there is a warranty defect."

Id. (citing ***Vultaggio v. General Motors Corp.***, 145 Wis. 2d 874, 882-83, 429 N.W.2d 93 (Ct. App. 1988)).

¶45 Kia points to other evidence that might have supported a jury finding that there was no defect in the vehicle's material or workmanship. In particular, Kia points to testimony by its service manager that the vehicle's failure to start when "low on gas" is not a "defect," and testimony by a Kia consumer affairs manager that he found no "defects, nonconformities or problems" upon inspection of the vehicle. However, as indicated above, the presence of evidence supporting a verdict that the jury could have reached, but did not reach, is not the test for sufficiency of the evidence. *See* ***Morden***, 235 Wis. 2d 325, ¶39.

¶46 Kia also argues that the starting problem was not caused by any defect in the vehicle but "by Kirichkow keeping too little gas in the vehicle." This argument does not come to grips with the evidence that the vehicle had starting problems even when the tank was at least one-eighth full and the evidence that the vehicle should not have required one-quarter of a tank of gas, or more, in order to reliably start.

ii. Evidence of Warranty's Terms

¶47 We turn to Kia's argument that Schweiger failed to introduce a copy of Kia's warranty into evidence or otherwise present specific terms of the warranty to the jury. Kia argues that, without evidence of the warranty's terms, Schweiger "could not possibly have established a violation" of the Lemon Law or Magnuson-Moss Warranty Act. We disagree because nothing in Kia's arguments shows that there was any dispute before the jury as to the content of the warranty or as to the categories of defects covered by the warranty. If there was any question or confusion in this regard, Kia fails to provide record cites showing it or showing

that Kia timely raised this issue in the circuit court. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (failure to timely raise an argument in the circuit court forfeits the argument on appeal); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments). Moreover, as indicated above, the jury heard evidence that, in Kia's repeated attempts to fix the starting problem, Kia replaced various components that it considered to be covered by Kia's warranty. In context, the jury could have reasonably inferred from this evidence that the underlying cause of the starting problem was due to one or more warranted components that Kia failed to adequately fix or replace.

iii. Substantial Impairment of Use, Value, or Safety

¶48 Kia's final argument as to alleged insufficiency of evidence of a nonconformity is that Schweiger failed to present evidence that the alleged starting problem impaired the vehicle's use, value, or safety. We reject this argument and conclude, based on the evidence already described, that a jury could reasonably infer that the underlying defect that caused the starting problem substantially impaired the vehicle's use, value, or safety. The jury could have drawn this inference from the evidence by applying common knowledge and common sense. Moreover, even if more was required, Schweiger's valuation expert testified that the starting problem diminished the value of the vehicle by twenty-five percent from the purchase price.

¶49 For all of the reasons stated, we are not persuaded by Kia's argument that the evidence was insufficient to show a nonconformity. We turn to Kia's argument that there was no evidence that the nonconformity remained unrepaired during the first year after delivery of the vehicle.

b. Nonconformity Remained Unrepaired

¶50 Kia's argument regarding the insufficiency of evidence that the nonconformity remained unrepaired is similarly unpersuasive. Of the evidence already described, we briefly review the most pertinent.

¶51 It is undisputed that Schweiger took delivery of the vehicle in March 2008. Kirichkow reported a starting problem with the vehicle to the dealership in October 2008 and six times during the summer of 2009. Over the winter of 2008-09, Kirichkow had a practice of keeping the fuel tank near the half-a-tank level, and did not have any starting problems during that period. After September 2009, when the dealership indicated that it had fixed everything that it could, Kirichkow generally tried to maintain at least one-quarter of a tank of gas. However, she continued to have problems starting the vehicle at times when the tank was only about one-eighth full. In addition, Schweiger's experts found a starting problem when testing or inspecting the vehicle.

¶52 We conclude that the evidence was sufficient for the jury to reasonably infer that the underlying defect causing the starting problem existed since at least October 2008 and that Kia never repaired the defect. Therefore, it is apparent that the jury could have reasonably made the more limited inference that the defect remained unrepaired during the first year after delivery of the vehicle.

¶53 Kia argues that, given that Kirichkow experienced no starting problems between October 2008 and June 2009, and that no witness specifically testified that the October 2008 starting problem had the same cause as the 2009 starting problems, there is "no evidence" that a defect in the vehicle was unrepaired during the first year after delivery. We disagree. The jury could have reasonably found that there was a single starting problem, caused by the same

underlying defect or set of defects, and that Kirichkow avoided that problem between October 2008 and June 2009 by maintaining at least one-quarter of a tank of gas in the vehicle during that period.

¶54 For all of the reasons stated, we reject Kia's argument that there was no evidence of a nonconformity that remained unrepaired during the first year after delivery of the vehicle. We therefore further conclude that Kia's arguments for judgment notwithstanding the verdict, which are actually arguments as to sufficiency of the evidence, must fail.

3. Jury's Damages Finding—Effect on the Entire Verdict

¶55 Kia argues that the circuit court should have granted its motion for a new trial based on the jury's damages finding of $7,000. Kia points out that the circuit court reduced the damages award to $4,307 to conform to the evidence. Without explaining further, Kia baldly asserts that the jury's damages finding thus "calls into question the accuracy and reasonableness of the verdict as a whole as well as the jury's understanding of the law." We reject this argument as unsupported by any law or facts. Kia provides a string cite of three cases, but none of those cases involve the question of whether a jury's unsupported or insufficiently supported damages finding renders other answers given to questions in a special verdict invalid or requires reversal for a new trial on those other questions. Rather, those cases simply address whether the evidence of damages was too speculative or otherwise insufficient to support a damages award. *See* ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977); ***Novo Indus. Corp. v. Nissen***, 30 Wis. 2d 123, 131, 140 N.W.2d 280 (1966); ***DeSombre v. Bickel***, 18 Wis. 2d 390, 398-99, 118 N.W.2d 868 (1963). Indeed, in ***Pleasure***

Time, the remedy for the unsupported damages award was "a new trial *limited to the issue of damages*." *See* ***Pleasure Time***, 78 Wis. 2d at 388 (emphasis added).

4. New Trial Based on Special Verdict Form

¶56 Kia next argues that the circuit court should have granted Kia's motion for a new trial because the special verdict form was improper. Kia points out that, although the Wisconsin Civil Jury Instructions state five elements for Schweiger's failure-to-repair Lemon Law claim, the special verdict form that the circuit court used states only two questions.

¶57 We recite the five elements from WIS JI—CIVIL 3304 in ¶28 above. The special verdict form the jury received was also based on the Wisconsin Civil Jury Instructions, in particular based on questions from WIS JI—CIVIL 3300. Specifically, the two questions that the jury received were as follows:

> Did Randal Schweiger's vehicle have at least one nonconformity?
>
> Did Kia or its authorized dealers fail to repair any nonconformity in Randal Schweiger's vehicle before the expiration of one year after delivery?

¶58 Kia argues that the special verdict form neglected to ask the jury whether the alleged defect was covered by warranty, which is part of the first of the five elements. We reject this argument because, as Schweiger points out, the jury received an instruction that defined "nonconformity" as requiring a condition or defect covered by the vehicle's warranty. *See* WIS JI—CIVIL 3301. Therefore, the jury would have understood that, in order to find a nonconformity, it had to find that there was a condition or defect that was covered by warranty.

¶59 Kia also argues that the two-question special verdict is confusing when compared to the five elements stated in WIS JI—CIVIL 3304, and that the form fails to incorporate each of those elements. We disagree, at least under the circumstances here. Specifically, the jury was instructed on all five elements. This instruction, along with the evidence, would have made it clear to the jury that the second question in the special verdict form incorporated the last four elements. We thus see no reason to conclude that the special verdict that the circuit court in its discretion decided to use confused or misled the jury in this case. *See* ***County of Kenosha v. C & S Mgmt., Inc.***, 223 Wis. 2d 373, 395, 588 N.W.2d 236 (1999) (a circuit court's discretion in preparing jury instructions "extends to both choice of language and emphasis").

5. Attorney's Fees and Costs

¶60 Kia argues that the circuit court erred in awarding Schweiger his full attorney's fees and in awarding certain costs. We address each part of this argument separately below.

a. Attorney's Fees

¶61 Our standard of review for an award of attorney's fees is undisputed:

> When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. We uphold the circuit court's determination unless the circuit court erroneously exercised its discretion. We give deference to the circuit court's decision because the circuit court is familiar with local billing norms and will likely have witnessed first-hand the quality of the service rendered by counsel. Thus, we do not substitute our judgment for the judgment of the circuit court, but instead probe the court's explanation to determine if the court "employ[ed] a logical rationale based on the appropriate legal principles and facts of record."

Kolupar v. Wilde Pontiac Cadillac, Inc., 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58 (citations omitted). In addition, we observe that, in determining a reasonable amount of attorney's fees, courts are to use "the product of reasonable hours multiplied by a reasonable rate—the so-called 'lodestar' figure" as the touchstone of a fee award, with adjustments allowed for other factors. *See* ***id.***, ¶¶29-30.

¶62 With one exception that we address below, Kia's more specific arguments regarding attorney's fees miss the mark because they effectively ignore our standard of review. Specifically, Kia's more specific arguments, with the one exception, do not address the circuit court's reasoning, cite to the record, or provide any authority showing that any aspect of the award is unreasonable on its face, and therefore we reject them.

¶63 The exception is Kia's argument that the circuit court erred in refusing to reduce Schweiger's counsel's hourly rate from $300 to $215. Kia points to a statement by Schweiger's counsel that his hourly rate for "civil litigation matters" for clients who pay him "directly" is "$215.00, or higher." Kia also cites case law for the proposition that a reasonable rate is the "market rate," meaning "the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." *See* ***Bankston v. State of Illinois***, 60 F.3d 1249, 1255-56 (7th Cir. 1995). Kia asks, "What better evidence is there of the market rate for counsel's services than the rate he normally charges his paying clients?"

¶64 We are not persuaded by this argument because the circuit court's reasoning provides a rational basis for rejecting it. In particular, the circuit court relied, in part, on an affidavit from another attorney who practices in the Lemon

Law area and who charges $350 per hour for work on such cases. In addition, the court reasoned that Schweiger's counsel's concession as to his rate was for other types of civil cases or civil cases generally, as opposed to Lemon Law cases specifically, and the court expressly noted that Schweiger's counsel's statement regarding his rate was that it was "$215 *or higher*." (Emphasis added.) Finally, the court explained that Kia submitted no affidavit or other evidence that might have rebutted Schweiger's submissions and shown that a lower rate would have been appropriate. Therefore, we decline to upset the circuit court's exercise of discretion to allow the $300 hourly rate.

b. Costs

¶65 A circuit court's determination of costs, like its determination of attorney's fees, is generally a discretionary call. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2007 WI 98, ¶43, 303 Wis. 2d 258, 735 N.W.2d 93.

¶66 Kia argues that many of the cost items that the circuit court allowed are not recoverable under WIS. STAT. § 814.04(2). As the circuit court recognized, however, ***Kilian v. Mercedes-Benz USA, LLC***, 2011 WI 65, 335 Wis. 2d 566, 799 N.W.2d 815, provides that, "in addition to the normal costs and disbursements awarded … under § 814.04 and [WIS. STAT.] § 809.25," a Lemon Law plaintiff may "recover any other 'reasonable expenses incurred in litigation.'" ***Id.***, ¶54 (quoting ***Chmill v. Friendly Ford-Mercury of Janesville, Inc.***, 154 Wis. 2d 407, 413 n.2, 453 N.W.2d 197 (Ct. App. 1990)). Kia fails to address ***Kilian***, and we therefore consider Kia's § 814.04-based argument no further.

¶67 Kia also argues that, regardless of WIS. STAT. § 814.04, a number of the cost items were excessive and unreasonable. However, as with Kia's attorney's fees arguments, Kia's more specific costs arguments fail to address the

circuit court's reasoning or cite to the record. While Kia portrays a number of cost items as excessive, we will not scour the record to evaluate whether Kia's claims as to these items have merit. ***Roy v. St. Lukes Medical Ctr.***, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256 (appellate courts "have no duty to scour the record to review arguments unaccompanied by adequate record citation").

Schweiger's Cross-Appeal

¶68 We turn to the two issues that Schweiger's cross-appeal presents: (1) whether the circuit court erred in dismissing Schweiger's failure-to-refund claim, and (2) whether the circuit court erred in reducing the amount of the jury's damages finding.

1. Dismissal of Failure-to-Refund Claim

¶69 As indicated above, the circuit court dismissed Schweiger's failure-to-refund claim on summary judgment, based on the doctrines of election of remedies and unjust enrichment. The parties dispute whether the court properly dismissed the claim.

¶70 Relevant to this dispute is that Schweiger asserts that the claim is actually for breach of contract. More specifically, Schweiger argues that the claim is for breach of a settlement agreement, based on Kia's alleged breach of the parties' pre-suit agreement that Kia would provide Schweiger a refund complying with the Wisconsin Lemon Law. Kia contends, among other things, that Schweiger failed to plead a breach of contract claim and that the parties never entered into a settlement agreement.

¶71 We will assume, without deciding, that Schweiger alleged a claim for breach of settlement agreement. However, for the reasons that follow, we conclude that the undisputed facts show that the parties never formed the settlement agreement that Schweiger alleges. Therefore, the circuit court properly dismissed Schweiger's claim on summary judgment. *See* ***Gustafson v. Physicians Ins. Co. of Wis., Inc.***, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998) (when the facts are undisputed, the existence of a contract is a question of law for de novo review).[7]

¶72 The pertinent undisputed facts consist of correspondence between the parties, starting with the September 2009 Wisconsin Lemon Law claim notice that Schweiger sent to Kia. As indicated above, Kia responded in writing, agreeing to provide a refund. However, the parties disputed the proper calculation of the amount of the refund in a subsequent exchange of additional letters.

¶73 In arguing that the parties reached a settlement agreement, Schweiger relies on his September 2009 notice and Kia's October 1, 2009 response. Schweiger's notice demanded "[a] refund *calculated in accordance with the Lemon Law*." (Emphasis added.) Kia's October 1 response stated, in part:

> In response to your … Lemon Law Notice and Demand, [Kia] *agrees to your client's request* for a repurchase of [i.e., a refund on] the 2008 Kia Spectra …. [Kia] *agrees, pursuant to your client's Lemon Law Notice and Demand, to repurchase the subject vehicle pursuant to and in accordance with the Wisconsin Lemon Law*.

[7] Schweiger concedes that we may decide whether there was a settlement agreement as a matter of law because no facts material to this issue are in dispute.

(Emphasis added.)

¶74 Schweiger argues that the demand and response unambiguously show a settlement agreement in which the parties unequivocally agreed that Kia would provide a refund calculated in accordance with the Wisconsin Lemon Law. According to Schweiger, Kia's failure to properly calculate the refund was a breach of that agreement.

¶75 Kia contends that the parties' dispute over the refund calculation shows a failure to agree on an essential term of the agreement. *See* ***Vohs v. Donovan***, 2009 WI App 181, ¶8, 322 Wis. 2d 721, 777 N.W.2d 915 ("A contract is not enforceable if an essential term is indefinite."); *but cf.* ***Herder Hallmark Consultants, Inc. v. Regnier Consulting Group, Inc.***, 2004 WI App 134, ¶9, 275 Wis. 2d 349, 685 N.W.2d 564 (even if parties do not agree on price, a contract is sufficiently definite if parties specify a "practicable method for determining … price or compensation" (quoting 1 CORBIN ON CONTRACTS: Formation of Contracts, § 4.3 (Joseph M. Perillo ed., rev. ed. 1993))). Kia also argues that subsequent correspondence shows that Schweiger made an additional request for attorney's fees, to which Kia never agreed. Thus, Kia argues, there was never a meeting of the minds on a settlement.

¶76 We are persuaded by Kia's arguments. Although the parties may have agreed generally to a refund in accordance with the law, it is apparent that they never agreed on what that law is or how to apply it. Therefore, there was no true agreement on the terms of a settlement. Indeed, their disagreement was apparent from the beginning because, even in Kia's October 1, 2009 response, Kia set forth an erroneous refund calculation of $2,295.29, which Schweiger did not accept.

¶77 Subsequent correspondence shows that the parties continued to dispute the calculation in a further exchange of letters Then, as Kia argues, Schweiger informed Kia that he was "willing to resolve this matter for the correctly calculated refund" in addition to $1,800 in attorney's fees. Kia refused this offer and continued to maintain that it had complied with its obligations under the Lemon Law. None of the subsequent correspondence indicates a belief by Schweiger that Kia was breaching a settlement agreement by miscalculating the refund.

¶78 This correspondence appears to show that the parties never entered into a settlement agreement. At most, the parties exchanged unaccepted offers of settlement. Because Schweiger bases his failure-to-refund claim on the alleged breach of this non-existent settlement agreement, the circuit court did not err in dismissing that claim.

2. Reduction of Damages Finding

¶79 Schweiger argues that the circuit court erred in reducing the jury's damages finding from $7,000 to $4,307. He argues that there was credible evidence to support the $7,000 finding. The circuit court reduced the jury's damages finding based on its conclusion that the only credible evidence on this issue was Schweiger's expert's testimony that the vehicle's value was diminished by approximately twenty-five percent, or $4,307, by the starting problem.

¶80 "When a circuit court decides as a matter of law that the evidence does not support the jury's findings, this presents a question of law that we review de novo." ***Reuben v. Koppen***, 2010 WI App 64, ¶19, 324 Wis. 2d 758, 784 N.W.2d 703. The standard we apply to the jury's finding is the same sufficiency of the evidence test we would ordinarily apply to jury findings. *See* ***id.***, ¶¶19-20

(citing ***Morden***, 235 Wis. 2d 325, ¶¶38-39). Thus, if there is "any credible evidence" to support the jury's finding, the circuit court is "clearly wrong" to overturn it. ***Id.***, ¶20 (quoting ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389, 541 N.W.2d 753 (1995)).

¶81 There is no dispute that the jury's damages finding had to be based on the difference between the value of Schweiger's vehicle if it had operated as warranted and the value of the vehicle with the defect. The jury was instructed on this standard, which also appeared on the special verdict form. The dispute regards whether Schweiger's expert's opinion testimony was the only credible evidence of the difference in value.

¶82 Schweiger argues that the jury could have additionally considered testimony by Kirichkow that the starting problem frustrated her because she felt as if she had received "nothing" in return for her money, and testimony by Schweiger that he was concerned about selling or trading the vehicle. Schweiger argues that the jury could have considered this testimony, along with the expert's testimony, to find a difference in value of $7,000. We disagree.

¶83 A jury cannot determine damages "by speculation or guesswork." ***Pleasure Time***, 78 Wis. 2d at 387 (quoting ***DeSombre***, 18 Wis. 2d at 398). Rather, damages must be proven with "reasonable certainty" and have "some reasonable basis of computation." ***Id.*** Here, we agree with the circuit court and Kia that the only reasonable and non-speculative evidence of damages was the expert opinion testimony as to diminished value.

¶84 We begin by observing that Schweiger fails to provide a clear explanation, in light of the applicable damages standard, as to how the $7,000 figure is based, with "reasonable certainty," on the evidence that Schweiger points

to. Rather, Schweiger's defense of the $7,000 figure appears to be speculative; the same defense could be made to justify a jury finding of diminished value of virtually any amount up to the purchase price of the vehicle.

¶85 Schweiger relies on ***Mayberry v. Volkswagen of America, Inc.***, 2005 WI 13, ¶42, 278 Wis. 2d 39, 692 N.W.2d 226, and ***D'Huyvetter v. A.O. Smith Harvestore Products***, 164 Wis. 2d 306, 323, 475 N.W.2d 587 (Ct. App. 1991). He points out, based on this case law, that owners of real or personal property may testify as to its value. *See* ***Mayberry***, 278 Wis. 2d 39, ¶42; ***D'Huyvetter***, 164 Wis. 2d at 323. More specifically, in ***Mayberry***, a vehicle owner submitted an affidavit including her lay opinion as to the value of her vehicle. ***Mayberry***, 278 Wis. 2d 39, ¶41. The court concluded that this was sufficient to avoid summary judgment on the issue, and left it for the jury to decide what weight and credibility to give the owner's opinion. ***Id.***, ¶¶42-43. In ***D'Huyvetter***, the court reduced a jury's damages finding, and based the reduced finding on a silo system owner's testimony that the silo was worth "nothing." ***D'Huyvetter***, 164 Wis. 2d at 323-24. The court explained that the owner's testimony was the "only evidence … produced regarding the actual value." ***Id.*** at 323.

¶86 While we can see why Schweiger might view ***Mayberry*** and ***D'Huyvetter*** as supporting his position, we conclude that these cases are distinguishable, and they do not persuade us that the jury's damages finding should have been upheld here. Unlike the affidavit in ***Mayberry*** and the testimony in ***D'Huyvetter***, there is nothing about Schweiger's and Kirichkow's testimony to show that it was being offered as evidence of value, nor does Schweiger point to anything in the record to convince us that a jury would have reasonably interpreted it that way. In particular, when read in context, Kirichkow's "nothing" testimony

clearly appeared to be an expression of her frustration with the vehicle and with Kia, not an opinion as to value. The idea that she thought that the value was affected to a greater degree than the expert testified is pure conjecture.[8] As to Schweiger's testimony regarding his concerns about selling or trading the vehicle, even if that testimony had been offered as evidence of value, it was too speculative and general to support any particular damages award. Accordingly, we conclude that the circuit court properly reduced the jury's damages finding to conform to the expert opinion testimony.

CONCLUSION

¶87 In sum, for all of the reasons stated, we affirm the circuit court's judgment.[9]

¶88 No costs on appeal to either party.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[8] Given our conclusion that there is no reason to view Kirichkow's "nothing" testimony as an opinion upon which the jury could rely as an objective indicator of value, we need not reach Kia's argument that her testimony cannot be used as evidence of value because Schweiger represented to the circuit court and Kia before trial that Kirichkow would not offer an opinion on value at trial.

[9] Schweiger requests that this court direct the circuit court to award additional reasonable attorney's fees and costs incurred since the time of the circuit court's partial judgment, filed August 17, 2011. This request for additional attorney's fees should be directed in the first instance to the circuit court.