

No. 1-15-3488

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MOHAMMED ZAKIUDDIN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 14 M2 000850
)	
SIGLER AUTO SALES, INC.,)	Honorable
)	Roger G. Fein,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in denying the plaintiff a jury trial on his fraud claim which was pled in count I of his complaint, but properly denied him a jury trial on the Consumer Fraud Act claim pled in count II. In addition, as the plaintiff failed to furnish an adequate record, we presume that the circuit court's rulings denying the plaintiff's motions *in limine* and its admission of evidence over the plaintiff's objections were in conformity with the law and had a sufficient factual basis. We, therefore, affirm the circuit court's judgment in favor of the defendant on the plaintiff's Consumer Fraud Act claim, reverse its judgment in favor of the defendant on the plaintiff's fraud claim, and remand the matter for a new trial on the fraud claim only.

¶ 2 The plaintiff, Mohammed Zakiuddin, appeals from the circuit court's judgment in favor of the defendant, Sigler Auto Sales, Inc. (Sigler), on both counts of his two-count complaint

which asserted claims for fraud and a violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)). The plaintiff argues that the circuit court erred in: (1) denying his demand for a jury trial; (2) "allowing undisclosed evidence;" and (3) allowing the defendant to introduce evidence of the post-sale history of the car which was the subject of this action. For the reasons which follow, we affirm the circuit court's judgment in favor of Sigler on the Consumer Fraud Act claim set forth in count II of the plaintiff's complaint, reverse the circuit court's judgment in favor of Sigler on the fraud claim set forth in count I of the plaintiff's complaint, and remand this case to the circuit court for a new trial on the plaintiff's fraud claim only.

¶ 3 In May 2014, the plaintiff filed his two-count complaint against Sigler arising out of his purchase of a 2000 Toyota automobile from Sigler on October 15, 2008. On the face of his complaint appears the phrase "JURY OF 12 DEMANDED." Each page of the complaint also contains the following phrase printed diagonally in large bold font: "Jury Demand!!!" Additionally, on the date that his complaint was filed, the plaintiff submitted a Civil Action Cover Sheet which checked the box marked "yes" next to the words "Jury Demand."

¶ 4 On October 6, 2015, the plaintiff filed his proposed jury instructions and motion *in limine* by mailing the documents to the clerk of the court, and he also sent copies to Sigler's attorney. When the trial commenced on October 21, 2015, the plaintiff moved for trial by jury. The circuit court's order entered on that date states that the motion was denied "based on [the plaintiff's] failure to file a jury demand on a separate document." Additionally, the circuit court denied the plaintiff's motion to bar the defendant's witnesses and to bar all evidence of the plaintiff's post-sale use of the subject vehicle. The case proceeded as a bench trial over the plaintiff's continuing objection. Following the presentation of evidence by both parties and the arguments of their

respective attorneys, the circuit court entered judgment in favor of Sigler and against the plaintiff on both counts of the complaint. Thereafter, the plaintiff filed a post-trial motion which the circuit court denied on November 25, 2015. This appeal followed.

¶ 5 For his first argument on appeal, the plaintiff argues that the circuit court erred in denying his demand for a jury trial and thereafter proceeding to try the matter without a jury. He contends that he invoked his right to trial by jury by the clear demand appearing on the face of his complaint. We agree that the circuit court erred by denying the plaintiff's demand for a jury trial on his fraud claim set forth in count I of his complaint. However, we find no error in the denial of the plaintiff's demand for a trial by jury on his Consumer Fraud Act claim.

¶ 6 In its decision in *Martin v. Heinhold Commodities, Inc.*, 163 Ill. 2d 33, 73-74 (1994), our supreme court noted that, "[i]n Illinois, the right to a jury trial does not attach to every action at law. Instead such right only attaches in those actions where such right existed under the English common law at the time the constitution was adopted." The Consumer Fraud Act represents a new cause of action which is different than the traditional tort of fraud. *Id.* at 75. It is a statutory proceeding unknown at common law and, as such, the Illinois Constitution does not confer the right to a jury trial for a claim under the Consumer Fraud Act, and the statute itself confers no such right. *Id.* at 76. "[A]n action under the Consumer Fraud Act [is] a new statutory right created by the legislature and, as such, does not confer the right to a jury trial." *Id.* at 75.

¶ 7 We are mindful that the circuit court did not deny the plaintiff a jury trial on count II of his complaint on grounds that no such right exists for actions brought pursuant to the Consumer Fraud Act. However, we may affirm the decision of the circuit court for any reason apparent from the record, regardless of whether the circuit court relied on that reason and even in circumstances where it arrived at its decision for the wrong reason. *Material Service Corp. v.*

Department of Revenue, 98 Ill. 2d 382, 387 (1983). Consequently, for the reasons stated in the preceding paragraphs, we find no error in the circuit court's denial of the plaintiff's demand for a jury trial on his Consumer Fraud Act claim and, thereafter, proceeding to resolve the claim without a jury.

¶ 8 We turn next to the circuit court's denial of the plaintiff's demand for a jury trial as it relates to his fraud claim which was pled in count I of the complaint. Section 2-1105 of the Code of Civil Procedure provides, in relevant part, that "[a] plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. *** Otherwise, the party waives a jury." 735 ILCS 5/2-1105(a) (West 2012). Section 27.2a(s) of the Clerks of Courts Act provides that, in addition to other fees allowed by law, the clerk of the court is entitled to receive a fee for the services of a jury which "shall be paid by the party demanding a jury at the time of filing the jury demand[, and i]f the fee is not paid by either party, no jury shall be called in the action or proceeding, and the same shall be tried by the court without a jury." 705 ILCS 105/27.2a(s) (West 2012).

¶ 9 Three facts relevant to our resolution of this issue as it relates to the plaintiff's right to a jury trial on his fraud claim are uncontested. First, the plaintiff's complaint and the Civil Action Cover Sheet filed with the complaint contain a clear desire on the part of the plaintiff that his claims against the defendant be tried by a jury. As stated earlier, every page of the complaint contains the notation, "Jury Demand!!!", in large print. Second, there is no evidence in the record that the plaintiff ever filed a separate jury demand on the form provided by the clerk of the court. Third, the record reflects that the plaintiff never paid the court clerk's statutory fee for the services of a jury. If this were simply a case where, although demanding a jury, the plaintiff did not pay the statutory fee, the consequence would have been statutorily mandated; namely, he

would not have been entitled to a jury trial and his fraud claim should have been tried by the court without a jury. See *People ex rel. Mehoczky v. Kelley*, 137 Ill. App. 3d 1074, 1076-77 (1985). In this case, however, there is an additional order in the record which affects our analysis. Prior to the filing of the instant action, the plaintiff filed an application pursuant to section 5-105 of the Code of Civil Procedure (735 ILCS 5/5-105 (West 2012)) to sue as an indigent person, and the circuit court entered an order in this case, stating that the plaintiff was "permitted to sue *** without payment of fees, costs or charges." Pursuant to section 5-105(a)(1) the fees which were waived included "jury demand fees." 735 ILCS 5/5-105(a)(1) (West 2012). We are left then with a rather simple question; whether the plaintiff's failure to file a separate document stating that he demanded a trial by jury, notwithstanding the fact that every page of his complaint contains the notation "Jury Demand!!!", is sufficient to deny him a trial by jury on his fraud claim? We answer in the negative.

¶ 10 Fraud is a tort of common law origin. The Illinois Constitution of 1970 provides that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." Ill. Const. 1970, art. I, § 13. This section of the constitution has been interpreted as guaranteeing the right to trial by jury in all actions where such a right existed under the common law. *Martin*, 163 Ill. 2d at 72-73. Statutes regulating the right to trial by jury should be liberally construed in favor of the right, and courts should protect and enforce the right. *Noren v. Metropolitan Property & Casualty Insurance Co.*, 369 Ill. App. 3d 72, 76 (2006).

¶ 11 As noted earlier, section 2-1105 of the Code of Civil Procedure provides that "[a] plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced." 735 ILCS 5/2-1105(a) (West 2012). The statute does not prescribe the manner in which a jury demand is to be filed, other than to say that it must be filed with the clerk

of the court at the same time that the action is commenced. In this case, the very complaint that was filed with the clerk which initiated this action clearly contains the notations "Jury Demand!!!" and "JURY OF 12 DEMANDED" on its face. In light of the fact that the circuit court had previously entered an order permitting the plaintiff to sue without payment of fees, including jury demand fees, we find that the conspicuous notation of "Jury Demand!!!" on each page of the complaint satisfied the requirements of section 2-1105 of the Code of Civil Procedure. To deny the plaintiff a trial by jury on his fraud claim merely because he did not make his jury demand on a separate document is to elevate form over substance. As the claimant clearly made a demand for a jury trial at the time that he filed his complaint, we find that the circuit court abused its discretion in denying the plaintiff a trial by jury on his common law fraud claim. Consequently, we reverse the circuit court's judgment in favor of Sigler on count I of the plaintiff's complaint and remand the matter back to the circuit court for a new trial on the plaintiff's fraud claim as pled in count I of his complaint.

¶ 12 Although we have found that the circuit court properly denied the plaintiff's demand for a jury trial on his Consumer Fraud Act claim, we must still address the plaintiff's two additional assignments of error to determine if he is also entitled to a new trial on count II of his complaint.

¶ 13 The claimant argues that the circuit court erred in denying his motion *in limine* and allowing Sigler to introduce testimony "regarding the circumstances of the transaction." The argument seems to be based on the contention that Sigler failed to disclose the names of the witnesses it intended to call and the subjects on which those witnesses would testify. According to the plaintiff, Sigler had an obligation pursuant to Illinois Supreme Court Rule 222 (eff. Jan. 1, 2011) to disclose the identity of the witnesses it intended to call to testify at trial and, when Sigler failed to do so, the circuit court abused its discretion in "allow[ing Al Gigler,] the owner

of the business[,] to testify extensively regarding the circumstances of the transaction." The two-sentence bystander's report executed by the trial judge acknowledges that "[d]uring the trial, Plaintiff made a standing objection to the testimony of Defendant's owner, as undisclosed." However, we find that we have an insufficient record to meaningfully address the issue.

¶ 14 The issue of whether to allow or bar the testimony of a witness is a matter committed to the sound discretion of the circuit court. See *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 393 (2000). The granting or denial of a discovery sanction is also reviewed under an abuse of discretion standard. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 122-23 (1998). In the absence of a transcript of the proceedings before the circuit court, we have no way of knowing what it is that the defendant's witnesses testified to; whether, or to what extent, the plaintiff was prejudiced by the witness's testimony; or whether a failure to disclose the witness's identity prior to trial worked a prejudice upon the plaintiff to the extent that an order barring the testimony would have been an appropriate sanction. More importantly, in the absence of a transcript of the trial proceedings, we have no means of knowing why the circuit court permitted the defense witness to testify over the plaintiff's objection, and as a consequence, we are unable to judge the court's action on an abuse of discretion standard. The bystander's report contained in the record sheds no light on these issues. As the appellant, the plaintiff had "the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a sufficient record, we are unable to meaningfully review the circuit court's exercise of its discretion in the matter. We presume, therefore, that the circuit court's order denying the plaintiff's motion *in limine* and its decision to

allow Sigler to introduce testimony "regarding the circumstances of the transaction," were in conformity with the law, and we, therefore, reject the plaintiff's argument that the circuit court abused its discretion in this regard.

¶ 15 For his final assignment of error, the plaintiff argues that the circuit court abused its discretion in denying his motion *in limine* and allowing Sigler to introduce evidence of the post-sale use of the vehicle, the sale of which was the subject of the instant litigation. He asserts that the proper measure of actual damages in this case was the difference between the value of the subject vehicle at the time of sale if the defects alleged did not exist and the car's actual value at the time of sale due to the defects. The circuit court's judgment order notes that the vehicle which is the subject of this litigation had 50,000 more miles on it since its purchase in 2008. The two-sentence bystander's report executed by the trial judge acknowledges that "[d]uring the trial, Plaintiff made a standing objection to the testimony regarding the post-sale use of the car, as irrelevant." Again, however, we find that we have an insufficient record to meaningfully address the issue.

¶ 16 In the absence of a transcript of the proceedings before the circuit court, we have no way of knowing the purpose for which the circuit court admitted evidence that, at the time of trial, the vehicle which the plaintiff purchased from Sigler on October 16, 2008, had 50,000 additional miles on it since the date of purchase. We agree that the proper measure of the plaintiff's actual damages, if proven, would have been the difference between the actual value of the subject vehicle at the time of sale and what the car would have been worth at the time of sale if it had not been a "Total Loss Vehicle" due to collision damage sustained four months prior to the plaintiff's purchase. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989); *Giammanco v. Giammanco*, 253 Ill. App. 3d 750, 759 (1993); *In re Neprozatis' Estate*, 62 Ill.

App. 3d 563, 570 (1978). Evidence of the number of miles that the plaintiff was able to drive the vehicle following its purchase could not be asserted as a defense or in mitigation of the plaintiff's damages, but that is not to say that such evidence is irrelevant to the issue of the vehicle's actual value on the date of sale. See *Shoop v. DaimlerChrysler Corp.*, 371 Ill. App. 3d 1058, 1063 (2007). As evidence of the number of miles which the subject vehicle was capable of being driven post-sale is relevant to the vehicle's actual value at time of sale, we are unable to conclude that the circuit court's denial of the plaintiff's motion *in limine* and its subsequent admission of that evidence over the plaintiff's relevancy objection was an abuse of discretion. Further, in the absence of an adequate record on appeal which supports the plaintiff's claim of error, it will be presumed that the circuit court's resolution of the matter was "in conformity with the law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 391-92. Consequently, we reject the plaintiff's argument that the circuit court abused its discretion in denying his motion *in limine* and allowing Sigler to introduce evidence of the post-sale use of the vehicle.

¶ 17 Lastly, we note that the plaintiff's brief does not contain any argument addressing the question of whether the circuit court's judgment in favor of Sigler on his Consumer Fraud Act claim is supported by the manifest weight of the evidence. As a consequence, any argument that the circuit court's judgment in favor of Sigler on the Consumer Fraud Act claim is against the manifest weight of the evidence has been forfeited. Ill. S. Ct. R. 341(h) (eff. Jan. 1, 2016); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010).

¶ 18 Based upon the foregoing analysis, we affirm the circuit court's judgment in favor of Sigler on the plaintiff's Consumer Fraud Act claim as pled in count II of his complaint; reverse the judgment in favor of Sigler on the plaintiff's fraud claim as pled in count I, and remand the matter to the circuit court for a new trial on the plaintiff's fraud claim only.

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¶ 19 Affirmed in part, reversed in part and remanded.