Opinion issued January 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00708-CV

MAC HAIK CHEVROLET LTD. AND WELLS FARGO AUTO FINANCE, INC., Appellants

V.

ALYSHA B. DIAZ AND MIGUEL DIAZ, Appellees

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2008-21787

MEMORANDUM OPINION

Appellants, Mac Haik Chevrolet Ltd. ("Mac Haik") and Wells Fargo Auto Finance, Inc. ("Wells Fargo"), challenge the trial court's judgment, entered after a jury trial, in favor of appellees, Alysha B. Diaz and Miguel Diaz, in the Diazes' suit against Mac Haik and Wells Fargo[1] for violations of the of the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA")[2] and breach of express warranties.[3] In seven issues, Mac Haik and Wells Fargo contend that the Diazes' DTPA claims regarding their purchase of a used 2003 Chevrolet Tahoe from Mac Haik are barred by "as is" language contained in a Buyer's Guide that they received when they purchased their Tahoe, the evidence is legally and factually insufficient to show that Mac Haik owed any duty to the Diazes or that Mac Haik violated the DTPA, the evidence is legally and factually insufficient to support the jury's finding that the Diazes "justifiably revoked acceptance" of the Tahoe, the trial court erred in denying their motion to exclude the Diazes' expert testimony, the Diazes' "motion for entry of judgment on the jury's verdict" waived the Diazes' right to subsequently request a higher amount of attorney's fees than

[1] As explained below, the Diazes named Wells Fargo as a defendant in their petition, but no jury questions were submitted in regard to Wells Fargo. Nevertheless, the trial court rendered judgment against Mac Haik and Wells Fargo jointly, and Wells Fargo is a party to this appeal.

[2] *See* TEX. BUS. & COM. CODE ANN. §§ 17.41–.63 (Vernon 2002 & Supp. 2010).

[3] It is undisputed that the Diazes nonsuited their claims against Mac Haik Chevrolet GP LLC ("Mac Haik GP") prior to trial.

the amount awarded by the jury, and the Diazes "waived all claims they might have asserted against Wells Fargo by failing to submit any issues to the jury concerning Wells Fargo."

We affirm.

Background

In their original petition, the Diazes alleged that in the summer of 2007, they were in the market for a used Chevrolet Tahoe and found an online listing for a "low-mileage" 2003 Tahoe at a Mac Haik dealership in Houston. On July 28, 2007, the Diazes traveled from their small town, which is several hours from Houston, to Mac Haik, where they met with Alejandro Flores, a salesman, who told them that the Tahoe was "low-mileage" and had approximately 36,000 miles on it. The Diazes purchased the Tahoe, and the purchase order stated that the Tahoe had 36,578 miles on it. Shortly after purchasing the Tahoe, the Diazes noticed a wire underneath the steering wheel. The Diazes later discovered that, attached to this wire, there was a switch that caused the Tahoe's speedometer and odometer to stop functioning. On December 5, 2007, the Diazes returned the Tahoe to Mac Haik and complained about the existence of the switch.

Following unsuccessful negotiations with Mac Haik, the Diazes filed suit, alleging that Mac Haik had violated the DTPA by misrepresenting the characteristics and quality of the Tahoe. The Diazes further alleged that Mac Haik

breached express warranties and they were entitled to revoke acceptance of the Tahoe. Mac Haik and Wells Fargo filed general denials.

At trial, Alysha Diaz testified that she became interested in the Tahoe based upon Mac Haik's online advertisement, which stated that the Tahoe had "low mileage," it was a "GM certified" Tahoe, and it came with a warranty. The Diazes introduced into evidence the online advertisement, which represented that the Tahoe had 36,816 miles on it. Alysha noted that on July 28, 2007, she and her husband visited Mac Haik and met Flores, who told them that they would not find another 2003 Tahoe with "that low of mileage." After a test-drive, the Diazes purchased the Tahoe.

The purchase order, which the Diazes introduced into evidence, represented that the Tahoe had 36,578 miles on it, and Alysha and her husband had understood that this represented "the actual mileage" on the Tahoe. The purchase order also referenced a warranty, for which the Diazes had separately paid approximately $2,000. It also included a separate box, entitled "Disclaimer of Warranties," which was set off with bold, larger-type, and all capital letters. Although it contained a signature block for the "Buyer's signature," the Diazes did not sign the signature block.[4] The Diazes only signed the signature block at the bottom of the

[4] This box, which was not signed by the Diazes, provided,

purchase order. Above this block there was a paragraph providing that there were "no *other* warranties, either express or including any implied warranty of merchantability or fitness" and, with the sale of used cars, the dealer "assumes only such warranty obligations to Buyer *as are set forth on the face of this order* or in *a separate written instrument*, if any." (Emphasis added.)

The Retail Installment Contract and the warranty documents, which the Diazes also introduced into evidence,[5] provided that the Diazes had purchased a 24 month/24,000 mile extended warranty. The Diazes also introduced into evidence the Odometer Disclosure Statements signed by a Mac Haik representative and the Diazes, which represented that on the date of sale the Tahoe had 36,578 miles on it. Finally, the Diazes introduced into evidence a copy of the "GM Certified Used Vehicles Inspection Checklist," which accompanied their newly-purchased Tahoe and represented that a GM mechanical inspector had performed a "final inspection" on the Tahoe and determined that the Tahoe met the "certified"

DISLCAIMER OF WARRANTIES

The Seller Hereby Expressly Disclaims All Warranties, either Express or Implied, Including Any Implied Warranty of Merchantability of Fitness For A Particular Purpose, and Dealership Neither Assumes Nor Authorizes Any Other Person To Assume For It Any Liability In Connection With This Sale.

Buyer's Signature _____

[5] These documents are missing from the record before us. However, the substance of these documents was discussed on the record.

standards checked on the list. This certification form also stated that the Tahoe had 36,578 miles on it and contained an extensive checklist of items that Mac Haik represented as having been inspected by its employees and as having met the GM certified standards. One of the items checked by the Mac Haik inspector as "meets std."on the checklist was "speedometer/odometer (operational)."

Alysha explained that approximately "a few weeks" after they had purchased the Tahoe, they noticed "some kind of a loose wire hanging down" "kind of back by the brake pedal." She "guessed" that she had not previously noticed this wire because it had been "more hidden," and, at that time, she "had no idea what" the wire was." However, because the wire "wasn't causing any problems," she did nothing further. "A while later," the Diazes "started noticing" problems with the speedometer, they became more concerned, and then contacted a Mac Haik salesman, who mentioned a recall related to the speedometer. "A little bit after that," the Diazes noticed that the speedometer problems were "more sporadic" and it was reflecting incorrect speeds. Sometime around November 2007, Alysha asked Miguel to take a closer look at the Tahoe. When he more closely inspected the loose wire, he noticed that attached to it was "some kind of a little switch" and, if one pushed the switch, the speedometer would "drop all the way to zero" while the Tahoe was being driven. The Diazes then contacted a mechanic who was also a friend, who stated that the device "could be possibly

connected to the odometer." The Diazes then pressed the switch and confirmed that, when pressed, the odometer did not record mileage. The Diazes visited another mechanic, who told them not to touch the switch, the switch was illegal, and they should contact a lawyer. The Diazes became "furious" because their "whole purpose" in buying the Tahoe was for its "low mileage" and they had learned that the switch prevented the mileage from being accurately recorded.

The Diazes returned to Mac Haik shortly thereafter in early December 2007, and, when they informed Mac Haik about the wire and switch, it attempted to sell the Diazes a more expensive Tahoe with higher mileage and offered to accept as a trade-in the Tahoe with the switch. The Diazes ultimately refused Mac Haik's offer and instead instructed it to "fix" their Tahoe. Leaving their Tahoe for repairs, the Diazes left Mac Haik in a rental car. When they later returned to Mac Haik, they discovered that it had not fixed the switch. The Diazes then retrieved their Tahoe and contacted a lawyer. Alysha confirmed that, if they had known about the existence of the switch, they would not have purchased the Tahoe because there was no "way of knowing the true mileage."

Alysha denied that either she, Miguel, or anyone else had installed the switch on the Tahoe after their purchase. On cross-examination, she agreed that she and her husband looked at the Tahoe prior to the purchase and they did not arrange for an independent mechanic to inspect the Tahoe prior to their purchase.

However, she noted that Mac Haik had represented that it had inspected the Tahoe, and she emphasized that she had "a GM certified paper that shows it should have been inspected." Alysha explained that, at this point, she and her husband simply wanted to "unwind the entire deal" because they never would have bought the Tahoe had they known about the existence of the switch.

Miguel Diaz also testified that he and his wife went to see the Tahoe at Mac Haik because it had "low mileage" and the Mac Haik salesman informed them that they would not find another Tahoe "with that low of a mileage [on] that year model." Miguel stated that approximately two weeks after their purchase, they noticed, hanging underneath the dashboard, the wire, which they had not noticed on the date of purchase. Miguel thought nothing of the wire because nothing was wrong with the Tahoe. Subsequently, the speedometer started vibrating and then started "acting crazy," going from "zero to a hundred" when the Tahoe was being driven. In late November 2007, Miguel looked at the wire again, saw a "loop," and "[f]rom that loop it was connected to a switch." Miguel flipped the switch to see what it would do, and it made the speedometer go to zero. Miguel then called a friend, who suggested that the switch could be connected to the odometer. Miguel pressed the switch again and learned that the odometer did not register mileage when the switch was pressed. Miguel took the Tahoe to another mechanic, who told him that such a switch is illegal. Miguel explained that "because of the switch

being how heavy it was," he assumed that "all of that bouncing" while driving had pulled the wire down until the wire and switch became visible.

The Diazes returned to Mac Haik and asked for a refund or a different Tahoe. The Mac Haik salesman "made it sound like [the Diazes] had installed" the switch, and Miguel denied that he or anyone else had installed the device after he and his wife had purchased the Tahoe. On cross-examination, Miguel agreed that once he saw the switch during his examination, he had pulled it down because it was still "hidden."

Alejandro Flores, a Mac Haik salesman, testified that another customer had traded in the Tahoe that was ultimately purchased by the Diazes. When this other customer brought in the Tahoe for the trade-in, Flores had walked around the Tahoe, looked inside, opened the driver's door, stuck his head underneath the dash, and looked for a switch connected to the odometer. Flores explained that he did this because this Tahoe had low mileage, and he "check[s] out the vehicles with low miles." Flores also put his hand "underneath [the dashboard] because obviously someone who has a switch in there will try to hide it." Flores was familiar with these kinds of switches because he had a friend in high school with one.

Flores noted that on December 7, 2007, the Diazes returned to Mac Haik and told him that they had discovered the switch in the Tahoe. Flores looked at the

switch, and he told them that the switch was not in the Tahoe at the time of their purchase. He explained that the Diazes were "frustrated" and their reaction was consistent with someone who was surprised to find the switch in their vehicle. Flores explained that he did not accuse the Diazes of having installed the switch and it was Mac Haik's general practice to send any vehicle that it discovered with such a switch "to the auction."

Mac Haik service director Brian Caldwell testified that "a GM certified inspection," like the one purportedly performed on the Diazes' Tahoe, is "more detailed than a standard inspection" and the benefit of such an inspection is "warranty coverage[]." He explained that a vehicle that is not "certified" would be "more than likely sent to be wholesaled." Although Caldwell contended that an inspection would have uncovered a switch attached to the odometer, he, on cross examination, agreed that he did not work at Mac Haik until January 2008, he had no personal knowledge of the inspection conducted on the Diazes' Tahoe, he could not identify the signature on the GM certified inspection form in question, the signature on the form was illegible, and he was not aware of anyone at Mac Haik who was familiar with the actual inspection performed on the Diazes' Tahoe. Caldwell also agreed that other portions of the GM certified inspection form for the Diazes' Tahoe were filled out incorrectly or incompletely. He also agreed that an "appearance inspector" had not signed the form in the space required.

Owen McCumber, Mac Haik's general manager, testified that his "position" was that the switch "was not on the vehicle at the time of sale." However, he agreed that he had not met the Diazes and Mac Haik had not inspected the Tahoe, despite being given the opportunity to do so.

At the conclusion of trial, the parties stipulated on the record that if the jury answered "Yes" as to whether the Diazes justifiably revoked acceptance of the Tahoe, and if the Diazes were allowed to recover "so much of the price as has been paid," then the appropriate sum of damages to be awarded the Diazes would be $8,795.95.

The jury, in response to question one, found that Mac Haik had engaged in false, misleading, or deceptive acts or practices that the Diazes had relied on to their detriment and such acts or practices were a producing cause of damages to the Diazes.[6] In response to question two, it found that these acts or practices had "led to the acquisition of . . . money or property from" the Diazes.[7] In response to question three, it found that Mac Haik had "fail[ed] to comply with an express warranty" provided to the Diazes. In response to question four, which was predicated upon an affirmative answer to any of the first three questions, it found that the Diazes had sustained economic damages in the amount of $7,550. In

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6 *See* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 2010).

7 *See id.* § 17.50(b)(3) (Vernon Supp. 2010).

response to question five, the jury found that the Diazes had "justifiably revoked acceptance" of the Tahoe.[8] In response to question six, which was predicated on a "yes" answer to either question four or five,"[9] it found that the Diazes should be awarded reasonable attorney's fees of $22,000 for trial, $2,000 for an appeal to the court of appeals, and $2,000 for an appeal to the supreme court.[10]

Mac Haik filed a motion for judgment notwithstanding the verdict, and the Diazes filed a "motion to enter judgment," in which they asked the trial court to enter judgment on the jury's findings in response to questions one, two, three, and five and to award "restoration of $8,795.95, a sum which was subject to stipulation at trial, in exchange for return of the Tahoe." Also within their motion, the Diazes asked the trial court to disregard the jury's findings on attorney's fees, contending that the evidence conclusively established $33,000 in attorney's fees for trial, $6,000 in attorney's fees for an appeal to the court of appeals, and $6,000 in attorney's fees for an appeal the supreme court. The Diazes also included in their motion a paragraph requesting entry of judgment against Wells Fargo. In this paragraph, the Diazes contended that Wells Fargo was liable for their damages

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8 *See* TEX. BUS. & COM. CODE ANN. § 2.711 (Vernon Supp. 2010).

9 Question four, the damages question, did not call for a yes or no answer, but we interpret this question as permitting the award of attorney's fees based upon an affirmative finding to any of the predicate questions.

10 Neither party complains about the jury charge on appeal.

because the Diazes had "made payments to [Wells Fargo]" and exhibits admitted into evidence showed that Wells Fargo was an assignee of Mac Haik. The Diazes contended that, as an assignee, Wells Fargo "was entitled to receive payments" and "also was liable for the wrongs" of Mac Haik.

The trial court rendered judgment in favor of the Diazes and against Mac Haik and Wells Fargo "cancelling the purchase agreement between the parties and restoring [the Diazes] the sum of $8,795.95." The trial court concluded that the jury's findings on attorney's fees were "contrary to all of the evidence presented at trial," and it awarded the Diazes $33,000 in attorney's fees for trial, $6,000 for an appeal to the court of appeals, and $6,000 for an appeal to the supreme court.

Legal and Factual Sufficiency

In their first issue, Mac Haik and Wells Fargo argue that the Diazes' DTPA claims are barred because the Buyer's Guide contained "as is" language, Mac Haik "gave no assurances, express or implied," and the Diazes failed to offer proof of misrepresentations, concealment, or "impairment of inspection." Mac Haik and Wells Fargo assert that there is "no credible evidence" that its mileage statements were false. In their second and third issues, Mak Haik and Wells Fargo argue that the evidence is legally and factually insufficient to support the jury's DTPA findings because Mac Haik did not owe a duty to the Diazes to disclose unknown defects or defects about which "it should have known," the Diazes failed to "offer

any credible evidence" contradicting the mileage reading on the odometer, Mac Haik did not have "a fiduciary relationship" with the Diazes, Mac Haik "had no legal duty to inspect the odometer," and Mac Haik's "failure to inspect the odometer is not a wrongful act in violation of the DTPA." In their fifth issue, Mac Haik and Wells Fargo argue that the evidence is legally and factually insufficient to support the jury's finding, in response to question five, that the Diazes "justifiably revoked acceptance" of the Tahoe because the Diazes "accepted the goods, never revoked acceptance, and did not assert a breach of contract claim."

We will sustain a legal sufficiency or "no-evidence" challenge if the record shows one of the following: (1) a complete absence of evidence of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal sufficiency review, a "court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *Id*. at 822. If there is more than a scintilla of evidence to support the challenged finding, we must uphold it. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex.1998). "'[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a

mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). However, if the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. *Keller*, 168 S.W.3d at 822; *see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within this zone of reasonable disagreement." *Keller*, 168 S.W.3d at 822.

In conducting a factual sufficiency review, we must consider, weigh, and examine all of the evidence that supports or contradicts the jury's determination. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *London v. London*, 192 S.W.3d 6, 14–15 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). We may set aside the verdict only if the evidence that supports the jury's finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986); *Nip v. Checkpoint Sys., Inc.*, 154 S.W.3d 767, 769 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Here, the jury found that Mac Haik had engaged in false, misleading, or deceptive acts or practices that the Diazes had relied on to their detriment and that

such acts or practices were a producing cause of damages to the Diazes. *See* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 2010). It also found that these acts or practices had "led to the acquisition of any money or property from" the Diazes. *See id.* § 17.50(b)(3) (Vernon Supp. 2010).[11] The charge defined "[f]alse, misleading, or deceptive act[s] or practice[s]" to mean "(a) [r]epresenting that a 2003 Chevrolet Tahoe had or would have characteristics that it did not have," and "(b) [r]epresenting that a 2003 Chevrolet Tahoe is or will be of a particular quality if it was of another." *See* TEX. BUS. & COM. CODE ANN. § 17.46(b)(5) (Vernon Supp. 2010) (characteristics), § 17.46(b)(7) (quality). The jury also found that

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[11] We construe Mac Haik and Wells Fargo's first three issues as presenting legal- and factual-sufficiency challenges to both the jury's DTPA findings and the jury's breach of express warranty findings. Mac Haik and Wells Fargo's first three issues primarily focus on the jury's DTPA findings, and, because there is no direct challenge to the jury's finding in response to question three on the breach of warranty finding, it is arguable as to whether Mac Haik and Wells Fargo have adequately briefed any challenge to this finding. We note that if an independent ground fully supports the complained-of judgment, but an appellant assigns no error to that independent ground, then we must accept the validity of the unchallenged independent ground and, thus, any error in another ground challenged on appeal is harmless. *Britton v. Tex. Dep't of Crim. Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Harris v. Gen. Motors Corp.*, 924 S.W.2d 187, 188 (Tex. App.—San Antonio 1996, writ denied). The rule requiring an appellant to attack all independent grounds supporting a judgment has been applied in many contexts, including independent jury findings fully supporting a trial court's judgment. *See Britton*, 95 S.W.3d at 682 (stating that "appellant must attack each independent jury finding to obtain a reversal"). Because we have construed Mac Haik and Wells Fargo's briefing to include a challenge to the warranty finding, we do not apply this law in this case and will consider the merits of Mac Haik and Wells Fargo's sufficiency challenges. However, we also note that Mac Haik and Wells Fargo argued their legal- and factual-sufficiency challenges separately.

Mak Haik had "fail[ed] to comply with an express warranty" provided to the Diazes. The charge defined an express warranty as "any affirmation of fact or promise made by one of the defendants identified below [that] becomes part of the basis of the bargain. It is not necessary that formal words such as 'warrant' or 'guarantee' be used or that there be a specific intent to make a warranty."

The Diazes both testified that Mac Haik represented the Tahoe as "low-mileage" in advertisements, a Mac Haik salesman represented that it was a "low-mileage" Tahoe, Mac Haik identified the mileage in the purchase order and in multiple other documents that it provided the Diazes, Mac Haik marketed and sold the Tahoe as a "GM certified vehicle," Mac's Haik's certification of the Tahoe represented that its employees had conducted inspections of the Tahoe and had met GM certified standards, and the Diazes purchased the Tahoe because Mac Haik told them it had "low-mileage," Mac Haik certified it as meeting GM certified standards, and they could purchase a warranty for the Tahoe. The Diazes further testified that they discovered a loose wire shortly after purchase, they made a closer examination of the wire when the Tahoe developed speedometer problems, they discovered a switch that had been "hidden" underneath the dashboard, they learned that the switch prevented the recording of mileage and resulted in an inaccurate odometer reading, and they raised their complaint with Mac Haik, who denied responsibility.

In contrast, Flores, the Mac Haik salesman, testified that he specifically looked for such a switch and did not find one at the time another customer traded in the Tahoe, and other Mac Haik witnesses testified that any such switch should have been discovered during inspections. However, no one at Mac Haik could testify as to the actual inspection performed on the Tahoe. And, as the Diazes emphasized, certain portions of the certified inspection form for the Tahoe were not properly completed, indicating a flawed inspection process.

Although the parties presented conflicting evidence, we conclude that the evidence is legally and factually sufficient to support the jury's implied finding that had Mac Haik performed an inspection of the Tahoe, as represented to the Diazes, it would have discovered the wire, the switch, and the malfunctioning odometer. We further conclude that the evidence is legally and factually sufficient to support the jury's implied finding that the wire and illegal switch device existed at the time Mac Haik marketed and sold the Tahoe as a GM certified vehicle. Mac Haik employees testified that, in order to classify a vehicle as a GM certified vehicle, such a vehicle must undergo more rigorous inspections. It was undisputed that the Diazes purchased the Tahoe based upon the certified status. Accordingly, we hold that the evidence is legally and factually sufficient to support the jury's findings that Mac Haik engaged in false, misleading, or deceptive acts or practices by representing that the Tahoe had characteristics that it did not have and that it

was of a particular quality when it was not.[12]

Related to their more direct sufficiency complaints, Mac Haik and Wells Fargo assert that the Diazes' claims are barred by "as-is" language in a Buyer's Guide. Mac Haik and Wells Fargo, for the first time on appeal, and in contradiction to the testimony of their own trial witnesses, also assert that Mac Haik had no obligation to even inspect the Tahoe. As with their sufficiency arguments, Mac Haik and Wells Fargo's "as-is" and "no duty" arguments ignore the conflicting evidence in the record. In regard to the "as-is" defense, Mac Haik and Wells Fargo wholly fail to acknowledge the discrepancies in the documentary evidence. For example, the Buyer's Guide contains two boxes that could have been checked: the first is entitled, "AS-IS NO WARRANTY," and it is checked, while the second is entitled, "WARRANTY," and it is not checked. The face of this document establishes that either one or the other box should have been checked. Here, the "AS-IS NO WARRANTY BOX" is checked, even though the

[12] Mac Haik and Wells Fargo's sufficiency arguments ignore the proper standard of review, the actual evidence presented by the Diazes, and the reasonable inferences that could have been drawn from that evidence. At trial, by taking the position that the switch did not exist on the Tahoe at the time of purchase, Mac Haik and Wells Fargo necessarily asked the jury to believe one of two possible factual theories. First, that the Diazes, shortly after they had purchased their Tahoe, installed the switch and, within months, returned to Mac Haik to complain about the switch. Second, that some third party obtained access to the Diazes' Tahoe and, unbeknownst to the Diazes, installed the switch. It is clear that the jury rejected these theories, and instead necessarily concluded that the switch was on the Tahoe at the time of the Diazes' purchase.

evidence at trial conclusively established that the Diazes purchased and received a warranty on the Tahoe. At trial, it was undisputed that Mac Haik had performed warranty work on the Tahoe that was unrelated to the switch. Another obvious discrepancy arises from the face of the purchase order. The Diazes did not sign the Disclaimer of Warranties box that appears on the purchase order. None of these discrepancies were addressed in any great detail at trial because Mac Haik and Wells Fargo did not as forcefully assert their "as-is" argument below. Based upon all of these discrepancies in the record, we conclude that Mac Haik and Wells Fargo have not established as a matter of law that the "as-is" clause in the Buyer's Guide bars the Diazes' claims or renders the evidence legally or factually insufficient to support the jury's liability findings.

In regard to their duty argument, Mac Haik and Wells Fargo fail to address the undisputed evidence that a GM certified vehicle must undergo certain inspections and that certain items, including the odometer, must meet GM standards. Mac Haik employees testified as to the benefits of this certification status and explained that higher inspection standards are applied to GM certified vehicles. Although we do not suggest that the record before us establishes that the certification process necessarily creates a warranty for every item identified in the checklist, it renders Mac Haik and Wells Fargo's no duty argument frivolous.

In regard to Mac Haik and Wells Fargo's challenge of the sufficiency of the

evidence supporting the jury's finding on question number five, we note that the question provided a separate basis for a finding of liability. We have already held that the jury's DTPA findings are supported by legally and factually sufficient evidence. Accordingly, we hold that to the extent there was any error associated with the jury's finding on the revocation question, which we need not decide, such error was rendered harmless.

We overrule Mac Haik and Wells Fargo's first, second, third, and fifth issues.[13]

Expert Testimony

In their fourth issue, Mac Haik and Wells Fargo argue that the trial court erred in denying their motion to exclude the testimony of Robert Eppes, the Diazes' expert, because he was not qualified to provide certain opinions and some of his opinions were "speculative, unscientific, conclusory, and based on a unreliable and flawed foundation." Mac Haik and Wells Fargo assert that (1) Eppes was not qualified to opine that the switch in question was present when the Diazes purchased the Tahoe and that "a reasonable inspection by Mac Haik would have disclosed the presence" of the switch; (2) Eppes's opinions that the switch functioned to turn off the odometer and "a reasonable inspection by Mac Haik

[13] As noted above, Wells Fargo was not identified in the jury charge. We separately discuss the judgment entered against Wells Fargo below.

would have disclosed the presence" of the switch were "speculative, unscientific, conclusory, and based on unreliable and flawed foundation"; and (3) Eppes's opinions that the switch was present when the Diazes purchased the Tahoe, the switch functioned to turn off the odometer, "a reasonable inspection by Mac Haik would have disclosed the presence" of the switch, the Diazes' Tahoe had 80,000 to 90,000 miles on it, and the fair market value of the Tahoe was $9,000 were "based on unreliable and flawed foundational data."

An expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified, the expert's opinion is relevant, the opinion is reliable, and the opinion is based on a reliable foundation. *See* TEX. R. EVID. 702; *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). A two-part test governs the admissibility of expert testimony: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). A trial court makes the initial determination about whether an expert and the proffered testimony meet these requirements. *Helena Chem. Co.*, 47 S.W.3d at 499. The trial court has broad discretion to determine admissibility, and an appellate court

will reverse only for an abuse of that discretion.[14] *Id*.

In examining the qualifications of an expert, trial courts "must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion." *Id*. (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex. 1998)). In deciding reliability, the trial court must "evaluate the methods, analysis, and principles relied upon in reaching the opinion" and "should ensure that the opinion comports with applicable professional standards outside the courtroom and [has] a reliable basis in the knowledge and experience of the discipline." *Id*. (citing *Gammill*, 972 S.W.2d at 725–26).

In *Robinson*, the Texas Supreme Court identified six nonexclusive factors to consider in determining the reliability of an expert's testimony: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique used by the expert relies upon the subjective interpretation of the expert, (3) whether the theory has been subjected to peer review or publication; (4) the potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-

[14] "[A] party may assert on appeal that unreliable scientific evidence or expert testimony is not only inadmissible, but also that its unreliability makes it legally insufficient to support a verdict." *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 637 (Tex. 2009). Here, Mac Haik has argued that the trial court abused its discretion in admitting Eppes's testimony.

judicial uses of the theory or technique. *Robinson*, 923 S.W.2d at 557.

These factors may not apply to certain testimony, and, in such instances, "there still must be some basis for the opinion offered to show its reliability, and, ultimately, the trial court must determine how to assess reliability." *Helena Chem. Co.*, 47 S.W.3d at 499 (citing *Gammill*, 972 S.W.2d at 726); *see also Whirlpool Corp*, 298 S.W.3d at 638 (explaining that in determining whether expert testimony is reliable court may consider *Robinson* factors and expert's experience and that "in very few cases will the evidence be such that the trial court's reliability determination can properly be based only expert's experience to the exclusion of *Robinson* factors" or, "on the other hand, properly be based only" on *Robinson* factors such to exclusion of considerations based on expert's experience). "If an expert relies upon unreliable foundational data, any opinion drawn from that data is likewise unreliable." *Helena Chem. Co.*, 47 S.W.3d at 499.

If the trial court determines that the proffered testimony is relevant and reliable, it must then determine whether to exclude the evidence because its probative value is outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." *Robinson*, 923 S.W.2d at 557 (citing TEX. R. EVID. 403).

Here, we note that the objections of Mac Haik and Wells Fargo in their

motion to exclude Eppes's testimony were much more limited than the complaints now made on appeal. Mac Haik and Wells Fargo made no additional objections to Eppes's testimony during trial. Accordingly, we will consider only those challenges raised by Mac Haik and Wells Fargo in their motion to exclude Eppes's testimony that are consistent with those Mac Haik and Wells Fargo now assert on appeal.[15] *See Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 143–44 (Tex. 2004) (holding that challenge to expert's qualifications, which was not presented in pretrial motion to exclude, was not preserved for appeal). In their motion to exclude, Mac Haik and Wells Fargo challenged any testimony offered by Eppes that (1) the switch device was present in the Tahoe when Mac Haik sold it to the Diazes, (2) a reasonable inspection by Mac Haik would have uncovered the existence of the switch, and (3) the switch was or may have been "tucked under the dash" when the Diazes purchased the Tahoe. Mac Haik and Wells Fargo complain

[15] In their appellees' brief, the Diazes argue this preservation issue, asserting that at no point in the trial court did Mac Haik or Wells Fargo object to Eppes's opinions that the switch functioned to stop the odometer from recording mileage, the Tahoe drove as if it had 80,000 to 90,000 miles on it, or the fair market value of the Tahoe was $9,000. In their reply brief, Mac Haik and Wells Fargo do not expressly concede this point, but they do limit their argument to those challenges that they raised in their motion to exclude. Mac Haik and Wells Fargo also do not cite to any other place in the record where they presented objections to Eppes's testimony. We also note that Eppes's testimony concerning the function of the switch seems unremarkable since the function of the switch never appeared to be seriously in dispute and Eppes's testimony was merely cumulative of the other evidence regarding the function of the switch.

on appeal about the admission of testimony concerning the first two categories.[16]

Eppes testified that he is a certified personal property appraiser and consultant in automotive fraud cases, one of his specialty areas is odometer fraud, and, in this capacity, he inspects and researches motor vehicles. He has been an automotive fraud consultant since 2005, had previously served as an expert witness in two automotive fraud cases, and had been retained as an expert in automotive fraud cases sixty times. Eppes has been a member of the National Odometer and Title Fraud Enforcement Association and the Midwest Odometer Title Fraud Enforcement Association for twenty-four years, and these organizations provide annual training of approximately forty hours. He reviews trade magazines, publications, and bulletins issued by manufacturers concerning odometers, and he has had twenty years of continuing education in the field. Prior to becoming a consultant, Eppes, for twenty-one years, was a special agent with the National Highway Traffic Safety Administration ("NHTSA"), where he worked in the odometer fraud unit and his responsibilities were to conduct odometer fraud investigations. One of four agents in the United States trained to conduct such investigations, Eppes conducted approximately 560 odometer fraud investigations, attended conferences and training on odometer fraud, and, serving as a trainer on

[16] In their reply brief, Mac Haik and Wells Fargo reference the third category, but they do not cite to any objectionable testimony in the record.

odometer fraud for law enforcement personnel, taught such topics as the techniques of committing odometer fraud and the installation of switches to commit odometer fraud. Eppes previously served as an expert witness in twenty five criminal proceedings involving odometer fraud.

Eppes explained that he inspected the Diazes' Tahoe in December 2008 and noticed "telltale signs" of a vehicle that had more mileage than shown on its odometer. He tested the switch and discovered that the odometer, when pressed a certain way, did not properly record mileage. He then examined the wires from the switch and observed that they went to the "instrument cluster" and were connected to the "vehicle speed sensor." After the Diazes introduced multiple pictures into evidence, Eppes opined that the switch had been installed to turn off the odometer so that the Tahoe would "show less than the actual miles the vehicle [had] traveled." He stated that he had seen this kind of switch on forty to fifty prior occasions and opined that a dealer performing a "reasonable inspection" would have discovered the switch. He based his opinion, in part, on the condition of the Tahoe and the scope of inspection necessary to find such a switch. Eppes explained that "It wouldn't take much to find this if it were there." He also testified regarding general inspection practices in the industry, which he believed should have led to the discovery of such a switch.

Eppes, based on his experience, also noticed issues with the brake pedal on

the Tahoe that indicated to him that someone may have replaced it, which indicated "someone wanting to disguise the mileage on the vehicle." Based upon his experience regarding the purposes of the switches, Eppes opined that "if the switch was on the vehicle on the date of the sale to the Diazes," the odometer would not have been accurate. He explained, "[T]here's only one purpose to put a switch onto the vehicle speed sensor," which is to preclude the recording of mileage on an odometer.

In regard to the first challenged opinion, the record reflects that Eppes did opine on two occasions during his extensive testimony that the switch was on the Tahoe at the time of the Diazes' purchase. Eppes based his opinion, in part, on the condition of the Tahoe and other "telltale" signs, which indicated to him that the Tahoe had been sold to the Diazes with more mileage on it than the amount disclosed. Although Mac Haik did, during its cross-examination of Eppes, elicit that he did not have personal knowledge of the number of miles driven by the Diazes during the time that they had the Tahoe, the Diazes presented evidence indicating that that the amount of actual miles on the Tahoe, as estimated by Eppes, exceeded the amount of miles that would have accumulated from their personal driving. Also, we note that even though Eppes did opine on two occasions about the existence of the switch, it was clear from his testimony that he conceded to the jury that he had no personal knowledge of the condition of the

Tahoe on the date of purchase. In fact, the Diazes' trial counsel even conditioned some of his direct questioning to Eppes by asking him to assume that the switch was on the Tahoe at the time of purchase.

Substantial evidence supports the trial court's implied finding that Eppes was qualified to opine on the existence of the switch on the Tahoe at the time the Diazes purchased it and, based upon his extensive experience and training in the field of odometer fraud, his opinions were reliable. Accordingly, we hold that the trial court did not abuse its discretion in admitting this testimony. Alternatively, even if the trial court erred in admitting this portion of Eppes's testimony, any error would be harmless based upon the limitations that Eppes himself placed upon his own testimony, the limitations of such testimony suggested by the questioning of the Diazes' trial counsel, and the other evidence presented by the Diazes regarding the existence of the switch at the time of the purchase.

In regard to the second challenged opinion that a reasonable inspection would have uncovered the switch, it is clear from Eppes's extensive training and experience as an investigator of odometer fraud that he was very familiar with the installation and location of the type of switch discovered on the Diazes' Tahoe. Eppes testified that during his career as an odometer fraud investigator, he had seen approximately fifty of these types of switches on other vehicles. Eppes also testified about the extensive training he had received in connection with being an

odometer fraud investigator, and he explained that, as one of four special agents in the NHTSA assigned to the field of odometer fraud, he had served as a trainer at education courses regarding odometer fraud. Accordingly, we hold that the trial court did not abuse its discretion in concluding that Eppes was qualified and possessed the requisite experience to testify that a reasonable inspection of the Tahoe would have uncovered the existence of the switch, even if it was "hidden" at the time of purchase.

In regard to the reliability challenge, the trial court could have reasonably concluded that Eppes's experience in investigating odometer fraud, and his specific experience in discovering these types of switches on a large number of vehicles, provided a sound basis for his opinion that a reasonable inspection of a vehicle, and its odometer, would have uncovered the existence of the switch. Eppes noted that Mac Haik documents revealed that Mac Haik was required to have specifically performed an inspection on the odometer in order for it to market the Tahoe as a GM certified vehicle. His testimony that a reasonable inspection should have uncovered the existence of the switch was also based, in part, on what he explained were "telltale signs" of a vehicle that had been driven more miles than the amount indicated on its odometer. Eppes explained that persons in the industry would use these "telltale signs" to make further inquiry into issues concerning the odometer and such signs were present in regard to the Tahoe's odometer and would have

warranted a more rigorous inspection. Again, Mac Haik notes that, during cross-examination, Eppes admitted that he was not familiar with the Diazes' driving habits after they had purchased the Tahoe. However, even if Eppes's reliance on the estimated mileage was somehow flawed, the reliability of his opinion about the scope of a reasonable inspection is still supported through his other testimony.

Finally, we note that Mac Haik and Wells Fargo's primary theory at trial was that Mac Haik conducted a reasonable inspection of the Tahoe and the switch did not exist at the time of the Diazes' purchase. Thus, Mac Haik and Wells Fargo's trial position was that the switch was added by the Diazes, or some unknown third party, after the purchase. Mac Haik never seriously challenged the proposition that a reasonable inspection should have uncovered the existence of the switch. Flores's testimony also supports Eppes's testimony that because of the low-mileage on the Tahoe at the time it was traded in, there was more reason to inspect it for the existence of a switch. Flores explained that when the original owner of the Tahoe brought it in for a trade, he specifically stuck his head underneath the dash and looked for a switch connected to the odometer because of the year of the Tahoe and its low mileage. Flores also put his hand "underneath because obviously someone who has a switch in there will try to hide it."

In sum, we hold that the trial court did not abuse its discretion in determining that Eppes was qualified to offer the challenged expert opinions or

that his opinions were reliable.

We overrule Mac Haik and Wells Fargo's fourth issue.

Motion for Entry of Judgment

In their sixth issue, Mac Haik and Wells Fargo argue that the Diazes' "motion for entry of judgment on the jury's verdict" and the trial court's granting of this motion waived the Diazes' right to subsequently request a higher amount of attorney's fees than the amount awarded by the jury.

At the conclusion of the trial court's reading of the jury verdict, the trial court asked the parties, "Motion to accept the verdict?" The Diazes' counsel responded, "Yes, your honor, I make that motion." The trial court then stated, "Verdict accepted," and it discharged the jury. Mac Haik subsequently filed a motion for judgment notwithstanding the verdict, and the Diazes filed a "motion to enter judgment." In their post-judgment motion, the Diazes asked the trial court to (1) enter a judgment on the jury's findings in response to question numbers one, two, three, and five and to award them damages of "restoration of $8,795.95, a sum which was subject to stipulation at trial, in exchange for return of the Tahoe" and (2) disregard the jury's findings on attorney's fees, contending that the evidence conclusively established $33,000 in attorney's fees for trial, $6,000 in attorney's fees for an appeal to the court of appeals, and $6,000 in attorney's fees for an appeal the supreme court.

In support of their argument that the Diazes waived any right to ask the trial court to disregard the jury attorney's fees findings and award higher fees by "accept[ing] the verdict" and agreeing to discharge the jury, Mac Haik and Wells Fargo cite case law indicating that a party should include reservation of rights language in a motion for entry of judgment if a party wants to challenge that judgment on appeal. *See First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (stating that "[t]here must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms" and a party should include a reservation of rights in any such motion for entry of judgment approving reservation of rights language in motion for entry of judgment); *see also Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984) (disapproving "practice by which a party, by motion, induces the trial court on the one hand to render a judgment, but reserves in a brief the right for the movant to attack the judgment if the court grants the motion"); *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389–90 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (stating that when party asks trial court to render judgment for particular amount, and court renders such judgment, party cannot challenge the judgment and "[t]o preserve the right to complain about a judgment on appeal, a movant for judgment should state in its motion to enter judgment that it agrees only with the form of the judgment, and note its

disagreement with the content and result of the judgment").

None of the cases cited by Mac Haik and Wells Fargo suggest that the Diazes' agreement on the reporter's record to "accept" the verdict and discharge the jury barred the Diazes from subsequently filing a motion asking the trial court to disregard certain jury findings based upon sufficiency challenges. *See* TEX. R. CIV. P. 293 (providing that when jurors agree upon their verdict, they shall deliver their verdict and "[i]f the verdict is in proper form, no juror objects to its accuracy, no juror represented as agreeing thereto dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court"); *see also Thomas v. Oil & Gas Bldg., Inc.*, 582 S.W.2d 873, 881 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (holding that trial court properly received verdict and that plaintiff did not, by motion to accept verdict, waive right to attack the jury's findings on grounds that findings were against overwhelming weight and preponderance of evidence). Accordingly, we hold that the Diazes, by accepting the verdict and agreeing to the discharge of the jury, did not waive their right to subsequently timely file a motion to disregard the jury findings on attorney's fees on the ground that the evidence conclusively established a higher amount of attorney's fees.[17]

[17] Mac Haik and Wells Fargo do not challenge the sufficiency of the evidence to support the judgment awarding the Diazes attorney's fees.

We overrule Mac Haik and Wells Fargo's sixth issue.

Judgment Against Wells Fargo

In their seventh issue, Mac Haik and Wells Fargo argue that the Diazes "waived all claims they might have asserted against Wells Fargo" because they failed "to submit any issues to the jury concerning Wells Fargo" and "[t]here was no testimony or evidence proving that Wells Fargo would be liable as a holder of the contract." In response, the Diazes contend that "[t]here was no need . . . to submit any jury issues relating to Wells Fargo because its liability was entirely derivative of Mac Haik's liability." The Diazes also contend that in seeking relief against Wells Fargo, they "relied entirely upon a clause in the retail installment contract" that was admitted into evidence and there was "undisputed evidence at trial" that the Diazes made payments to Wells Fargo "indicating" that Wells Fargo "was the holder of the contract."

In their petition, the Diazes alleged that Wells Fargo was "responsible for these claims as well because of the clause in the contract which provide[d] that the holder of the contract is subject to all claims and defenses that the buyer has against the seller." The Diazes alleged that this "holder" clause "allow[ed] the Diazes to seek affirmative relief" against Wells Fargo.

At oral argument, the parties stated that although no issues were submitted to the jury concerning Wells Fargo's liability, Wells Fargo appeared and was

represented by counsel at trial. The trial court entered judgment against Mac Haik and Wells Fargo on May 15, 2009. Mac Haik timely filed a new-trial motion, but raised no complaint in this timely new-trial motion concerning the judgment against Wells Fargo. Wells Fargo did not timely file a new-trial motion, and Wells Fargo did not attack, in any other timely post-judgment motion, the legal basis on which the trial court entered judgment against it.[18] Thus, Wells Fargo failed to preserve the challenge it now seeks to present on appeal.

We overrule Mac Haik and Wells Fargo's seventh issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

[18] Although not stated in the judgment, the only basis for liability against Wells Fargo pleaded by the Diazes was derivative liability arising from the retail installment contract. After argument, the Diazes filed a post-submission brief, again explaining that the trial court had found Wells Fargo derivatively liable as the lender under this contract. We need not directly comment on this legal matter because Wells Fargo never timely presented its complaint to the trial court. Wells Fargo does argue that its new-trial motion, which was filed more than thirty days after judgment, was timely. Wells Fargo is incorrect. *See* TEX. R. CIV. P. 329b (providing that motion for new trial must be filed within thirty days from date judgment is signed).